

Guidelines to Reduction System for Cooperation in Investigation (Proposal)

1. Purposes

The act No.45 of 2019 for amending the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter the “AMA”), which was promulgated in June 2019, amended the leniency program and introduced the Reduction System for Cooperation in Investigation in order to reveal the truth of the cases more efficiently and effectively, and eliminate and deter violations, by increasing the enterprises’ incentives for cooperating in investigations by the Japan Fair Trade Commission (JFTC). The Reduction System for Cooperation in Investigation would make it possible to add the reduction rates according to the degree of contribution to revealing the truth of the case by cooperation of an enterprise which applies for the Leniency Program (excluding an enterprise which first applied for the Leniency Program before investigation start date; hereinafter referred to as the “Reporting(etc.) Enterprises”) (hereinafter the system of applying the reduction rates according to the degree of contribution to revealing the truth of the case by cooperation of Reporting(etc.) Enterprises is referred to as the “Reduction System for Cooperation in Investigation”) to the rate according to the order of the application for the Leniency Program (hereinafter the system of applying the immunity and reduction rates according to the order of application is referred to as “the Leniency Program” and the combination of the Leniency Program and the Reduction System for Cooperation in Investigation is referred to as “the New Leniency Program”).

Table1. The reduction rates in the New Leniency Program

The Investigation Start Date	The order of the application for the Leniency Program	The reduction rate according to the order of the application for the Leniency Program	The reduction rate according to the degree of contribution to revealing the truth of the case
Before	First	Immunity	Up to 40%
	Second	20%	
	Third~Fifth	10%	
	After Sixth	5%	
After	Up to 3 (Up to 5 including applicants which apply before the investigation start date)	10%	Up to 20%

	Other than the above	5%	
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The diagonal line in the table 1 means that the enterprise which first applies for the Leniency Program before the Investigation Start Date is not subject to the Reduction System for Cooperation in Investigation

In light of newly introducing the Reduction System for Cooperation in Investigation, the JFTC stipulates the “Guidelines to Reduction System for Cooperation in Investigation” (hereinafter referred to as the “Guidelines”). The Guidelines is aimed at improving predictability of enterprises and transparency of the enforcement of law, and encouraging cooperation of enterprises in investigation of cases.

In order to encourage enterprises to cooperate with the JFTC in the investigation of cases, the JFTC shall closely communicate with enterprises through the investigation period; when the JFTC operates the New Leniency Program.

2. Relationship between the Leniency Program and the Reduction System for Cooperation in Investigation

As stated in the preceding paragraph 1, the latest revised AMA added the Reduction System for Cooperation in Investigation to the Leniency Program.

An enterprise which first applies for the Leniency Program before the Investigation Start Date is not subject to the Reduction System for Cooperation in Investigation. However, the JFTC may request that enterprise to report additional facts or submit additional materials regarding the facts of the violation (the AMA article 7-4(6)). If the enterprise fails to report the facts or submit the materials or reports false facts or submits false materials in response to the request, the enterprise shall not be subject to the Leniency Program. For this reason, it is expected that the enterprise will proactively cooperate with JFTC in the investigation through the investigation period.

In the Reduction System for Cooperation in Investigation, as stipulated in Article 7-5 (1) of the AMA, reduction rates shall be determined through evaluating the degree of contribution to revealing the truth of the case by cooperation of Reporting (etc.) Enterprises, including the content of reported the facts and submitted the materials in application for the Leniency Program (hereinafter referred to as “Report (etc.) under the Leniency Program”).

If an enterprise ascertains facts about a violation, the enterprise provides Report(etc.) under the Leniency Program, and after that, if the Reporting(etc.) Enterprise intends to further cooperate with the JFTC in ascertaining facts(etc.) contributing to revealing the truth of the case , it may apply for a conference in the subsequent 3 (2)(i), enter into an

agreement with the JFTC and report the facts and submit the materials based on the agreement (hereinafter referred to as “Report(etc.) under the Reduction System for Cooperation in Investigation,” and the combination of Report(etc.) under the Leniency Program and Report(etc.) under the Reduction System for Cooperation in Investigation is referred to as “Reports etc.”).

In this context, along with the enforcement of the latest revised AMA, from the perspective of making the New Leniency Program more effective, the treatment that documents stating the contents of confidential communication between enterprises and attorneys, if they satisfy certain requirements, shall be returned before the termination of the investigation is introduced.

In addition, as described below in 4(1), when the JFTC evaluates the degree of contribution to revealing the truth of the case in the Reduction System for Cooperation in Investigation, it is not taken into consideration in case of evaluating the degree of contribution to revealing the truth of the case that whether Reporting (etc.) Enterprises apply and request pursuant to the Rules on Investigations (Fair Trade Commission Rule No. 5 of October 19, 2005) by the Fair Trade Commission which stipulate procedure mentioned above for return or not.

For this reason, planning to utilize the New Leniency Program by closely communicating with independent attorneys will benefit enterprises.

3. Procedure

(1) Application for the Leniency Program :

If enterprises ascertain facts of a violation, they may apply for the Leniency Program.

With the latest revised AMA, the upper limit on the number of enterprises which may apply for the Leniency Program was abolished.

As described below in (2)(i), because the enterprise which may request a conference for utilizing the Reduction System for Cooperation in Investigation is limited to the enterprise which receives a notice pursuant to the Article 7-4 (5) of the AMA (hereinafter the notice of Clause 5), enterprises may not utilize the Reduction System for Cooperation in Investigation if the enterprises do not provide sufficient Report (etc.), Therefore, when enterprises which ascertain facts of a violation, they have to provide sufficient Report (etc.) under the Leniency Program as before.

(2) Conference and Agreement

(i) Conference

Reporting (etc.) Enterprises may apply for a conference by 10 days (excluding Holidays of Administrative Organs) from the date when they receive the notice of Clause 5.

During a conference, Reporting (etc.) Enterprises shall explain the content of the Report (etc.) under the upcoming Reduction System for Cooperation in Investigation, and, in response, the JFTC shall present a reduction rate. (Refer to the subsequent 4 for reduction rates to be presented.)

In addition, Reporting (etc.) Enterprises have to include intent to accept request of the JFTC (Article 7-5(i) (b) and(c)) (e.g. reporting the facts) as the content of cooperation which they explain at a conference.

(ii) Agreement

There are two types of agreement: an agreement on the determination of Specified Rate (hereinafter referred to “the Agreement on Specified Rate”) and an agreement on the determination of the upper and lower limit of the reduction rates (hereinafter referred to as “the Agreement on the Upper and Lower Limit”).The JFTC makes either agreement with Reporting (etc.) Enterprises.

Regarding the Agreement on Specified Rate, the JFTC determines the reduction rates through evaluating the facts (etc.) including the contents of Report(etc.) under the Leniency Program (Article 7-5(1)) which Reporting (etc.) Enterprises ascertain until the time of agreement .

On the other hand, regarding the Agreement on the Upper and Lower Limit, the JFTC determines the reduction rates in the range of upper and lower limitation stipulated in the agreement through evaluation of the new facts (etc.) which Reporting (etc.) Enterprises ascertain and provide Report (etc.) under the Reduction System for Cooperation in Investigation after the agreement (Article 7-5(2)).

Therefore, in case of the Agreement on the Upper and Lower Limitation, content of the cooperation which conducted through the investigation period may be reflected the reduction rates.

In addition, it is stipulated that the JFTC may seek the Agreement on the Upper and Lower Limitation if it recognizes that it is highly possible for Reporting (etc.) Enterprises to find new facts(Article 7-5(2)).

In this point, not only facts (etc.) which Reporting (etc.) Enterprises voluntarily ascertain after the agreement but facts (etc.) which they ascertain at the additional reporting request of the JFTC(Article 7-5(1)(i)(b)and(c)) may contribute to revealing the truth of the case. Therefore, in this case, it would be recognized ascertaining of new facts (etc.) and that it is highly possible for Reporting (etc.) Enterprises to ascertain new facts.

Because determination of reduction rates based on content of the cooperation during the investigation period will benefit Reporting (etc.) Enterprises, the JFTC ordinarily seeks the Agreement on the Upper and Lower Limit with a Reporting (etc.) Enterprises.

Whether to make agreement or not depends on an independent judgment by the JFTC and a Reporting (etc.) Enterprise. As mentioned above in (i), Reporting (etc.) Enterprises may explain the content of the Report (etc.) under the upcoming Reduction System for Cooperation in Investigation at a conference. In light of said explanation, the JFTC may record the content of explanation in order to evaluate the degree of contribution to revealing the truth of the case. However, if a Reporting (etc.) Enterprise and the JFTC do not enter into an agreement but said record is used as evidence, Reporting (etc.) Enterprises may hesitate to explain at the conference. For this reason, Article 7-5 (7) of the AMA prohibits the JFTC from using documents containing the content of explanation presented by Reporting (etc.) Enterprises during the conference mentioned above in (i) if the two parties fail to enter into an agreement.

(3) Implementation by Reporting (etc.) Enterprises

Reporting (etc.) Enterprises shall provide the Report (etc.) under the Reduction System for Cooperation in Investigation by the deadline set in the agreement. The deadline may differ depending on acts to be performed by Reporting (etc.) Enterprises, which is specified in the agreement.

If a Reporting (etc.) Enterprise fails to implement the content of agreement by the deadline, the Article 7-6 (vii) of the AMA is applied and the Reporting (etc.) Enterprise shall not be subject to the New Leniency Program in accordance with this Article.

(4) Determination of Reduction Rates

In case a Reporting (etc.) Enterprise provides the Report (etc.) under the Reduction System for Cooperation in Investigation, the process of determining reduction rates may differ in accordance with which the agreement of the preceding (2) (ii) is made.

Regarding the Agreement on Specified Rate, if a Reporting (etc.) Enterprise provides the Report (etc.) under the Reduction System for Cooperation in Investigation, the amount of surcharge shall be reduced based on the Specified Rate determined in the agreement. The Specified Rate shall be presented by the JFTC at a conference as stated in the preceding (2) (i). The Specific Rate shall be determined at the conference based on the evaluation method described in the subsequent 4 and the reduction rates according to the degree of contribution to revealing the truth of the case by the content of application for the Leniency Program and the content of the Report (etc.) under the upcoming Reduction System for Cooperation in Investigation.

Regarding the Agreement on the Upper and Lower Limit, if a Reporting (etc.) Enterprise provides the Report (etc.) under the Reduction System for Cooperation in Investigation, the amount of surcharge shall be reduced based on the evaluation method described in the subsequent 4 and the reduction rates according to the degree of

contribution to revealing the truth of the case by the content of the Report (etc.) under the Reduction System for Cooperation in Investigation in accordance with the reduction rates determined by the JFTC within the range between the upper and lower limitation determined in the agreement.

4. Evaluation Methods and Reduction Rates

(1) Factors for Consideration in Evaluation

In order to evaluate the degree of contribution to revealing the truth of the case, the following factors will be taken into consideration in light of the progress status of revealing the truth of the case: Whether or not the content of the Report (etc.) provided by Reporting(etc.) Enterprises: (i) is detailed and concrete; (ii) includes all the relevant materials “contributing to revealing the truth of the case” as stipulated in the JFTC’s rules; and (iii) is corroborated by materials submitted by the Reporting (etc.) Enterprise. In evaluating each factors mentioned above, the JFTC will consider the progress status of revealing the truth of the case such as whether or not Report (etc.) are provided as far as the Reporting (etc.) Enterprise can ascertain according to the degree of involvement of the violation which shall be evaluated by facts (etc.) collected by the other enterprises (etc.), regarding to the specific “contributing to revealing the truth of the case” which is necessary to fact finding of relevant violation case.

(2) Contents that are regarded as facts contributing to revealing the truth of the case:

See the attachment for specific examples of contents that fall under the facts related to matters “contribute to revealing the truth of the case” stipulated in the JFTC’s rules
Facts ascertained by the JFTC through an investigator’s voluntary interview or interrogation are not evaluated as facts contributing to revealing the truth of the case even if they are statements of employees of Reporting (etc.) Enterprises. But, if the Reporting (etc.) Enterprises provides the content of said statement as part of the Report (etc.), it may be evaluated as a fact contributing to revealing the truth of the case.

(3) Reduction Rates

The JFTC shall determine reduction rates in the following table by taking into account above 3 factors in the preceding (1) on the degree of contribution to revealing the truth of the case:

Table 2. The reduction rates according to the degree of contribution to revealing the truth of the case

Before the Investigation Start Date	After the Investigation Start Date	Degree of Contribution to Revealing the Truth of the Case
40 %	20 %	High (Satisfying all factors)
20 %	10 %	Medium (Satisfying two factors)
10 %	5 %	Low (Satisfying one factor)

Note that, in case of making the Agreement on the Upper and Lower Limitation, it is expected that the content of Reporting (etc.) Enterprises' implementation usually remains unclear at the time of agreement. It is, however, possible that the content of every Report (etc.) under the Reduction System for Cooperation in Investigation by a Reporting (etc.) Enterprise may be evaluated as having highly contributing to revealing the truth of the case at the time of evaluation. For this reason, the upper limit of the reduction rates proposed by the JFTC will usually be at 40% for an enterprise that applied for the Leniency Program before the Investigation Start Date and 20% for an enterprise that applied after the Investigation Start Date.

End

Attachment

Matters contributing to revealing the truth of the case	Examples of the content of facts related to matters contributing to the revealing the truth of the case
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Matters Related to the Violation</p> <p>Goods or Services Subject to the Violation</p>	<ul style="list-style-type: none"> ○ Cartel <ul style="list-style-type: none"> • Names, kinds, purposes or characteristics of goods or services • Geographical range where supply is possible • Users, suppliers, and distribution channels • Market share • Price fluctuation factors • Regulations including standards, etc. ○ Competitor coordination on orders <ul style="list-style-type: none"> • Names, kinds, purposes or characteristics of goods or services • awarding public agencies (Name of orderer, person in charge of orderer, etc.) • Method of order • Users, suppliers, and distribution channels • Market share • Price fluctuation factors • Regulations including standards, etc.
<p>Description of the Violation</p>	<ul style="list-style-type: none"> ○ Cartel <ul style="list-style-type: none"> • The content of agreement (Price, quantity of production, sales areas, etc.) • The decision-making method of the content of agreement (meeting, phone call, e-mail, etc.) • The implementation method of agreement (Time of the start

Matters contributing to revealing the truth of the case	Examples of the content of facts related to matters contributing to the revealing the truth of the case
	<p>of supply of products at the agreed price, etc.).</p> <ul style="list-style-type: none"> • Discussions within the company (Methods of deciding prices, etc.) <ul style="list-style-type: none"> ○ Competitor coordination on orders <ul style="list-style-type: none"> • The content of agreement (The method of coordination on orders) • The decision-making method of the content of agreement (meeting, phone call, e-mails, etc.) • The implementation method of agreement (methods of deciding an awardee on an individual case, ways for those other than the awardee to cooperate with the rigging, and ways to communicate the order price among members, etc.) • Discussions within the company (Methods of deciding a target contract)
Participants in the Violation	<ul style="list-style-type: none"> ○ Violator <ul style="list-style-type: none"> • The name and location of enterprises • The composition of shareholders and group companies • The history of company • The department in charge of business related to the violation (The chain of command, division of duties) • An industrial association in which violators hold a membership • Qualifications to participate in a bidding, grade, etc. <ul style="list-style-type: none"> ○ Executives or Employees involved in the violation <ul style="list-style-type: none"> • The name of enterprise to which the executives or employees

Matters contributing to revealing the truth of the case	Examples of the content of facts related to matters contributing to the revealing the truth of the case
	<p>belong to, their positions, name, career record, etc.</p> <ul style="list-style-type: none"> • executives or employees' authority within the company, positions, etc. • The period during which executives or employees were involved in the violation • executives or employees' relationship with executives or employees of other companies who conspired to commit the violation.
Time of the Violation	<ul style="list-style-type: none"> ○ The time the violation started • The time of agreement • Circumstances and opportunity of agreement ○ The time of termination of the violation • The time of termination of the violation • Circumstances and opportunity for terminating the violation
Implementation of the Violation	<ul style="list-style-type: none"> ○ Cartel • Price negotiations, etc. with business partners (timing, methods, etc.) • Price trends of goods or services • Information exchange among violators on circumstances of price negotiations, etc. (timing, place, and methods, etc.) • Response to those who did not implement the content of agreement • Notification to business partners, information provision to trade papers, etc., relevant to price revision

Matters contributing to revealing the truth of the case	Examples of the content of facts related to matters contributing to the revealing the truth of the case
	<ul style="list-style-type: none"> ○ Competitor coordination on orders <ul style="list-style-type: none"> • The order status of goods or services (awardee, order prices, etc.) • Response to those who did not implement the content of agreement.
Other Matters Related to the Violation	<ul style="list-style-type: none"> ○ Outsiders <ul style="list-style-type: none"> • The name and location of enterprise • Whether enterprises were involved in the violation and the details • Measures for said enterprises, information sharing, etc. ○ An industrial association involved in the violation <ul style="list-style-type: none"> • The name and location of association • The outline of association (Purposes of foundation, member enterprises, etc.) • Circumstances of involvement in the violation • The period of the association's involvement in the violation ○ Officials of orderer involved in the violation <ul style="list-style-type: none"> • The name of orderer, names and positions of officials • Authorities, positions, etc., in said organization • Details of involvement in the violation • The period of the orderer's involvement in the violation • The relationship with enterprises involved in the violation
The basic amount for	<ul style="list-style-type: none"> • The amount of sales, etc. of goods or services subject to the

Matters contributing to revealing the truth of the case	Examples of the content of facts related to matters contributing to the revealing the truth of the case
calculating surcharges	<p>violation (excluding those not subject to restriction of the violation)</p> <ul style="list-style-type: none"> • The content of instruction or information on the supply of goods or services subject to the violation, which was given to wholly-owned subsidiaries, etc. • The amount of equivalent value of business closely related to goods or services • The amount equivalent to profits obtained by not supplying goods or services.
The Calculation Rate of Surcharges	<ul style="list-style-type: none"> ○ The calculation rate for small and medium-sized enterprises <ul style="list-style-type: none"> • The type of business of violators and their subsidiaries • The amount of capital or a total amount of investment of violators and their subsidiaries • The number of regularly used employees of violators and their subsidiaries ○ Aggravation <ul style="list-style-type: none"> • Past violations of violators and their subsidiaries • The concrete content of the violators' request for the participation in the violation to other enterprises • The concrete content of the business activities as the implementation of the violation specified by violators to other enterprises • The concrete content of the request by the violators to other enterprises to hide relevant materials, etc., at the time of investigation by the JFTC • The concrete content of the request by the violators to other enterprises to not apply for JFTC's Leniency Program (P).