

*(Provisional Translation)*

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**RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN  
TO THE GOVERNMENT OF THE UNITED STATES  
REGARDING REGULATORY REFORM  
AND COMPETITION POLICY**

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October 14, 2004

## **FOREWORD**

The Deregulation Dialogue under the Enhanced Initiative which continued for four years since 1997, and the first to third year dialogue of the Regulatory Reform and Competition Policy Initiative (“Regulatory Reform Initiative”) under the “Japan-U.S. Economic Partnership for Growth (“Partnership”)” established by Prime Minister Junichiro Koizumi and President George W. Bush at the Japan-U.S. summit meeting on June 30, 2001, have certainly achieved success in clarifying regulatory and systemic problems of each country and in reducing unnecessary regulations, strengthening competition, and improving market access.

It is also a fact, however, that there remain regulations and systems in the United States that are: 1) unique to the United States and not harmonized with international standards; 2) inconsistent with the principle of free trade; and 3) impeding fair competition. Particularly, the United States has not completed measures that are necessary to redress its laws and decisions whose inconsistency has already been confirmed through WTO’s dispute settlement procedure. The United States should revise these regulations on its own initiative to maintain the multilateral trade system. Also, some investment-related measures of the United States are imposing unreasonable burdens on Japanese companies conducting or attempting to conduct business in the United States, thus being their serious concerns.

The Government of Japan also apprehends that the series of changes in policies and reinforcement of regulations by the Government of the United States in several areas such as consular affairs, distributions and export control might impede active and smooth trade as well as movement of peoples between the two countries and mutual visits by both nationals. While the Government of Japan understands that the Government of the United States has been taking these measures pressed by the increasing necessity of national security in fighting against terrorism, it also believes that both Governments, as the two largest economies of the world as well as close allies, should intensify their concerted efforts to prevent these measures from adversely affecting the economic ties between the two countries. For the Government of Japan believes that such efforts will serve the objectives of the Partnership to promote sustainable growth not only in both countries but also of the world economy.

Recognizing the current situation as above and based on the achievements attained in the course of the past three-year consultations, the Government of Japan here presents its recommendations regarding regulatory reform and competition policy to the Government of the United States upon the commencement of the fourth year dialogue of the Regulatory Reform Initiative. In course of the dialogue, the Government of Japan will keep urging the Government of the United States to improve its policy and further promote regulatory reform and competition policy by reflecting these recommendations sufficiently.

The Government of Japan strongly hopes that the frank and constructive dialogue with the Government of the United States under the Regulatory Reform Initiative will greatly contribute toward further strengthening and deepening of the bilateral economic relationship. Japan and the United States should fully recognize that they are leading the growth and harmonization of the world economy as well as the reinforcement of an open and multilateral trading system, and then should demonstrate a model of dialogue and cooperation in this globalized age. The Government of Japan expects that the Government of the United States will seriously consider all the items raised in these recommendations based on the principle of two-way dialogue, and, in order to realize such a productive dialogue, take positive actions for the production of tangible results.

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## **I. CROSS-SECTORAL ISSUES CONCERNING REGULATORY REFORM AND COMPETITION POLICY**

### **1. Consular Affairs**

As the relationship between Japan and the United States has been deeper than ever, a great number of Japanese nationals are visiting the United States. The number of Japanese nationals residing in the United States has reached 331,677 as of October 1, 2003<sup>1</sup>. The number of the Japanese nationals who entered the United States in 2003 was a total number of 3,589,544<sup>2</sup>, which is the third largest number next to the British and Mexicans. The Government of the United States should enable all of them to smoothly enter the United States and stay there with no significant obstacles. The Government of Japan deems it the very basis of the close bilateral relationship.

The Government of the United States has been changing its consular policies and measures several times for a recent couple of years. The Government of Japan continues to request the Government of the United States to inform immigration officers and other relevant institutions of the Federal Government of newly-established regulations precisely and promptly so that they can answer questions made by Japanese nationals accurately and consular policies and measures are implemented correctly.

On the recognition above, the Government of Japan requests the followings.

#### **(1) Use of Biometric Identifiers on Passports**

Section 303 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (“Border Security Act”) provided that the United States would suspend the Visa Waiver Program (VWP) for the countries which had failed to certify to the United States by October 26, 2004 that the said country had a program to issue passports with biometric identifiers. It also stipulated that even the nationals of the countries under VWP must obtain visas if they had passports without biometric information issued after the date. With the requests made by VWP countries including Japan, however, the Congress passed a bill which authorized one-year extension of the deadlines to October 26, 2005 by which the VWP countries should begin issuance of biometric passports to remain in the scope of the Program. As a result, the deadline has been extended to October 26, 2005. The Government of Japan welcomes this amendment.

With the letter dated September 26, 2004 from the Department of State, the Government of the United States certified that the Government of Japan met the requirement of the Border Security Act to have a program in place to produce biometrically enabled passports. The Government of Japan welcomes this acknowledgement by the Government of the United States, which confirms that Japan remains under the VWP even after October 25, 2005 and that the

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<sup>1</sup> *Statistics on the Japanese national residing overseas, 2003*, Ministry of Foreign Affairs of Japan

<sup>2</sup> *2003 Yearbook of Immigration Statistics*, United States Department of Homeland Security, table 23

holders of the Machine Readable Passports without biometric identifiers issued before October 25, 2005 will be admitted to enter the United States under the VWP as long as their passports are valid.

The Government of Japan has been developing a program to issue passports with biometrics identifiers as quickly as possible. However, even if the program is carried out most smoothly, it will not be before March 2006 that the Government of Japan completes the necessary preparations for issuing the first passports with biometric identifiers. In such a case, approximately 700,000 Japanese nationals will have to obtain United States visas during the five months from October 26, 2005 to March 2006, which is about ten times as large as the number of United States visas currently being issued in Japan in the same length of period. Considering the time and cost incurred by applying for visas, it is obviously an enormous burden for Japanese nationals.

From this point of view, the Government of Japan requests the Government of the United States to:

- (a) Re-extend the deadline of the introduction of passports with biometrics identifiers for another year in order not to exclude any Japanese national from the VWP even in a short limited period of time; or
- (b) Consider seriously about the proposal that the Government of the United States does not apply the deadline to a country which certifies that it can issue passports with biometrics identifiers within six months at the time of October 26, 2005.

**(2) Suspension of the VWP for Holders of Non-machine Readable Passports**

The Government of the United States will start to require holders of non-machine readable passports to obtain visas before entry on October 26, 2004.

When a Japanese national lose his or her passport or has it stolen during a trip overseas, the Government of Japan issues a “travel document” which is valid only for the return trip to Japan at the establishments in foreign countries if the person should return to Japan immediately without waiting for the reissuance of passports. As the “travel document” is non-machine readable, after October 26, 2004, its holders who return to Japan from other countries in the Americas via the United States will be required to obtain transit visas after interviewed at the establishments of the United States. As a result, they will have to stay in the country where they lost them for a certain additional period of time. It will prevent them from returning to Japan smoothly and it will be a huge monetary and psychological burden.

Accordingly, the Government of Japan requests the Government of the United States to continue to waiver visa requirement for the nationals of the VWP countries, as an exceptional case, who have travel documents that are valid only for their journey home.

**(3) Immigration Control by Use of Biometric Identifiers at Ports of Entry**

From January 5, 2004, the Department of Homeland Security (DHS) started to collect facial information and scan fingerprints electronically at ports of entry for authentication from all entrants with visas except holders of official, international organization and NATO visas, in accordance with the United States Visitor and Immigrant Status Identification Technology

(US-VISIT) program. Moreover, the US-VISIT program has been applied to all VWP visitors from September 30, 2004, onwards, the DHS will start to collect biometric information at 50 most highly trafficked land border ports of entry on December 31, 2004. A departure confirmation program using biometric identifiers is also in its pilot phase at some airports and seaports.

Since the introduction of the US-VISIT program, some foreign businessmen have missed connecting flights due to the longer time it takes for passengers to pass immigration control, which is certainly an impediment to their business. Also, Japanese nationals still have concerns about the fact that the Government of the United States possesses their fingerprint information almost eternally. The Government of Japan appreciates that the Government of the United States published a brochure about the purpose and details of the US-VISIT program in Japanese in addition to English and Spanish, and that the Embassy of the United States in Tokyo has provided some briefings to the Japanese tourism industry about the US-VISIT program in response to the request by the Government of Japan, both of which have contributed to the alleviation of anxiety about the program harbored by Japanese people. The Government of the United States is, however, still requested to make further efforts for much better understanding of the program by the Japanese public.

Furthermore, Japanese workers of companies located on the border between the United States and Mexico (the so-called “Maquiladora” companies) commute to Mexico and re-enter the United States when they return home. After the introduction of the US-VISIT program at land ports of entry, they will have their fingerprints scanned and their facial information taken every evening when they return home. As a result, it will take a much longer time to pass immigration control at land ports of entry, which has already been requiring them to spend more than one hour waiting in lines for their turns.

In light of the situations described above, the Government of Japan requests of the Government of the United States the following points.

- (a) It is estimated that the US-VISIT program is applied to the total number of 4.5 million Japanese nationals traveling to the United States per annum after the expansion of its scope on September 30, 2004. The Government of Japan requests the Government of the United States to monitor the situation of immigration control thoroughly again after the expansion and shorten the time it takes for passengers to pass immigration control by, wherever necessary, reinforcing organizational setup to implement the program including the increase of staff.
- (b) The Government of Japan also requests the Government of the United States to, in order to alleviate Japanese nationals’ anxiety about having their fingerprints scanned, inform Japanese public of the fact more extensively that it takes only a short time to scan fingerprints and ink is not used in scanning, as well as of the series of measures taken by the Government of the United States to protect personal information;
- (c) The Government of Japan further requests the Government of the United States to clarify specific arrangements it has been making or it will take to avoid congestion that might occur at the Mexican border on the introduction of the US-VISIT therein.

#### **(4) Visa Process**

**(a) Introduction of Visa Services into the Other Consulates in Japan**

Since July 1, 2004 all United States visa applicants have been obliged to be interviewed in person and provide their biometric identifiers, except those applying for official, international organization and NATO visas as well as those at the ages of over 79 or under 14. Nevertheless, the United States overseas establishments in Japan that provide interviews and collect biometric information are only the Embassy in Tokyo and Consulates-General in Osaka-Kobe and Okinawa. The applicants residing in Hokkaido and Kyushu therefore have to visit Tokyo or Osaka to apply for visas, paying expensive travel and stay costs.

Accordingly, the Government of Japan continues to request the Government of the United States to provide services of interview and collection of biometric information at the United States Consulates in Sapporo, Nagoya and Fukuoka. It is also requested to consider some other measures for improvement of visa process, including the possibility of interviewing by videoconference system.

**(b) Efficiency in Visa Revalidation Procedures**

The Government of the United States suspended the revalidation of visas at the Department of State on July 16, 2004. Applicants of visa revalidation residing in the United States therefore must return to Japan, or otherwise must visit a “third country”, such as neighboring Canada or Mexico. As a result, Japanese businessmen and their families in the U.S. have been facing some negative effects as below.

Monetary cost of visa revalidation

It has cost approximately 1,500 to 6,000 dollars for one person to revalidate visa, including costs incurred by travel to and stay in the country of revalidation in addition to the application fee. (For example, one family living on the Eastern Coast necessitated the employer to pay 15,000 dollars for them to return to and stay in Japan for revalidation.) Another Japanese company paid more than 100 million yen (approximately 900,000 dollars) in total for its employees to revalidate their visas.

Negative impacts on business management

Some Japanese companies dispatched employees to the United States to substitute original workers who were traveling to Japan for visa revalidation, since it was impossible for the companies to leave the portfolio of the original workers untouched during their visit to Japan. In this case, one such “substitute” workers needs several thousands dollars to travel to and stay in the United States.

There are some Japanese companies whose branches in the United States have only one Japanese worker or a few. In these companies, absence of one worker from his or her office for one month for visa revalidation means the failure of all or significant parts of their business operation in the United States. Such companies have introduced new personnel systems by which a worker must be altered by another upon the expiration of his or her visa.

EffectImpacts on education of children

Children of Japanese workers cannot attend schools while returning to Japan or traveling to Canada or Mexico for visa revalidation. Some Japanese parents have concerned about the possibility for their children to fail to promote due to insufficient class attendance.

Several thousands of Japanese businessmen have had their visas revalidated at the Department of State, the majority of which are greatly contributing to the United States economy from their positions as branch heads of Japanese companies.

The Government of Japan therefore requests the Government of the United States to:

- (i) Resume visa revalidation at the Department of State, in particular;
  - a. Consider the use of equipment at airports for the implementation of the US-VISIT program for visa revalidation applicants as well, if the failure to collect biometric identifiers within the United States hinders the resumption of the domestic revalidation (As the only statutory requirement regarding biometric identifiers is that entry visas shall contain them, it is solely a matter of implementation rather than regulations where biometric identifiers should be collected from applicants.);
  - b. Consider the resumption of domestic revalidation only for certain categories of visas, such as L visas, whose bearers are guaranteed their status more reliably by their employers;
- (ii) Commence revalidate E visas in third countries (There is no statutory prohibition of the revalidation of E visas in countries other than the United States and bearers' home countries, and some revalidation application have been rejected due to the reasons concerning the management of overseas establishments, such as the lack of sufficient staff. It is therefore requested to reinforce the ability to process visa revalidation at the United States establishments in Canada and Mexico, including reviewing the level of staffing at these places.); and
- (iii) Shorten the time incurred by visa revalidation in Japan, Canada and Mexico by, for example, the establishment of organizational setup that could prioritize revalidation applications to process them within one to three days or that could process the revalidation partly before interviewing and assure the issue of revalidated visas a few days after interview.

**(c) Visa Issuance and Terms of Validity**

- (i) As mentioned in (b) above, the current visa revalidation procedure is imposing huge burden on Japanese nationals. It will therefore contribute to the solution of the problem to extend the original terms of validity of respective types of visas, from the viewpoint of reducing revalidation needs themselves. Accordingly, the Government of Japan requests the Government of the United States to observe the Japan-United States Visa Agreement to change its present practice to issue L visas valid only for two or three years, which corresponds to the term of validity of Permission to Stay (I-94), and issue 5-year visas as E visas.

- (ii) Under the visa regulations of the United States, applicants of E visas are required to have job experiences at managerial level for certain period of time. As a result, for example, a Japanese in his or her twenties who speaks English fluently and has distinguished business ability cannot obtain an E visa. The Government of Japan therefore requests the Government of the United States to mitigate the job experience requirement of E visa, or to implement it more flexibly.
- (iii) The Government of Japan also requests to increase again the number of H1-b visa issued annually.
- (iv) Bills have been introduced in the Congress that will reinforce regulations on H and L types of visas by shortening their validity terms or setting floors to the salary earned by the holders of these visas (H.R. 2154, H.R. 2702 and H.R.2849). These bills, when passed and enacted, will affect the economic relationship between the two countries adversely as well as may gravely discourage the Japanese business sector to invest in the United States. The Government of Japan therefore continue to desire these bills to be abandoned.

## **(5) Driver's License**

### **(a) Term of Validity of International Driver's License**

A number of Japanese nationals drive with international driving licenses in the United States until they obtain local State licenses, since it normally takes a long time to obtain the latter. Many States, however, require foreigners to obtain State licenses and render their international licenses lapse upon the fixation of their residence in the State. In other states, international licenses lose effect in relatively short period, six months for example. North Carolina does not allow foreigners to drive with international licenses at all.

Therefore, the Government of Japan requests the Government of the United States to petition relevant State authorities to accept one-year term of validity of international driver's licenses issued by Japanese authorities, in light of the effects of the Convention on Road Traffic, of which the United States is also a signatory.

### **(b) Identification Requirements for License Applicants**

The State of Michigan requires foreigners who apply for State driver's licenses to present three different types of identification. Accordingly, they have to provide additional identification other than passport and Japanese driver's license (accompanied by authenticated translation), which is usually difficult for them.

The Government of Japan therefore requests the Government of the United States to petition the authority of Michigan to mitigate its identification requirement to the level equivalent to other states.

### **(c) Clarification of New License Application Procedure of Illinois**

The State of Illinois, which had required the applicants of driver's license to present SSN and had not admitted any other substitute, amended its related legislation in May. This

amendment will enable foreigners lawfully admitted to the United States without SSN to obtain Illinois temporary visitor's driver's license by presenting the documentation, issued by United States Citizenship and Immigration Services, authorizing the person's presence in the United States. While the Government of Japan welcomes this long-requested amendment, it might still cause some difficulties foreigners in obtaining driver's licenses, depending on the details of application procedure under the amended rule to be clarified further in future.

The Government of Japan therefore requests the Government of the United States to petition the authority of Illinois to clarify the particulars of procedures introduced under the amended rule, and to avoid excessive monetary and time burden being imposed by new requirements on Japanese nationals residing in the State, in light of the effect of the amendment.

**(d) "Sponsor" Requirement in Driving Test**

The regulations of the State of Massachusetts oblige the applicant of driver's license, when taking driving test, to be accompanied by a "sponsor" who must be at least 21 years old with a valid driver's license issued in the United States and have a minimum of one year of driving experience. It is often difficult to find an appropriate sponsor for a foreigner immediately after his or her arrival at the country, and therefore this requirement in Massachusetts has been causing inconvenience for Japanese nationals to obtain driver's licenses in the State. It is possible but also costly to ask an agent to introduce a sponsor.

The Government of Japan is aware that Massachusetts is the only State that provides such a "sponsorship" requirement. It therefore requests the Government of the United States to petition the State to abolish the rule, or otherwise mitigate it to avoid excessive burden imposed upon foreigners.

**(e) "Driver's Certificate"**

On May 29, 2004, the State of Tennessee suspended the issuance of driver's "license" to the residents who do not have the nationality or right of permanent residence of the United States, and instead started issuing "Driver's Certificate" to them on July 1. The Driver's Certificate does not function as a "photo ID", and, as a consequence, has resulted in certain inconveniences as follows.

- The "Driver's Certificate" cannot be used as a means of identification to rent a car, which is certainly an impediment of business.
- The bearer of "Driver's Certificate" has to carry his or her passport in every occasion, since it is the only identification document that can be surely admitted, and thus their passports are always exposed to the danger of loss or steal.

As the Government of Japan is aware that Tennessee is the only State that has taken such a measure, it requests the Government of the United States to petition the State to abolish the rule.

**(f) Term of Validity of License**

The Government of Japan continues to request the Government of the United States to petition the States that have linked the validity of driver's licenses and that of license holders' visas to entitle Japanese nationals to obtain licenses of four-year validity as the United States citizens do.

The Government of the United States stated that it would "seriously consider the requests of the Government of Japan when formulating its position on this issue" in the Third Report to the Leaders. The Government of Japan also requests the Government of the United States to articulate its present position on the issue and the actions and measures it has taken in this regard upon the Japan's request.

## **(6) Social Security Number (SSN)**

### **(a) Shorter Period for SSN Issuance Process**

The local agents of the Social Security Administration (SSA) issue SSNs after confirming that an applicant is eligible to obtain SSN by checking his or her entry record on the database provided on-line by the DHS. It usually takes one to two months for SSA to issue SSNs for foreigners, however, since their entry data are not registered on DHS's database immediately after their entry. As they required to present SSNs as identification on a variety of occasions including those of taking necessary procedures to start their lives in the United States, such as opening of bank account, Japanese businessmen are facing inconvenience in their daily lives until their SSNs are issued.

Now that the United States has been reinforcing its immigration control by the US-VISIT program and other related measures, the Government of Japan believes that there are much less necessity than before to confirm the eligibility of SSN applicants that takes a long time again. It therefore continues to request the Government of the United States to make necessary improvement for swifter issuance of SSNs. In particular, it is requested to consider the possibility to:

- (i) Issue SSNs to the applicants, who have obtained visas through rigid examination including interviews and collection of biometric information, only with the submission of necessary forms to SSA's agents and without checking DHS's database;
- (ii) Shorten the time required to issue SSNs for SSA's agents to use entry data and the results of its examination immediately upon their arrival at ports of entry; or
- (iii) Issue SSN when the company that provides an employment certificate in for an applicant of SSN in the United States is identical to that included in his or her visa application documents.

### **(b) Issuance of Social Security Numbers to the Dependents of Employment Visa Holders**

As mentioned above, foreigners are often required to present their SSN in their daily lives in the United States. As the holders of non-working visas, namely dependent family of foreign businessmen, are not eligible to obtain SSN under the current rule, they have been facing a variety of inconvenience including their inability to study at education institutions other than those compulsory. While the Government of Japan has been requesting this issue to the United States continuously since the first-year dialogue of the Regulatory

Reform Initiative, it has not witnessed any tangible progress on the issue.

Based upon this recognition, the Government of Japan requests the Government of the United States to:

- (i) Amend related regulations to enable all lawful foreign residents including those with nonemployment-based visas to obtain SSN; and
- (ii) Explain how and on what the Government of the United States has been working to realize the issuance of SSN to foreigners with nonemployment-based visas since the beginning of the Regulatory Reform Initiative.

**(c) Individual Taxpayer Identification Number (ITIN) as a Substitute Identification of SSN**

The revision of the rule of the Internal Revenue Service (IRS) concerning the application of Individual Taxpayer Identification Number (ITIN) effective on December 17, 2003 rendered the application for ITIN acceptable only once a year, namely at the time of Federal tax return filing in February to April. This change has been resulting in some inconveniences for Japanese nationals residing in the United States as follows.

- *North Carolina*: This State obliges the applicants of driver's licenses to present either their SSN or ITIN. As a result, the dependent family who are not entitled to obtain SSN has been only able to use ITIN as a means of identification. IRS's new rule leaves no choice for them but wait for the season of tax return filing to obtain ITIN, and thus some of them have to wait for nearly one year after their arrival at the United States to apply for driver's licenses.
- *Illinois*: Those who file for dependent family deduction (approximately 3,000 dollars per head) must present SSN or ITIN in Illinois. Also in this case, the dependent family who are not entitled to obtain SSN has been only able to use ITIN as a means of identification. The new IRS's rule, however, allow them to apply for ITIN only upon Federal tax return filing, and therefore does not allow them to obtain ITIN before the deadline of State tax return filing in many cases. As a consequence, some Japanese workers in the State petition for the extension of the deadline for State tax return filing after the Federal tax filing and application for ITIN, which has resulted in huge monetary and time burden on them, including troublesome paperwork and additional fee paid to accountant offices.

To sum, dependent family of Japanese businessmen in the United States have been facing difficulties because they are not entitled to obtain SSN and obliged to use ITIN as a substitutable means of identification.

The Government of Japan therefore requests the Government of the United States to:

- (i) Enable the dependent family to apply for ITIN before the Federal tax return filing if their "breadwinner" have SSN; or
- (ii) Petition the relevant authorities of states which require the presentation of either SSN or ITIN on one's taking administrative procedures such as application for driver's

license or filing for dependent family deduction to admit documentation, as a substitute, that certify their ineligibility to obtain SSN.

**(7) Permission to Stay (I-94)**

Upon the suspension of visa revalidation in the United States, the Government of the United States explained that since the visa was the document that certified the bearer's entitlement to enter the country, he or she did not need to revalidate visa because the person could still stay in the United States lawfully as long as his or her I-94 remained valid, even if the visa itself has expired. On this premise, longer terms of validity of I-94 and efficiency in its extension process are all the more essential. Accordingly, the Government of Japan requests the followings to the Government of the United States

**(a) Longer Terms of Validity of I-94**

It is requested to assure longer terms of validity of I-94, particularly for E visa bearers. Currently, the term of validity of the permission to stay issued to E visa bearers is maximum two years, and in some cases only one year. In the latter cases, the bearer has to extend his or her I-94 every year.

**(b) Swifter Processing of I-94 Extension**

At present, it takes two to three months to extend I-94. This long time incurred by I-94 extension has been causing impediment to business due to bearer's inability to leave and re-enter the United States while extension is under procedure. It is therefore requested to process the extension swifter.

The Government of Japan has made this request since the first-year dialogue of the Regulatory Reform Initiative, and the Government of the United States stated in the Third Report to the Leaders "(t)he Citizenship and Immigration Services Office of the Ombudsman (OCIS) within the Department of Homeland Security is exploring ways to improve the process of applying for extension of permission to stay." Consequently, the Government of Japan requests the Government of the United States to articulate the measures and actions it has taken since the publication of the Third Report.

## 2. Trade/Investment Related Measures

### (1) Anti-Dumping Measures and Safeguard Measures

#### (a) General Recommendations

Although anti-dumping measures are proper trade remedies as far as they are operated in a manner consistent with the WTO Agreement, there is a possibility that they may unduly limit trade and distort competition once operated in an arbitrary manner, for example, in determining whether a dumping exists or not. Furthermore, the initiation of anti-dumping investigations itself may discourage exporting companies.

The United States is one of the major users of anti-dumping measures. A number of countries including Japan have been claiming that some of the U.S. anti-dumping measures are inconsistent with the WTO agreements, because of, for example, the arbitrariness in determining whether a dumping exists or not. In several cases such as “*United States - Anti-Dumping Act of 1916 (DS162)*” and “*United States - Certain Hot-Rolled Steel Products from Japan (DS184)*”, the Dispute Settlement Body (DSB) found that the U.S. measures were inconsistent with the WTO Agreement.

From these viewpoints, the Government of Japan urges the Government of the United States to operate its anti-dumping mechanism prudently in a manner fully consistent with the WTO Agreement without abusing it for protectionist purposes.

#### (b) Title VIII of the U.S. Revenue Act of 1916

The United States has not been able to repeal the Title VIII of the U.S. Revenue Act of 1916 (the so-called "Anti-Dumping Act of 1916"), for more than four years since the Dispute Settlement Body (DSB) found its inconsistency with the WTO Agreement. Moreover, the District Court awarded treble damages against a Japanese company in the lawsuit filed by a United States firm under the Act. The case is still pending at the Court of Appeals.

The Government of Japan appreciates the fact that Government of the United States expressed its support to the legislation that would repeal the Anti-Dumping Act of 1916 in the Third Report to the Leaders. The Government of Japan also takes note of the Administration's efforts to work with the United States Congress to repeal the Act, as a piece of evidence of its positive attitude to realize what is confirmed in the report. At the same time, the Government of Japan strongly requests the Government of the United States to make efforts further for the passing of the repealing legislation with retroactive effect at the Congress, and, until the Act is repealed, to take every possible measure to avoid Japanese firms being damaged under lawsuits relating to the Act.

#### (c) The Byrd Amendment

The Byrd Amendment, which stipulates the distribution of revenues collected from

anti-dumping and countervailing duties to United States domestic producers who filed or supported the petition for such duties, was found to be inconsistent with the WTO agreements by the WTO panel and Appellate Body. More recently, on August 31, 2004, the WTO arbitrator confirmed that eight WTO Members including Japan were entitled to take retaliatory measures against the United States. In accordance with the award and the requirements of the dispute settlement rules of the WTO, Japan can exercise its right to the retaliatory action at any time deemed appropriate.

The Government of Japan requests the Government of the United States to take this arbitration seriously, and work with the Congress to abolish the Byrd Amendment promptly.

**(d) Sunset Reviews**

As a result of the Uruguay Round negotiations, the United States incorporated sunset provisions of Article 11.3 of the WTO Anti-dumping Agreement into its anti-dumping laws, and then has conducted reviews since July 1998. In reality, however, the United States sunset review is designed to “maintain in principle, eliminate exceptionally” its anti-dumping measures, by its related legislations, regulations, policy bulletins and actual implementations. Japan still holds that United States sunset review procedure is not consistent with the WTO Anti-dumping Agreement. Indeed, the implementation of the United States sunset review procedure showed that many anti-dumping measures are not terminated in five years and remain in force for a longer time.

The Government of Japan requests the Government of the United States to make a closer examination of the necessity to continue imposing anti-dumping duties, and conduct sunset reviews in a manner consistent with the WTO Agreement.

**(e) Methods related to Dumping Investigations and Calculation of Dumping Margins inconsistent with the WTO Agreement**

The Government of Japan requests the Government of the United States not to apply, in its future anti-dumping investigations, the methods that have already been found to be inconsistent with the WTO Agreement by the Dispute Settlement Panel, such as those for anti-dumping margin calculations adopted by the Department of Commerce and for injury determination adopted by the United States International Trade Commission (ITC).

**(f) Zeroing**

The United States applies “zeroing” methodology whereby the authority treats negative dumping margins in individual transactions as having zero value in calculations of dumping margins (which means neglecting price data of transactions whose exporting prices are higher than domestic sale prices). The WTO Appellate Body in *EU—Anti Dumping Duties on Imports of Cotton-type Bed Linen from India* and *United States—Final Dumping Determination on Softwood Lumber from Canada* found the practice of “zeroing” to be inconsistent with the WTO Agreement. The Government of Japan requests the Government of the United States not to apply zeroing methodology in anti-dumping procedures, which has already been determined to be inconsistent with the WTO Anti-dumping Agreement by the Appellate Body.

**(g) Model-Matching**

With regard to the categorization of respective product models among investigated product and domestic “like product” and determination of domestic product model that is “identical” to or “closely resembling” export product model (“model-matching”), the Department of Commerce is considering, in the current 15<sup>th</sup> review, the revision of the model match methodology that has been hitherto used without any significant problems in the past fourteen anti-dumping reviews of ball bearings imported from Japan without any convincing reasons.

The new methodology proposed by the Department of Commerce will impose excessive burdens on Japanese exporters by additionally requiring them to report an enormous amount of domestic sale and price data, while damaging predictability of the results of anti-dumping investigations. In particular, the new model will eventually further increase dumping margins of foreign-made ball bearings, which is the most important target of the still-effective Byrd Amendment.

The Government of Japan requests the Government of the United States to fully recognize the evident unfairness of the new methodology that causes the problems mentioned above, and rescind the revision of method.

**(h) The Definition of “Affiliated Parties” and “Ordinary course of trade”**

The issue of “affiliation” to or “affiliated companies” of exporters arises in various places in calculating the normal value in domestic market and the constructed export price. The Department of Commerce deems respondents to be “affiliated” with suppliers or purchasers simply based on the former’s ownership of 5 percent or more of stocks issued by the latter, regardless of whether respondents have control over suppliers or purchasers. The authority thus requires a wider scope of entities to submit cost and other data than what is actually necessary to determine appropriate margin of dumping.

The Department of Commerce decides whether a certain sale is regarded as an “ordinary course of trade” by “arm’s length test,” whose criteria are extremely strict. The current rule provides that sale at 98 to 102 percent of the normal value is regarded as an “ordinary course of trade”; these figures are amended ones from the previous “99.5 percent or more” in November 2002 in response to the decision made by the Appellate Body of WTO in July 2001, which is nevertheless still too narrow a range. When sales to affiliated parties do not fall within the range on average, the affiliated companies are required to report all downstream sales to unaffiliated companies. This requirement has been imposing tremendous burden on affiliated companies, the majority of which are small and medium-sized and therefore not fully equipped with adequate electronic data-processing system. It is estimated that extra-labor cost incurred by one investigation would reach 20 to 50 million yen (approximately 180 to 450 thousand dollars).

The Government of Japan therefore requests the Government of the United States to:

- (i) make more substantial scrutiny in determining whether a certain entity is an “affiliated company”; and
- (ii) broaden the range of percentage in arm’s length test to determine whether a certain

transaction is an “ordinary course of trade” and review the excessively burdensome requirements under anti-dumping investigations.

**(i) Exemption Procedure**

Under current practices of the Department of Commerce in anti-dumping investigations, exemption of a product from anti-dumping investigation is granted only if more than 85 percent of United States domestic producers approve of it. Accordingly, exemption is not granted without approval by the majority of United States *producers*, even if downstream *users* petition the exemption of a specially-designed product which United States producers cannot produce or whose supply is extremely tight in the United States. As a consequence, downstream users are forced to import the product by paying anti-dumping duties, or otherwise abandon purchase. This is an unreasonable implementation of rule that ignores actual market demands.

The Government of Japan therefore requests the Government of the United States to lower the 85-percent threshold to grant a product exemption from investigation, hear opinions from both producers and downstream users that petition exemption, and, if their views differ, provide remedy such as judicial proceedings or arbitration by which adequacy of exemption is decided substantially.

**(j) Rules and Procedures on Steel Imports**

The Government of Japan welcomes the withdrawal of United States steel safeguard measures by the President on December 4, 2003. The Government of the United States, however, also decided to maintain the “Steel Import Monitoring & Analysis System (SIMA)” even after the withdrawal of the safeguard measures themselves until March 21, 2005 or otherwise the Department of Commerce establishes a substitutable system.

Besides, the Steel Import Monitoring Bills, submitted to the House of Representatives on June 25 (H.R.4730), and Senate on July 22, (S.2722) respectively plan to enlarge the scope of SIMA from present 15 products to all steel-related products, and perpetuate the current SIMA, which was initially expected to terminate in March 2005.

The Government of Japan therefore requests the Government of the United States to:

- (i) Ensure that SIMA is fully consistent with the WTO Agreement and that any future change or amendment therein does not result in trade restrictive measures; and
- (ii) Refrain from expanding the product coverage of the SIMA to all steel products, which might result in additional works and cost for Japanese exporters.

**(2) The Patent System of the United States**

**(a) The First-to-Invent System and Interference**

The United States is the only country adopting the first-to-invent system. Under this system, when two or more people make inventions separately and file applications respectively, an interference procedure is carried out in order to determine who receives patent rights.

From the point of view of patent applicants, this procedure has problems as follows:

- (i) There is little certainty and predictability in that the position of the right holder may be imperiled *post factum* by the appearance of a prior inventor;
- (ii) The interference procedures requires long periods of time and tremendous cost; and
- (iii) There is a danger of leaking the contents of inventions contained in applications filed or of know-how contained in patents during the interference period.

Another problem is raised when multiple inventors make the same invention independently and multiple patents are granted to some of these inventors. In such a case, there is a possibility that a third person will suffer an unreasonable loss in that he or she may be forced to pay redundant royalties to each right holder, since there is no means for third persons to invalidate the status by themselves.

Therefore, the Government of Japan requests the Government of the United States to switch to the first-to-file system, which is the international *de facto* standard. The Government of the United States is also urged to simplify its interference procedures as a provisional measure until such a switch is made.

**(b) The Early Publication System with Exceptions**

The United States early publication system, introduced by the revised Patent Act of November 1999, has an exception that allow applicants, by their request, not to publicize applications made in the United States not filed overseas as well as contents of U.S. applications not included in corresponding foreign applications.

The contents of applications remained unpublicized by request are not disclosed until the granting of patent right is announced on the patent gazette. *Bona fide* third persons may in the meantime redundantly invest in research and development or put an invention to practical use that is identical to one written in the specification. This will certainly damage the predictability of profits and losses in business.

Another problem relating to the U.S. early publication system is the “submarine patent.” If a patent examination is delayed for a long time, an invention identical to one under examination may put into practical and extensive use in the market by *bona fide* third persons. A “submarine patent”, issued after a long term of examinations, could demand huge royalties from those third persons, thus violating their interests which they have obtained in the meantime.

Therefore, the Government of Japan strongly requests the Government of the United States to abolish an article for exceptions included in the early publication system. In this regard, the Government of the United States has already agreed to disclose all applications, excluding those under secret order and those non-pending, within eighteen months after the first date of application in the 1994 agreement under the Japan-U.S. Framework for New Economic Partnership. The Government of Japan reemphasizes that the Government of the United States should sincerely implement the agreement.

**(c) The Reexamination System**

In the United States, a reexamination system is provided as a means to review the validity of patent rights after granting. The revised Patent Act enacted in November 1999 introduced *inter partes* reexamination, which affords third persons other than patent holders greater opportunity to participate in the process, as an option of the appeal reexamination. Latest revision of the Patent Act in November 2002 further improved the system.

However, the scope of U.S. reexamination system is limited to those based on the existence of prior art documents. It is not allowed to apply for reexamination on the grounds of not meeting the enablement requirement or the description requirement of the specification.

Therefore, the Government of Japan strongly requests the Government of the United States to accept all of the requirement inadequacies prescribed in Article 112 of the Patent Act, excluding the best mode requirement, which is disadvantageous to foreign applicants, as reasons for reexamination request.

**(d) Restriction Requirement due to Non-fulfillment of Unity of Invention**

When two or more separate inventions are contained in one application, the applicant is requested to select and file only one invention in order to maintain unity of invention. (Only one independent invention should be included in an application.)

The United States standards of decision for unity of invention are more stringent than those of the Patent Cooperation Treaty (PCT). While an invention filed in the United States under the PCT may satisfy the requirement of unity of invention, the same invention may not meet the requirement if the application is filed as claiming priority rights under the Paris Convention for the Protection of Industrial Property.

Those applying for patents in multiple countries prefer considering claims (specified scope of patent contents) in accordance with internationally common standards. It is practically difficult for them to do extra work only for application in the United States, which has peculiar standards on unity of invention in the world.

Another problem is the division of application. Upon specification of a claim to be filed after receiving a request, other claims are automatically opted out from the scope of examination. Therefore, if the applicant wants to maintain such “opt-outs,” he or she needs to file a divisional application before the patent is issued for the remaining claim. Filing divisional applications forces applicants to consume further time and expenses. Nevertheless, extremely stringent standards of unity of invention of the United States expose the applicants to by far larger possibility to be obliged to file divisional applications, thus imposing an excessive burden on them.

Furthermore, the U.S. standards of unity of invention is burdensome to all of parties concerned, namely applicants, right-holders as well as third persons who monitor the patent to avoid conflict. For they are paying costs unnecessary to pay in other countries where multiple inventions that the U.S. authority might deem multiple could be regarded as single.

Therefore, the Government of Japan requests the Government of the United States to ease the requirements for unity of invention.

**(e) The Hilmer Doctrine**

Article 119 of the U.S. Patent Act provides the priority rights system prescribed by Article 4 of the Paris Convention. Under the provision, an application filed in the United States within twelve months from the first date of corresponding overseas application have the same effects as one filed in the United States on that day.

However, the United States has a unique legal principle called “the Hilmer Doctrine”, which has been causing the following problems:

- (i) According to the Doctrine, precedents and practices have deemed that, among the effects provided under Article 119, the effect of eliminating subsequent applications by third persons on the ground of items on specification being prior art retroacts only to the date of the application in the United States, not to the first date of overseas application; and
- (ii) While applications first filed in the United States have the elimination effects under both Articles 102(e) and 102(g) of the Patent Law, those afforded to applications made in the United States based on the priority rights of overseas are limited only to the items under 102(g) on subsequent applications within the term of the priority right.

In Japan and Europe, domestic applications based on priority rights of overseas applications retroact to the application date in the first-filing country, and the effects to eliminate subsequent applications applies to all items of the specification. It is unfair that the same treatment is not guaranteed in the United States.

The Government of Japan therefore requests the Government of the United States to improve the system to ensure that all items of the specification could eliminate subsequent applications by third persons, retroacting to the date of first filing overseas.

**(f) Plant Patent**

The “novelty” requirement should be satisfied for a new plant variety to be protected. In this regard, the Convention of the International Union for the Protection of New Varieties of Plants (UPOV) provides that, in the countries where a certain new plant variety has been sold, the novelty requirement could be satisfied if an application for protection is made within one year after sale in respective countries, while, in the other countries, the corresponding period is four years (six years for trees and grapes) after sale in the original country. The UPOV Convention also provides that *publication* of a new plant variety does not disqualify it for novelty, and the time of actual *sale* or otherwise *disposal to others* is the starting point of the application of the criteria (one, four or six years as mentioned) for the novelty requirement.

The United States signed the UPOV 1991 Convention with reservations and has applied different novelty requirement (Article 35 of the UPOV 1991 Convention). Namely,

Article 102 of the United States Code Title 35 provides that, concerning asexually reproduced plants except tuber propagated plants, novelty requirement is satisfied unless “the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.”

It usually takes longer time in comparison to industrial products to market a new plant variety and confirm how well it sells. This is exactly because the UPOV Convention allows four or six-year criteria for the novelty requirement of plant varieties for the application in the countries where they have not been sold, which are longer period than that of industrial patent.

Under the United States Code Title 35, however, an application for patent should be made within one year after the publication of application in a foreign country (even if the new variety is not sold generally in that country) to satisfy the novelty requirement. It is therefore difficult to apply for plant patent of and then sell a new variety in a foreign country (Japan) to confirm sales status before applying for plant patent in the United States, since once application is made in Japan even before sale in the United States begins, the clock starts to tick until one year passes, which is the time when a new variety loses its novelty under the United State law. Some Japanese companies cannot avoid applying for plant patent in the United States by way of precaution to ensure their novelty under the United States Patent Act, even before sales begins in the country, which incurs additional cost to them.

The Government of Japan therefore requests the Government of the United States to work for the amendment of the patent law to render it conform to the related provisions of the UPOV Convention.

### **(3) Improvement of Regulations on Insurance Business**

Although the Government of Japan has discussed with the Government of the United State for improvement of the latter’s regulatory system on insurance through bilateral insurance consultations as well as the WTO service negotiations, there still remain a number of regulations that obstruct foreign insurers’ business operations in the United States. Based upon this recognition, the Government of Japan hereby raises the following regulations as priorities, and requests the Government of the United States to improve them, taking the opportunity of fourth-year dialogues under the Regulatory Reform Initiative.

#### **(a) Harmonization and Unification of the State-Based Regulatory System**

In the United States, differences in insurance supervisions and regulations among States require insurers to obtain business licenses in all individual States in which they wish to do business. Moreover, insurers are required to apply for approval of and report on products and rates in all individual States in which they wish to sell insurance products.

As a result, insurers are obliged to subject to examinations in every single state based on the laws of each state to obtain licenses and approvals. In addition, Japanese insurers operating in the United States have experienced long period that extremely excess standardized ones necessitated by examinations for licensing and approval. These regulations cause huge burden on insurers and prevents insurers from responding customer

needs in a timely manner.

- (i) The Government of Japan, therefore, requests the Government of the United States to realize harmonization and unification of the State-based insurance regulatory system in not only procedural aspects but also substantial requirements, including the realization of eligibility for an insurer who has obtained license and approval in one State to operate in all the other States. It is also requested to improve regulatory processes in each state, such as expediting examinations and enhancement of transparency.
- (ii) Actions by the Federal Government in addition to those taken by the National Association of Insurance Commissioners (NAIC) to State insurance authorities are critical for resolving the problems mentioned above. The Government of Japan therefore requests the Government of the United States to communicate the aforesaid concerns to each state, and inform the Government of Japan of the state of improvement in respective States in timely and appropriate manner.

**(b) Reinsurance Collateral Requirement**

- (i) Under the current reinsurance regulations of the United States, overseas (re)insurers are, without any exception, required to post a trust account equivalent to 100 percent of credit amount within the country, or to submit a letter of credit for collateral, when they conduct reinsurance businesses with U.S. ceding companies on a cross-border basis. These systems incur tremendous burden on overseas insurers in reinsurance business, and therefore the Government of Japan requests the elimination of these requirements.
- (ii) The Government of Japan is aware that the revision of this requirement has been discussed in the United States by NAIC in response to the concern raised by European insurers. The Government of Japan therefore requests the Government of the United States to ensure that future regulations reviewed by NAIC do not provide discriminatory treatment to the Japanese (re)insurers, and to inform the Government of Japan of the status of the related discussion in a timely manner in order to ensure transparency of review process.

**(4) Harmonization of Standardization of State Legislations on Industrial Products for the Protection of the Environment**

With the public awareness of the environment increasing, respective States have been reinforcing their environmental regulations. While the Government of Japan does not oppose to the reinforcement of environmental regulations, unharmonized initiatives taken by individual States at different speeds are imposing a huge burden on both Japanese and United States companies in conducting their businesses at national or inter-state level. Moreover, if more States introduces regulations that differ from one another in terms of extent to and scope for which environmentally-friendliness are required for industrial products, it will presumably be extraordinarily difficult for manufacturers to confirm their compliance with the environmental regulations of all the States in which their products will be marketed.

The Government of Japan therefore requests the Government of the United States to work for the unification of environmental regulations of individual States, particularly those regarding

recycling and mercury control, by Federal legislation or other appropriate means. If it is difficult, it is requested to consider to: (i) issue a certain policy guideline to be referred to by States by which their environmental regulations should be harmonized, or (ii) to develop some compliance guidelines to be referred to by manufacturers that put together information in a streamlined manner on what criteria individual industrial products should satisfy in respective States.

### **3. Distribution**

#### **(1) Counter-Terrorism Measures in Physical Distribution**

##### **(a) Transport Security**

The Government of Japan recognizes the importance of, and supports in principle, initiatives launched by the United States to combat terrorism through promoting transport security.

At the same time, however, the Government of Japan requests the Government of the United States to pay due consideration to securing legitimate trade and to ensure that such initiatives do not hinder rapid, smooth and effective distribution. The Government of Japan also believes that the Government of the United States should ensure that specific measures and the application of such initiatives be consistent with the practices of relevant international organizations including the World Customs Organization (WCO), and should aim to build internationally common and unified systems.

Upon this basic recognition, the Government of Japan requests the following points to the Government of the United States.

##### **(i) Advance electronic presentation of cargo information**

The Government of Japan requests the Government of the United States to make maximum efforts to prevent the regulations on advance electronic presentation of cargo information, issued under the Trade Act of 2002, from affecting negatively on Japan-United States bilateral as well as multilateral trades. The Government of Japan also requests that tangible benefits to the participants of the Customs-Trade Partnership Against Terrorism (C-TPAT) are realized, such as their exemption from the 24-hour rule, swifter customs clearance and a reduced number of inspections along with the implementation of the rule.

##### **(ii) Automated Commercial Environment (ACE)**

As the Automated Commercial Environment (ACE) is still under development at present, the Government of Japan requests the Government of the United States to introduce the system promptly, and to provide the former with information on its details, current situation of its development, its implementation schedule as well as on how incumbent systems will be changed and their compatibility will be ensured in line with the introduction of ACE.

As regards the Container Security Initiative (CSI), the Government of Japan hopes that the United States Bureau of Customs and Border Protection (CBP) and the Japanese Customs and Tariff Bureau will continue to exchange their views on its implementation, while hearing opinions from interested parties of Japan and the United States, in order to ensure compatibility between securing safety of containers and legitimate trade.

**(b) The Bioterrorism Act and Related Regulations**

Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (“Bioterrorism Act”), the Government of the United States publicized two Interim Final Rules of “Registration of Food Facilities” and “Prior Notice of Imported Food Shipments” respectively, and has been implementing them since December 2003.

On the solicitation of comments on the Interim Final Rules, the Government of Japan has filed comments three times that request the United States authorities to take measures to avoid excessive burden imposed on companies and individuals who send foods to the United States. The Food and Drug Administration (FDA) is now elaborating the final rules based on the comments filed so far in cooperation with CBP. The Government of Japan strongly hopes that FDA takes full account of the filed comments and that any final rules concerning bioterrorism will not impose excessive burden on exporters or individual senders of food beyond the level required by the principle of the Bioterrorism Act, namely the protection of United States from the threat of bioterrorism. According to the “Compliance Information: Registration” announced by FDA on September 22, FDA had received 15,446 registrations of Japanese food facilities, which is the largest number by country among the total of 118,963 registrations on foreign food facilities. This fact clearly demonstrates that Japanese exporters and individual senders of foods have been gravely affected by these rules.

In particular, the Government of Japan had been deeply concerned about the fact that even individual senders of foods were required to notify FDA of import prior to the sending of foods. In this regard, the Government of Japan welcomes that FDA’s “Compliance Policy Guide” publicized in June (revised in August) provides that by discretion of FDA and CBP, food “imported or offered for import for non-commercial purposes with a non-commercial shipper” is not typically refused at customs even without prior notice, regardless of whether the food is sent by international mail or home-delivery services.

In reality, however, it is also reported to the Government of Japan that some food products satisfying these criteria sent by home-delivery services have been refused at customs. The “Compliance Policy Guide” also provides that food shipped by a retail store (which itself is “commercial”) on behalf of an individual who purchased the food at the store is not regarded as “shipped” by a non-commercial person, since FDA regards one who actually sends food as a “shipper,” and therefore prior notice is required. As it causes tremendous difficulties for an individual to take prior notice procedure on the Internet in English, the final rules concerning the shipment of food to the United States by individuals, which is to be publicized in near future, should be even more practicable and implemented certainly.

Based on the recognition above, the Government of Japan requests the Government of the United States to:

- (i) Not oblige non-commercial senders of food for non-commercial purposes to subject to prior notice requirement under the forthcoming final rule on prior notice;
- (ii) Exempt food shipped by retail stores or other commercial shippers on behalf of

non-commercial individuals from prior notice requirement under the forthcoming final rule, if the non-commercial nature of the shipped food is clearly declared on the parcel;

- (iii) Ensure the implementation of two points described above at the United States customs and avoid refusal of food import by discretionary decision of customs inspectors; and
- (iv) Establish a contact point at the United States establishments in Japan at which Japanese nationals, particularly small and medium-sized food processors and individuals could inquire in Japanese about the latest status of related rules and guidelines and procedures to be taken on the registration of food facilities and prior notice, and inform food processors, the Japan Post, commercial transport service providers and Japanese nationals in general of any future changes in the rules without delay through appropriate means including the website of the United States Embassy in Japan.

## **(2) Container's Weight Limit**

The Maximum weight limit of container differs among states under Section 658.17 of the Department of Transport Federal Motor Carrier Safety Administration's regulations. Therefore, the foreign exporters have to use containers of the smallest weight among those of all the states where their cargoes are unloaded. In the case of 40 feet containers, the weight limit is about 18 to 23 metric tons in the United States, whereas it is about 26 to 30 metric tons in Japan, which causes increased unit cost for export. Such additional cost also imposes unnecessary expenses on United States consumers who purchase Japanese merchandises. Consequently, the Government of Japan requests the Government of the United States to raise the limit up to the level equivalent to what is adopted in Japan.

## **(3) Maritime Transport Legislation**

### **(a) Merchant Marine Act of 1920**

The Federal Maritime Commission (FMC) is authorized by Sec. 19 (1) (b) of the Merchant Marine Act of 1920 (the Jones Act) to make rules and regulations affecting shipping in foreign trade.

The FMC imposed a unilateral sanction against Japanese carriers in September 1997. Although the sanction was removed in May 1999, the FMC still requires carriers to report to it on the situation of the ports in Japan. The rule (repealed in May 1999) which provided the grounds for unilateral sanctions was a violation of the Treaty of Friendship, Commerce and Navigation between Japan and the United States, which provides each other's ships with the national treatment and the most-favored-nation treatment.

The Government of Japan therefore strongly requests the Government of the United States to work even more closely with the FMC in order to ensure that such unilateral measures will not be taken any more.

### **(b) Reporting requirement on the situation of Japanese ports**

Since the repeal of the abovementioned rule, the FMC has required Japanese and U.S.

carriers to report to it on the progress of the situation of the ports in Japan.

Efforts have been made and signs of progress have been seen on the situation of the ports in Japan. The “prior consultation system” has improved significantly (and the improved system has been implemented steadily); the revised Port Transportation Business Law abolished the supply-demand adjustment restriction and thus realized new entries into port transport business; progress have also been made toward the introduction of port terminal service operation on the 24-hour/364-day basis.

Despite the significant improvement of port situation in Japan described above, the FMC introduced, in August 2001, a new order which not only increased the number of items to be reported, but also expanded the scope of carriers subject to the reporting requirement. The order includes requirements going beyond the extent deemed appropriate to impose upon carriers, such as directly requiring Japanese carriers to submit translated copies of the Japanese laws and instructions concerned. Thus the order has been causing unfair and excessive burdens on carriers.

If it is the case that the FMC decided to expand the range of the reporting requirements in order to judge whether or not it should impose unilateral sanctions that would violate the Treaty of Friendship, Commerce and Navigation between the United States and Japan, it is a serious abuse of FMC’s mandates which the Government of Japan recognizes as extremely regrettable.

The Government of Japan therefore strongly requests the Government of the United States to withdraw the order.

**(c) Ocean Shipping Reform Act of 1998**

The Ocean Shipping Reform Act of 1998 includes a provision allowing discriminatory treatment of Japanese and other foreign shipping firms by making it possible to impose unilateral regulations on pricing and other practices. As the pricing practice is the foundation of free shipping activity on a commercial basis, unilateral regulations by the FMC on the pricing practice obviously intervenes in free shipping activity, discriminating foreign firms. Furthermore, the amendment to the Act in 1998 explicitly stipulates the right of the Federal Government to make this intervention. The Government of Japan requests the Government of the United States to affirm that in the future the FMC should not impose unilateral regulations on shipping activities on a commercial basis conducted by Japanese and other foreign shipping firms, which do not reflect the reality of the market.

**(4) Abolition of Maritime Security Program**

The Government of Japan requests the Government of the United States to abolish the Marine Security Program (MSP), under which as much as 100 million dollars of maritime subsidy is provided annually for ten years. It is obvious that a provision of such an enormous amount of subsidy distorts conditions for free and fair competition in the international maritime market.

Moreover, the term of MSP was extended for another ten years from fiscal years 2006 to 2015 with the increase of the amount of subsidy and that of ships subsidized. The Government of Japan also requests the repeal of this legislative change.

If the repeal is difficult, the Government of Japan requests the Government of the United States to:

- (a) Take measures, in the implementation of the MSP, to minimize the distortion of free and fair playing field of international maritime transport market caused by the MSP, including the limitation of its application only to cases where genuine security interest requires requisition.
- (b) Inform the Government of Japan surely and without delay of any changes and developments in the MSP and the scope of ships to which the MSP is applied, to which the Government of the United States committed in the Third Report to the Leaders.

**(5) Abolition of Cargo Preference Measures including the Law Lifting the Ban on the Export of Alaskan Oil**

The Government of Japan requests the Government of the United States to abolish the Cargo Preference Measures, such as the requirement to use U.S. vessels for the exports of Alaskan oil which is commercial cargo. These protectionist measures are inconsistent with the principle of national treatment, and are also against the Ministerial Decision on Negotiations on Maritime Transport Services of WTO, which prescribed that the participants should not apply any protectionist measures during the negotiations.

In the Third Report to the Leaders, the Government of the United States “took note of the opinion of the Government of Japan that measures such as cargo preferences may distort conditions for free and fair competition in the international maritime market.” The Government of Japan therefore continues to request the abolition of cargo preference measures.

## 4. Sanctions Acts

The sanctions measures taken by the Government of the United States based on related acts discourage, significantly and unreasonably, investment into and establishment of economic relations with the countries targeted by those laws, affecting not only U.S. private enterprises but also those all over the world. In legal terms, they constitute an extraterritorial application of domestic laws, which is not permissible under general international law and may cause a problem of inconsistency with the WTO agreements. Moreover, fairness, transparency and predictability have not been observed in their applications. Although the Government of Japan has taken every opportunity, including those available under the Regulatory Reform Initiative, to urge the Government of the United States to improve the situation from all these perspectives, the latter has not taken actions sufficiently.

The Government of Japan therefore strongly requests the Government of the United States to ensure consistency of these acts with international laws and implement them prudently. Application of the acts to enterprises of third countries is discouraged in particular.

On this recognition, the Government of Japan requests the following points on respective acts.

### **(1) Iran and Libya Sanctions Act of 1996**

It is a matter of fact that ILSA has not been applied to a number of investments in Iran by third countries' companies. The Government of Japan has expressed its concern that, under these circumstances, application of ILSA to Japanese companies' investments alone, or higher probability of its application to them in comparison to other countries' cases, would clearly constitute a double standard.

In this regard, the Government of Japan appreciates the clarification made by the Government of the United States in the Third Report to the Leaders on the issue regarding the criterion by which ILSA is applied. It continues to request the Government of the United States, however, to give Japanese enterprises the level of treatment tantamount to what has been guaranteed to EU enterprises.

### **(2) Cuban Liberty and Democratic Solidarity Act of 1996**

The Government of Japan urges the Government of the United States to fully recognize the fact that the United Nations General Assembly has resolved to express its concern about the Cuban Liberty and Democratic Solidarity Act supported by an overwhelming number of the Member States.

The Government of Japan appreciates the decision made by the Government of the United States on July 16, 2004 to extend the suspension of the implementation of Title 3 of the Act for another six months. From the viewpoint of predictability for potential traders, however, the maximum six-month assurance of the suspension is not yet sufficient. The Government of Japan accordingly requests the Government of the United States to suspend the implementation of the Title 3 of the Act for much longer term, namely one year or more.

**(3) Sanctions Acts Instituted by Local Governments**

The Government of Japan appreciates the Third Report to the Leaders in confirming some progresses concerning local sanctions. The Government of Japan requests the Government of the United States to continue to petition respective States and local governing bodies to abolish or sanctions acts, or suspend their enforcement, that are not consistent with general international law and the WTO Agreement.

## 5. Competition Policy

- (1) The Government of Japan urges the United States Department of Justice to continue to review and express its views on the appropriate scope and reach of limitations and exemptions of the application of the federal antitrust laws from the viewpoint of active promotion of competition policy, and abolish the limitations and exemptions that have no rationale for their existence.
- (2) The Government of Japan requests the Government of the United States to actively cooperate with the states concerned in the review process of the antitrust exemptions at the state level as well.
- (3) The Government of Japan also requests the Government of the United States to make available to the former any public documents relating to the abovementioned work, and to explain the progress that has been made with regard to the work.

## **6. Legal Services and Other Legal Affairs**

### **(1) Acceptance of Foreign Lawyers as Foreign Legal Consultants**

#### **(a) Acceptance of Foreign Lawyers as Foreign Legal Consultant in Every State**

In the United States, only twenty-three states and the District of Columbia accept foreign lawyers as foreign legal consultants (FLCs). All other states do not allow foreign lawyers to practice therein, thus restricting the provision of diverse legal services in the United States. The Government of the United States has supported the adoption of rules on FLCs by every state, which the Government of Japan has welcomed, as they facilitate international business. It also requests the Government of the United States to take further positive actions towards the acceptance of foreign lawyers as FLCs in all states.

#### **(b) Reduction of the Period of Practicing Experience Required for Acceptance of Foreign Lawyers as FLCs**

As far as the Government of Japan has been aware, practicing experience is necessary for foreign lawyers to be qualified as FLCs in every state (District of Columbia is not included here) that accept foreign lawyers as FLCs. The Government of Japan deems that the requirement constitutes a barrier for foreign lawyers to practice in the United States, as the majority of those states require five years of experience, whereas only three years of experience is imperative in Japan in the same regard. The Government of Japan requests the Government of the United States to take necessary measures, such as petitioning the state governments concerned, in order to reduce the period of practicing experience requirement to three years in every state.

#### **(c) Abolition of the Requirement that Only Practicing Experience in the Period Immediately Preceding the Date of Application can be Considered as Practicing Experience**

As far as the Government of Japan confirmed, every state where foreign lawyers are accepted as FLCs allow only the period of practicing experience immediately preceding the date of application to be considered as that satisfying the requirement. The corresponding system in Japan does not impose such a limitation. The Government of Japan therefore requests the Government of the United States to take necessary steps, such as making suggestions to the relevant state authorities, to eliminate this kind of requirement in qualifying foreign lawyers as FLCs.

#### **(d) Inclusion of the Practicing Experience in Third Countries into the Practicing Experience Requirement for Acceptance of Foreign Lawyers as FLC**

As far as the Government of Japan has been informed, there are only two States, namely New York and Indiana, among those accepting foreign lawyers as FLCs, that allow the inclusion of practicing experience in third countries into the practicing experience requirement. In Japan, the amendment of the Special Measures Law Concerning the

Handling of Legal Business by Foreign Lawyers in 1998 has enabled foreign lawyers to include the period of time engaged in legal services in third countries as practicing experience. The Government of Japan urges the Government of the United States to take appropriate actions, including making requests to the state governments, to allow the period of practicing experience in third countries to comprise a part of the entire term of experience required to be FLCs in every state.

**(e) Other matters**

- (i) While the Government of Japan has made the four requests above consistently throughout the first to third-year dialogue of the Regulatory Reform Initiative, significant improvement has not been attained yet. Although the Government of Japan understands that the scope of actions the Federal Government can take on this issue is circumscribed as FLCs are exclusively regulated by States, the Government of the United States should also recall that the Government of Japan has continuously improved its system for the acceptance of foreign lawyers in response to the United States requests. Accordingly, the Government of Japan strongly requests the Government of the United States to address the issues the Government of Japan has raised more constructively
- (ii) The Third Report to the Leaders states, “[a]t the next meeting of the U.S.-Japan Regulatory Reform and Competition Policy Initiative, the Government of the United States will inform the Government of Japan whether it has received from the ABA (*American Bar Association*) any formal response by State authorities to the Japanese request, and the content of any such response.” The Government of Japan therefore requests the Government of the United States to inform the former of whether the ABA has conveyed Japan’s request to state authorities, which state authorities have made responses as well as their contents.

**(2) Product Liability Law**

Product Liability Law in the United States constitutes a heavy burden for Japanese and U.S. companies doing business in the U.S. The Government of Japan therefore requests the Government of the United States to encourage the reforms currently underway in various states to limit product liability, and to promote reform of product liability law at the federal level such as putting certain limits to the amount of damages and shortening the statute of limitations, which has already been attempted in such form as the submission of relevant bills to the Congress.

**(3) Civil Procedure**

With regard to the civil procedure in the United States, the Government of Japan requests the followings.

**(a) Class Actions**

A class action, not requiring listing of individual class members’ names, could be a lawsuit brought by plaintiffs on behalf of an enormous number of the class members who have “common interests.” Those damages to be compensated may reach such a large amount that they could have a tremendous impact on business management. The Government of

Japan therefore requests the Government of the United States to amend the rule to interpret “common interests” strictly in deciding the standing of the class before the trial.

**(b) Jury Trial**

As the trial relating to legislation on antitrust and securities exchange and other business activities are relatively complicated and technical, doubts are often raised about the validity of judgment by jury. The Government of Japan therefore requests the Government of the United States to take improvement measures, such as exemption of lawsuits concerning business activities from jury trial.

**(c) Discovery**

Under the broad discovery rule in the United States, consumers can file lawsuits against company without good evidence, while the defendant companies have to pay a large amount of attorney’s fee only for dealing with the discovery process, which often have immense impact on business management. The Government of Japan therefore requests the Government of the United States to amend the rule to interpret the validity of the discovery request strictly.

**(d) Punitive Damages**

Unpredictable punitive damages awards may be such large amount that they could sometimes undermine business enterprises themselves. Although the Supreme Court ruled last year in *State Farm* that punitive damages shall be limited by the federal law, the ruling has had less impact on other judgments in the aspects of both the amount of damages and their predictability. The Government of Japan requests the Government of the United States to work for the legislation at the Federal level concerning: i) limitation of the level of punitive damages awards in relation to actual damages; ii) a clear and restrictive definition of the types of conducts to which punitive damages are awarded; and iii) requiring strict burden of proof standard to establish punitive damages liability.

## II. TELECOMMUNICATIONS

To maximize efficiency in the work towards the next Report to the Leaders of the Regulatory Reform Initiative and its benefits in the telecommunications field, the Government of Japan requests the Government of the United States to have appropriate experts of the Federal Communications Commission (FCC) attend the Telecommunications Working Groups to be held in Japan and the United States.

### 1. Elimination of Entry Barriers

#### **(1) Restrictions on Foreign Investment in the Licensing of Radio Stations**

Section 310 of the Communications Act of 1934 (hereinafter referred to as "the Communications Act") stipulates, as a criterion of licensing, that the ratio of foreign direct investment in radio stations shall be limited to 20 percent. This restriction makes it impossible for Japanese carriers to directly obtain licenses to establish earth stations in the United States to provide services such as international communications between Japan and the United States via satellite. As a result, they are faced with difficulties in creating flexible networks.

The Government of Japan therefore requests the Government of the United States to:

- (a) Abolish the restriction on foreign investment ratio in licensing radio stations for telecommunications business stipulated in Section 310 of the Communications Act, the corresponding regulations of which have already been abolished in Japan; and
- (b) Inform the Government of Japan appropriately of whether the Government of the United States has been working with the Congress in whatever ways for the abolition of the regulations or improvement and, if so, the details of such work

#### **(2) Certification and Licensing Criteria for Foreign Carriers' Entry into the U.S. Telecommunications Market**

Section 214 and Section 310 (b)(4) of the Communications Act provides several certification and licensing criteria for foreign carriers' entry into the U.S. telecommunications market. Among them, the criteria of "trade concerns" and "foreign policy" could be applied to refuse issuance of certification or licenses as reasons that are irrelevant to telecommunications policy. Also, the criterion of "very high risk to competition" is extremely ambiguous, and therefore undermines foreseeability for foreign carriers to develop business plans.

The Government of Japan therefore requests the Government of the United States to:

- (a) Abolish ex-ante certifications based on these criteria and explain any work it has been conducting with the Congress for the abolition of these regulations;

- (b) Enhance foreseeability, regarding the criteria of “very high risk to competition,” by publicly clarifying the conditions for its application as the second and interim best policy before its abolition; and
- (c) Request the FCC to make specific and tangible proposals for the abolition or improvement of the regulations in the process of the biennial reviews.

## 2. Improvement in foreseeability of regulations

### **(1) Elimination of Harmful Effects caused by the Dichotomous Classification of Telecommunication Service and Information Service**

Different from other major countries, the Communications Act has uniformly classified services into "telecommunications services" and "information services." "Telecommunications services" are subject to a number of regulations including provision of unbundled network elements (UNE), contribution to the universal service fund and rate regulations, while "information services" are not in the scopes of these regulations. Criteria of this classification are not necessarily clear, however.

With respect to this regulatory classification, there have been heated debates in the United States on whether the regulations imposed on telecommunications carriers should be similarly imposed on the broadband service providers via cable modems. Recently, controversies are also ongoing concerning what regulations should be imposed on new IP-enabled services, including VoIP. As such, predictability for service providers has been significantly undermined.

The Government of Japan therefore requests the Government of the United States to assure foreseeability for carriers by establishing an effective system in which appropriate regulations could be introduced flexibly and promptly, responding to expected emergences of a great deal of intermediate services (i.e. services that do not simply fall into either of the two categories).

### **(2) Development of UNE Regulations**

At present, the review of UNE regulations imposed on incumbent local exchange carriers (ILECs) has been in progress in the United States. During the current “blank” period between the previous and upcoming regulations, there have been some cases where competitive local exchange carriers (CLECs) raise prices for local telephone services and suspend offering new services to customers.

In reviewing regulations, the Government of Japan requests the Government of the United States to realize a new regulatory framework swiftly, while ensuring maximum level of order and predictability, based upon public comments filed by stakeholders, fully considering possible burdens on CLECs and end users.

## 3. Unified regulations for reducing irrational burdens

### **(1) State-Level Regulations**

- (a) In the United States, the federal institutions delegate implementation of various kinds

of regulations on telecommunications to states' decisions. Due to the differences in implementation of regulations among states, telecommunications carriers are facing obstacles in the development of their inter-state level businesses. The Government of Japan therefore requests the FCC to explore ways that enables states to swiftly and efficiently implement and amend the Federal regulations and their amendments to ensure smooth management of inter-state businesses, in the course of which effective use of the newly established "Office of Interstate Affairs" is recommended.

- (b) Specifically, in the United States, carriers are obliged to file reports on business information including their earnings to all individual states where they are providing services. As there is no standardized filing form that is common among states, an excessive burden has been placed on carriers operating over many states in reporting to all those states governments. Although the Government of Japan requested the Government of the United States to simplify and standardize request forms in the third-year dialogue of the Regulatory Reform Initiative, there is no indication of improvement.

Accordingly, the Government of Japan requests the Government of the United States to continue to communicate the former's concerns to the National Association of Regulatory Utility Commissioners (NARUC), and petition the Commission in a tangible manner to attain achievements in this regard. The Government of Japan also requests that information on the status of work and prospect of improvement by NARUC is provided.

## **(2) Access Charges**

There are three different kinds of access charges in the United States: reciprocal compensation, intra-state access charges and inter-state access charges, which are imposed depending on, for instance, the types of accessing carriers. The Government of Japan requests the Government of the United States to eliminate or at least reduce disparity and inconsistencies among them.

Requests concerning individual access charges are as follows:

### **(a) Inter-State Access Charges**

Inter-state access charges are decided at levels below the Total Element Long-Run Incremental Cost (TELRIC) under the Coalition of Affordable Local and Long Distance Service (CALLS) plan. It is impossible, however, to verify and validate charges of the CALLS plan, since figures calculated by the TELRIC model to be compared with inter-state access charges are not publicized. The Government of Japan therefore requests the Government of the United States to clarify the details of TELRIC models and concrete figures calculated by the model to ensure transparency in the approval process of inter-state access charges.

### **(b) Intra-state Long-distance Access Charges**

Inter-LATA access charges are calculated by the TELRIC method based on the FCC rules and authorized by each State Public Service Commission/Public Utilities Commission. However, since information on the TELRIC model used for

calculation is not expressly indicated, it is impossible to verify and validate said charges. Therefore, the Government of Japan requests the Government of the United States to urge Public Service Commissions/Public Utilities Commissions to disclose information about TELRIC model upon authorization of the charges to ensure transparency of authorization process.

**(c) Reciprocal Compensation**

The Government of Japan requests the Government of the United States to reconfirm that reciprocal compensations are different from ordinary access charges in that: i) it is possible to use other calculation methods than those based on the TELRIC, and ii) flexible applications of calculation methods are applicable through negotiations among carriers.

In addition, upon review of compensation methods among carriers, including unification of the three different access charges mentioned above, the Government of Japan requests the Government of the United States to reduce end-user burdens through transparent procedures.

**4. Ensuring fairness in mutual recognition procedures**

With regard to regulations on the certification of electromagnetic compatibility (EMC), the FCC has denied, without reasonable grounds, to accept test data accredited by a Japanese accreditation body that satisfies the provisions of 47CFR2.948. The Government of Japan therefore requests the FCC to recognize Japanese laboratories designation body that has already concluded agreements with the designation body of the United States, and to accept test data submitted by Japanese testing laboratories that have been designated by the Japanese designation body

**5. Procedures for Processing Export Licenses, TAA Approval and Other Measures concerning Commercial Satellites**

- (1) Regarding the licensing process of the export of commercial satellites and transfer of technical information concerning these satellites, the Government of Japan welcomes that the Directorate of Defense Trade Controls of the Department of State has completed the development of an electronic "paperless" licensing system, which is expected to shorten the time taken for approval processing. The Government of Japan requests the Government of the United States to, in response to the Third Report to the Leaders, continue to provide information on the status of improvement of licensing process attained by the implementation of the new electronic licensing system.
- (2) On the other hand, criteria of export licensing and approval under the Technical Assistance Agreement (TAA) are not clear. Moreover, exporters are not provided with essential information such as documents on test procedures nor reports on non-performance on the manufacturing process. As a result, Japanese satellite communications companies have had long-lasting concerns over business activities. The Government of Japan therefore requests the Government of the United States to, in response to the Third Report to the Leaders and in accordance with the United States laws, regulations and policies, i) minimize delay in procedures, ii) continue making efforts to maximize transparency, and iii) minimize the items of undisclosed information.

- (3) The Government of the United States restricts disclosure of certain types of information in satellite trades. As a consequence, when a U.S. satellite purchaser puts out a tender, Japanese satellite makers can only obtain related documents later than U.S. makers do. The Government of Japan is concerned that Japanese makers will be at a disadvantage in competition, and thus requests the Government of the United States to ensure fair competition for satellite communications businesses in the procurement of satellites.

### **III. INFORMATION TECHNOLOGY**

#### **1. Regulation of the Government of United States in Copyright and Related Rights**

##### **(1) Protection of Copyright and Related Rights**

Given the current situation that copyrighted works are freely distributed across the borders due to the wide use of the Internet and the development of digital technologies, it is vital to ensure protection of copyright and related rights in an internationally harmonized manner.

From this viewpoint, the Government of Japan requests the Government of the United States to ensure clear and reliable protection of items which are not fully protected in the United States, such as the right of making available, the rights concerning live performances, the rights concerning the unfixed works, the moral rights of right holders and performers, and the right of rental concerning video games.

##### **(2) Adequate Protection of Rights under the Digital Millennium Copyright Act**

The Sec. 512 (h) of the United States Copyright Act, which was added by the Digital Millennium Copyright Act enacted in 1998, obliges internet service providers, under certain conditions when copyrights are infringed, to subject to subpoena to disclose information to the level of amount sufficient to identify the alleged infringer.

During the process of authorizing a subpoena, the court only confirms that the documents submitted by a requester (copyright holder) are in accordance with the proper form, and does not examine whether there is any substantial infringement of copyrights. Furthermore, no opportunity is given for an alleged infringer to defend himself or herself in the course of the procedure. As a consequence, there is a possibility that the right of a sender (alleged infringer of copyright) itself might be neglected.

The Government of Japan requests that the Government of United States ensure an appropriate balance between the copyright owner's rights and sender's rights including protection of privacy information and freedom of expression by, for example, provision of opportunity for a sender to defend himself or herself.

#### **2. Cooperation between Japan and U.S. in Intellectual Property Rights**

##### **(1) Combat Piracy of Digital Content**

The Government of Japan requests the Government of the United States to work with the former to explore and consider possible ways of cooperation to combat piracy of digital content under the Regulatory Reform Initiative.

The Government of Japan particularly desires to explore specific ways for the cooperation between Japan and the United States to address piracy, especially in Asian countries,

including holding of symposia or seminars to attain more profound understanding of the importance of intellectual property in the countries where piracy is rampant, as well as exchange of information on the measures both countries are taking to combat piracy, with coordination with the private sectors of the both countries.

**(2) New Copyright Issues Pertaining to the wider use of the Internet and the development of digital technologies**

The Government of Japan requests to explore and study a desirable nature of copyright protection system in future through active and deregulation-oriented exchange of information on new copyright-related issues that have been raised along with the wider use of the Internet and development of digital technologies, taking account of the necessity of smooth innovation as well as consumers' convenience. For example, the Government of Japan desires to exchange information on "Access Control" provided by the Sec. 1201 of the United States Copyright Act, copyright management system of digital contents including encryption technologies to prevent illegal copy or distribution that the private sectors of Japan and the United States have been promoting, as well as technological methods to protect the copyright of digital contents.

## **IV. ENERGY**

### **1. Clarification of the Market Regulation Policies and Measures of the Federal Energy Regulatory Commission (FERC)**

Following the failure of Enron, many wholesale suppliers ran into management crisis and are announcing their intention to sell their power-generating facilities. In this situation, Japanese corporations are considering the possibility of purchasing such facilities or taking stakes in United States firms. Unless unpredictable nature of FERC's policies is eradicated, however, foreseeability of businesses remains low and motivation for investment is not stimulated. Also, the Government of Japan is aware that the notice of proposed policy statement named "Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid" (issued on January 15, 2003), which is referred to in the Second Report to the Leaders, has not reached to the final decision yet, opposed by the Department of Energy. If such policies have not been executed, investment in transmission facilities will not be promoted either, which might cause the decline of the reliability of electricity supply and another major blackout.

Based upon this recognition, the Government of Japan requests FERC to clarify its regulation and relating policies. At least, anxiety about the possibility of recall of its policies in relatively short terms should be erased (In one case, a FERC's order was recalled in five months.). The Government of Japan further requests the Government of the United States to accelerate the making of policy proposals and their execution to enhance incentives for investment in transmission facilities that contributes the improvement of the reliability of electricity supply.

### **2. Improving the Two-Layer Structure of Federal and State Regulations and Disparity among States**

In the United States, both the federal and state governments regulate the electricity sector, obliging new entrants to learn and research the regulations of respective states in addition to those of the Federal Government. Due to this two-layer structure, procedures for the licensing of purchase and sale of power generation and related energy businesses can be over-complicated. Also, regarding participation to power generation projects, licensing procedures on power development of each state, especially those related to environmental regulations, differ drastically, which might lead to longer lead times in some states. Although the Government of the United States articulates in the Third Report to the Leaders that "(w)hile our system of government provides for separate federal and state responsibility over energy regulation, Congress and the Federal Energy Regulatory Commission (FERC) continue to take steps to limit any adverse impact of multiple state systems," no concrete measure has been taken yet. Furthermore, the Energy Policy Act of 2003 has not passed the Congress, which is also referred to in the Third Report.

To enable foreign business operators to expand their business smoothly, the Government of Japan requests the Government of the United States to create a system which makes the standardization and unification of licensing procedures on setting power-generation facilities which vary among states, including closer consultations between FERC and NARUC.

### 3. The Prompt Approval of the Comprehensive Energy Bill including the Repeal of the Public Utility Holding Company Act (PUHCA)

The Energy Policy Act of 2003 currently deliberated in the Congress includes the repeal of the PUHCA. The Government of Japan expects the Act to pass the Congress, since the PUCHA has made business activities of the retail suppliers operating in multiple states difficult by requiring them to proceed with complex approval procedures. Accordingly, the Government of Japan requests the Government of the United States to intensify its efforts for an early passing of the Act which includes the repeal of the PUHCA.

### 4. Review on Public Business

Publicly-owned entities (POEs) are allowed to participate in liberalized wholesale and/or retail market, while they receive preferential treatments in terms of taxation and capital procurement and their retail customers are protected under regulations. Thus, the United States electricity market is not sufficiently liberalized in reality. The current situation does not provide the conditions for fair competition for private business.

Moreover, inaccessibility to about 25 percent of the wholesale and/or retail market in practicalities is a major problem for business development. For instance, even the State of California, which introduced full liberalization into its power market ahead of all other states, still maintains electricity prices regulated by POEs in most part of Los Angeles, the largest city of the State and which has high demand of electricity, as well as in the Silicon Valley, where a massive number of IT companies are operating, and thus discouraging the motivation to develop retail business. Failure to liberalize such high-demand markets including large cities could impede entrance into the liberalized energy market in terms of the pursuit of the economy of scale, since profitability tends to be relatively low in unregulated retail business.

In order to solve these problems, the Government of Japan requests the Government of the United States to implement policies to include the markets for POEs into the scope of liberalization through consultations with the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA) and NARUC under the strong leadership of FERC.

### 5. Price Cap Regulation in Wholesale Market

Some states have price cap regulations on the electricity wholesale trade, which occasionally prevent market participants from recovering their investment costs. The Government of Japan requests the Government of the United States to clarify the procedure to determine the price cap publicly, verify whether price cap regulation is the most effective and efficient measure for the prevention of the abusive exercise of market power in comparison to *ex post* regulation, and publicize its results. Also, the Government of Japan requests the Government of the United States to clarify the details of process of the “careful examination of the costs and benefits of price cap regulation,” which was mentioned in the Third Report to the Leaders.

### 6. Public Trust to the Energy Market

Due to the increase of speculative investors which mainly use financial transaction for arbitrage transaction, and market and accounting manipulation by dishonest entities such as Enron,

public confidence in the energy market has been severely damaged. Under such circumstances, it is doubtful whether free and fair transactions are provided in the United States electricity market, which is the prerequisite of the full utilization of the effects of liberalization. The Third Report to the Leaders states that measures are taken for the normalization of the energy market and for the improvement of the credibility on the accounting method of energy derivatives. The Government of Japan believes that the Government of the United States should investigate thoroughly and publicize the effect of these measures and the degree of market normalization in order to prevent the recurrence of incidents similar to Enron's.

Therefore, the Government of Japan requests the Government of the United States to investigate whether the Order 627 named "Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities," issued in October 2002 and also referred to in the Second Report to the Leaders, is functioning effectively or not, and to publicize the result of the investigation.

## **V. MEDICAL DEVICES AND PHARMACEUTICALS**

### **1. FDA's Regular Meeting with Foreign Industry**

The Government of Japan requests the Government of the United States to provide foreign pharmaceutical and medical device industry operating in the United States, including those Japanese, with continuous as well as meaningful opportunities to exchange views with the FDA on the U.S. regulations concerned.

The Government of Japan also requests the Government of the United States to provide similar opportunities extensively to Japanese industry as well when they visit the United States.

### **2. Compliance with ICH Guidelines**

The Government of the United States has not fully implemented some of the guidelines of the International Conference on Harmonization (ICH). In a certain case, for example, the FDA required twelve-month chronic toxicity testing in non-rodents, although the corresponding period that the ICH guideline provides is nine months. Since such a disregard of harmonized guidelines has merely negative impact on both applicants and the FDA, the Government of Japan requests the Government of the United States to observe the agreed ICH guidelines.

While the Government of the United States confirmed that "FDA would be willing to provide updated information about the number of cases requiring longer duration than that according to the ICH guideline in response to a request from MHLW through the ICH steering committee" in the Third Report to the Leaders, such information has not been provided yet. The Government of Japan strongly requests the early provision of related information.

### **3. Immediate Implementation of the Agreements in GHTF**

The Government of the United States has not yet fully implemented some of the agreements at the Global Harmonization Task Force (GHTF) including the Essential Requirement. The Government of Japan therefore requests the Government of the United States to implement all the GHTF agreements without delay.

### **4. Mutual Recognition on Good Manufacturing Practices of Pharmaceutical Products**

In December 2000, the Ministry of Health and Welfare of Japan (present Ministry of Health, Labour and Welfare) and the FDA exchanged letters regarding cooperation in the exchange of pharmaceutical inspection reports and other pharmaceutical surveillance information. The Government of Japan requests the Government of the United States to further enhance this cooperative relation and to initiate more substantial discussion with the former toward the mutual recognition on Good Manufacturing Practices (GMPs) of pharmaceutical products. The Government of Japan believes that having an MRA in this area will make it more efficient for authorities to conduct inspections to verify conformity of the establishments to the quality-related regulatory requirements as well as reduce the burden of Japanese manufacturers exporting products to the United States to prepare for duplicate inspections..

**5. MOU for Cooperation Regarding Auditing of the Quality Management System of Medical Devices and In-Vitro Diagnostics Manufacturing Establishments**

The Government of Japan requests the Government of the United States to conclude a memorandum of understanding (MOU) regarding cooperation in the exchange of auditing reports with regard to conformity to the regulatory requirements for quality management systems (QMS) of medical devices and in-vitro diagnostics, in the same manner as the authorities did in 2000 for pharmaceutical GMPs,

**6. Mutual Recognition on Good Clinical Practices**

The Government of Japan requests the Government of the United States to exchange information on GCP inspection more actively, and to embark on substantial consultations with the former toward the mutual recognition on Good Clinical Practices (GCPs). The Government of Japan is convinced that it will facilitate the processing of GCPs conformity assessment of application dossiers, and subsequently will reduce the time currently required for MHLW's review of new drug application.

The Government of the United States confirmed, in the Third Report to the Leaders, that “(i)n view of Japan’s growing accumulation of experiences following the introduction of ICH Good Clinical Practice standards, FDA is willing to provide training to personnel of MHLW and PMDA in order to promote the exchange of information on GCP between Japan and the United States within its resource constraints.” The Government of Japan therefore requests the Government of the United States to start substantial consultation with the former on the next specific steps the two Governments should take.

**7. Simplification of Data Requirements for Investigational New Drug Application**

The FDA requires excessive amount of data on drugs in the investigational stage, Chemistry, Manufacturing and Controls (CMC) data in particular, in comparison to those required in Japan. It also obliges the pharmaceutical industry to translate data into English that are not substantially related to investigational process, which is a considerable burden on them. While it is surely important to guarantee the quality of investigational drugs once they be given to the human body, the data requirement should be minimized for investigational new drugs in the process of manufacturing, where production process has not been optimized.

**8. Suspension and cancellation of the Advisory Committee meetings**

The Government of Japan recognizes that the FDA sometimes notify pharmaceutical companies of the suspension or cancellation of scheduled Advisory Committee meetings for the conformity assessment of application dossier without any prior coordination with them. The Japanese pharmaceutical industry operating in the United States are sparing enormous efforts and cost in preparation of hearings at the Advisory Committee, and therefore suspension and cancellation of the Committee meetings cause a great amount of loss. The Government of Japan therefore requests the Government of the United States to coordinate with Japanese pharmaceutical industry sufficiently about the schedule of the Committee meetings in advance to avoid any unexpected suspension or cancellation of them.

## **VI. FINANCIAL SERVICES**

### **1. Qualification of Financial Holding Companies**

On account of foreign banks' entering securities businesses equivalent to those conducted by the United States securities firms such as underwriting equities and bonds through their securities subsidiaries, it is necessary for foreign banks to obtain the status of financial holding companies ("FHCs") in the United States, based on the Gramm-Leach-Bliley Act of 2000.

To establish the status of an FHC, foreign banks are required to be "well-capitalized" based under Act. In determining whether a foreign bank is well-capitalized, "reliance on government support to meet capital requirements", that is, injection of public fund is taken into account by the Federal Reserve Bank (FRB), according to "Supervision and Regulation Letter 00-1" issued on February 8, 2000. Banks injected with public funds might be ineligible to obtain FHC status in principle.

FRB alleges that, a financial institution that relies on government support has advantages over its competitors. The Government of Japan, however, disagrees with this view because it is not legitimate to regard that all financial institutions injected with public fund on policy consideration for the stabilization of financial market are in an advantageous playing field. The Government of Japan therefore requests the Government of the United States to abolish the standard.

### **2. Registration Requirements for Foreign Issuers in Case of Business Reorganization**

Under Rule 145 of the Securities Act of 1933, the issuing of new stocks resulting from business reorganization, which requires approval by shareholders, such as reclassification of securities, merger of consolidations and transfer of assets, is considered "offer" or "sale" of securities. If 10 percent or more of stocks of a target company are owned by investors residing in the United States, an acquiring company is required to file a registration form attached by the company's financial statement written in accordance with the United States Generally Accepted Accounting Principles (USGAAP). Accordingly, even in the case of a merger between foreign companies, the acquiring company should satisfy the registration requirement only if investors residing in the United States have aforesaid share of stocks.

It is difficult for foreign companies to keep informed of the ratio of United States shareholders on a regular basis. It is also unreasonable and huge burden on foreign companies to be required to satisfy the registration requirement simply because United States investors own 10 percent or more of stocks

The Government of Japan therefore requests the Government of the United States to abolish the registration requirement or mitigate them.

### **3. Regulations on Sales and Offers on Foreign Investment Trusts**

Under Section 7(d) of the Investment Company Act of 1940 ("Company Act"), a foreign fund

that seeks offering of investment trust for public subscription in the United States must obtain a Securities and Exchange Commission's (SEC) order permitting the registration of the fund as an investment company. As specific requirements to be satisfied for that purpose, the same section provides "it is both practically and legally feasible effectively to enforce the provisions of this title against such company and that the issuance of such order is otherwise consistent with the public interest and the protection of investors." The Government of Japan is concerned that application of Section 7(d) might impose burdens on foreign funds and restrict access substantially.

With regard to the aforesaid section of the Investment Company Act of 1940, SEC Rule 7d-1 has been provided entitled "Specification of Conditions and Arrangements for Canadian Management Investment Companies Requesting Order Permitting Registration." As the title suggests, Rule 7d-1 specifies conditions applied to Canadian management investment companies. The Government of Japan therefore believes that it is not appropriate to apply Rule 7d-1 to non-Canadian foreign investment companies.

The Government of Japan has concern that, if Rule 7d-1 is applied to non-Canadian foreign companies, the following requirements in particular will become excessive burdens for foreign funds and hinders the sale of investment trust to United States investors substantially:

- (1) Fund directors are required to be residents of the United States;
- (2) Assets are required to be entrusted to banks in the United States; and
- (3) Funds are required to use United States Certified Public Accountants.

Therefore, the Government of Japan requests the Government of the United States not to apply Rule 7d-1 to non-Canadian foreign investment companies or at least abolish three conditions listed above.

#### 4. Regulations on the Sales of Foreign Exchange Trade Funds

The regulations regarding the sale of foreign Exchange Traded Fund (ETFs) to United States investors are more burdensome than those of stocks. Since the exemption clauses (Section 4(3) of the Securities Act of 1933) applicable to stocks do not apply to ETFs, filing of registration forms and prospectuses is required at all times. Therefore, the Government of Japan requests the Government of the United States to exempt ETFs listed in Japan to be sold to United States investor from the filing requirements of registration forms and prospectuses, as stocks are exempted from them.