Fifth Annual FALL FORUM

Section of Antitrust Law

American Bar Association

A Leniency Program a la Japonnaise
- How it is going to be enforced -

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November 16th of 2005
Washington D.C.

It is my great honor to be invited to the Fifth Annual Fall Forum and talk about a leniency program of Japan that is going to be effective as of January 4th of 2006. I want to express my great appreciation to the Section of Antitrust, American Bar Association for offering me such a valuable chance.

It was only a few years ago when many observers on Japanese competition law developments were thinking that it was a mission impossible for the JFTC to introduce a leniency program in Japan. However, after roughly 2 years and a half struggles to go through the legislative process to enact a law that gives the JFTC a power to enforce a leniency program in Japan, such a program finally became a part of the Anti-monopoly Act (AMA) by a law enacted on April 20th of this year[1].

Any new system that is going to be introduced into a country with different legal background cannot avoid some complication or deviation from the standard or original model. Sometimes, it is better to modify the model in order to make it workable under a different legal system. However, I want to emphasize the facts that we made a thorough review and analysis on various models of leniency programs that are enforced in other jurisdictions, therefore, the difference contained in our program is intentional one based on our own justifiable reason and international harmonization was taken into our consideration as much as possible.

In this paper, firstly I am going to explain, as the background information, arguments pros and cons forwarded during the debates to introduce a leniency program in Japan. I think it has some value for American lawyers to know what kinds of arguments are forwarded in Japan in order to codify such a fundamentally new concept into a law.

Secondly, I will describe our system of leniency program and how it is going to be enforced. In particular, I will try to give answers to various questions and comments submitted to the JFTC during public comment procedures by American and European lawyers.

Thirdly, I will try to analyze the implication of a leniency program introduced in Japan, in particular the implication on international cooperation against international cartels.

I Debates forwarded for or against introducing a leniency program in Japan

The public arguments for or against a leniency program in Japan were started by the publication of the Antimonopoly-Act Study Group Report of Oct[2].

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1 The Law No. 35 of 2005 promulgated on 27 April 2005.

2 The Fair Trade Commission, "Summary Points of the Report of the Study Group on the Antimonopoly Act," 28 October 2003, <http://www.jftc.go.jp/e-page/reports/survey/2003/031028sgroupamabeppyo.pdf>(26 September 2005).

2003. Initial reaction to the idea of a leniency program was very bad, as we expected. The idea of a leniency program had met a strong opposition from various interest groups. Japanese society attaches a great importance to harmonious cooperation. In such an environment, it is clear that a leniency program is against its "harmonization culture". The issue was a cultural one as well as legal one[3].

(1) Major objections against a leniency program

Two major objections are raised against the idea of a leniency program in Japan. One is an argument against secret reporting (*mikkoku* in Japanese). For some, a leniency program reminded of pre-war secret reporting nightmare. For others, it reminded of the similar system of secret reporting employed under communist regimes. Anyway, for our people, it sounded like a very selfish conduct for a company to take advantage of a leniency program, namely reporting on its wrongdoing and make other companies to be punished as a result of the reporting, whereas the reporting company itself was free from any punishment. The other is an argument against plea-bargaining. Our people are very conscious of any element of bargaining contained in the plea-bargaining system, and are critical to give such a power to the government authority.

Because it is a matter of culture, it is a matter whether you like it or not. Is the concept of a leniency acceptable for Japanese businesses? Isn't it against business ethics firmly established in Japan? Which is more important, a harmony in business community or the elimination of cartel activities?

Those who supported an idea of a leniency program seemed to put higher value to a fight against cartels and bid-riggings, whereas those who hesitated to accept the idea seemed to put higher value to harmonization culture[4]. I felt, therefore, that an introduction of a leniency program may be an important step toward establishing "competition culture" in Japan. One of the essential aspects of "competition culture" is, of course, to regard cartel activities as something of a very serious nature in a free market economy. Thus, introduction of a leniency program into Japan became a kind of litmus test to see whether one believes in harmonization culture or competition culture.

(2) Plea-bargaining issues

Let me explain on plea-bargaining issue first. A leniency program of any

3 A. Uesugi, "Recent Developments in Japanese Competition Policy -Prospect and Reality-, Address before International Antitrust Forum, Section of Antitrust, American Bar Association (24 January 2005 Miami), <http://www.jftc.go.jp/e-page/policyupdates/speeches/050124uesugi.pdf>(26 September 2005).

4 KEIZAI DOYUKAI (Japan Association of Corporate Executives) had expressed that a leniency program needed to be introduced in Japan to crack down on an illegal conduct that occurred as a result of free competition. See Keizai Doyukai announcement dated on 24 June 2004.

sort is thought to be objectionable because the program was regarded as a plea-bargaining that has been rejected as an evil idea in Japan. An influential economic organization insisted that a leniency program, if necessary in Japan, should be examined in conjunction with the introduction of plea-bargaining system into our society that would surely take years to argue [5].

Therefore, the first thing for the JFTC is to try to make people understand the nature of a leniency program and we started our arguments by emphasizing that a leniency program is completely different from plea-bargaining. Fortunately, most people accepted our arguments that a leniency program is quite different from a plea-bargaining. A leniency program should not have an element of bargaining in order to work effectively. It is up to the management of a company to use the program or not. Once the management made up his mind to use it, the authority must accept the application and must afford a lenient treatment.

(3) Secret reporting issues

Second is an argument against a secret reporting. We tried to explain to people that a leniency program is different from a secret reporting because the applicant must report on his own wrongdoing, whereas, a secret reporting is an act of reporting on someone else's wrongdoing. There is nothing wrong for someone to report on his own wrongdoing to the authority. This is equal to a confession, so to speak. The rest of cartel participants are detected as a consequence of the reporting by the applicant's. Therefore, it is a kind of compliance efforts by applicant companies that shall be encouraged nowadays.

Fortunately, as debates moved forward, our arguments gained more and more support among people. At last, opposition against a leniency program based on cultural aspect lost its influence even among opposing groups.

(4) Legal problems

There was also a legal problem because the surcharge system did not allow any discretion on the part of the JFTC [6], therefore, why the JFTC should be able to treat cartel participants leniently. How can you justify a program where the first applicant can be immune from the payment of surcharges in spite of the clear fact that he admits his wrongdoing and cartel profits are in his pocket? This problem

[5] Nippon Keidanren (Japan Business Federation) had occasionally expressed its concern about the introduction of a leniency program. For example, it proposed that whether or not Japan should introduce a leniency program in Japan needs to be discussed as a part of criminal and judicial system reforms as a whole, otherwise, it could disturb the criminal and judicial justices.

[6] In Japan, both criminal fine and surcharges could be imposed on the respondent companies. Therefore, in order to avoid double jeopardy problem under our Constitution, it was thought necessary to construct the surcharge system as clearly distinguishable one from criminal fine. One of the key elements in this regard is non-discretionary nature of the surcharges power of the JFTC.

could be cleared because, the surcharge system was introduced as a means of deterrence against cartel activities and bid riggings, therefore, if a lenient treatment of applicant companies can increase a deterring effect of anti-cartel provisions, it could be justifiable under the surcharge system. In this way, the necessity of a leniency program is established by showing that the benefit outweighs the loss, namely society as a whole can gain more than the loss of surcharges payable by the leniency applicants. It is also true that even such applicants cannot escape the legal responsibility under our single damage award system[7]. Therefore, cartel profits of the leniency applicants could be taken care of under our single damage award system.

[7] An injured person can sue under Article 25 of the Antimonopoly Act, or under the Article 709 of the Civil Code's tort damage provisions.

II Outline of a leniency program of Japan

(1) Surcharge rate increase

Basic rate for surcharges against cartels and bid riggings is, after January 4th, 10 % of turnovers during the cartel period. The surcharge order could cover up to three years depending on the length of cartel period. Therefore, when a company's sales figure of product A in Japan is 100 million U.S. dollars per year and the good is cartelized for three years, the surcharge amount would be 30 million U.S. dollars. If the company is subjected to another surcharge order within 10 years after the last surcharge order, 50% higher surcharge rate is applied, namely 15%, and the surcharge amount would be 45 million U.S. dollars. The increased rate of 10% or 15% is applicable to the cartels and bid riggings that are conducted after January 4th of next year, and 6% is applicable to the cartels and bid riggings that are terminated before that date.

(2) Immunity or reduction of surcharges under a leniency program

The first applicant of a leniency program is afforded 100% immunity so far as the surcharges are concerned, 50% reduction is afforded as to the second applicant, and 30% reduction to the third applicant when necessary information is provided before the start of the JFTC investigation. If necessary information is provided after the start of the JFTC investigation, 30% reduction is equally available up to the third applicant. No joint application by multiple companies is accepted. On the other, multiple applications to various competition authorities are possible.

The order of application is crucial, therefore, the order is determined by the time when the Form I is submitted to the JFTC via fax[8]. Thus, no company throughout the world faces disadvantage in the access to the JFTC.

(3) How to apply for a leniency

A leniency applicant must submit a report to the JFTC using Form I, Form II or Form III and provide necessary information and documents stipulated in each form[9]. Form I is used to give him a marker position, namely the first company who submits the Form I report is qualified as the first applicant, and is afforded roughly 15 business days before submitting the Form II report as well as necessary materials and documents. The time limit shall be designated as to each applicant, and may be variable. We know that 15 business days are rather short period of time for the applicant to complete its internal investigation, but we must also consider the interests of other potential applicants who might be preparing for submission of information to the JFTC if the first applicant missed the deadline.

When the first applicant submits the Form II report accompanying necessary materials and documents by the designated date, the company is afforded a status of immunity from a surcharge order as well as criminal

8 See "Flowchart for Applying a Leniency in Japan." as attached as Appendix 1

9 See Tentative English translation of the Form II report as attached as Appendix 2.

accusation. I will touch on the criminal accusation aspect later.

The Form III is used by those who report after the start of the JFTC investigation on a case. The Form III report is almost identical to the Form II report in the content, therefore in this paper, I will not refer to the Form III report specifically. The Form I report and Form III report must be transmitted by fax., to make sure that no simultaneous application takes place.

Those Forms must be submitted under the name of a company representative, or its attorney. It must have a company seal or attorney's seal to show its authenticity.

After the officer in charge of a leniency application at the JFTC examines the Form II report, the JFTC will issue a notice or a letter to the company telling that the leniency application is properly processed and he is qualified as the first applicant (second or third applicant). This status is guaranteed so long as the company does not fall under any one of the disqualification requirements stipulated under the Article 7-2, paragraph 12, namely, where the applicant submitted a report containing false information, the applicant did not submit additional information even if he is so requested by the JFTC, or where the applicant forced other entrepreneurs to engage in cartels and bid riggings or tried to block other entrepreneurs from quitting such illegal conducts. When the first applicant fell under any one of the disqualification requirements after he obtained immunity status, it does not change the status of the second and the third applicant.

(4) Why a company must submit a written report instead of an oral report

Now let me turn to a written submission issue that met critical comments when public comments are invited to our leniency rules. This looks to be a very serious concern for U.S. and European attorneys, therefore, let me explain on this issue in detail. The Leniency Working Group, International Bar Association and the Section of Antitrust and International Law of American Bar Association kindly submitted very useful comments on the JFTC proposed Rules on a Leniency Program[10].

Let me first explain why we think the submission of the Form II report is a necessary element of a leniency program in Japan whereas most jurisdictions are moving towards oral submission for a leniency application.

During the debates on the introduction of a leniency program at the Diet or elsewhere, some concerns were raised about abuse of a leniency program. Someone indicated a possibility to abuse the program in order to harass its

10 American Bar Association, "COMMENTS OF THE ABA SECTION OF ANTITRUST LAW Joint Comments on the Japan Fair Trade Commission Draft Leniency Rules," 2 August 2005, <http://www.abanet.org/antitrust/comments/2005/08-05/japan-fair-trade.html>(26 September 2005).

competitors, namely someone might file a false report to the JFTC. Or it might encourage a secret reporting by a whistle blower. The latter is done by employees, by definition, without consulting their company management.

During the time when a leniency program was debated at our Diet, pros and cons on whistle blowing law are also debated there. The Act on Protection of Informers for the Public Interests was finally enacted during the ordinary session of year 2004[11], whereas we could not submit the amendment bill of the AMA during the same ordinary session because we could not obtain go sign to the bill by the Ruling Parties. Under such circumstances, it was important for us to make clear the relationship between a leniency program and a whistle blowing.

It is very clear that a leniency application must be filed under the name of a company representative, because other person than an entrepreneur cannot be subject to surcharge orders. No possibility to treat a company leniently under our surcharge system even where some employee of a company provided very useful information on cartel and bid-riggings to the JFTC. Whistle blowing is an act of individual whereas a leniency application must be an act of an entrepreneur.

In order to differentiate from the act of an individual, submission of an authentic report by a company is thought a vital element of our leniency program. The best practice to see the act of a company in Japan is to require the applicant to submit the report with the company's seal. This will also eliminate a possibility of one kind of abuse of a leniency program. It is impossible to submit a report with the company's seal without necessary authorization by the company management. By the same reason, the original shall be submitted to the JFTC after the leniency applicant submits respective reports via fax. so that the original of the report is in the hands of the JFTC.

The second reason is somehow related to joint application issue. During debates regarding pros and cons on a leniency program, the Japan Business Federation (Nippon Keidanren) insisted that a joint application by more than two companies should be permitted[12]. The JFTC rejected such a proposal and wanted to make sure that a leniency application be done individually. Based on this necessity, the idea of sending a report through facsimile is developed.

(5) Is a corporate statement necessary in order to file the Form II report?

The idea of an oral report is promoted in order not to force a potential applicant to create a document that outlines all the critical factual elements of the

11 The Law No. 122 of 2004 promulgated on 18 June 2004.

12 Japan Business Federation expressed in July 2004 that "If the violators come forward with application at the same time, a lenient treatment should still be applied to them, since it has the same effect to inhibit the AMA violations and to assist investigation activities of the JFTC".
<http://www.keidanren.or.jp/english/policy/2004/061.html>(26 September 2005).

cartel. Already existing documents are excluded. It is clear that what the JFTC expects to obtain through the Form II report is not such a corporate statement. Without having a corporate statement, we have plenty of means to obtain necessary evidences including investigator-taken depositions in the pursuit of investigation activities.

Suppose you are preparing for a leniency application for a Company A, and prepare the Form II report by filling the column using the information you learned from your client company. You might think that some of the column should not be filled because of potential risk of treble damage suits against the client company. What will happen? After submission of such a report, an officer in charge of leniency application at the JFTC will call you and ask whether you can provide necessary information to fill the column. Or you can tell him at the time of the filing that you want to provide some of the key information orally. It is clearly designated in the leniency rule that certain key information can be provided orally[13].

The officer, then ask you whether you can make you or any other appropriate person available for an interview with him or his deputies so that he can prepare a document describing what you tell to him. In the course of our investigation activities, the JFTC investigators prepare a kind of deposition in order to document what the person involved in a case tells him. We call this an investigator-taken deposition (*kyojutsu chosho* in Japanese). Thus, a corporate statement that outlines all the critical factual elements of the cartel could be avoided. For the purpose of a leniency application, an attorney interview might be sufficient so far as necessary information to fill the column is concerned. The key information, of course, must be provided orally by those persons who are involved in a case before an officer in charge of a leniency application.

After the start of our investigation on a case, we will ask the person involved in the case to appear for an interview with our investigator, so that he can prepare an investigator taken deposition.

If the person to be interviewed cannot speak Japanese, an interpreter must be employed. It is the interpreter to confirm the accuracy of the investigator-taken deposition in terms of Japanese and thereafter to put his signature on the deposition.

(6) What level or standard of disclosure of the facts is sufficient to obtain immunity?

The information obtained at the time of a leniency application under the Form II report is used by the JFTC to start an investigation on a case. The level or standard of disclosure of the facts shall be the one sufficient for this purpose, not less than that, but not more than that. The information is used by the JFTC to

13 See footnotes of Form II (Appendix 2).

judge whether the applicant shall be afforded a leniency status of 100 % immunity, 50% reduction or 30% reduction. The information obtained through a leniency application need not be sufficient for proving a violation of the AMA. The JFTC can and will produce necessary evidences later in its pursuits of investigation activities.

I think it is very important for a potential leniency applicant to make sure his status or qualification under our leniency program before he submits critical information to the JFTC. For the JFTC, further cooperation with the leniency applicants at later investigation stage is very important because, once the investigation activities on a case are started, other cartel participants might make contradictory statements and, if it happened, the investigator needs to make sure whether their statements are true or false by questioning the leniency applicants on such statements. This kind of cooperation or additional request of information from the applicant companies is needed until investigation activities are completed by the JFTC.

(7) Issue of confidentiality and risk of disclosure

Any information obtained by the JFTC by using the compulsory power under the AMA cannot be used for other purposes than the enforcement of the Act. I cannot think of any situation for the JFTC to share the information submitted under a leniency program with other branches of the Japanese government.

I can think of two situations where the JFTC would provide the report and materials and documents submitted under a leniency program to the third party. The one exception is, off course, the Public Prosecutor's Office. This only happens when the JFTC files a criminal accusation on a case[14]. The other is when the JFTC's disposition is contested by the respondent companies, and the case moves to the hearing stage. If other cartel participants are contesting the JFTC's disposition at the hearing, it might be necessary for us to use the information submitted under the Form II report or any materials and documents provided by the leniency applicants. However, I think the possibility to use the Form II report itself as evidences in support of our disposition at the hearing stage is rather low. Let me show you why.

Under an ordinary circumstance, investigators will take depositions by interviewing with those directors and employees of involved companies including the applicant company after the start of investigation activities. Or, as I have already described, necessary depositions will be taken as arranged at the time of filing of the Form II report. This is because, under our legal practices, the evidentiary value of the investigator-taken deposition is much higher than that of the information contained in the Form II report. The information contained in the Form II report may be sufficient for the JFTC to start necessary investigation

[14] Article 96 of the Antimonopoly Act: "Any offense under Article 89 to 91 inclusive shall be considered only after an accusation of the Fair Trade Commission has been filed."

activities but may not be sufficient to prove a violation of the AMA.

A corporate statement prepared by a legal department of an applicant company, even if submitted voluntarily, may not have the same level of evidentiary value with the investigator-taken deposition. A corporate statement does not enjoy high evidentiary value in our legal practices because the investigator-taken deposition could describe much more precisely any necessary information for proving a violation of the AMA. Therefore, we will continue to rely on the investigator-taken deposition as evidences when the case is contested at the hearing stage, rather than the information obtained through the filing of the Form II report.

As I described above, it is the investigator-taken depositions that are used as evidences once the other cartel participants contest the disposition by the JFTC. Therefore, it may be possible for the injured person to obtain copies of the investigator taken depositions once they are submitted as evidences in support of complaint before the hearing examiners or subsequently before a court[15].

From our point of views, the investigator-taken depositions may expose the leniency applicant to far greater financial risk than any written report submitted by him. A leniency applicant cannot stop the other cartel participants to contest the disposition by the JFTC, and cannot prevent the materials and documents he submitted to the JFTC from being used as evidences at the hearing proceedings or at the subsequent court proceedings. If a written report, if any, is discoverable in private litigation and could prejudice the leniency applicant vis-à-vis the other cartel participants, so are the evidences submitted before the hearing examiners. Therefore, I have some difficulty to understand the seriousness of the oral report issue, but anyway, so long as a leniency applicant prefers to submit orally any information with respect to factual elements of the cartel, it is totally acceptable for the JFTC. Our requirement for a written report does not force a leniency applicant to produce such a corporate statement de novo.

(8) Is immunity from criminal prosecution guaranteed for the first applicant?

Criminal prosecution could be filed only by the public prosecutor including the AMA violation, therefore, it is not simple task to guarantee the first applicant immunity from criminal prosecution. The JFTC has an exclusive power to file a criminal accusation on violation cases of the AMA[16]. Therefore, unless the JFTC files an accusation, no criminal complaint could be filed by the public prosecutor. However, this rule applies only as to a case, namely, so long as the

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15 Article 69 of the Antimonopoly Act: "Any interested person may request to the Fair Trade Commission, after the issuance of a complaint, to peruse or copy of the record of a case, or may ask the Fair Trade Commission for a certified copy of a surcharge payment order or a decision or an abridged copy thereof."

16 See supra note14.

JFTC files a criminal accusation on a case, it is the public prosecutor to decide who should be prosecuted among cartel participants.

The Ministry of Justice declared to pay a full regard to the JFTC's decision not to accuse the first applicant. This is because the JFTC, having an exclusive power to file a criminal accusation, decides not to accuse the first applicant, the judgment deserves high respect on the part of the public prosecutor. Therefore, under an ordinary circumstance, the public prosecutor will not prosecute the persons (company and individuals) who are excluded from criminal accusation by the JFTC when a criminal complaint is filed.

The second and the third applicant cannot enjoy the benefits of this special treatment. It depends on a case-by-case consideration whether the second and the third applicant or their employees shall be or shall not be accused. Anyway, the JFTC will decide the persons to be accused after close consultation with the Public Prosecutor's Office. Therefore, the JFTC can exercise a reasonable evaluation on who should be prosecuted as to a particular case. Immunity from criminal prosecution is offered only as to employees of the first applicant company who, following the instruction by the company, had cooperated with the JFTC's investigations.

(9) Use of information by public prosecutors

The public prosecutor can use any information submitted by the first applicant in case a second or subsequent applicants are prosecuted. There is no way to avoid this possibility. Again, my answer to this question is yes, but the probability is not very high. Public prosecutor is fully equipped with compulsory powers in order to discover evidences in support of his criminal complaint, therefore, the information submitted by the first applicant are only one of such evidences. It is the public prosecutor who decides which evidences he should rely on in support of his case. As I explained above, a second or a third applicant may or may not be prosecuted based on a case-by-case consideration.

(10) How about freedom of information requirement?

I cannot deny the possibility of freedom of information type situation where a court might compel the JFTC to submit a copy of the Form I, II or III report. There is no case law yet on this issue. We will definitely raise necessary objections to avoid such an order in a court proceeding because we classify any information we rely on to start our investigation strictly. When the disposition by the JFTC is not contested by the respondents, thus became final, the injured person might ask a court to obtain relevant evidences on which the JFTC relied in disposing a case[17]. However, it is the JFTC's policy not to provide any documents to the third party that fall under information source materials for the JFTC

[17] On 15 May 1991, JFTC issued the guideline that describes the situation where evidential materials produced by the JFTC are provided to injured persons in order to ease plaintiff's burden of proof for seeking damages caused by the AMA violations.

investigation. The Form I, Form II or Form III report fall under such information source materials clearly.

On the other hand, I cannot deny the possibility for the injured person to obtain a copy of the report from the leniency applicant, if he files a damage suit to a court and ask the court to compel a discovery of such report. When a leniency applicant is identified in one way or another, it seems difficult for him to deny the existence of the reports he filed to the JFTC. In this sense, a leniency applicant might have good reason to submit the Form II report with information that is sufficient to qualify for a leniency status, then submit the rest of the information after he was so requested by the JFTC.

(1) Evaluation of Japanese leniency program from international standpoint

Any leniency program enforced by major competition authorities must be suitable for multiple applications. Only problem I can see is the use of our language since Form I, II and III must be filled in only Japanese language. When you plan multiple applications including the JFTC, you can have a contact with an officer in charge of the leniency application at the JFTC, and make sure that no one is yet filed a Form I application on product X in Japan. Then, you can prepare the Form I (I think it takes less than an hour for an experienced lawyer to prepare for the Form I), and fax. it as soon as possible. You will have in principle 15 business days for submitting the Form II report. At this stage, what you need to do is to prepare for a filing of the Form II report, and to arrange an interview date with the officer in charge for an oral submission.

As I already described, at this stage, what you should provide to the JFTC through the Form II report is not necessarily everything you have learned about the involvement of your client company into the cartel activities. The information contained in the Form II report shall be sufficient one for the JFTC to start an investigation on a case, but nothing more. Therefore, you could still have time to continue your internal investigation even after the submission of the Form II report. Any information thus collected through internal investigation shall be provided later to the JFTC [18].

Under this rule, the leniency application may first be filed with the JFTC in view of the shorter period of time we afford for such submission, at least, earlier than the application to the U.S. authority. I think it makes sense for a potential applicant to secure the status of the first applicant as soon as possible. The confidentiality of your application to the JFTC is fully protected.

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18 Paragraph (11) of Article 7-2 of the Amended Antimonopoly Act: "Prior to issuing an order pursuant to the provisions of paragraph (1) or a notification pursuant to the provision of paragraph (13) to an entrepreneur who falls under any one of the provisions of paragraph (7) through (9) inclusive, the Fair Trade Commission can additionally request the said entrepreneur to submit reports or documents related to the facts of the said violating act."

Our rule on a leniency program does not prevent an applicant company from filing an application to other jurisdictions, of course. The final leniency rule made it clear that an applicant cannot disclose his filing to the JFTC to the third party without good cause[19]. Therefore, multiple applications to other competition authorities are not prevented at all under the rule.

Under our leniency rule, the applicant is not compelled to disclose information he has with respect to other cartels and bid riggings. Under our system, we cannot offer any lenient treatment additionally to a second or a third applicant even if he provides information with respect to other cartels and bid riggings (so-called amnesty plus rule). However, it seems that a second or a third applicant, by having a contact with our officer in charge of the leniency application, is in a better position to learn whether the Form I report is already filed as to the other cartels and bid riggings. Therefore, he could be in an advantageous position to become the first applicant on the other cartels and bid riggings.

19 Article 8 of JFTC rule on a leniency program.

III A leniency program is vital for international cooperation

(1) Importance of having a leniency program for Japan

A leniency program is vital for international cooperation to fight against cartels. This is based on our experience on vitamin cartels investigation as well as graphite electrode cartels investigation. It proved to be a difficult task for the JFTC to conduct an investigation on a case after the other competition authority announced its measures on the case and after the involvement of Japanese firms became public knowledge. Without a leniency program, the JFTC could not obtain materials and documents submitted to the other competition authorities such as U.S.DOJ or European Commission. Also, it became clear based on this experience that starting our investigation activities simultaneously with the other competition authority, not after the disposition of a case by the other competition authority, is vitally important.

The JFTC started an investigation on modifier cartel case by cooperating with the competition authorities of the U.S., EU and Canada. The JFTC relies on a dawn raid to collect evidences from suspected firms. In this regard, it is imperative for the JFTC to start a dawn raid before any action is taken by other competition authorities, such as service of search warrant or notice to officers of suspected firms. Because of time difference between Japan and Europe, or Japan and U.S.A., adjustment of time to start necessary investigation activities by each competition authority was necessitated. This was the first occasion for us to coordinate investigation activities with other competition authorities, but it proved to be successful.

On Dec.11, 2003, the JFTC issued a recommendation against two Japanese firms finding price-fixing cartel among those firms and one other Japanese firm that had sold the whole business operation in Japan to a foreign firm and quitted from the cartel[20]. Both of the respondent firms rejected the recommendation and the case is under administrative hearing procedure.

(2) Can Japanese leniency program work effectively?

For a leniency program to work effectively, the surcharges must be high enough to encourage a potential applicant to apply for the leniency program. Because the rate of surcharges is reduced from the JFTC proposals, it may be wondered whether the program could work effectively in Japan. Of course, we must see what will happen after the amended AMA is enforced as of Jan 4th, 2006. However, it seems that 10% surcharges could be significantly large enough for cartels and bid-riggings participants when the ring covers a fairly large product market, besides, 15% surcharges that is applicable to a repeated violator would

20 The Fair Trade Commission, "A Recommendation to Producers of Modifiers that Conducted Price-hike Cartel Activity," 11 December 2003, <http://www.jftc.go.jp/e-page/pressreleases/2003/december/031211modifiers.pdf>(26 September 2005).

provide a significant incentive to apply for the leniency program. Fortunately or unfortunately, there are so many big Japanese firms that are already subjected to our surcharge orders within the past ten years, thus 15% is applicable to them if they repeat violations of the AMA[21].

(3) Compliance program needs to be enhanced

Another important aspect that influences the effectiveness of a leniency program is whether Japanese firms strengthen their AMA compliance programs. As I have explained, since the publication of the Study Group report in Oct. 2003, in particular after the announcement of the JFTC amendment proposals in April 2004, very heated debates and arguments were observed in Japan with respect to a competition policy. This offered a rare occasion for our people to think about what kind of competition laws and policies Japan should have for the 21st century. Regardless of the opinions pros and cons to the JFTC proposals, it became clear through these debates that competition policy enhancement is a key for the re-birth of the Japanese economy and, therefore, the AMA needs to be strengthened in one way or another[22].

I sincerely hope that big Japanese firms would tighten their AMA compliance programs in order to effectively cope with the strengthened AMA that will significantly enhance business risk for Japanese firms as well as international firms to engage in cartel and bid riggings in Japan. The JFTC intends to tighten its law enforcement program by encouraging Japanese firms to adopt more effective compliance program.

IV Concluding remarks

I sincerely hope that our leniency program is in harmony with international practices. This is what we intended and our leniency program should be easily accessible by Japanese companies as well as international companies. The most important thing to consider in formulating a leniency program is, of course, to offer a strong incentive for potential applicants and no disadvantage be associated with the application for a leniency program vis-à-vis non-applicant. We will carefully keep these elements in our mind and if we find something wrong with our program in these elements, we will do our best to correct any problems. If you find something different in our leniency program, it is probably some of the traits of our struggles to go through a difficult legislative process to introduce a leniency program into Japan.

I am not aware of any other jurisdiction that will introduce a leniency

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21 Approximately 550 entrepreneurs have been subjected to surcharge orders within the past 10 years that were not small and medium sized company under Article 7-2, paragragh4.Those are companies that could be subjected to 15% surcharges, if they repeat violations.

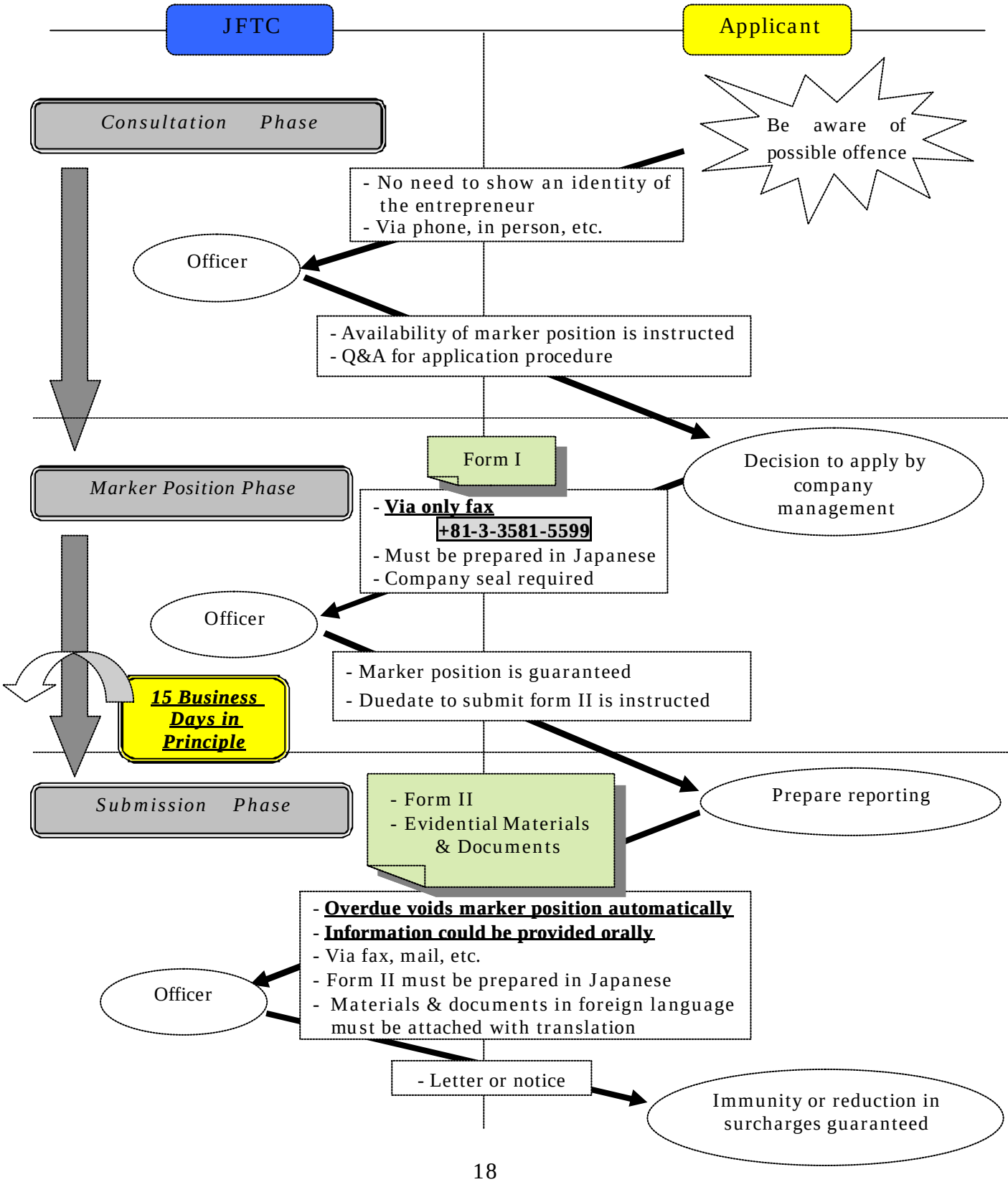
22 See supra note 3.

program starting at certain date in the future. Since the law authorizing the introduction of a leniency program was enacted, more than 8 months' preparation period was afforded for a potential applicant to file an application in January. It is possible for any potential applicant to apply for a leniency so long as the JFTC does not start its investigation activities on the case by the end of this year. By this reason, it is of great interest to see what will happen in Japan on 4th of January, 2006. Who comes first? Is that a Japanese company or a non-Japanese company? Or no company might try to file an application for the first couple of months of 2006. It deserves careful watch for international antitrust lawyers what will happen in Japan in early next year.

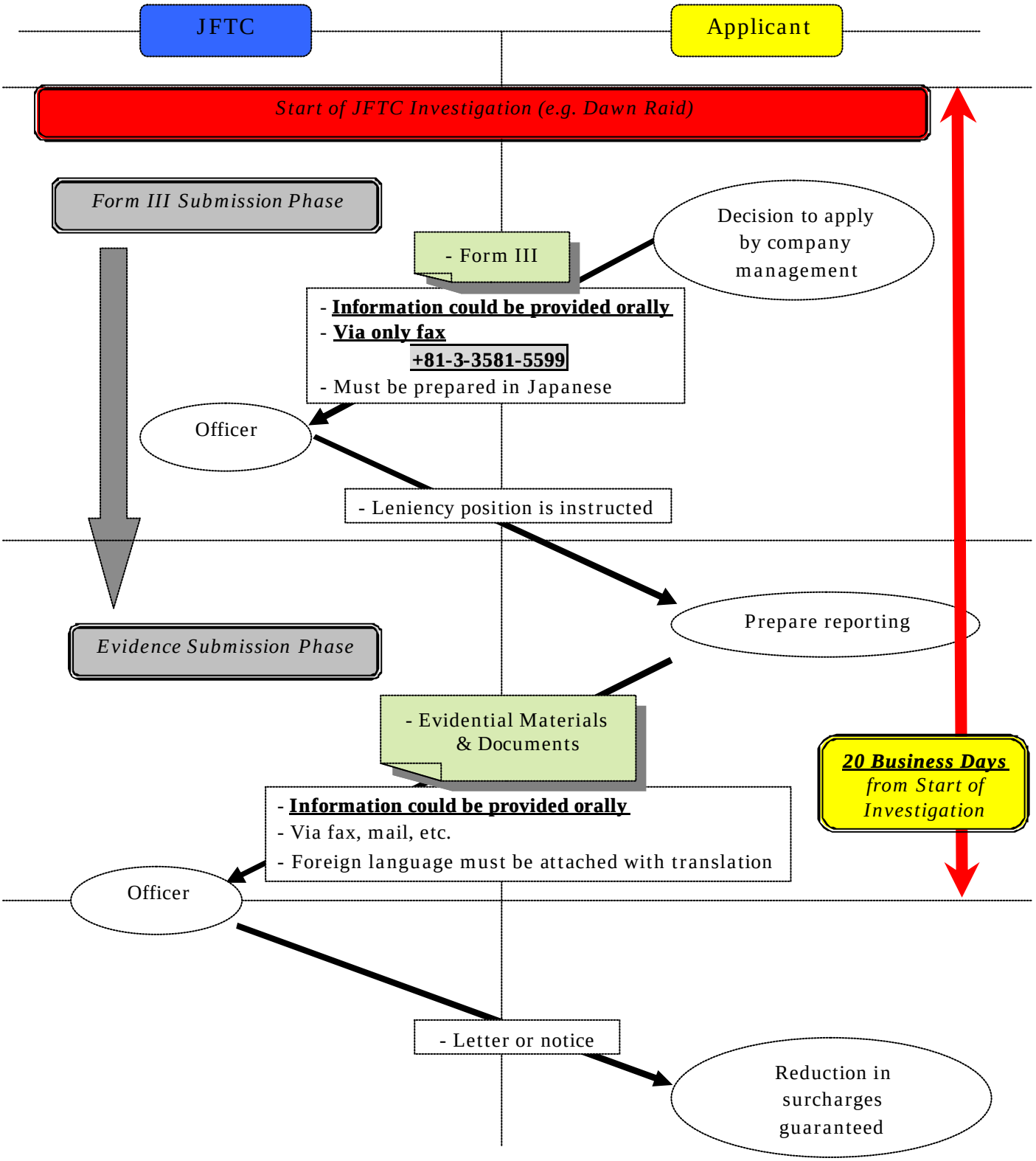
Appendix 1

<Flowchart for Applying a Leniency in Japan>

* "*BEFORE*" *the start* of JFTC investigation



<Flowchart for Applying a Leniency in Japan>
* "*AFTER*" *the start* of JFTC Investigation



Appendix 2

FORM No.2: (Paper Size: JIS A4)

(Tentative translation:
only Japanese version is authentic)

WRITTEN REPORT
REGARDING IMMUNITY FROM OR REDUCTION OF SURCHARGES

Date: _____ (Year) _____ (Month) _____ (day)

Submitted to:

Fair Trade Commission of Japan

Submitted by:

Name or Title of Entrepreneur:
Address or Location:
Name and Position Title of Representative: (Seal)
Name of Division for Contact:
Name and Position Title of Person in Charge:
Telephone Number:

We hereby make a report pursuant to the provisions of Section 7-2 (7) (i), Section 7-2 (8) (i), or Section 7-2 (8) (ii) of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (including cases where these sections shall apply *mutatis mutandis* to Section 8-3 of the Act).

Without justifiable reason, we shall not disclose to third parties the fact that we have made the following report.

1. Summary of the violative act to be reported

(1) Goods or Services Targeted by the Said Act	
(2) Description of the Said Act	a
	b
(3) Name or Title and Address or Location of Other Entrepreneur(s) Participating in the Said Act	
(4) The Time of First Implementation (The time of Termination)	_____ (Year) _____ (Month) _____ (Day) (until _____ [Year] _____ [Month] _____ [Day])

2. Position Titles and Names of Executives or Employees Who Have Involved in the Said Act at the Reporting Entrepreneur

Current Position Title And Division one belong to	Position Title at Time of Involvement And Division one belonged to (The Time of the Position)	Name

3. Names and others of Executives or Employees Who Have Involved in the Said Act at Other Entrepreneur(s) Participating in the Said Act

Name of Entrepreneur	Current Position Title And Division one belong to	Position Title at Time of Involvement And Divison one belonged to (The Time of the Position)	Name

4. Other Matters for Consideration

5. Submission of Materials

We hereby submit the following materials.

No.	Title of Material	Description of Material's Content (Summary)	Notes

Instructions for Completing This Form
(The following items correspond to the items on the Form No.2.)

1. Summary of the violative act to be reported

(1) Goods or Services Targeted by the Said Act

a. For clarifying the range of the goods or services targeted by the said act, enter in detail in 1 (1).

For example, where there are two distribution routes for a product—one for sales through distributors and the other for direct sales to consumers, if there is a cartel to raise prices targeting only products sold through the latter distribution channel, clearly enter for clarifying such matters.

If the said act is regarding bid rigging case, enter in detail the contract awarding public agencies and divisions, the kinds of bids (open bids with limited conditions, bids competed by designated firms desiring to join the bid, bids competed by designated firms, and others), the type of construction, and others regarding ordered related projects.

b. If things, within the range of goods or services targeted by the said act, are specifically outside the target of arrangements (for example, goods or services for export, for specified uses, bidding projects competed by the designated specific firms, and others), clearly enter for clarifying such matters in 1 (1).

(2) Description of the Said Act

a. Enter the description of the said act (price cartel, bid rigging, agreement of separate market, and the others) in 1 (2) a.

b. Enter in detail in 1 (2) b for clarifying, for example,

① in the case of price-raising cartel, details of agreement (the date of implementation of the price increases, and the range of price increases, and others),

② in the case of bid rigging, details of the procedure (details of rules) for selecting an expected bid winner.

If trade associations are involved in the said act, enter details of the associations' involvement 1 (2) b.

(3) Name or Title and Address or Location of Other Entrepreneur(s) Participating in the Said Act

If trade associations are involved in the said act, enter in detail the title, address or location, and others of the trade associations in 1 (3).

(4) The Time of First Implementation (The Time of Termination)

a. Enter the time when the arrangement regarding the said act was decided in 1 (4). If it is not clear when the said act was started, enter the earliest date when it is certain that the said act was being implemented, and write

"at the latest" complementarily.

b. If the reporting entrepreneur has already ceased the said act, enter the time of termination in the parentheses. For example, if there is a date the entrepreneur decided to cease the said act as the organization, enter the date,

2. Position Titles and Names of Executives or Employees Who Have Involved in the Said Act at the Reporting Entrepreneur

Specify not only executives and employees who are involved currently, but also were involved in the past.

3. Names and others of Executives or Employees Who Have Involved in the Said Act at Other Entrepreneur(s) Participating in the Said Act

a. While possible, specify not only executives and employees who are involved currently, but also who were involved in the past. Where the name and position title of an executive or employee is not found out, write a note to that effect.

b. If the executives or employees of trade associations are involved, specify their position titles and names of them.

4. Other Matters for Consideration

a. Specify other matters for consideration, for example, the situation surrounding the implementation of the said act, contacts with other entrepreneur(s) participating in the implementation of the said act, a profile of the industry, and the summary of related trade associations.

b. If the fact is able to be deemed concerned with involvement in bid rigging as provided for in Section 2 (5) (i) through (iii) the Act Concerning Elimination and Prevention of Involvement in Bid Rigging and others (Act No.101 of 2002), enter the details of the fact.

5. Submission of Materials

a. List on the chart and submit materials to prove the matters indicated in 1. through 4. above, including, ①Memorandums of meeting related to the act, business daily reports indicating matters related to the said act, correspondence with other entrepreneur(s) participating in the said act, and others and ②reports related to the said act with the signatures and seals of the executives or employees involved in the violative act to be reported, and others.

If the materials are not prepared in Japanese, a Japanese-language translation or abridged translation of the concerned part shall be attached.

b. For clarifying which matters indicated in 1. through 4. above are proven by the respective materials, appropriately organize the materials, for example, write "2-(7)" in the "Notes" column corresponding to the seventh material proving the matter indicated in 2. above.

Note:

1. The entries written in "Note" (the entries which is substitutable for the writing Form by oral statement) stipulated in the Section 3 (2) of this Rule is the entries mentioned in 1 (2) b, 2, 3, and 4 above.

2. (1) In case of reporting or stating by oral mentioned in Section 3 (2) of this Rule, an entrepreneur which reports or states shall appear before the Leniency Program Administrator by the deadline for submission set in the Section 2 of this Rule.

(2) The written report mentioned in 5.a.② above is in principle " materials which are substitutable by oral statement " stipulated in the Section 3(2) of this Rule. In this case, the person who should prepare the said report shall state by oral statement.

3. If this report is being prepared by the agent, enter the name or title and address or location of reporting entrepreneur, the description that the report is prepared by the agent and the name of agent and add the seal of the agent in place of the seal of the representative,.

In this case, a letter of agent shall also be required to be attached. In case of making an oral report as provided for in Section 3 (2), the letter shall be submitted at the time of report.

4 Where there is no space to write fully reporting matters of 1. to 5. above use and attach extra sheets.

5 When this report is being transmitted in facsimile, do not mistake the fax number.