

*(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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December 7, 2005

## **FOREWORD**

The first to fourth 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.

There remain, however, regulations and systems in the United States that are: 1) inconsistent with the principle of free trade; 2) impeding fair competition; and 3) unique to the United States and not harmonized with international standards. Particularly, the United States has not completed measures that are necessary to redress its laws and decisions whose inconsistency with the WTO agreement 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 free 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 people 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, the Government of the United States should prevent these measures from adversely affecting the economic ties between the two countries.

Recognizing the current situation as above and based on the achievements attained in the course of the past four-year consultations, the Government of Japan presents its recommendations regarding regulatory reform and competition policy to the Government of the United States upon the commencement of the fifth 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 to further strengthening and deepening 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 take positive actions for the production of tangible results.

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## I. TRADE/INVESTMENT RELATED MEASURES

Among trade/investment related measures of the United States are there those that contradict the principle of free trade and impede fair competition. In particular, ones that have been found inconsistent with the WTO agreement through WTO's dispute settlement procedures should be immediately redressed. Regulations and systems of the United States also include ones that are unique to the United States and inconsistent with international standards and incoherent standards and regulations in different states, which place unreasonable burdens on Japanese companies. Many of those measures have not been redressed despite repeated appeals by the Government of Japan. It therefore continues to strongly urge the Government of the United States to address these issues.

Specific requests are as follows:

### **1. Anti-Dumping Measures and Safeguard Measures**

Although anti-dumping measures are considered proper trade remedies as far as they are operated in a manner consistent with the WTO Agreement, they may unduly limit trade and distort competition once used 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 agreement, due to, for example, arbitrary judgment in determining whether a dumping exists or not. In several cases such as "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 cautiously in a manner fully consistent with the WTO Agreement without abusing it for protectionist purposes.

#### **(1) The Byrd Amendment**

The Byrd Amendment, which stipulates the distribution of revenues collected from anti-dumping and countervailing duties to the United States domestic producers who filed or supported the petition for such duties, was found to be inconsistent with the WTO Agreement by the WTO Dispute Settlement Body (DSB). Moreover, 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, EU and Canada exercised the right of retaliatory action on May 1, 2005, Mexico on August 18, 2005, and Japan on September 1, 2005.

The Government of Japan urges the Government of the United States to take seriously the finding and arbitration by the DSB and the consequences that the countries concerned decided

to exercise the right of retaliatory action, and to abolish the Byrd Amendment promptly.

## **(2) Zeroing**

The United States applies “zeroing” in anti-dumping procedures whereby the authority disregards intermediate negative results of comparison between normal value and export prices of product models or individual transactions in calculating an overall margin of dumping for the product, and artificially inflates the overall dumping margins for products, and thereby impermissibly raises the anti-dumping duty rates.

The “zeroing” procedure in original investigation has been already found inconsistent with the WTO Agreement by the DSB 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.

The Government of Japan deems “zeroing” in any anti-dumping procedures inconsistent with the WTO Agreement and urges the Government of the United States not to apply “zeroing” in any anti-dumping procedures.

## **(3) Anti-Dumping measures on Certain Hot-Rolled Steel Products from Japan (DS184)**

The dispute regarding the anti-dumping measures on certain hot-rolled steel products from Japan, the measures taken by the United States were found inconsistent with the WTO Agreement in August, 2001. However, the Government of the United States has not fully implemented the DSB recommendations and rulings, which called for certain legislative amendments. The Government of Japan strongly urges the Government of the United States to implement the DSB recommendations and rulings promptly.

In particular, the United States’ Tariff Act of 1930 requires the inclusion of margins concerning the companies under investigation established in part based on “facts available” in calculating “all-others rate”. The Government of the United States needs to amend the provision of the said Act promptly.

## **(4) Sunset Reviews**

The United States sunset review procedures, by their related legislations, regulations, policy bulletins and in their actual implementations, maintain anti-dumping measures in principle, and terminate them only in exceptional cases. The Government of Japan still deems that United States sunset review procedures not consistent with the WTO Anti-dumping Agreement. Indeed, many United States anti-dumping measures are not terminated in five years and remain in force for a longer time. In addition, the United States sunset review puts burden of proof on respondents (exporters or producers), rather than on petitioners (domestic industry) who prefer continuation of anti-dumping measures, thus resulting in promoting the continuation.

The Government of Japan urges the Government of the United States to make it clear, for example, to terminate anti-dumping measures within five years in principle, and put proof of burden on those who call for the continuation of the measures, even before anti-dumping negotiations under the Doha Development Agenda negotiations of WTO strengthen regulations related to the sunset legislation. It also urges the Government of the United States to examine closely the necessity to continue anti-dumping duties, and conduct sunset reviews in a manner consistent with the WTO Agreement.

### **(5) Model-Matching**

In calculating dumping margins, one needs to classify different models of the product in question and its domestic “like product”, and then determine a domestic product model that is “identical” to or “closely resembling” the export product model (“model-matching”). In the annual review of anti-dumping measures on ball bearings imported from Japan in FY2003/2004, the Department of Commerce announced without any convincing reasons the revision of the model matching methodology that had been used without any significant problems in the past fourteen anti-dumping reviews.

The new methodology proposed by the Department of Commerce, which compares prices of dissimilar products, will reduce the predictability of the results of anti-dumping investigations, and impose excessive burdens on Japanese exporters to submit an enormous amount of domestic sale and price data. The Department of Commerce made a final decision based on the new methodology, even though Japanese companies had repeatedly pointed out the problem. In addition, the Government of Japan is deeply concerned that reviews through the new methodology are applied retroactively to the transactions prior to the introduction of the methodology.

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

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

In anti-dumping investigations, how to define “affiliation” to or “affiliated companies” of exporters becomes an issue 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 if the former owns 5 percent or more of stocks issued by the latter or has family relationships with the latter, regardless of whether respondents have control over suppliers or purchasers. The authorities require exporters to submit data such as cost related to all “affiliated parties” in principle.

The Department of Commerce decides whether a certain sale is regarded as an “ordinary course of trade” by applying “arm’s length test,” whose criteria are excessively 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 were revised 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, but they are still too narrow a range. The affiliated companies are also required to report all downstream sales to unaffiliated companies.

This requirement imposes tremendous burden on “affiliated companies”, especially when they are small- and medium-sized and therefore not fully equipped with adequate electronic data-processing system. It is estimated that costs incurred in responding to an investigation would reach 20 to 50 million yen. It is also difficult for the company under investigation to request companies that own around 5 percent of its stocks to provide cost and other data.

The Government of Japan therefore urges the Government of the United States to make a more substantial judgment in determining whether a certain entity is an “affiliated company”; and to reconsider the excessively burdensome requirements under anti-dumping investigations by relaxing the criteria of the arm’s length test.

### **(7) 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 substitute system. Besides, the Steel Import Monitoring Bills, submitted to the House of Representatives on June 25, 2004 (H.R.4730), and Senate on July 22, 2004 (S.2722) respectively, plan to expand 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 urges the Government of the United States to 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 to refrain from expanding the product coverage of the SIMA to all steel products, which might result in additional burden on Japanese exporters.

### **(8) Lawsuit related to the Anti-dumping Act of 1916**

The Anti-dumping Act of 1916 was repealed on December 3, 2004. However, the Government of Japan is concerned about the ongoing lawsuit against a Japanese company under the Anti-dumping Act of 1916.

The Government of Japan urges the Government of the United States to work on the judiciary authorities through actions such as filing Amicus Curiae Brief to prevent damages being inflicted upon the Japanese company by a judgment based on the act that was found inconsistent with the WTO agreement and repealed already.

## **2. Re-export Control**

There is concern that the U.S. re-export control could constitute an extraterritorial application of U.S. domestic law, which is impermissible under general international law. In addition, the Government of Japan finds little reason for the Government of the United States to control re-exports from Japan, because the Government of Japan carries out effective export control not by participating in all the international export control regimes, but by having introduced a Catch-all system for weapons of mass destruction and their delivery means. The Government of Japan therefore urges the Government of the United States to exclude Japanese importers (re-exporters) from application of the U.S. re-export control.

As a transitional measure pending exclusion of Japanese importers (re-exporters) from the U.S. re-export control, the Government of Japan has already requested the Government of the United States to encourage U.S. companies to improve their behavior related to the U.S. re-export control and hopes for further measures by the Government of the United States. It remains a serious problem that Japanese importers (re-exporters) are prevented from taking appropriate procedures for export control compliance, because they are not provided with sufficient information on the U.S. origin items by U.S. exporters.

Lacking sufficient information on these items, Japanese importers (re-exporters) face difficulties in identifying the items correctly and determining whether they are subject to the U.S. regulations.

The Government of Japan urges again the Government of the United States to oblige U.S. exporters to provide Japanese importers (re-exporters) with sufficient information on the U.S. origin items, including their Export Control Classification Numbers (ECCNs). In addition, the Government of Japan urges the U.S. export control authority to make it a condition of approval of export license applications by U.S. exporters that they provide importers (re-exporters) with appropriate information, including the ECCNs of the items, and exclude Japanese importers (re-exporters) from the application of the U.S. re-export control in the case that such information is not provided.

### **3. The Federal Buy American Act and Other Related Rules**

The Government of Japan submitted recommendations on the federal Buy American Act and other rules of the same purpose in the first, second and third years of the Japan-U.S. Deregulation Dialogue under the Enhanced Initiative. In light of the absence of tangible improvements made by the Government of the United States, the Government of Japan urges improvements on the following.

The Government of Japan urges the Government of the United States to ensure equal business opportunities for both the U.S. and foreign suppliers, from the viewpoint of fully applying the principle of non-discriminatory treatment in government procurement.

In particular, the Government of Japan urges the Government of the United States to reform following regulations.

#### **(1) The 2006 Defense Authorization Bill**

The 2006 Defense Authorization Bill, which includes provisions restricting purchase of foreign products, is currently under deliberation in the Congress. The Government of Japan is aware that consideration of security is necessary for the procurement by the Department of Defense. If the bill passes, however, it will place unreasonable restraint on business opportunity of foreign supplies as well as impede the procurement of high-quality, and low-cost articles or materials by the Department. Therefore, the Government of Japan urges the Government of the United States to eliminate those provisions from the bill.

#### **(2) The Inter-Modal Surface Transportation Efficiency Act of 1991**

The Inter-Modal Surface Transportation Efficiency Act of 1991 includes two Buy American Rules. One is that the Federal Transit Administration is required to buy steel produced in the United States and other domestic products to obtain financial aids to buy machines for mass transport. In addition, the rule provides that at least 60 percent of the total cost of parts constituting a rolling stock must be of those manufactured in the United States.

The other rule is that the Federal Highway Administration is required to buy only steel produced in the United States to obtain federal financial aids to build highways.

These requirements hinder free trade, U.S. companies' suitable and efficient procurement, and increase the cost of governmental procurement. For these reasons, the Government of Japan urges the Government of the United States to abolish these Buy American provisions which require the minimum threshold of U.S. parts and restrict targets of procurement to U.S. products.



#### **4. The Exon-Florio Provision**

The Exon-Florio provision (Section 721 of the Defense Production Act of 1950) provides a mechanism to review and, if the President finds necessary, to restrict foreign direct investment that might threaten the national security of the United States. In general, the Government of Japan fully understands the necessity of regulations for national security reasons. The Government of Japan has concerns, however, about the provision from the following viewpoints: (1) the lack of predictability for investors due to ambiguous definition of “national security”; (2) the lack of legal stability due to the possibility that completed transactions can also be subject to future investigation; and (3) the lack of due process, illustrated by the fact that even the parties concerned cannot be notified of the reasons for the commencement of investigation nor the final decisions by the President. The Government of Japan also has concerns that this provision could impede investment activities of Japanese companies beyond the extent necessary for its original purpose. Transparency and predictability of government regulations are key elements in determining investment. They are also prerequisites for competitive businesses to conduct their business under fair conditions.

The Government of Japan urges the Government of the United States, in implementing the Exon-Florio provision, not only to comply with WTO rules but also to take necessary measures to ensure transparency and fairness, to the maximum extent possible, in the process from the notification to the Committee on Foreign Investment in the United States to the final decision by the President.

#### **5. Metric System**

The metric system is adopted as the international standard unit system by International Organization for Standardization and other international organizations, in developing international standards and criteria. While most countries have adopted the metric system, the United States continues to use the unit of the yard and pound despite its accession to the Metre Convention. This causes not only inconveniences in daily life but also obstacles in international trade.

Given that the Agreement on Technical Barriers to Trade (TBT) recommends reducing technical barriers on trade by adopting international units, that the United States is not taking necessary measures to promote the metric system is not in accordance with the WTO agreements including the TBT Agreement.

The Government of Japan therefore urges the Government of the United States to ensure thorough adoption of metric system in public and private sectors of the United States. It also urges the Government of the United States to provide information on its policy measures to promote the adoption the metric system.

#### **6. Patent System**

##### **(1) 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 invented first and receives patent rights.

From the point of view of patent applicants, this procedure has problems as follows: (a) 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; (b) Interference procedures require long time and tremendous cost; and (c) 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.

Yet another problem arises when multiple inventors make the same invention independently and multiple patents are granted to some of these inventors. In such case, there is a possibility that a third person is forced to pay redundant royalties to each right holder and suffer an unreasonable loss, since the third person has no means to invalidate the multiple patent status.

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

## **(2) Early Publication System with Exceptions**

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

The contents of applications unpublished by request remain undisclosed until the granting of patent right is announced in a patent official gazette. In the meantime, *bona fide* third persons may redundantly invest in research and development for or in putting to practical use an invention identical to the one in the unpublished application. This will certainly damage the predictability of profits and losses in business.

In addition, when a patent examination of an unpublished application is prolonged, *bona fide* third persons may put into practical and extensive use in the market an invention identical to the one in the unpublished application under examination. If a patent is granted to the invention under examination after that, those third persons can be required to pay huge royalties for the “submarine patent”.

Therefore, the Government of Japan strongly requests the Government of the United States to abolish the provisions of the Patent Act regarding exception in the early publication system, and to implement the 1994 agreement between the two governments under the Japan-U.S. Framework for New Economic Partnership, in which the Government of the United States agreed to disclose all applications after 18 months since the first date of application, except for those non-pending and those under secret order.

## **(3) Reexamination System**

In the United States patent system, a reexamination system is established to review the validity of patent rights after grant. The revised Patent Act enacted in November 1999

introduced the *inter partes* reexamination, which affords third persons other than patent holders a greater opportunity to participate in the process, as an alternative to the *ex parte* reexamination. The reexamination system was further improved by the revision of the Patent Act in November 2002.

In the U.S. reexamination system, however, reasons for reexamination request are limited to those based on the existence of prior art documents. It is not allowed to request 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 kinds of requirement inadequacies prescribed in Article 112 of the Patent Act as reasons for reexamination request, except for the best mode requirement, which is disadvantageous to foreign applicants.

#### **(4) 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 from the contents of the application in order to maintain unity of invention (only one independent invention should be included in one application).

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

It is practically difficult for those applying for patents in multiple countries to prepare a different application (and consider scope of patent contents) in accordance with the peculiar U.S. standards on unity of invention.

When an applicant specifies a claim to be filed in response to a request for division of application, 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 requires additional time and expenses, thus imposing an excessive burden on applicants.

Furthermore, it is possible that an invention that is regarded as single in other countries is filed as multiple inventions in the United States. This is burdensome to all parties concerned, namely, applicants and right-holders as well as third persons who need to monitor patents to avoid infringement of existing patents.

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

#### **(5) Hilmer Doctrine and Language Discrimination**

Article 119 of the Patent Act provides the priority rights system prescribed in 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 has the same effects as one

filed in the United States on that day.

However, the United States has a unique legal principle called “Hilmer Doctrine”, which has been established by precedents. According to the Hilmer Doctrine, 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 filing date in the United States, not to the filing date in the first-filing country other than the United States.

Article 102 (e) of the Patent Act provides that PCT international applications have the effect of eliminating subsequent applications since the international filing date only when the application primarily designates the United States and is published in English internationally. When PCT international applications are published in other languages internationally, however, they do not have the effect of eliminating subsequent applications. Thus, Article 102 (e) is discriminatory against other languages than English.

In Japan and Europe, domestic applications based on priority rights of overseas applications retroact to the filing date in the first-filing country, and the effect of eliminating subsequent applications applies to all items of the specification. And the effect of eliminating subsequent applications does not change by language of international publication. It is unfair that the same treatment is not guaranteed in the United States.

The twelve month period of priority prescribed by Article 4 of the Paris Convention and the period for translation of international applications are very meaningful for applicants to prepare to file overseas. Notwithstanding, the limitation of effects of eliminating subsequent application by the Hilmer Doctrine and Article 102 (e) narrows the effect of eliminating subsequent applications under both Article 4 of the Paris Convention and PCT rules, and is significantly disadvantageous to Japanese applicants.

The Government of Japan therefore requests the Government of the United States to improve the system to ensure that all items of the specification eliminate subsequent applications by third persons, retroacting to the date of first filing overseas. In addition, the Government of Japan requests the Government of the United States to abolish the language discrimination based on Article 102 (e).

## **(6) Information Disclosure Requirement of Prior Art Documents**

All applicants for the United States patents ought to disclose important prior art documents to the U.S. Patent and Trademark Office (USPTO) as far as they know until they obtain patents. In addition, they ought to submit English translation of prior art documents as a whole or in part, in case the documents are not in English. If applicants are judged in patent litigations not to have met the information disclosure requirement during patent examinations, the patent rights to all of their claims become unenforceable.

For that reason, every time Japanese applicants for U.S. patents find new prior art documents by the notice of rejection, they need to submit information on the documents, with English translation if necessary, to the USPTO. Even though applicants are required to translate only part of the documents in many cases, they still need to decide which part of the documents to translate, confirm the translation, and pay the translation cost.

The Government of Japan therefore requests the Government of the United States to take measures to reduce the burden on Japanese patent applicants, including eliminating the requirement to submit English translation and shortening the period of the information

disclosure requirement.

### **(7) Plant Patent**

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

The Government of the United States signed the UPOV Convention with reservations (Article 35 of the UPOV Convention) and has applied different novelty requirement. Namely, Article 102 of the Patent Act 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 seems that the Government of the United States applied the general provision of UPOV Convention at the time of joining the International Union for the Protection of New Varieties of Plants (UPOV). At the Forty-Third Session of the UPOV Administrative and Legal Committee in April 2001, however, the Government of the United States reported that the USPTO changed their interpretation and application of the Patent Act with regard to the novelty requirement of plant patents. Since then, the Patent Act has been applied pursuant to the Article 35 of the UPOV Convention, and then Japanese breeders have started to report that their applications for plant patents to the United States were rejected because they did not satisfy the requirement of novelty. These applications would have satisfied the novelty requirement before the change of the interpretation and application of the Patent Act.

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

Under the Patent Act, 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 for a new variety in Japan and see how well it sells there before applying for plant patent in the United States. Some Japanese companies could not help but file an application for plant patent in the United States by way of precaution before they decided to sell the variety in the United States, which incurs additional cost to them.

The Government of Japan therefore urges the Government of the United States to render the novelty requirement for plant patent under the Patent Act conform to the related provisions of the UPOV Convention.

## **7. Harmonization and Unification of the State-based Licenses for Construction Business**

In the United States, while construction companies need to obtain business licenses in each State, the requirements for the licenses are different by each State. The different requirements in each State create obstacles to business activities and development of new business by the companies who intend to do business in more than two States.

The Government of Japan urges the Government of the United States to take measures towards harmonization and unification of the State-based licenses in both their procedures and substantial requirements, including by approving the validity of a license issued by one State in other States, and by issuing federal guidelines for all States towards harmonization of the State-based licenses.

## **8. 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 issues as priorities, and urges the Government of the United States to take necessary measures for improvement, taking the opportunity of fifth-year dialogues under the Regulatory Reform Initiative.

### **(1) Harmonization and Unification of the State-Based Regulatory Systems or Transition to the Federal Regulatory System**

Due to the State-based insurance regulation and supervision in the United States, foreign insurers who wish to conduct insurance business in the United States are required to obtain business licenses in each State in which they wish to operate. Moreover, insurers are required to apply for approvals of products and premium rates and notify important matters in each supervisory authority of the States in which they wish to sell insurance products.

As a result, insurers are obliged to be subject to examinations in every single State in compliance with the laws of each State to obtain licenses and approvals. In addition, Japanese insurers operating in some States have been faced with cases in which examinations for licensing and approval took excessively long time compared with the standard period. These regulations cause unfair burden on insurers and prevents them from responding customer needs in a timely manner.

Under these circumstances, the Government of Japan requested the Government of the United States to realize harmonization and unification of the State-based regulatory and supervisory systems in terms of both procedural and substantial requirements in the previous Recommendations. It also requested to expedite examinations and enhance their transparency in each State. In addition, to resolve these problems, the Government of Japan also presented its demand that actions for reviewing the current regulatory system should be undertaken not only by the National Association of Insurance Commissioners (NAIC) but also by the Federal Government and that they should inform the Government of Japan of the progress they achieved.

To our disappointment, however, the harmonization and unification of the State-based

insurance regulations have not been realized yet. There has not been any progress in harmonization or unification of State-based procedure for license and approval. Examinations of these licenses and approvals also have not been expedited. In addition, neither NAIC nor the Federal Government has provided information on the measures taken in response to the previous requests from the Government of Japan.

Furthermore, the Government of Japan is aware that even in the United States there is criticism against the current State-based system and growing voices for abolishing the current system and introducing the federal regulatory system by establishing the Optional Federal Charter.

Therefore, the Government of Japan urges both the Government of the United States and NAIC to realize the following:

- (a) To harmonize and unify the State-based insurance supervisory systems, or to shift to the federal regulatory system (Harmonization and unification can be realized by taking substantial measures by which, for instance, an insurer who has obtained license of a particular line of business or approval of a new product in one State is deemed to be eligible for the same business or product in other States);
- (b) To play a role in promoting harmonization and unification of regulations of the State-based supervisory system or shift to the federal regulatory system and to present practical timeframe of these reforms to the Government of Japan; and
- (c) To provide information about the progress of the unifying or the shifting to the Government of Japan in a timely manner to ensure transparency of its process.

## **(2) Elimination of Reinsurance Collateral Requirement**

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 requirements incur tremendous burden on overseas insurers in reinsurance business. In addition, 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. However, it seems that a substantial plan of taking measures to abolish these requirements has not been presented by NAIC yet.

Therefore, the Government of Japan urges the Government of the United States to take the following measures:

- (a) To eliminate these requirements in order to ensure that Japanese (re)insurers should not be discriminated against; and
- (b) To present a practical timeframe towards elimination of these requirements and to provide information about its progress in a timely manner to the Government of Japan in order to ensure transparency of its process.

### **(3) Abolishment of Trusteed Surplus Requirement**

Under the state-based regulatory system, the Trusteed Surplus Requirement is imposed on not only foreign insurance companies but also alien insurance companies' branches in the United States. This regulation requires them to hold their major assets, which consist of deposits to the State authorities and Trusteed Assets, exceeding their net liability at banks or trust companies within the United States.

However, this requirement virtually means that these insurance companies have to deposit enormous proportion of their assets to these banks and trust companies. The Government of Japan believes that this restriction excessively blocks flexible fund investment of these insurance companies and causes a loss of many of their opportunities to gain profits.

Therefore, the Government of Japan urges the Government of the United States and NAIC to abolish the Trusteed Surplus Requirement applied to alien insurance companies' branches in the United States.

## **9. Protection of Credit Card Information**

On June 7, 2005, an illegal access to the computer system of Card Systems Solutions Inc (CSS), a processor of payment card data, leaked credit card data of approximately 40 million customers. Upon this incident, Japanese credit card companies, in fear of possible leakage of data of about 70 thousand of their customers, were forced to take necessary measures, including adopting monitoring reinforcement and card replacement to prevent further illegal access, and bear huge costs.

In a process of settling credit card in the United States, customer banks and card issuing banks often outsource their processing work to third-party processors like CSS. However, laws and regulations are not established to properly monitor personal credit data owned by those third-party processors.

In order to prevent recurrence of credit card leakage, the Government of Japan urges the Government of the United States to establish appropriate regulations and enforcement mechanism to regulate those companies that deal with credit card information including third-party processors.

The Government of Japan also urges the Government of the United States to immediately provide adequate information to the former in case of similar incidents of credit card information leakage in the future.



## II. CONSULAR AFFAIRS

As the relationship between Japan and the United States has become deeper than ever, a great number of Japanese nationals visit the United States. The number of Japanese nationals residing in the United States has reached 339,387 (as of October 1, 2004)<sup>1</sup>, which is more than Japanese nationals in any other foreign country, followed by those residing in China, 99,179. The number of Japanese nationals who entered the United States was 4,335,975 in 2004<sup>2</sup>, which is the third largest next to the British and Mexicans. The Government of Japan believes that it is the very basis of the close bilateral relationship for all Japanese nationals to be able to smoothly enter the United States and stay there with no significant inconvenience.

The Government of the United States has changed its consular policies and measures several times in recent years. The Government of Japan urges the Government of the United States to inform immigration officers and other relevant institutions of newly-established regulations precisely and promptly so that they can accurately answer questions made by Japanese nationals and that consular policies and measures are implemented properly without inconsistency among relevant officers.

On the recognition above, the Government of Japan requests the following:

### 1. Visa Process

#### **(1) 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 need to either return to Japan or visit a third country such as neighboring Canada or Mexico. Especially, as E visa bearers cannot revalidate their visas in third countries, they have no choice but to return to Japan for visa revalidation. When visa bearers revalidate their visas, they are required to be interviewed and to have their biometric identifiers taken. Even though they can make reservation through the internet, it is usually hard to schedule an interview at a convenient time. It has been reported that some had to stay in Japan and wait for twenty days to have an interview. This situation is putting burdens on the Japanese people working in the United States and their families as follows:

- Monetary cost of visa revalidation

Japanese companies operating in the United States have to bear huge expenses for visa revalidation for their employees and their families. The costs are spent mostly on travel and accommodation, and are increased due to the uncertainty as to how long it takes to have visas revalidated and to go back to the United States. In one of the reported cases, it cost a Japanese company 10,000 dollars per employee for visa revalidation.

- Negative impacts on business management

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<sup>1</sup> *Statistics on the Japanese national residing overseas, 2005*, Ministry of Foreign Affairs of Japan

<sup>2</sup> *2004 Yearbook of Immigration Statistics*, United States Department of Homeland Security

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There are an increasing number of cases where Japanese companies have to substitute employees in the United States since original workers have to come back to Japan for visa revalidation for a few weeks. In such cases, it costs additional several thousand dollars to send substitutes to the United States. In cases where Japanese companies have only one Japanese worker or a few, or when employees in the United States are in charge of highly specialized works, absence of such worker from the office for a long time for visa revalidation could result in suspension of a project, which would cause a significant loss. Some companies have therefore introduced new personnel systems in which a worker is replaced by another upon the expiration of his or her visa.

• *Impacts on education of employees' children*

Children of Japanese employees working in the United States are often in school age. When they have to leave the country for visa revalidation, they cannot go to school for a few weeks. There are concerns among Japanese parents in the United States about not only their children's education but also the possibility for their children to fail to promote due to insufficient class attendance.

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

- (a) Resume visa revalidation at the Department of State, in particular;
  - (i) Take necessary measures to use equipments to collect biometric identifiers in the United States for visa revalidation applicants, such as equipments at airports for the implementation of the US-VISIT program;
  - (ii) Consider the resumption of domestic revalidation only for certain categories of visas whose bearers' status is more reliably guaranteed;
- (b) Commence the revalidation of E visas in third countries, and (since there is no statutory prohibition of the revalidation of E visas in countries other than the United States and bearers' home countries, and in some reported cases revalidation applications were rejected only due to insufficient staff,) 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
- (c) Shorten the time for visa revalidation in Japan, Canada and Mexico and clarify how long it takes to revalidate visas, and secure the issue of revalidated visas in a few days after interview by establishing an organizational setup to prioritize the revalidation process and by completing a part of the examination of applications before interviews.

**(2) Expansion of Visa Services in Japan**

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. It also increases the cost for those who return from the United States to revalidate their visas.

Accordingly, the Government of Japan urges 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 also urges the Government of the United States to consider the possibility of introduction of visa services at these Consulates even only for a certain period.

### **(3) Visa Issuance and Terms of Validity**

- (a) As mentioned 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. Currently, L visas are valid only for two or three years, while intracompany transferees to Japan are provided with five-year visas. Accordingly, the Government of Japan urges the Government of the United States to change its present practice and issue 5-year visas from the reciprocal point of view.
- (b) Under the visa regulations of the United States, applicants of E visas are required to have job experiences at managerial level for a 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 urges the Government of the United States to mitigate the job experience requirement for E visa, or to enforce the requirement more flexibly.
- (c) The Government of Japan also urges the Government of the United States to increase again the number of H1-b visa issued annually.
- (d) Bills have been introduced in the Congress that aim to reinforce regulations on H and L types of visas (H.R. 3322, H.R. 3648 and others). These bills, when passed and enacted, might adversely affect the economic relationship between the two countries, and gravely discourage the Japanese business sector to invest in the United States. The Government of Japan therefore urges these bills to be abandoned.

## **2. Driver's License**

### **(1) Real ID Act**

The Real ID Act, signed into law in May 2005, stipulates that a Federal agency may not accept, for any official purpose, a driver's license issued by a State to any person unless the State is meeting the requirements prescribed in the Act. One of the requirements is that a temporary driver's license issued to a foreign national shall be valid only during the period of time of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.

There are following concerns arising from this Act:

- If States comply with the Act and issue driver's licenses to foreign nationals that are valid only for the period of time of applicant's authorized stay, Japanese people residing in the United States will have to revalidate their driver's licenses more frequently than currently required.

- If driver's licenses issued to nonimmigrant foreign nationals are not accepted for any official purpose, they always have to carry their passports for identification, which raises the possibility of having their passports stolen or lost. It not only causes inconvenience for Japanese nationals in the United States but also increases the risk of stolen or lost passports to be used for crimes or terrorism.
- As Federal regulations for the implementation of the Act are not decided yet, it is unclear how much impact the Act will actually have on Japanese people in the United States. This uncertainty makes them even more worried. On the other hand, some States are already making their laws and regulations to implement the Act. If State laws are enacted before the Federal regulations, the State laws may have to be amended later to be in accordance with the Federal regulations. In contrast, other States will decide how to respond to the Act after the enactment of the Federal regulations. Hence, the Government of Japan is concerned that the delay in establishing the Federal regulations will cause confusion as to the implementation of the Act in each State.

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

- (a) Regard the term of validity of nonimmigrant visas, which are valid for a longer time, as the "period of time of applicant's authorized stay" so that an excessive burden will not be placed on Japanese nationals when States implement the Act;
- (b) Confine the "official purposes" in the Act to the minimum that are genuinely necessary, and clarify it so that foreigners do not always need to carry passports with them in case several States do not comply with the Act or issue non-complying licenses as an option;
- (c) Guide and monitor State Governments and related Federal authorities as much as possible in the scope of the Federal Government's authority, including by informing them of U.S. immigration policies so that State Governments can change their regulations about driver's licenses smoothly; and
- (d) Issue the Federal regulations as soon as possible in order to alleviate the concerns among Japanese nationals which arise from the uncertainty about the actual impact of the Act, and to avoid confusion as to the implementation of the Act in each State.

## **(2) Improvement of State Rules**

With regard to the issuance of driver's licenses, some States impose an excessive burden on Japanese nationals residing in the United States by requiring many documents and by making them wait for a long time. Besides, there are States that require different procedures for Japanese driver's license applicants from those for other foreigners. The Government of Japan urges the Government of the United States to request each State Government not to impose an excessive burden on Japanese people regarding the issuance of driver's licenses, and not to make any unreasonable difference between procedures for Japanese applicants and those for other foreign applicants.

Specific recommendations to State rules are as follows:

- (a) Improvement of Term of Validity of International Driver's License

A number of Japanese nationals drive with international driver's licenses in the United States until they obtain local State licenses, since it normally takes a long time to obtain the latter. However, many States require foreigners to obtain State licenses upon the fixation of their residence in the State and void their international licenses. In other states, international licenses lose effect in a relatively short period, six months for example. Furthermore, the State of North Carolina does not allow foreigners to drive with international licenses at all. Therefore, the Government of Japan urges the Government of the United States to request relevant State authorities to accept one-year term of validity of international driver's licenses issued by Japanese authorities, in accordance with the spirit of the Convention on Road Traffic, to which the United States is also a signatory.

(b) "Sponsor" Requirement in Driving Test in the State of Massachusetts

The regulations of the State of Massachusetts provide that the applicant of driver's license be accompanied for a driving test by a "sponsor" who is 21 years or older with a valid driver's license issued in the United States and with 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 provide a sponsor. The Government of Japan understands that Massachusetts is the only State that requires a "sponsor" for driving tests. It urges the Government of the United States to request the State authorities to abolish the rule, or otherwise mitigate the requirement to avoid excessive burden imposed upon foreigners.

(c) Issuance of "Driver's Certificate" in the States of Tennessee and Utah

Driver's Certificates issued in Tennessee and Utah do not have a "photo ID" function that driver's licenses have, and therefore cause daily inconveniences to Japanese people in the United States. The Government of Japan urges the Government of the United States to request these States to abolish the measures.

(d) Restriction of Driving Test Location in the State of Rhode Island

In the State of Rhode Island it used to be possible to take driving tests near the applicant's residence. However, the recent change in the rule requires foreigners to take driving test at a specified location, which is often far away from their residence. The Government of Japan urges the Government of the United States to request the State to enable foreigners to take driving tests near their residence as in the past.

### **3. Immigration Control by Use of Biometric Identifiers at Ports of Entry and Departure**

Through the United States Visitor and Immigrant Status Identification Technology (US-VISIT) program, which was introduced on January 5, 2004, and expanded later, facial information is collected and fingerprints are scanned at ports of entry and departure. Japanese nationals residing in the United States have complaint that the US-VISIT program prolongs immigration control. While the Government of Japan appreciates that the Government of the United States has conducted outreach programs about the US-VISIT

program several times in response to request of the Government of Japan, Japanese nationals have apprehensions about the fact that the Government of the United States possesses their fingerprint information. The Government of the United States should make further efforts to promote better understanding of the program by the Japanese public.

Thus, the Government of Japan urges the Government of the United States to:

- (1) Collect information on the time required for passengers to pass immigration control, and take necessary measures to make it shorter;
- (2) Protect personal information collected through the US-VISIT program stringently, and publicize the measures taken for the information protection as much as possible in order to alleviate Japanese nationals' concerns about the fact that their fingerprint information is scanned and possessed by the Government of the United States; and
- (3) Make further outreach efforts to promote better understanding of the program by the Japanese public, especially when changes in procedures are expected to cause confusion, for example, when the US-VISIT program is expanded in terms of the number of implementing points of entry and departure, and when radio frequency identification (RFID) technology or other new technology is introduced.

#### **4. Suspension of Visa Waiver Program for Holders of Non Machine-Readable Passports**

The Government of the United States had granted a one-time entry for Visa Waiver Program (VWP) travelers arriving without an individual machine-readable passport as provisional measures since October 26, 2004. The measures were terminated on June 25, 2005, and a holder of a non machine-readable passport cannot enter the United States without United States visas since June 26, 2006. Besides, beginning that date, transportation carriers are fined 3,300 dollars per violation for transporting any VWP traveler without a machine-readable passport to the United States. Accordingly, it has been reported many times since June 26 that Japanese nationals who have non machine-readable passports but have not obtained U.S. visas were rejected to board airplanes by transportation carriers at airports and had to change their schedule. Furthermore, some of them were reported to have given up traveling to the United States.

When a Japanese national has his or her passport lost or stolen during a trip overseas, the Government of Japan issues a "travel document" at overseas establishments, which is valid only for the return trip to Japan if the person should return to Japan immediately and cannot wait for the reissuance of passports. Since the current "travel document" is non machine-readable, its holders who return to Japan via the United States cannot be given visa waiver status. Therefore, when holders of the "travel document" return to Japan from a country in the Americas via the United States, for example, they have to obtain U.S. transit visas after interviewed at overseas establishments of the United States. As a result, they have to stay in the third country where they lost passports for a certain additional period of time or return to Japan via a country other than the United States. This hampers smooth return to Japan and places a huge monetary and psychological burden on the Japanese people.

Accordingly, the Government of Japan urges the Government of the United States to:

- (1) Make further efforts to inform relevant sectors, including travel agencies, of the fact that a holder of a non machine-readable passport cannot enter the United States without a visa, so that travel agencies confirm the passport of a traveler is machine-readable when the traveler reserves or purchases an airplane ticket, and prevent in advance a holder of a non machine-readable passport from being rejected to travel to the United States on the very day of departure; and
- (2) Waive visa requirement for the nationals of the VWP countries who have travel documents that are valid only for their return to the home country as an exceptional case, and continue to waive visa requirement, after October 26, 2006, for those who have urgent passports issued at overseas establishments of Japan (valid for a year) or the travel documents without biometrics identifiers, even though the Government of the United States has decided that holders of non biometrics passports issued after October 26, 2006, are required to obtain visas to enter the United States.

## **5. Social Security Number**

### **(1) Expeditious Issuance of Social Security Number**

The local agents of the Social Security Administration (SSA) issue Social Security Number (SSN) 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 Department of Homeland Security. Though the Government of Japan is aware that the SSA and the Department of Homeland Security continue efforts to expedite the process to verify immigration status, it still takes one to two months for SSA to issue SSNs for foreigners. Since SSNs are required as identification on a variety of occasions when Japanese nationals start living in the United States, for example, in opening bank accounts and in contracting for credit cards, the delay in issuing SSNs causes them significant inconvenience.

Accordingly, the Government of Japan urges the Government of the United States to take necessary measures to expedite the issuance of SSNs.

### **(2) Issuance of Social Security Number to Dependents of Employment Visa Holders**

As mentioned above, foreigners are often required to present their SSN in their daily lives in the United States. Since the current rule provides that holders of non-working visas are not eligible for SSN, dependent family members of foreign workers can not obtain SSN and therefore face a variety of inconveniences including not being allowed to study at educational institutions other than those compulsory.

The Government of Japan urges the Government of the United States to:

- (a) Amend related regulations to enable all lawful foreign residents including those with non employment-based visas to obtain SSN; and
- (b) Explain all the measures taken by the Government of the United States to realize the requests by the Government of Japan in this regard.

## **6. Individual Taxpayer Identification Number**

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 acceptable only once a year at the time of Federal tax return filing (from February to April). This change has resulted in inconveniences for Japanese nationals residing in the United States, including in obtaining driver's licenses and in filing tax deduction.

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

- (a) Reconsider the rule to enable the application for ITIN at any time before the Federal tax return filing;
- (b) Request the relevant authorities of States that require the presentation of either SSN or ITIN for administrative procedures, such as application for driver's license or filing for dependent family deduction, to accept documentation which certifies their ineligibility to obtain SSN as a substitute to ITIN; and
- (c) Shorten the time to issue ITIN to alleviate the inconveniences of Japanese dependant family.

## **7. Permission to Stay**

### **(1) Expeditious Extension of Permission to Stay**

At present, it takes two to three months to extend permission to stay (I-94), and in the mean time, it is not virtually impossible for Japanese workers in the United States to leave and re-enter the country, which creates impediment to their business. The Government of Japan urges the Government of the United States to expedite the extension process.

### **(2) Extension of Validity of Permission to Stay**

The Government of Japan urges the Government of the United States to extend the term of validity of I-94. In particular, the term of validity of I-94 issued to E visa bearers is two years at maximum, and one year in some cases, in which case the bearer has to extend his or her I-94 every year. The Government of Japan therefore urges the extension of the term of I-94 issued to E visa bearers.



### III. DISTRIBUTION

The Government of Japan recognizes the importance of, and basically supports, initiatives launched by the United States to combat terrorism through promoting transport security. At the same time, however, the Government of Japan urges the Government of the United States to ensure that such initiatives do not hinder rapid, smooth and effective distribution. The Government of Japan also urges the Government of the United States to 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 to build internationally common and unified systems.

The Government of Japan also urges the amendment of the U.S. distribution regulations which are inconsistent with the principle of free trade, impeding fair competition, not harmonized with international standards, and obstructing smooth distribution.

Specific requests are as follows:

#### **1. Maritime Transport Security**

As a part of initiatives for counter-terrorism, the United States has enforced the regulations implementing the advance electronic presentation of cargo information under the Trade Act of 2002, and obligated the submission of the manifest of the international sea container bound for the United States to the U.S. customs authorities no later than 24 hours prior to loading. As a result, the deadline for delivery of containers to the yard, which had been commonly set around 24 hours prior to loading, has been moved up by 48 hours. This has decreased the efficiency of distribution is imposing huge burden to the operators including those with excellent compliance record.

The seven relevant Ministries of the Government of Japan set up a Promotion Council under the “Policy Package to Promote the Security and Efficiency of International Distribution” combined in FY2004. The Government of Japan, in cooperation with private sectors, will set the guideline regarding measures of exchanging cargo information and burden sharing among cargo owners, maritime cargo forwarders, forwarders and sea carriers within FY2005. It makes maximum efforts to shorten the lead time of export to the United States.

Given the limit on our own efforts, however, the Government of Japan urges the Government of the United States to take measures for the deregulation of the advance presentation of electronic cargo information (such as extension of a deadline) and expansion of benefits to the participants of the Customs-Trade Partnership Against Terrorism (C-TPAT), such as their exemption from the 24-hour rule and a reduced number of inspections, in consideration of the compatibility between thorough security measures and efficient distribution.

In addition, with regard to the benefits said to be already given to C-TPAT members, the Government of Japan requests the Government of the United States to implement and publicize the policy evaluation based upon the C-TPAT members’ comments, and improve transparency.

## **2. 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 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 the Customs and Border Protection (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 purpose of the Bioterrorism Act, that is, the protection of the United States from the threat of bioterrorism.

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 December 2003 (most recently revised in November 2005), 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 practice, however, it has been reported to the Government of Japan that some food products satisfying these criteria sent by home-delivery services were 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 follow prior notice procedures 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 the near future, should be even more practicable and implemented certainly.

Besides, the Government of Japan has received complaints that many regulations related to the shipment of food to the United States, including the Bioterrorism Act, are complex and hard to understand, and it took so much time to receive licenses issued by the United States Department of Agriculture (USDA) or FDA to permit importation that business activities of Japanese enterprises are negatively influenced.

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

- (1) 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;
- (2) 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;

- (3) Ensure the implementation of the two points described above at the United States customs and avoid refusal of food import by discretionary decision of customs inspectors;
- (4) 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; and
- (5) Shorten the time for procedures such as issuance of licences for importation.

### **3. Container's Weight Limit**

A large number of countries, including Japan, approve the limits of the maximum weight to 30.48 metric tons by container in the transport freights, which is based on the international cargo standard provided by International Organization for Standardization.

On the other hand, the U.S. federal weight laws set weight standards not for cargoes or the boxes in which they move, but for the total vehicle combination and its relative axle weights. The maximum gross vehicle weight on interstate highways is 80,000 pounds (36.3 metric tons) except where lower gross vehicle weight is dictated by the bridge formula.

A freight tonnage can be calculated by subtracting (1) the weight of tractor (the average weight is from 9 to 12 metric tons); (2) the weight of container trailer (the average weight is from 4 to 6 metric tons); and (3) the weight of container itself (the average weight is around 3 metric tons) from the maximum gross vehicle weight. As a result of calculation, the remaining weight is from 15 to 20 metric tons, which is below the maximum freight tonnage (30.48 metric tons) provided by International Organization for Standardization by 10 to 15 metric tons (22 to 33 thousand pounds).

The Government of Japan urges the Government of the United States to recognize that the container's weight limit set by the federal weight laws is inconsistent with ISO regulation, hampers the efficiency of logistics, causes a delivery delay by the U.S. transport agencies, and increases transport costs. It also urges the Government the United States to raise the upper limit of the maximum gross vehicle weight concerning the regulation of weight standards by 10 pounds over from the present 8 pounds, in order to conform the international cargo standard.

#### **4. Maritime Transport Legislation**

##### **(1) Merchant Marine Act of 1920 and Reporting Requirement on the Situation of Japanese ports**

The Federal Maritime Commission (FMC) is authorized by Sec. 19 (1) (a) 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 in 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 urges the Government of the United States to ensure that such unilateral measures not be taken any more by strengthening its convincing efforts on the FMC.

In addition, after the repeal of the abovementioned rule, the FMC has continued to require Japanese and U.S. carriers to report to it on the progress of the situation of the ports in Japan.

The situation of the ports in Japan has been improved through efforts made by the parties concerned. 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 thereby realized new entries into port transport business. And port terminal service operation on the 24-hour, 364-day basis has been introduced.

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 that are 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 would be a serious abuse of FMC's mandates which the Government of Japan finds extremely regrettable.

The Government of Japan therefore urges the Government of the United States to repeal the order, which provides a basis for the reporting requirement.

##### **(2) 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 are obvious intervention against free shipping activity and discrimination against foreign firms.

Furthermore, the amendment to the Act in 1998 explicitly stipulates the right of the Federal Government to intervene the pricing practice. The Government of Japan urges the Government of the United States to ensure that the FMC not impose unilateral regulations on commercial shipping activities conducted by Japanese and other foreign shipping firms without taking into account the actual situation of the market.

## **5. Abolition of Maritime Security Program**

The Maritime Security Program (MSP), which provides as much as 100 million dollars of maritime subsidy annually for ten years, was extended for another ten years in October 2005, with the increased amount of subsidy and the increased number of ships subsidized. It is obvious that a provision of such an enormous amount of subsidy distorts conditions for free and fair competition in the international maritime transport market. The Government of Japan therefore urges the Government of the United States to abolish the MSP.

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

- (1) Take measures, in implementing the MSP, to minimize the distortion of free and fair playing field of international maritime transport market caused by the MSP, including by limiting its application only to cases where genuine security interests require requisition; and
- (2) 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 Fourth Report to the Leaders.

## **6. Abolition of Cargo Preference Measures including the Law Lifting the Ban on the Export of Alaska Oil**

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

In the Fourth 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 urge the Government of the United States to abolish cargo preference measures.

## **7. Regulation regarding Alcohol**

### **(1) On-sale License of Alcoholic Beverages in the State of California**

In the State of California, on-sale license which permits the sale of wine for consumption on the premises where sold also authorizes the sale of *soju*, an imported Korean alcoholic beverage which contains no more than 24 percent of alcohol by volume and is derived from agricultural products. However, it is not permitted to sell *shochu*, an import Japanese alcoholic beverage derived from agricultural products, for consumption on the premises where sold with the on-sale wine license. The Government of Japan therefore urges the Government of the United States to permit the sale of *shochu* with the on-sale license.

In terms of alcohol content, the Government of Japan also urges the Government of the United States to permit the sale of *shochu* that contains 24 percent or more and not more than 26 percent of alcohol by volume with the on-sale license.

### **(2) Certificate of Label Approval on Alcoholic Beverages Imported into the United States**

According to the Part 4 Section 40, Part 5 Section 51, and Part 7 Section 31 of the Code of Federal Regulation, Title 27, no imported alcoholic beverages in containers shall be released from the United States Customs custody for consumption unless there is a certificate of label approval (ATF Form 5100.31). Due to the regulations, even the alcoholic beverages intended for use as samples for tasting must have the certificate of label approval prior to the import into the United States, which stands as a high barrier for Japanese people to conduct promotion campaigns of Japanese alcoholic beverages in the United States.

The Government of Japan urges the Government of the United States to allow imported alcoholic beverages which will be used as samples for tasting to be imported into the United States without certificate of label approval.

## IV. 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 acts, 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 in terms of consistency 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 sufficient measures.

The Government of Japan therefore requests the Government of the United States to ensure consistency of these acts with international laws and implement them cautiously. In particular, application of the acts to enterprises of third countries is discouraged.

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

### **1. Iran and Libya Sanctions Act of 1996**

It is a matter of fact that Iran and Libya Sanctions Act of 1996 (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 explanation made by the Government of the United States in the Fourth Report to the Leaders that ILSA applies to those who engage in activities covered by the statute, without distinction by nationality. 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 appreciates that the Government of the United States has extended the suspension of the implementation of the Cuban Liberty and Democratic Solidarity Act of 1996 every six months, but it 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 Act supported by an overwhelming number of the Member States, and to continue to suspend the implementation of the Act.

### **3. Sanctions Acts Instituted by Local Governments**

The Government of Japan appreciates that the Government of the United States has made

considerable efforts over the years to reach out to state and local authorities to help ensure that initiatives at the state or local level support U.S. foreign policy. The Government of Japan requests the Government of the United States to continue to work on respective States and local governing bodies to abolish sanctions acts that are not consistent with the general international law and the WTO Agreement, or to suspend their enforcement.



## V. COMPETITION POLICY

Active promotion of competition policy facilitates entrepreneurs' new entry into market and innovation and creates efficient economic circumstances. In light of the recent globalization of the world economy, further promotion of competition policy in the United States will stimulate both Japanese and the United States economy and bring various benefits to enterprises and consumers.

While the Government of Japan recognizes that the Government of the United States has actively promoted its competition policy, such as the review process of antitrust laws including antitrust exemptions by the Antitrust Modernization Commission (AMC) and the enforcement activities including exposure of international cartels, the Government of Japan still urges the Government of the United States to promptly review antitrust exemptions and disclose further information on the enforcement activity.

### **1. Antitrust Exemptions**

The Government of Japan urges the Government of the United States 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.

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.

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.

### **2. Release of Documents and Materials on Antitrust Enforcement Activities**

#### **(1) Department of Justice**

The United States Department of Justice publicizes statistical data of the total number of criminal and civil cases, the total amount of fines and the documents or indictments of a part of the cases in which the Department of Justice made indictment or initiated civil action in "Antitrust Case Filings" on the department's website (individual cases are listed on related entrepreneur basis) on a fiscal year basis. However, the Department of Justice does not release a list of the content and the final judgment of such cases.

Because the publication of sanctions and sentences against corporations or individuals will be expected to deter violation of the Federal Antitrust Laws, the Government of Japan urges the Government of the United States to publicize an annual list of cases in which the Department of Justice made indictment or initiated civil action and the content of each judgment (date of filing, date of judgment, sentence imposed, summary of violations, etc).

**(2) Federal Trade Commission**

The Federal Trade Commission (FTC) publicizes major enforcement activities for non-merger cases in the annual report to the Congress and on FTC's website. However, the FTC does not publicize statistical data of the number of legal measures and adjudicative proceedings (the number of decisions to initiate a hearing and final decisions), an annual list of cases in which FTC took legal measures or which are in the process of adjudicative proceedings, and an annual list of final decisions. The Government of Japan urges the Government of the United States to consider whether to publicize these data and lists from the view point of ensuring transparency.

In addition, with regard to merger cases, the Government of Japan also urges publicizing annual data of the number of decisions to initiate a hearing, final decisions and consent orders.

## **VI. LEGAL SERVICES AND OTHER LEGAL AFFAIRS**

As international trade and exchange of people across borders deepen, legal services are increasingly globalized. However, acceptance of foreign lawyers is insufficient in the United States. In addition, some regulations in the legal system of the United States place an excessive burden on businesses, compared to global standards. Although the Government of Japan has discussed with the Government of the United States these points under the Regulatory Reform Initiative, sufficient progress has not been made. The Government of Japan therefore urges the Government of the United States to improve the situation.

On the recognition above, the Government of Japan requests the following:

### **1. Acceptance of Foreign Lawyers as Foreign Legal Consultants**

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

In the United States, only twenty five States and the District of Columbia accept foreign lawyers as foreign legal consultants (FLCs), but all other states do not allow foreign lawyers to practice therein. According to the explanation of the Government of the United States, the above twenty-six jurisdictions that accept foreign lawyers as FLCs account for approximately 85 percent of the total legal services market in the United States. However, in Japan, foreign lawyers that are qualified as Gaikokuho-Jimu-Bengoshi practice nationwide, and therefore the openness of legal service market is equivalent to 100 percent. While the Government of Japan welcomes the efforts made by the Government of the United States, together with the American Bar Association (ABA), to increase the number of States that accept foreign lawyers as FLCs, it urges the Government of the United States to take positive actions towards the acceptance of foreign lawyers as FLCs in all States.

#### **(2) Period of Practicing Experience Required for Acceptance of Foreign Lawyers as FLCs**

Regarding the period of practicing experience that is required for foreign lawyers to be qualified as FLCs in every jurisdiction that accepts foreign lawyers as FLCs, the Government of Japan urges the Government of the United States to make efforts to realize the following.

##### **(a) Reduction of the Period of Practicing Experience**

As far as the Government of Japan has confirmed, a certain period of practicing experience is necessary for foreign lawyers to be qualified as FLCs in every jurisdiction that accepts foreign lawyers as FLCs, except the District of Columbia, and a number of those states require five years or more of experience, whereas only three years of experience is required in Japan in the same regard. The Government of Japan therefore urges the Government of the United States to reduce the period of practicing experience requirement to three years in every jurisdiction.

##### **(b) Abolition of the Requirement for Practicing Experience in the Period Immediately Preceding the Date of Application**

As far as the Government of Japan has confirmed, every state where foreign lawyers are

accepted as FLCs allows only the period immediately preceding the date of application to be counted as practicing experience. The corresponding system in Japan does not impose such a limitation. The Government of Japan therefore urges the Government of the United States to eliminate this requirement in qualifying foreign lawyers as FLCs.

(c) Inclusion of the Practicing Experience in Third Countries into the Practicing Experience

As far as the Government of Japan has confirmed, there are only two States among those accepting foreign lawyers as FLCs, namely the States of New York and Indiana, that allow the inclusion of practicing experience in third countries into the period of practicing experience. The corresponding system in Japan allows the period of the practicing experience in third countries to be included into the practicing experience. The Government of Japan therefore urges the Government of the United States to allow the period of practicing experience in third countries to be counted as the period of experience required to be FLCs in every state.

**(3) Response by State Authorities**

The fourth report of the Regulatory Reform Initiative states, “the Government of the United States will continue working with the ABA on these matters and will inform the Government of Japan of any response by state authorities to its requests”. The Government of Japan therefore urges the Government of the United States to inform the former of any such response by State authorities to the matters that the Government of Japan has requested.

**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 United States, because of a large amount of damages and soaring liability insurance premium. The Government of Japan welcomes the efforts made by the Government of the United States to achieve the tort reform. The Government of Japan also welcomes that fifteen State governments have amended their laws to cope with product liability, and that State governments are making efforts to shorten the statute of limitations and to place certain limits on the amount of damages for non-economic damage.

However, the tort reform is focused on some specific areas such as asbestos litigation reform, medical liability reform, and Protection of Lawful Commerce in Arms, and has not made any tangible progress on the reform of product liability, which brings a majority of lawsuits.

The Government of Japan therefore urges the Government of the United States, as a part of the tort reform, to support and encourage the reform currently underway in many States to limit product liability, and to promote the reform of product liability law at the federal level by placing limits on the amount of damages and by shortening the statute of limitations, which have already been attempted by relevant bills submitted to the congress.

### **3. Punitive Damages**

Unpredictable punitive damages awards can be such a large amount that they could sometimes threaten the existence of the companies upon which the damages are imposed. Although the Supreme Court ruled last year in the State Farm case that punitive damages shall be limited by the federal law, the ruling has not had substantial effects on other judgments in terms of both the amount of damages and their predictability. The Government of Japan urges the Government of the United States to legislate for the following elements at the Federal level, which have been realized in some States: (1) limitation of the level of punitive damages awards in relation to actual damages; (2) a clear and restrictive definition of the types of conducts to which punitive damages are awarded; and (3) requirement of strict burden of proof standard to establish punitive damages liability,

## VII. TELECOMMUNICATIONS

In the area of telecommunications, structural changes to the network, such as broadband diffusion and IP-migration, and subsequent rapid environmental changes in the telecommunications market point to the need for appropriate and timely regulations and policies.

The Government of Japan recognizes that ensuring equal opportunity for entry and foreseeability for all carriers including Japanese carriers and implementing regulations and policies in a transparent and fair manner will lead to the promotion of further technological innovation, investment and market competition, and will also contribute to the protection of consumer benefits in both Japan and the United States.

From these viewpoints, the Government of Japan has requested improvements in the past dialogues under the Regulatory Reform and Competition Policy Initiative, but the Government of the United States has not responded adequately to these requests. In addition, the Government of Japan considers that rapid responses to emerging issues resulting from technological innovation and market structural changes are becoming increasingly necessary.

Based on the recognition above, the Government of Japan requests the following:

### **1. Elimination of Entry Barriers**

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

Section 310 (b) (3) of the Communications Act of 1934 (hereinafter referred to as "the Communications Act") stipulates, as a criterion of licensing, that the ratio of direct foreign 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, Japanese carriers face difficulties to establish flexible networks.

With regard to indirect investment in radio stations, Section 310 (b) (4) of the Communications Act stipulates the ratio of indirect foreign investment in radio stations shall be limited to 25 percent. Although the "Foreign Participation Order" (November 25, 1997, FCC97-398) stipulates that the Federal Communications Commission (FCC) will make a rebuttable presumption that a foreign investment beyond 25 percent fulfills public interest if a foreign investor is from a WTO member country, the Government of the United States has not abolished the regulation in relation to indirect foreign investment.

Regarding licensing radio stations for telecommunications business stipulated in Section 310 of the Communications Act, the Government of Japan urges the Government of the United States to:

- (a) Abolish the restriction on the direct foreign investment ratio;
- (b) Remove completely the restriction on the indirect foreign investment ratio; and

- (c) Inform appropriately the Government of Japan whether the Government of the United States has been working with the Congress in whatever ways toward the abolition or improvement of the regulations, and, if so, the details of such work.

**(2) Certification and Licensing Criteria for Foreign Carriers' Entry into the Telecommunications Market of the United States**

Section 214 and Section 310 (b) (4) of the Communications Act provides several certification and licensing criteria for foreign carriers' entry into the telecommunications market of the United States (November 25, 1997, FCC97-398, FCC97-399). Among them, the criteria of "trade concerns" and "foreign policy" are unclear and have nothing to do with telecommunications policy. Nevertheless, they could be applied to refuse issuance of certification or licenses. These criteria are, therefore, significant barriers preventing foreign carriers from entering the market of the United States. The criterion of "very high risk to competition" could be also applied to refuse the issuance of a license. However, this criterion is ambiguous and as a result, it undermines the foreseeability for foreign carriers to develop their business plans.

The Government of Japan therefore urges that:

- (a) The Government of the United States ensure opportunities for foreign carriers to enter the telecommunications market in the United States by abolishing the criteria of "trade concerns" and "foreign policy", which have nothing to do with telecommunications, for ex-ante certifications;
- (b) The Government of the United States enhance the foreseeability of carriers, regarding the criterion of "very high risk to competition" by publicly clarifying the conditions for its application as the second best policy; and
- (c) The FCC make specific and tangible proposals for the abolition or improvement of the regulations in the process of the biannual reviews which are stipulated in Section 11 of the Communications Act.

**2. Regulatory Reform in the Broadband Era**

The government of the United States implements and explores various regulatory reform and new policies, including a review of competition policy, in order to enable all consumers to enjoy the benefits of broadband and to respond to structural changes in the telecommunications market such as IP-migration. These actions being taken by the government of the United States are understood as including both initiatives by the regulatory authority to undertake reforms: revision of the unbundled network elements (UNE) rule and determination of the regulatory framework for new services under the current Telecommunications Act, and attempts by legislature to revise the Communications Act. While these reforms would be beneficial to consumers if implemented appropriately, the Government of Japan requests the government of the United States to ensure that the reforms will not hinder market competition, technical neutrality, consumer benefits, and free entry, in the process or as a result of the reforms.

In particular, the Government of Japan urges the following as priority issues:

- (1) Unlike other major countries, the Communications Act of the United States classifies services into “telecommunications services” and “information services”. “Telecommunications services” are subject to a set of regulations including provision of UNE, contribution to the universal service fund and price regulations, and on the other hand, “information services” are not subject to such a set of regulations. However, as technology development progresses, it is becoming difficult to tell what specific services is classified as a telecommunications services or an information service. Regarding a variety of new services including VoIP, which have been emerging following broadband diffusion and IP-migration, it is understood to be the actual situation that the FCC determines which type of service a new service falls into, and what regulations are applied to it on a case-by-case basis.

In this context, the Government of Japan urges the Government of the United States to:

- (a) Provide consistent criteria on what kind of services are classified as “telecommunications services” or “information services” to ensure foreseeability for carriers;
  - (b) Prevent the dichotomous classification of “telecommunications services” and “information services” of the Communications Act from hindering an implementation of appropriate and reasonable regulations based on bottleneck and market dominance; and
  - (c) Consider revising the dichotomy of the current service classification in the process of the revision of the Communications Act unless both (a) and (b) above are satisfied at the same time under the current framework of the Communications Act.
- (2) As the rapid development of IP-based networks promotes separation of service supply functions, various new business models have also emerged, such as a model in which only specific or partial service is supplied by one company. On the other hand, vertically integrated services, which are supplied by one single company that controls their own network and also supplies content and applications, are prevailing. One example is the tripleplay, that is, one single company supplies video, voice and data services all together. Under these circumstances, with a view to promoting fair competition, the Government of Japan urges the Government of the United States to ensure that consumer benefits not be hindered by an abuse of cross-layer dominant power, such as manipulation of an advantageous position as a bottleneck infrastructure holder.

In particular, the Government of Japan urges the Government of the United States to ensure that (a) consumers be entitled to connect any legal devices to networks; (b) consumers be entitled to access any lawful Internet content; and (c) consumers be entitled to select any application, as stated in the “Policy Statement” (August 5, 2005, FCC05-151) adopted by the FCC, no matter which broadband service provider consumers choose, as long as their actions do not cause any harm to networks. The Government of Japan also urges the Government of United States to take specific actions with a view to increasing consumer choice.

- (3) Section 706 of the Communications Act stipulates that “the FCC shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion” through regular inquiries. The Government of Japan urges the Government of the United States to enhance transparency of the process of revising



regulations for broadband by collecting and analyzing sufficient data for “the determination in a reasonable and timely fashion” and by publishing the results of the determination.

In particular, the Government of Japan urges the following:

- (a) The Government of the United States define the market based on sufficient inquiry, evaluate market competition from the viewpoint including whether there is a carrier abusing its dominant position across different layers, and publish the results of the evaluation.
- (b) Regarding a series of reviews of regulations for the purpose of not hindering incentives to invest in infrastructure, the Government of the United States conduct an ex-post evaluation of the policies by using quantified data on a regular basis and publish the results of the evaluation on:
  - (i) whether the reviews really provide telecommunications carriers with investment incentives and whether they in fact bring about substantial investment; and
  - (ii) whether or not the reviews, by focusing too much on ensuring investment incentives, result in an anti-competitive market environment where, for example, medium and small companies are hindered from entering the market.

### **3. Competition in the Navigation Devices Market in the Process of Transition to Digital Television**

The Government of Japan understands that for adequate services that meet consumer requirements to be provided in the process of transition to digital television, it is of particular importance to ensure new entry and fair competition in the navigation devices market. Section 629 of the Communications Act stipulates that the FCC shall ensure that consumers get converter boxes and other equipment for multichannel video programming from manufacturers, etc. which are not affiliated with any multichannel video programming distributor. The Government of Japan urges the Government of the United States to continuously maintain and enforce the section of the Act in order to ensure consumer benefits in the navigation devices market in the process of transition to digital television and the revision of the Communications Act.

### **4. Unified Regulations to Reduce Unreasonable Burdens**

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

In the United States, the federal institutions delegate implementation of various kinds of regulations on telecommunications to states' decisions. The differences in implementation of regulations among states create obstacles to the development of the inter-state telecommunications businesses. The Government of Japan therefore urges the FCC to explore ways that enable states to swiftly and efficiently implement and amend the Federal regulations and their amendments to ensure smooth management of inter-state businesses by an effective use of the newly established “Office of Interstate Affairs”.

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 across many States in reporting to all these State governments in different forms.

Accordingly, the Government of Japan urges the Government of the United States to

- (a) Continue to communicate these concerns to the National Association of Regulatory Utility Commissioners (NARUC), and to work on NARUC in a tangible manner to make achievements in this regard.
- (b) Provide information to the Government of Japan on the status of work and prospects for improvement by NARUC.

## **(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 implement the ongoing process of Notice of Proposed Rulemaking (NPRM) of access charges reform in a transparent manner, establish a unified intercarrier compensation regime, and eliminate disparity and inconsistencies among the three kinds of access charges.

Requests concerning individual access charges are as follows:

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

Inter-state access charges are decided at levels below charges calculated on the basis of the Total Element Long-Run Incremental Cost (TELRIC) model under the Coalition of Affordable Local and Long Distance Service (CALLS) plan among carriers. It is impossible, however, to verify the validity of the 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 urges the Government of the United States to clarify the details of TELRIC models and specific 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 this calculation is not publicized, it is impossible to verify the validity of the charges. Therefore, the Government of Japan urges the Government of the United States to work on Public Service Commissions/Public Utilities Commissions to disclose information about the TELRIC model upon authorization of the charges to ensure transparency of authorization process.

### **(c) Reciprocal Compensation**

The Government of Japan urges the Government of the United States to reconfirm that reciprocal compensations are different from ordinary access charges in that it is possible to use calculation methods other than those based on the TELRIC and to apply those calculation methods flexibly through negotiations among carriers.

## **5. Development of UNE Regulations**

UNE regulations imposed on incumbent local exchange carriers (ILECs) have been revised according to the process of "Triennial Review" (August 21, 2003, FCC03-36). On the other hand, the review of UNE regulations stipulated in Section 271 of the Communications Act, which are imposed on Regional Bell Operating Companies (RBOCs) as conditions to fulfill before entry into inter-LATA services is still on-going.

Regarding UNE regulations of Section 271, the price standard and the impact on the regulation caused by the rulemaking which classified broadband access services as information services are unknown. The Government of Japan urges the Government of the United States to provide a full vision of UNE regulations at an early time, with a maximum level of foreseeability, based on public comments filed by interested parties, and taking into account possible burdens on competitive local exchange carriers (CLECs) and end users.

## **6. Procedures for Export Licenses, Approval of Technical Assistance Agreement and Other Measures concerning Commercial Satellites**

### **(1) Continuous information provision regarding paperless licensing system**

Regarding the process for the export licensing of commercial satellites and the approval of the transfer of technical information concerning these satellites, the Government of Japan welcomes the fact 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 continue to provide information on the status of improvement of licensing process attained by the implementation of the new electronic licensing system.

### **(2) Ensuring Prompt Procedures and Transparency**

Regarding the export licensing of commercial communications satellites and the approval of Technical Assistance Agreement (TAA), the criteria determined by the Government of the United States for information disclosure, export licensing, and TAA approval are not clear. Therefore, commercial satellites makers do not disclose technical information at their own risk and they bring into the licensing process the information not required for application. As a result, the unclear criteria of the export licensing and TAA approval need additional time before the satellites makers acquire export licensing and approval. Foreign satellite communications companies cannot access indispensable information such as test procedures, reports on non-performance on the manufacturing process, and conditions reports in the assembly or the ex-ante test. Moreover, foreign satellite communications companies must shoulder additional cost due to undisclosed necessary information. Consequently, Japanese satellite communications companies have long-term concerns over business activities.

The Government of Japan therefore urges the Government of the United States to minimize delay in procedures, continue making efforts to maximize transparency in the export licensing and TAA approval, and minimize the items of undisclosed information in accordance with the United States laws, regulations and policies.

In addition, in order to prevent commercial satellites makers from being daunted and keeping information secret, the Government of Japan urges the Government of the United States to specify and exemplify information which is able to be disclosed as far as possible and draw up a guideline for information disclosure as soon as possible.

### **(3) Ensuring Fair Procurement Conditions**

The Government of the United States restricts disclosure of certain types of information in satellite trades. As a consequence, when a United States-satellite purchaser puts out a tender, Japanese satellite makers obtain related documents later than United States makers. The Government of Japan is concerned that Japanese makers are put at a competitive disadvantage, and therefore urges the Government of the United States to ensure fair competition for the satellite communications businesses in the procurement of satellites.

## VIII. INFORMATION TECHNOLOGY

Along with the wider use of the Internet and development of digital technologies, various new issues are emerging, which require new measures to cope with them.

Even though the United States is an advanced IT country, there are some aspects of its efforts to protect copyright that are thought to be inadequate or inappropriate. The Government of Japan therefore urges the Government of the United States to improve its measures to secure the protection of rights and to enforce the proper mechanism in this regard.

At the same time, Japan and the United States need to lead the international efforts against infringements of intellectual property rights and damage from SPAM caused by the development of IT. The Government of Japan urges the Government of the United States to closely cooperate with the former in this field.

### **1. Cooperation in Efforts against Counterfeits and Pirated Goods**

With regard to the international treaty for preventing proliferation of counterfeits and pirated goods, which the Government of Japan proposed to develop an international rule to counter counterfeiting and piracy, and is being discussed among the G8 countries, the Government of Japan urges the Government of the United States to cooperate with the former toward the realization of this treaty. With regard to the Anti-Counterfeiting and Piracy Initiative, which was collaboratively proposed by Japan, the United States and Republic of Korea at the Asia Pacific Economic Cooperation (APEC) and agreed in June 2005, the Government of Japan urges further cooperation from the Government of the United States on factors including those which were agreed to be further developed in the Model Guidelines that were agreed at the Ministerial Meeting in November of the same year.

The Government of Japan requests the Government of the United States to work with the former to explore and consider 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. For example, the Government of Japan wishes to invite specialists from the United States to the ASEAN+3 Copyright Seminar in Tokyo. The Government of Japan also proposes that the two Governments actively cooperate with private organizations in their efforts against pirated contents.

### **2. 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. In

order to cope with this situation, international rules for the age of digitization and networking are currently being formulated at the World Intellectual Property Organization (WIPO). To facilitate such discussions, the Government of Japan urges 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.

### **3. Adequate Protection of Rights under the Digital Millennium Copyright Act**

Section 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.

Therefore, the Government of Japan urges the Government of the United States to:

- (1) Ensure an appropriate balance between the copyright owner's rights and the sender's rights including protection of privacy information and freedom of expression by, for example, providing an opportunity for a sender to defend himself or herself.
- (2) Provide the Government of Japan with information on its activities in this regard in an appropriate manner.

### **4. Response to Digital Networking**

In order to cope with new copyright-related issues that arise from the wider use of the Internet and development of digital technologies, the Government of Japan urges the Government of the United States to explore and study a desirable nature of copyright protection system in the future through active exchange of information toward deregulation, 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 Section 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.

## **5. SPAM**

SPAM has become a worldwide problem in the Information and Communication Technology field and the United States is recognized as the largest spam-sending country in the world.

In this context, the Government of Japan requests the Government of the United States to further promote comprehensive anti-spam measures such as strict enforcement of the CAN-SPAM Act, support for technical measures taken by the private sector, and international cooperation with other countries. In addition, the Government of Japan requests the Government of the United States to continue to explore and consider measures to combat spam between the two countries.

## **IX. MEDICAL DEVICES AND PHARMACEUTICALS**

In recent years, Japanese pharmaceutical and medical device industries are actively expanding overseas operations, with the increased number of Japan-origin pharmaceuticals on a list of biggest global sales. With this development, Japanese companies have strong interest in raising the transparency of related regulations in the United States and in ensuring their appropriate implementation. The Government of Japan therefore continues to urge the Government of the United States to make improvements concerning difficulties faced by Japanese companies.

The Government of Japan is convinced that it is beneficial to both Japan and the United States including patients in the United States that the Government of the United States provides meaningful opportunities to have dialogue with Japanese companies and industry groups in order to enhance communication between both sides, and that, as a result, pharmaceuticals and medical devices developed by Japanese companies are introduced smoothly into the U.S. market.

Specific requests are as follows:

### **1. Regular Meeting with Japanese Companies Operating in the United States**

The Government of Japan urges the Government of the United States to offer continuous opportunities for foreign pharmaceutical industries and medical device industries operating in the United States including Japanese industries to exchange views with U.S. Food and Drug Administration (FDA).

The Government of Japan also requests the Government of the United States to actively offer similar opportunities for Japanese industries to exchange views with appropriate U.S. expert officials when they visit the United States as well.

### **2. Facilitation of Worldwide Simultaneous Development**

When U.S. pharmaceutical companies submit applications for new drugs in Japan, they have usually had developed and submitted applications for the new drugs in the United States a few years before they do so in Japan. From the viewpoint of the need to provide patients with earlier access to better pharmaceuticals and of social responsibility of the pharmaceutical industry, the Government of Japan requests the Government of the United States to encourage the U.S. pharmaceutical industry to facilitate worldwide simultaneous development on new drugs including in Japan.

### **3. Clarification of FDA's Inspection Policy**

When FDA inspects manufacturing sites in Japan to verify the function of their Quality Control System, it conducts thorough inspection not only of products for the U.S. market but also of those for the Japanese market.

Since requirements for Good Manufacturing Practices (GMP) or other quality management differ in many aspects between Japan and the United States, the Government of Japan urges



the Government of the United States to clearly indicate FDA's inspection policy with reasonable rationale so that Japanese manufacturers can respond to FDA's inspection if FDA is to continue the inspection in Japan in the same way.

#### **4. Observance of Time Period of consultation on clinical trials for Investigational Device Exemption**

There are some cases where consultation on clinical trials to start the clinical development of medical devices in the United States takes longer than prescribed in the Guidance on IDE Policies and Procedures. The Government of Japan therefore requests the Government of the United States to observe the time period stipulated in the Guidance.

#### **5. Clear Criteria on Medical Device Classification**

Although criteria on medical device classification in the U.S. regulations are stipulated in "21 CFR Part 860", criteria on the classification of attachments for medical devices are not clearly defined. As a result, attachments have been treated the same as main bodies of medical devices with a high level of classification, and have been over-regulated. Therefore, the Government of Japan requests the Government of the United States to clarify criteria on the classification of attachments for medical devices and thereby enable manufacturers to make their own judgments on classification.

#### **6. Acceleration of Third-Party Review of Pre-market Notifications**

FDA makes it possible for accredited third parties to review pre-market notification (510(k)) submission of medical devices with relatively low risk and a market record. FDA applies 30-day rule to the FDA review of the products already reviewed by third parties in order to expedite the process. However, since there are no provisions as to the period of third-party reviews, their length differs significantly. In addition, it takes long for a third party to start the review after it receives the submission, and therefore companies are not enjoying intended benefits of the system. Therefore, the Government of Japan requests the Government of the United States to stipulate the evaluation period of third-party reviews.

#### **7. Ultrasound Data for 510 (k) Submission of Endoscopic Ultrasonography**

The "Information for Manufacturers Seeking Marketing Clearance of Diagnostic Ultrasound Systems and Transducers" is guidance by the Government of the United States, which is issued for the safety of the ultrasound diagnostic equipments which radiate ultrasound from outside the body. However, the accordance with this guidance is required for 510 (k) submissions of endoscopic ultrasonographies, which radiate by far weaker ultrasound from inside the body. As a result, for an endoscopic ultrasonography system, which constitutes of many kinds of endoscopic ultrasonographies combined with processors, ultrasound data of all possible combinations is required, placing huge burden on applicants. To reduce the burden of applications, the Government of Japan requests the U.S. Government to review the guidance or its implementation, and allow the data attached to 510(k) submissions of endoscopic ultrasonographies to include only typical data (for example, the data on the combination of equipments that theoretically maximizes the level of ultrasound).

## **8. Clear Criteria for Application Categories**

There are various categories for application for post approval of partial changes of medical devices after Pre-Market Approval (PMA). Different categories have different application fees and review periods, but criteria for categorization are unclear. This uncertainty has negative implications on the budget and plans of applicants. Therefore, the Government of Japan requests the Government of the United States to clarify the criteria for application categories for post approval changes of medical devices.

## X. FINANCIAL SERVICES

For further development of the close economic relationship between Japan and the United States, the Government of Japan recognizes the importance of promoting economic activities between the two countries by improving market access for Japanese financial service providers in the United States.

The Government of Japan has continued discussions with the Government of the United States, including at the Japan-U.S. Financial Dialogue. However, there remain in the United States regulations that obstruct activities of Japanese financial service providers. The Government of Japan urges the Government of the United States to ease or abolish such regulations.

Specific requests are as follows:

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

In the previous recommendation, the Government of Japan requested the Government of the United States to abolish the Rule 145 of the Securities Act of 1933 or mitigate it. This rule provides that when new stocks are issued in a business reorganization and if U.S. residents come to hold more than 10 percent of the shares of the target company, the acquiring company should submit registration forms, including financial statements based on the United States Generally Accepted Accounting Principles (GAAP) to the Securities Exchange Commission (SEC). This rule is applied even to non-American companies, which issue new stocks due to their business reorganization by merger with other non-American companies outside the territory of the United States.

In the previous Report to the Leaders, the Government of the United States answered that SEC had carefully considered the desirable and appropriate level of U.S. ownership for the purpose of exemption and in the interest of investor protection, and that SEC had adopted a more tailored relief measure for non-American companies to address conflicting regulatory mandates and offering practices. The Government of the United States also mentioned in the report that non-American companies of which American residents' ratio became more than 10 percent due to merger are encouraged to raise specific concerns with SEC.

However, the rule obviously places excessive burden on Japanese companies which have never reported their financial statements based on USGAAP and reorganized themselves by merger with other Japanese companies, just because the U.S. ownership of stocks exceeds 10 percent, even taking into account the need of investor protection. As a basis for this opinion, Japanese laws do not require non-Japanese companies, which reorganized themselves by merger with other non-Japanese companies either to file registration formats for issuing new stocks or to disclose their financial statements based on the Japanese GAAP, even if non-residents' shareholding ratio exceeds 10percent of the total.

The Government of Japan therefore urges the Government of the United States to abolish this registration requirement that is applied to non-American companies.

## **2. Regulations on Sales and Offers of Foreign Investment Trusts**

In the previous recommendation, the Government of Japan requested the Government of the United States not to apply Section 7 (d) of the Investment Company Act of 1940 and SEC Rule 7d-1 entitled “Specification of Conditions and Arrangements for Canadian Management Investment Companies Requesting Order Permitting Registration.” to non-Canadian foreign investment trusts which publicly offer their shares within the territory of the United States. If not, the Government of Japan requested the Government of the United States to abolish the following three conditions:

- (1) At least a half of directors of investment trusts must be American citizens and reside in the United States.
- (2) Assets of investment trusts are required to be entrusted to banks in the United States; and
- (3) Investment trusts are required to use United States Certified Public Accountants.

The Government of Japan recognizes that this rule is still applied to other foreign investment trusts besides Canadian ones, places excessive burden on foreign investment trusts, and substantially limits foreign investment trusts’ entry to the U.S. capital market.

In the previous report, the Government of the United States answered that SEC had issued the orders to investment trusts from five countries, Canada, Australia, Bermuda, South Africa and the United Kingdom, had also granted limited exemptive relief from the Rule to a Canadian investment trust, and remained willing to consider applications for this rule.

The Government of Japan, however, is aware that these are just rare and exceptional measures during the period between 1950s and 1970s and most of past applicants were not given such orders and relieves. It is difficult for the Government of Japan to understand that the Government of the United States ensures enough opportunities for foreign investment trusts to enter into the U.S. investment trust business by citing a very few exceptional measures. In addition, even though the Government of the United States answered that SEC remains willing to consider applications for 7 (d) orders, it is still difficult for the Government of Japan to interpret that the Government of the United States fully understood the need of exceptional relief for foreign investment trusts.

Furthermore, in terms of costs, it is also very heavy burden for investment trusts of foreign countries, which are geographically distant from the United States, to fulfill all of the three conditions listed above.

Therefore, the Government of Japan urges the Government of the United States not to apply Rule 7d-1 to Japanese investment companies or to abolish at least these three conditions.

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

To engage in the securities business in the United States with the scope comparable to that of U.S. securities companies, including underwriting stocks and corporate bonds, foreign banks are required to obtain the status of Financial Holding Companies (FHCs). In determining whether foreign banks are comparable to U.S. banks in terms of capital and management, an

injection of public funds into their capitals is taken into consideration as one of negative factors. Because of this criterion, Japanese banks are having difficulty in gaining the status of FHCs, and the business scope of securities subsidiaries of these banks is substantially limited in the United States.

In the previous recommendations, the Government of Japan requested the abolishment of this criterion. However, in the previous Report to the Leaders, the Government of United States answered that the criterion is not the only factor but one of several factors that may be taken into account to determine comparability of capital, and that the same criteria for U.S. bank subsidiaries under FHCs are applied to foreign banks.

Compared to the situation several years ago, the problem of non-performing loan at Japanese banks is substantially diminishing and their financial conditions have dramatically improved. In light of the current situation, the Government of Japan urges the Government of the United States to ensure Japanese banks obtain the status of FHCs, regardless of public fund injection.

#### **4. Deregulation of Investment into Initial Equity Public Offering by Foreign Investment Trusts**

The National Association of Securities Dealers (NASD) Rule No. 2790 basically prohibits NASD members and other persons associated with these members from conducting the following:

- Selling initially publicly offered stocks to accounts in which “restricted persons”, such as security brokers, dealers and portfolio managers, have beneficial interests
- Purchasing these stocks in accounts in which these members and persons have beneficial interests

This rule stipulates two conditions of exceptional treatments for foreign investment trusts as follows:

- (1) Such foreign investment trusts are listed on foreign stock exchanges or authorized by foreign authorities for public sale; and
- (2) No “restricted person” owns more than 5 percent of the shares of the foreign investment trusts

However, in the Japanese securities business, securities companies and banks are entrusted by investment trusts to sell trust funds to their domestic investors, and it is those securities companies and banks, not investment trusts, that have information about the investors. In addition, it is very difficult even for these securities companies and banks to check if the second condition mentioned above is always fulfilled because of the enormous number of investors. As a result of this regulation, Japanese investment trusts have difficulties in investing their funds into initially publicly offered stocks in the United States.

Therefore, the Government of Japan urges the Government of the United States to take necessary measures to enable Japanese investment trusts that do not have any intention to sell their shares to, and trade initially publicly offered stocks for the benefits of, “restricted persons” to invest their funds into these stocks.