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Dealing with misconduct at Japanese companies – when and how to engage with regulators

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› Regulatory enforcement model

› Self-disclosure and cooperation with regulators

› Comment

Regulatory enforcement model

Japan does not have a single agency – akin to the Department of Justice in the United States or the Serious Fraud Office in the United Kingdom – that deals with serious corporate offences, such as bribery, fraud or corruption, across different industries. Various government departments and agencies are responsible for bringing regulatory enforcement actions against companies in Japan. In the pharmaceutical space, the Ministry of Health, Labour and Welfare (MHLW) is the main regulatory authority. However, depending on the issue, other authorities and organisations may take on relevant regulatory functions, such as the Pharmaceuticals and Medical Devices Agency, which has been delegated regulatory powers by the MHLW. In addition, various industry organisations establish their own rules through self-regulation (eg, rules relating to payments to healthcare professionals and transparency rules).

In terms of enforcement powers, criminal and administrative sanctions can be imposed for misconduct. Fines are generally not as large as in other countries, such as the United States, but there is also not the same clearly established system of discounting of fines available for cooperating.

Administrative sanctions include a business suspension order and a cancellation of business licences, either of which could severely impact a company's operations.

Self-disclosure and cooperation with regulators

Since incentives for cooperation have not been clearly articulated as part of regulatory policy in Japan, compared to other jurisdictions, companies cannot expect to receive the same substantial reduction in any final penalty imposed if they promptly self-disclose misconduct and cooperate throughout the investigation.

However, when determining regulatory enforcement outcomes, regulators in Japan may take into consideration whether voluntary self-disclosure and cooperation have occurred. Failing to self-disclose may give regulators the impression that the company is not transparent and trustworthy, which could result in a more severe penalty than would otherwise have been imposed.

Comment

Although the same significant monetary benefits to prompt self-disclosure that exist in other jurisdictions do not exist in Japan, transparency with the regulator should be encouraged, as non-cooperation can ultimately lead to negative consequences like it can in other jurisdictions.

The most difficult situations to navigate are those where the underlying corporate misconduct touches on multiple jurisdictions, including Japan. Careful thought must be given as to when and how misconduct is disclosed. It may be prudent to alert the regulatory authorities in Japan promptly but, equally, it may be necessary to engage with regulators in other jurisdictions first, depending on a careful consideration of the facts in question.

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