

**SUBMISSION BY THE GOVERNMENT OF THE UNITED STATES TO
THE GOVERNMENT OF JAPAN REGARDING DEREGULATION,
COMPETITION POLICY, AND TRANSPARENCY AND
OTHER GOVERNMENT PRACTICES IN JAPAN**

October 6, 1999

The United States has a deep, sustained and substantive interest in the promotion of deregulation, competition and regulatory reform, stronger competition policy advocacy and enforcement, and greater transparency of regulatory processes in Japan. Bold measures by the Government of Japan in these areas are needed to address the structural and regulatory impediments to the effective functioning of market forces in the Japanese economy. Adoption and implementation of meaningful policies in these areas will increase the efficiency of the allocation of capital and human resources in Japan, which is critically important to the longer-term sustainability of economic growth in Japan. It would also redress some of the structural and regulatory barriers impeding market access for U.S. and other foreign firms.

The Governments of the United States and Japan recognized the importance of sustained bilateral focus on these issues when they established in June 1997 the Enhanced Initiative on Deregulation and Competition Policy. The Enhanced Initiative identifies key sectoral and structural areas for particular attention by the two Governments. The United States welcomes the progress achieved to date under the Enhanced Initiative, set out in the First and Second Joint Status Reports issued by the leaders of the two countries in June 1998 and May 1999, respectively, and anticipates Japan's full implementation of these measures. Notwithstanding, much more remains to be accomplished.

The Government of the United States is pleased to present to the Government of Japan this submission on deregulation, competition policy, and transparency and other government practices in Japan. In addition to containing numerous specific and concrete proposals in all of the sectors covered by the Enhanced Initiative, this submission also calls for broad bold structural initiatives. The United States believes that this submission should form the basis for a Third Joint Status Report which the two Governments will issue by the end of March 2000.

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TELECOMMUNICATIONS

As recognized by Japanese consumers and industry alike, the telecommunications market in Japan is burdened by a legacy of laws, regulations, and monopolistic business practices that fail to support the needs of a competitive market. As such, Japan has been denied the broad-based benefits of innovative services and technology and lower prices that competition brings. Japan's lag in the deployment of broadband and Internet-based services, and, more broadly, development of electronic commerce is a direct result of the absence of a pro-competitive telecommunications regulatory structure. Leading-edge foreign companies, which will be key to building this infrastructure in Japan, will continue to be restricted in their ability to invest in Japan and introduce innovative technology unless a fundamental change in Japan's regulatory approach to telecommunications is forthcoming.

The United States Calls on Japan to Undertake a “Telecommunications Big Bang”

It is increasingly being recognized by governments and regulators globally that fostering competition in the telecommunications sector can only be accomplished through the establishment of regulatory structures that seek, as a key policy objective, to address two critical issues: 1) the need to promote and foster the entry of new competitors; and 2) simultaneously establishing legal and regulatory protections against the anti-competitive abuse of monopoly positions traditionally enjoyed by established dominant carriers. While Japan has made some progress in the first area, e.g., removing unnecessary and outmoded regulations, it has yet to seriously address the government's lack of the legal and regulatory tools to ensure that NTT can be prevented from using its dominant position in wired and wireless communications to prevent anti-competitive practices.

Japan will not succeed in establishing a globally competitive telecommunications sector through continued incremental regulatory change. Rather, fundamental legislative and regulatory changes are necessary. The United States calls on Japan to establish a clear public policy commitment to the implementation of a “Telecommunications Big Bang.” As in financial services, a “Telecommunications Big Bang” would address both fundamental legislative and regulatory issues within a defined timeframe. Early adoption of a “Telecommunications Big Bang” would create jobs, stimulate investment, lower prices for both businesses and individual consumers, and lead to new services and technologies not only in the telecommunications sector but throughout the Japanese economy. A globally competitive and open telecommunications sector would also position Japan as a leader in the emerging global digital economy. Specifically, the United States believes that the following measures are necessary to address these key issues and thus achieve a Telecommunications Big Bang.

I. Dominant Carrier Regulation and Competition Safeguards

- A. During CY 1999, the Japanese Government should undertake preparations to implement in FY 2000 a legal framework that establishes the promotion of

competition for the benefit of consumers as the clear primary objective of telecommunications regulation, and the fundamental criterion guiding all regulatory action. This framework should include the establishment of dominant carrier regulation and stronger oversight to prevent anti-competitive behavior by the incumbent. Specifically, a new Telecommunications Business Law should:

1. Set out a clear, pro-competitive mission for the Ministry of Posts and Telecommunications (MPT) and its successor entity.
2. Provide for dominant carrier regulation, which involves:
 - a. freeing new entrants from regulatory burdens while safeguarding against dominant carrier abuses;
 - b. covering rates, terms and conditions for retail and wholesale service offerings; and
 - c. providing access to dominant carrier facilities.
3. Establish institutional measures to enhance regulatory independence.

B. As interim measures, MPT should by October 31, 1999:

1. Direct the NTT Companies to modify the structure of its NTT discount services to ensure that they are not anti-competitive by:
 - a. Require the NTT regional companies to apply discounted prices for local discount services (e.g., Telehodai, Time Plus, flat-rate Internet) to calls that terminate on its competitors' local networks; and
 - b.. Require NTT Communications Corporation to apply discounts to calls terminating on competitors networks, e.g., including "Shaberichhi" discount service.
2. Begin developing metrics, to be published by the end of CY 1999, to measure progress in advancing local competition thus enabling concrete goals to be set (e.g., number of local lines controlled by competitors); and

C. Introduce strengthened measures to ensure that restructured NTT entities do not engage in anti-competitive cross-subsidization, or the imposition of inefficiencies on competing carriers. Specifically, by the end of FY 1999:

1. Require NTT Holding Company, NTT East, NTT West, NTT Communications Corporation, NTT Facilities, and NTT Commware to publish separate financial reports that are at least equal in specificity to those published by the pre-restructured NTT; and
2. Require that any NTT reports to MPT on successor companies' interactions (including financial, R&D, personnel and other interactions), as called for by MPT in its April 1999 response to NTT's restructuring plan, be made public.

II. Interconnection

Effective April 1, 2000, MPT should fulfill its pledge in the Second Joint Status Report to reduce NTT's interconnection rates as much as possible, to a level equivalent to those that would be found in a fully competitive market using pricing, based on a Long Run Incremental Costing (LRIC) model that reflects all relevant economic principles. In the interim (FY 1999), MPT should fulfill its pledge to significantly reduce interconnection charges to prepare the market for LRIC pricing and to ensure that the relationship between retail and interconnection rates does not impair local competition. To achieve these commitments, MPT should:

- A. Improve the MPT LRIC model to accurately reflect widely accepted LRIC principles. These include cost recovery reflecting:
 1. accurate distinction between traffic-sensitive and non-traffic sensitive costs;
 2. accurate depreciation rates based on objective studies, including international experience; and
 3. advances in technology which provide more efficient delivery of telecommunications services.
- B. Disallow pricing based on NTT's Top-Down Model, given the inherent inefficiency of NTT's existing network.
- C. Commit to making LRIC-based pricing retroactive to April 1, 2000.
- D. Ensure that the NTT retail-interconnection charge relationship for different types of services (e.g., residential, ISDN, Internet) does not impair local competition, factoring in the full range of NTT interconnection rates and NTT discount, flat rate and other retail services.

- E. Within CY 1999, require the NTT regional companies to provide interconnection within six months of application, without assessing “premium charges,” unless there is a need for major network modification; and to require itemized charges for modification, subject to independent review.
- F. Beginning in FY 2000, apply interconnection conditions of a “designated carrier” to NTT DoCoMo for wireless services and to NTT Communications Corporation for long distance services.
- G. In the interim, during CY 1999, require NTT DoCoMo and NTT Communications Corporation to:
 - 1. Publish their interconnection tariffs, including rates, terms and conditions;
 - 2. Disclose their computation methodology for interconnection rates;
 - 3. Provide interconnection within six months of application; and
 - 4. Allow competing carriers to set rates for calls terminating on DoCoMo’s network.
- H. Establish regulations that require NTT regional companies to expand the list of functions considered basic in their tariffs to include all services currently available to NTT customers. For services where NTT can prove that a “value added” charge is valid, NTT should be obligated to provide such services to competing carriers at wholesale rates.

III. Rights of Way and Access to Incumbent Facilities

- A. During CY 1999, Japan should develop regulations, to be implemented in FY2000, which will require NTT, electric utility companies, and railroads to provide transparent, non-discriminatory, timely and cost based access to all poles, ducts, conduits, and rights of way that they own or control. Such regulations should:
 - i. Ensure that rates, terms and conditions for access are just, reasonable and non-discriminatory;
 - ii. Establish clear rules for costs and burden sharing associated with facility modifications;
 - iii. Set benchmarks for responsiveness; and
 - iv. Establish an expeditious complaint settlement procedure.

B. As interim measures, by the end of CY 1999, the Government of Japan should:

1. Extend the interconnection obligations that MPT has placed on certain parts of NTT's networks (e.g. up to the manhole closest to the switch) to other bottleneck facilities, including conduits and ducts linking fiber loops and customer premises;
2. Encourage NTT, electric utility companies, and railroad companies to improve their voluntary plans by:

For NTT:

- a. Publishing its policies, rates, terms and conditions for each of the NTT successor companies;
- b. Identifying one contact point to coordinate all aspects of conduit and duct survey and installation;
- c. Explicitly allowing other carriers to install and maintain their own cables in NTT facilities; and
- d. Shortening NTT's facility survey period to 30 days, publishing survey rates, and setting a standard installation period of three months for cables installed by NTT.

For electric utility companies:

- e. Publishing rates, terms and conditions for using their ducts and conduits; and
- f. Publishing the rates and formulas used to compute pole modification and maintenance costs, including a system for fair burden sharing among pole occupants.

For railroad companies:

- g. Submitting voluntary plans providing rates, terms and conditions for use of their facilities, including poles, ducts, conduits and land.

C. With respect to access to public rights of way, Japan should facilitate construction of telecommunications and CATV infrastructure using public roads, highways, and bridges by:

1. Accelerating the construction of publicly controlled ducts and conduits (such as the Ministry of Construction's (MOC) CC boxes) in urban areas;
2. Eliminating the MOC's winter/spring road digging moratorium;
3. Eliminating mandatory 5-7 year intervals between digging of certain roads;
4. Permitting trenching of cables, as opposed to mandatory installation of conduits and tunnels; and
5. Publishing in one location all plans for construction or renovation of highways, bridges, tunnels and other public works which provide opportunities for telecommunications facilities to be installed.

IV. Resale/Unbundling

In the Second Joint Status Report, Japan recognized carriers' needs for flexibility in choosing network structures based on the carriers' evaluation of their practical and economic requirements, and the technical viability of such arrangements. Consistent with this recognition, during FY 2000, MPT should eliminate all restrictions on carriers' ability to combine owned and leased facilities in building their networks, ensuring that all carriers have the choice to build, buy or lease facilities in any combination necessary to facilitate their business. Specifically, MPT should:

- A. Eliminate Type I/ Type II distinctions, allowing carriers to structure and build their networks in the most efficient manner, without needless corporate redundancy.
- B. By April 1, 2000, expand the minimum list of elements that must be unbundled by a designated carrier and ensure that new and existing elements are provided on rates, terms and conditions that are timely, reasonable, and non-discriminatory. Specifically, the designated carrier should be required to:
 1. Offer LRIC-based, geographically de-averaged rates for all unbundled elements, applying to both recurring and non-recurring costs.
 2. Price unbundled elements that are not traffic-sensitive on a flat-rate (e.g. monthly) basis; and
 3. Provide unbundled elements, as well as access to them, that are at least equal in quality and provisioning timeliness to that which the designated carrier provides itself or its affiliated companies.

- C. In addition, MPT should require unbundling of:
 - 1. Local loops, including high-capacity lines, sub-loops, x-DSL-capable loops, dark fiber, and inside wiring owned by a designated carrier;
 - 2. Inter-office transmission facilities, or transport, including dark fiber and shared transport; and
 - 3. Enhanced extended link (EEL), including a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport.

V. Co-location

To enhance the ability of competing carriers to offer competing services, the MPT should strengthen co-location obligations of the designated carrier to include rules for co-location in NTT facilities that ensure reasonable and non-discriminatory treatment for competitors on a tariffed basis (subject to comment by competitors). Such rules should include:

- A. A fair methodology for assessing co-location charges;
- B. Reasonable rates and timely provisioning times, based on benchmarks;
- C. 24 hour access to facilities by any bona fide competitor or qualified contractor;
- D. The right of competitors to inspect facilities to determine if space exists; and
- E. A burden on the designated carrier to prove that co-location at a requested location is not technically feasible.

VI. Inside Wiring

Pervasive impediments exist in Japan to accessing existing wiring within buildings which prevent new telecommunications entrants from reaching end-users. In order to remove these impediments, MPT should develop during CY 1999, for implementation during CY 2000, an internal wiring policy that will best advance competition in servicing privately-owned buildings. MPT should adopt policies that:

- A. Ensure that designated carriers are prohibited from obstructing access within buildings and require that they provide for use of their facilities (e.g. wiring, risers, etc.) on rates, terms and conditions that are fair, reasonable and non-discriminatory; and

- B. Set forth principles to govern when the ownership or control of facilities rests with the incumbent or competitive service providers, when ownership rests with customers or business owners, and under what circumstances ownership or control may change or the ability to exercise control may be limited.

MEDICAL DEVICES AND PHARMACEUTICALS

The Government of Japan has agreed to undertake a number of important measures to reduce regulatory impediments to the introduction of new and innovative pharmaceuticals and medical devices. Many of these measures are contained in the First and Second Joint Status Reports under the Enhanced Initiative on Deregulation and Competition Policy, and it is critical that Japan fully implement those measures on the timelines agreed. Looking forward, the Government of the United States is committed to continuing to work with the Government of Japan on these and other related issues. As such, the United States advances the following proposals based on the belief that market-led innovation through deregulation and structural reform are the best means to achieve Japan's goal of ensuring health care quality while striving to contain overall health care costs. As that debate unfolds in Japan, the United States may submit proposals, in addition to those below, specifically relating to legal and regulatory issues regarding the provision of health care services.

I. Recognizing Innovation

Under the Enhanced Initiative, the Ministry of Health and Welfare (MHW) agreed to recognize the value of innovation of pharmaceuticals and medical devices, so as not to impede the introduction of innovative products which bring more effective and more cost-effective treatments to patients. In implementing this policy, the United States calls on MHW to adopt the following:

- A. Promote the Introduction of Innovative Pharmaceuticals. MHW should introduce steps that recognize the role of the market to increase the availability of innovative pharmaceutical products.
- B. Promote the Introduction of Innovative Medical Devices. In reforming the by-function system for medical devices, MHW should accommodate incremental functional differences in medical device development which result in enhanced performance and abilities over the expected life of the product.

II. Approval Process

Speeding the approval process for medical devices and pharmaceuticals will increase the availability of innovative medical products to Japanese patients. Consistent with the measures agreed to by MHW in the Joint Status Reports, MHW should adopt the following:

- A. Speed the Approval of Innovative Medical Devices. Improve the consistency and speed of the approval process for medical devices by:

1. Instituting a four-week review for the JAAME to complete the equivalency study (*doitsusei chosai*);
 2. Indicating within two weeks of receipt of requested information and /or data if reviewer's questions have been answered fully;
 3. Accepting biocompatibility tests done in accordance with the International Standards Organization without the need to conduct additional tests;
 4. Relaxing the Medical Services Law and the Radiation Hazard Prevention Law to allow the start of clinical trials in January 2000 for certain radiation therapies including, intravascular radiotherapy of restenosis and radio isotope treatment of prostate cancer;
 5. Exempting medical devices (thermometers and blood pressure gauges) from the Measurement Law; and
 6. Expanding the scope of medical devices not subject to clinical trials.
- B. Speed the Approval of Innovative Pharmaceuticals. The approval processing period for new drug applications (NDAs) will be shortened to 12 months by April 2000, with steady and continuous improvement in the interim. To speed the approval process:
1. Outline the 12-month processing period for NDAs including clarifying timeout periods;
 2. Allow for the submission and review of an NDA for an additional indication while the NDA for the molecule's initial indication is still pending;
 3. Allow applicants to continue clinical work on a molecule, including compassionate use and work on additional indications, during the NDA review of a molecule's initial indication; and
 4. Add provisions for the pre-filing and review of the chemistry, pharmacy, and toxicology sections of the NDA.

III. Acceptance of Foreign Clinical Data

The broad use of use of foreign clinical data in the pharmaceutical approval process will help speed the availability of innovative pharmaceutical products to Japanese patients. The

United States welcomes Japan's agreement in the Joint Status Report to allow the use of such foreign data. Consistent with this agreement, MHW should adopt the following:

- A. Allow for Bridging Packages. For pharmaceutical products which have significant global experience and corresponding data, including post-marketing data, MHW should allow for the submission of a bridging package rather than a pre-designed bridging study in order to approve such products when data to confirm comparability is already available for extrapolation.

IV. Reimbursement Process

- A. Speed the Reimbursement Process for Medical Devices. Improve the consistency and speed of the reimbursement process for medical devices by:
 - 1. Establishing a maximum time period for granting reimbursement of three months from the date of reimbursement application for new products with incremental improvements, and six months for brand new technologies; and
 - 2. Developing a mechanism by which products which are no longer new to Japan, including for example, stents, specialized wound dressings, and inferior vena cava filters, can be shifted from Category C to Category B.
- B. Appeals Process. Establish and make public a process whereby an applicant for medical device or pharmaceutical reimbursement may appeal a reimbursement decision.

V. Transparency

- A. Access to Chuikyo. Improve access to Chuikyo by allowing U.S. medical device and pharmaceutical industry representatives meaningful opportunities to participate in Chuikyo's health care reform discussions of policy recommendations and other matters, including those being conducted by the Subcommittees formed on September 1, 1999 to study medical and pharmaceutical pricing rules. In addition, Japan should make the draft recommendations of these Subcommittees available for public comment before such recommendations are finalized.

VI. Nutritional Supplements

- A. Market Liberalization. MHW should expeditiously institutionalize and implement measures to promote liberalization of the Japanese nutritional supplements market, e.g., vitamins, herbs, and minerals, including the recommendations made by the Office of the Trade and Investment Ombudsman on March 18, 1996.

VII. Health Care Services

- A. Deregulation of Health Care Services. The Government of Japan should adopt policies to deregulate its health care services sector, including hospital management and the scope of providable services, with an aim to improving the efficiency of Japan's health care system.

FINANCIAL SERVICES

I. Financial Services

The United States Government welcomes Japan's successful implementation of the measures under the 1995 U.S.-Japan Measures Regarding Financial Services, negotiated under the U.S.-Japan Framework Agreement, as well as the Japan's actions taken to date under its Big Bang financial deregulation initiative. The Government of the United States will continue to closely monitor the implementation of the measures that have been taken, as well as regard with interest additional steps under the Big Bang initiative to further open and develop the Japanese financial market.

A. Specific Measures

In this context, the United States welcomes deregulation in the following areas at the earliest possible date:

1. Introduction of tax-advantaged defined contribution pension plans, in an open and competitive environment for investment offerings and plan administration.
2. Rapid implementation of the proposed direct onshore trust arrangement for management of Pension Welfare Service Public Corporation (*Nempuku*) funds by investment advisory companies, as well as the elimination of the cashing requirement on these funds when changing fund managers.
3. Modification of the regulations regarding foreign holder exemption from withholding tax on Japan Government Bond (JGB) interest to allow use of global custodians.
4. Modification of the Corporation Tax Law to grant the same rights of income tax deferral and business expensing of employee and employer contributions to pension funds, irrespective of whether the administrators of the plans are Japanese companies, or branches or subsidiaries of foreign companies.
5. Allowance of investment advisory companies to manage pension fund assets on a co-mingled basis, similar to the treatment accorded trust banks and life insurance companies.
6. Revision of the laws and regulations governing special purpose companies (SPCs) and servicer companies to encourage wider use of asset-backed securitization.

7. Permission for the introduction of Internet banking operations without requiring physical branches, provided that legitimate prudential concerns are met.

B. Transparency

The United States welcomes deregulation that improves transparency and government practices, including:

1. Establishment of an open and transparent process for the approval of new products and services.
2. Full use of the Government's notice and comment procedures for financial services, with sufficient time to incorporate industry comments, and with sufficient time between finalization of regulatory changes and implementation so that industry can make necessary organizational, operational, and systems changes.
3. Introduction of a regulatory review process to evaluate experience and consider revisions to newly implemented financial services regulations.
4. Introduction of measures to increase regulatory and supervisory clarity, including published rulings and no-action letters.
5. Clear separation of industry representation and industry self-regulatory functions. Industry associations should represent and advance the interests of their members. Association policies and procedures should be fully transparent, and all members should have a meaningful role in the association's governance.
6. Improve the disclosure of pension funds and investment trusts to allow standardized and accurate comparisons of investment performance.

II. Insurance

The United States welcomes the efforts of the Financial Supervisory Agency and other entities in Japan to deregulate and open Japan's insurance sector to U.S. and other foreign insurance providers. Deregulation of Japan's insurance sector will provide Japanese consumers access to the broad range of innovative, low cost products and services available in other developed country markets. Japan should move forward in implementing deregulation measures which ensure the financial soundness of the industry, and thus bolsters consumer confidence, while maximizing the role of the private sector, and conversely minimizing the government's role, in the provision of insurance.

- A. Improvements in Administrative Procedures and Practices . The United States urges Government of Japan to implement the following improvements in the administrative procedures and practices related to licenses, permits and approvals in the insurance sector.
1. The United States urges the adoption of a simultaneous file-and-use system to regulate a broad range of insurance rates and forms beginning in JFY 2000. To ensure that the file-and-use system is operated with sufficient transparency, the FSA should review the examination standards for the issuance of product approvals with the aim of clarifying, specifying and quantifying the examination standards, while minimizing discretionary factors, in accordance with the Three-Year Deregulation Program of March 31, 1998.
 - 2.. The FSA should conduct all communications with insurance companies in a manner fully consistent with the APL.
 3. As a further method of ensuring fairness and transparency in conducting product examinations, the FSA should employ a “First In, First Out” system so that no firm’s application is given delayed consideration due to concerns that it is too complex or innovative.
 4. To enable the FSA to cope more adequately with the large and expanding flow of insurance product applications, the United States welcomes the increase in the number of personnel in the FSA’s product approval office in JFY 1999, and suggests that staff be further expanded significantly in JFY 2000. FSA processes should be modernized and streamlined through computerization and the utilization of relevant technical resources such as the Internet.
- B. Actuarial Services: The Government of the United States encourages efforts by the American and Japanese actuarial profession to achieve a mutual recognition agreement consistent with provisions of the WTO General Agreement on Trade in Services.
- C. Postal Insurance (*Kampo*): Expanding the role of government postal insurance into product lines currently being offered by private insurers is inconsistent with Japan's goals of deregulation for free, fair and global financial markets. Such schemes fall outside the scope of the Insurance Business Law, and are not subject to oversight by the Financial Supervisory Agency or the Japan Fair Trade Commission. As such, the United States urges Japan to halt all consideration of expanding government and quasi-public insurance schemes included in the Postal Insurance

(kampo) that compete with products offered by private insurers, and review whether existing programs should be reduced or eliminated.

HOUSING

The United States welcomes Japan's efforts over the past two years to deregulate its housing policy regime and to move towards performance-based housing standards. These measures have contributed to the recovery of Japan's housing construction market, which in turn has promoted growth in the Japanese economy.

Yet much remains to be accomplished. Homes in Japan continue to cost far more than in other countries, and they lack functional features that are common elsewhere. Long-term growth of Japan's housing sector is also constrained by the lack of a significant resale and renovation markets, as well as the paucity of quality rental housing.

Excessive regulations and the continued reliance on prescriptive regulations in many areas are at the root of these problems. The United States believes that implementation of the following proposals would help Japan and the United States achieve the mutual goal of improving the quality, affordability, and variety of Japanese housing -- without compromising safety.

I. Land Use Policy

- A. By December 31, 2000, Japan should revise the Land and House Lease Law (*Shakuchi Shakka Ho*) to allow for fixed-term lease regimes, including elimination of automatic lease renewal (Article 26), "justifiable cause" requirements for lease renewal refusal (Article 28), and tenant rights to demand rent changes/resist rental increases (Article 32).
- B. By July 2000, Japan should rationalize floor area ratio requirements (FARs) in Category I and II Residential Zones in the Building Standard Law, including provisions regarding opening-to-floor area ratios (Article 29), specific FAR requirements (Article 52), specific ratios for building-to-site areas (Article 53) and minimum building site areas (Article 54).

II. Forest Products Issues

- A. By December 31, 2000, Japan should implement a performance-based building standard to allow construction of four-story, multi-family and mixed-use/multi-family wood-frame buildings with improved fire protection outside of fire protection and quasi-fire protection districts.
- B. By April 1, 2000, Japan should undertake a review of the provisions relating to restrictions on construction of special use buildings to ascertain the consistency of such provisions with Japan's adoption of performance-based codes by June 2000. The results of this review should be made publicly available by December 31, 2000.

- C. By March 31, 2000, Japan should publish alternative rules for fire separation between building sections, in accordance with international practice, with the stated intention of reducing the size of the current fire separation requirement and of permitting firewalls. Buildings sections separated by such walls would be treated as separate buildings for purposes of calculating the permissible building area.

III. Housing Components

- A. By the end of CY 2000, Japan should adopt the legal changes necessary to prohibit dissuasion or outright prohibition through local ordinances of food waste disposers connected to sewer lines.
- B. By July 2000, Japan should adopt, and implement in a non-discriminatory and transparent manner, international standards as the basis for reasonable and safe fire test requirements for interior finish applications, e.g., acoustical ceiling tiles.
- C. To promote further harmonization of plumbing standards, by the end of CY 2000, Japan should allow standard NSF 61 to serve as the equivalent to its Water Works Law standards on drinking water system components, or develop a joint certification system that applies in both Japan and the United States.

IV. Resale/Renovation

- A. Working with the real estate industry and public and private sector lending institutions, the Government of Japan should establish by July 2000 a property quality appraisal and assessment system in order to promote the resale of the existing housing stock.

V. Government Housing Loan Corporation Loan Programs

- A. By March 31, 2000, Japan should take all necessary measures to revise the loan programs of the Government Housing Loan Corporation (GHLC) to ensure that they do not discriminate against imported products.
- B. By March 31, 2000, the GHLC should increase the maximum repayment terms for resale housing to 35 years, the same as for new housing.

ENERGY

Japan has set goals of reducing electricity costs to internationally-competitive levels by 2001 and of increasing the share of natural gas in Japan's primary energy supply. The United States Government supports the promotion of a regulatory and competitive environment that would allow Japan to achieve these goals. Worldwide experience has demonstrated that the most efficient way to lower energy costs and stimulate economic growth is through the establishment of an open and competitive energy market. Moving from a monopoly to a competitive structure would enable Japan to attract investment in innovative energy equipment and services and leading-edge technologies that are necessary to increase efficiency and lower energy costs. The United States is following Japan's energy deregulation initiative carefully and assessing the new trade and investment opportunities that may be created by this initiative.

Based on its own experience and the experience of other countries, the United States believes three steps are key to a successful transition from a monopoly to a competitive market in the energy sector: (1) reducing regulatory and other barriers that discourage investment and market entry; (2) implementing appropriate incentives and disciplines for pro-competitive behavior; and (3) providing for full transparency in setting and implementing rules and procedures so that appropriate and fair rules are set and rational business decisions can be made. The proposals below focus on these steps.

I. Electricity Sector

- A. Establishment of Independent Regulatory Authority. Japan should establish an independent regulatory authority that is separate from, and not accountable to, any supplier of electricity services. The responsibility of this independent regulatory authority would be to oversee activities of participants in the electricity sector and to ensure fair, transparent, and non-discriminatory access in both generation and transmission in this sector. The decisions of and the procedures used by this regulatory body should be impartial with respect to all market participants. The process by which the independent regulatory authority reaches decisions should be open to all interested parties and its decisions should be published in publicly available documents. Among its responsibilities, the independent regulatory authority should:
1. Ensure that effective unbundling of generation, transmission, and distribution functions is undertaken by all market participants.
 2. Review and monitor the establishment of independently operated and managed generation, transmission, and distribution units within utilities.

3. Establish competition standards and procedures for all market participants owning or operating generation or transmission facilities, including rules and enforcement procedures on:
 - a. anti-competitive cross-subsidization or other anti-competitive pricing practices;
 - b. improper use of information obtained from competitors;
 - c. failure to make available on a timely basis technical information or other commercially relevant information that is necessary for the users of the regulated good or service to provide their own good or service; and
 - d. development and implementation of an effective dispute resolution and appeals mechanism.
 4. Establish, after consideration of the views of all industry participants and other interested parties including through the use of Public Comment Procedures, terms and conditions for access to transmission facilities and procedures for determining and implementing cost-based transmission tariffs, allocation and use of transmission capacity, transmission access requirements and standards, and a dispute resolution mechanism.
 5. Encourage the use of transmission operators that are independent of other market participants.
 6. Work toward establishing spot markets for electric energy.
- B. Transmission Services. In order to encourage new entrants into the Japanese electricity sector, the Government of Japan should introduce by March 21, 2000 non-discriminatory tariffs and terms of access to transmission facilities and require provision of access to the transmission network on a fair, transparent, and non-discriminatory basis.
1. With regard to access and connection to the transmission system, the Government of Japan or an independent regulatory authority should require the regulated entity to provide transmission unless it can demonstrate that it is unable to provide the necessary transmission capacity and lacks the capability to provide open access to third party transmission users, including necessary ancillary services, on a fair and nondiscriminatory basis.
 2. Access to the transmission network should be provided:

- a. under non-discriminatory terms and conditions (including technical standards and specifications) and of a quality no less favorable than that provided by the transmission owner for its own like services or for its subsidiaries or other affiliates;
 - b. to all similarly situated parties, regardless of the ownership of generating facilities, under the same terms and conditions;
 - c. in a timely fashion, with the transmission capacity available for sale as well as all requests for transmission service and the response to these requests available to all market participants via an electronic bulletin board or the internet;
 - d. on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided;
 - e. guaranteed except for exceptional reasons, such as congestion or other technical problems, that are clearly defined in writing by the utilities, including additional information or other arrangements that are needed to enable the utility to provide the requested service, and subject to the approval of and verification by the Government of Japan or an independent regulatory authority;
 - f. upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities; and
 - g. with transmission access rights subject to reassignment by the customer.
3. Ensure that procedures applicable for obtaining access to and using the transmission system and the established tariff or standardized contract for using the network are clearly specified, publicly available, and easily accessible.
 4. Require electric utilities to make publicly available either standardized transmission contracts or a reference transmission offer, following review of such contracts or offers by the Government of Japan or an independent regulatory authority.

5. Ensure that any electricity supplier requesting access to the transmission network has recourse at any time to the Government of Japan or an independent regulatory authority to resolve disputes regarding appropriate terms, conditions, and rates for transmission in a timely fashion.
6. Ensure that procedures regarding the allocation and use of transmission capacity is carried out in an objective, timely, transparent, and non-discriminatory manner and is subject to appeal as described in (5) above.
7. Consider establishment of a congestion pricing system, which may include payments to relieve congestion.

C. Setting of Fair Transmission Charges. The Government of Japan or an independent regulatory authority should implement measures that set out how transmission tariffs are to be calculated and that ensure a pro-competitive and transparent tariff rate structure that is applied fairly to all transmission users.

1. Develop rates for transmission and ancillary services that:
 - a. use an internationally recognized system of cost accounting; and
 - b. allow for the opportunity to earn a fair return on investment but not guaranteed profits.
2. Establish transparent procedures for reviewing utilities' plans for allocating costs, including revenues, and require accounts to be maintained in a manner that permits the independent regulatory authority or the Government of Japan to review cost allocation between and within functions.
3. Establish transparent procedures for review by the Government of Japan or an independent regulatory authority of investment decisions by utilities regarding the transmission charges.

D. Competitive Safeguards. Development and implementation of measures to prevent a utility or other major supplier that has the ability to materially affect the terms of participation (with regard to price or supply) in the relevant market for electricity equipment or services as a result of its control over essential facilities, or use of its position in the market, from engaging in anticompetitive practices.

1. By April 1, 2000, repeal Antimonopoly Law Article 21 exemption for natural monopolies, including for electricity and gas.

2. Develop guidelines regarding application of the Antimonopoly Law to the electricity and gas sectors and subject Draft Guidelines to Public Comment Procedures.
 3. After deregulation of concentrated markets in these sectors, apply Antimonopoly Law rigorously to:
 - a. prevent dominant firms from engaging in business practices that restrict competition, including exclusionary reciprocal dealing arrangements; group boycotts; and the anticompetitive use of exclusionary, nontransparent or discriminatory standards or technical requirements; and
 - b. prevent activities aimed at maintaining or increasing dominant market position. (See also Competition Policy and Antimonopoly Law, JFTC Guidelines and Antimonopoly Law exemptions).
- E. Timetable for Review of Future Liberalization. The Government of Japan should review the progress of liberalization in this sector by no later than March 20, 2001 and publicly announce its findings. This review process should evaluate the scope of liberalization of the electric utility sector with a view toward including retail users among the set of eligible customers who receive electricity via high voltage lines by April 1, 2003 and eventually to allow full retail competition.

II Natural Gas Sector. The increased use of natural gas as a fuel in Japan will play an important role in lowering the cost of clean energy. To accomplish this, Japan should create a legal and regulatory framework that will foster competition and facilitate the development of a national gas grid. Such a framework also would promote the development of a dynamic natural gas market, thereby encouraging the construction of pipelines between Japan and Asian natural gas fields. The APEC Natural Gas Initiative, endorsed by APEC members in 1998, also contains useful recommendations for policies in this sector.

- A. Developing a Competitive Market. Japan should establish a regulatory regime that would permit non-discriminatory access by new entrants to the existing utility-owned natural gas infrastructure. For example, that regime should allow new entrants permission to import natural gas and access to utility-owned LNG receiving terminals and transportation networks for a reasonable fee.
- B. Long Distance Pipelines. Japan should ensure a regulatory regime that will promote the construction of new long distance pipelines and foster competition by facilitating access by new entrants. For example, Japan should develop a pro-competitive framework governing construction and operation of long-distance

pipelines that would include rights of way, eminent domain, and a transparent, non-discriminatory project approval process. Japan also should establish a regime on non-discriminatory access charges for the pipeline system, including transparent publication of rates, a fair and timely process of granting access, and a mechanism for resolving disputes.

DISTRIBUTION

The distribution system is a crucial link between producers and consumers in modern market economies. Overly burdensome regulations and other distribution inefficiencies can cause significant resource misallocation and higher economic costs. Increased efficiency and competition in the distribution sector would lead to lower price levels, increase consumer choice, and enhance overall consumer welfare.

Distributing foreign goods from the point of entry to the end user is a costly and time-consuming process in Japan relative to other major countries. The high cost of distribution is a principal reason why Japanese commodity prices are much higher than in other countries. Furthermore, long lead times between the arrival of imported goods in port and actual delivery can be the critical factor in a business decision to order domestic or foreign goods. This is especially true in the case of a company using the just-in-time inventory method.

I. Customs/Import Processing

A recently issued report by the Japan External Trade Organization (JETRO) points out that the lead time between the arrival of imported goods in Japan and their removal from customs custody is three times longer than any other country surveyed (U.S., UK, Germany, France, Netherlands) for sea freight, and longer than all but one of the surveyed countries for air freight. Despite the efforts of Japan to modernize and expedite its customs procedures in recent years, the report cites numerous specific areas in which Government of Japan procedures continue to compare unfavorably with other major countries. Further efforts are needed, inter alia, to improve the practical value of pre-clearance procedures, eliminate inefficient cargo handling inherent in the bonded area principle; hasten the introduction of information technology, improve inter-agency coordination; and expand regular hours for customs operations to make them responsive to the age of 24-hour distribution.

It is the view of the United States Government that the Government of Japan should continue to modernize and expedite its customs clearance procedures with the goal of achieving lead times comparable to other major countries, and to that end should:

- A. Recognize that many of the problems identified do not fall solely within the jurisdiction of the customs administration and that a coordinated Government of Japan response is needed;
- B. Permit the release of low risk (physical examination not required) shipments at the point of arrival without transfer to a bonded area (*hozei*);
- C. Improve pre-clearance procedures so that prior to arrival the customs administration and all other relevant Japanese Government agencies accept and

process declarations, determine whether physical examination will be required, and notify the importer/broker/carrier by NAACS whether the goods are released or that a physical exam will be required;

- D. Establish a "one-stop office" to coordinate simultaneous processing of all legal permits required for importation, such as food and plant quarantine procedures, and applications required by the High Pressure Gas Control Law, Poison Control Law, and Pharmaceutical Law;
- E. Upgrade NAACS to permit access and use by all government agencies and private parties involved in the clearance process;
- F. Enable bank transfers to be made into NAACS 24 hours a day for payment of customs duty;
- G. Until NAACS is available 24 hours a day, change the daily maintenance period from 0430-0600 to 0200-0330 to avoid down time when importers need to use the system most;
- H. Extend the customs administration's regular hours for cargo clearance to conform to passenger hours (from 0830-1700 Monday through Friday to 0600-2200 365 days a year);
- I. Increase the import *de minimus* value in Customs Tariff Law, Article 14, Section 18, from 10,000 to 30,000 yen to improve efficiency and reduce manpower requirements;
- J. Calculate dutiable value on an FOB rather than CIF basis in the interest of fairness (because CIF includes the cost of transportation, it imposes higher duties on goods coming from farther away);
- K. With respect to shipments of duty-free documents, eliminate the requirement that carriers submit the manifest for each individual shipper when the carrier has consolidated several different shipments under a master airway bill;
- L. Sharply reduce the number of requests for presentation of paper documents for inspection for inbound shipments from Asia when information about those shipments has been entered into NAACS.

II. Retailing and Services

Large retail stores enjoy economies of scale and offer consumers more variety at lower prices. Restrictions on large stores have been shown to contribute to low productivity in

the distribution sector because efficiency is closely linked to average store size. Furthermore, complex establishment procedures give increased market power to existing retailers, which control the relatively scarce assets of location and space, resulting in higher prices and limited choice.

The Government of Japan will begin a new era of large retail store regulation when the Large-Scale Retail Store Location Law (*Daiten-Ricchi Ho*) takes effect on June 1, 2000. At this point in time it is impossible to tell whether the new law will produce the desired effect of decreasing the burden of regulation on large retail store openers, or whether application of the new Law will pose an even greater obstacle to the establishment of large-scale retail stores than existed under the previous regulatory regime. The United States is concerned that the Guideline and Ministerial Ordinance impose excessive and burdensome requirements and may lead to the establishment of a defacto prior evaluation system rather than a *post facto* verification system. It is the view of the United States that, in order to ensure the fair, reasonable and uniform application of the Daiten-Riccho Ho by local governments that is consistent with the Daiten-Riccho Ho, the Japanese Government should:

- A. Use the Public Comment Procedure , which was adopted on March 23, 1999 prior to adopting or issuing any commentary or measures that expand, explain, interpret or elaborate upon the Guideline, Ministerial Ordinance, or Daiten-Ricchi Ho and ensure that any such measure is made public.
- B. In accord with the Second Joint Status Report, publish the name and address of the contact point within the Ministry of International Trade and Industry that will receive and facilitate resolution of complaints from any interested party regarding the application of the Daiten-Ricchi Ho, and take all necessary steps to ensure that the office is fully staffed on June 1, 2000 to perform this function.
- C. Undertake a broad education campaign to inform local government officials, prior to June 1, 2000, of the content of the Guideline, Explanatory Document and Ministerial Ordinance; their legal responsibilities and the limitations on their authority under the Daiten-Ricchi Ho; and the role of the contact point described in paragraph A
- D. Ensure that MITI and the relevant local governments take all necessary and appropriate measures to remove obstacles faced by any store opener in opening a large-scale retail store as a result the so-called "construction freeze" during the transition phase from the repeal of the Daiten-Ho to the implementation of the Daiten-Ricchi Ho.

LEGAL SERVICES

It is essential that Japan's legal service infrastructure be capable of meeting the needs of Japanese and foreign persons and enterprises that are responding to the opportunities created by market liberalization and deregulation. Japan's restructuring process, *e.g.*, in the financial services sector, will be seriously impeded if Japan continues to thwart the development of a globally competitive legal services sector in Japan and to prevent foreign and Japanese lawyers from offering comprehensive services to clients. Both Japanese and foreign persons and enterprises must be able to obtain fully integrated transnational legal services for domestic and cross-border transactions. Accordingly, the United States recommends that Japan take the following measures:

- A. Remove Partnership Prohibition. The Japanese Government should remove the prohibition against partnerships between Japanese lawyers (*bengoshi*) and foreign legal consultants (*gaikokuho-jimu-bengoshi* or *gaiben*). The rule should be freedom of association between and among legal professionals on an equal basis, as contemplated by Article 27 of the Bengoshi Law.

- B. Increase Transparency and Participation in Foreign Lawyer Regulation. The Japanese Government should ensure that *gaiben* are provided meaningful opportunities to participate in the development by the Japanese Federation of Bar Associations (Nichibenren) and mandatory local bar associations (local bars) of all new or amended rules or regulations that affect them. In particular, the Japanese Government should:
 - 1. Require Nichibenren and the local bars to provide for greater representation and effective participation by *gaiben* on all Nichibenren and local bar committees, subcommittees and other bodies that consider registration, discipline and all other regulations and issues relevant to *gaiben*;
 - 2. Require Nichibenren and the local bars to use public comment procedures before adopting or issuing rules or regulations;
 - 3. Reduce the time required for registration by *gaiben*, including any appeals, and expedite and rationalize the reporting process for *gaiben*; and
 - 4. Ensure that the Nichibenren and the local bars do not impose any restrictions on the use of specified joint enterprises (*tokutei kyodo jigyo*).

- C. Allow Full Credit for Experience in Japan. The Japanese Government should allow a foreign lawyer to count all of the time in Japan spent practicing the law of the lawyer's home jurisdiction toward meeting the experience required to register as a *gaiben*, not just the one year allowed under current practice.

- D. Remove Discriminatory Restrictions on *Gaiben* Advising on “Third Country” Law. A *gaiben* should be recognized to be as capable as a *bengoshi* of offering advice on so-called “third country” law (that is, the law of a country other than the one which is a *gaiben*'s home jurisdiction). To that end, the Japanese Government should remove the current discriminatory requirement, not applicable to *bengoshi*, that a *gaiben* may give advice on third country law only on the basis of specific written advice from a *bengoshi* or a lawyer admitted to practice in the third country involved.
- E. Examine Establishment of Professional Corporations. The Japanese Government should examine expeditiously the establishment of professional corporations for *bengoshi* and other legal professionals in Japan to determine whether their establishment would facilitate the provision of more comprehensive, transnational and easily accessible legal services in Japan. However, the Japanese Government should ensure that any such establishment of professional corporations does not discriminate against or disadvantage existing forms of international legal and other professional partnerships and organizations. If the Japanese Government allows the establishment of professional corporations, it should recognize professional corporations and limited liability partnerships covered under the laws of a foreign country, and should allow such firms that use LLP, LLC or similar designations in their names in their home jurisdictions to use those designations in Japan, so long as their Japanese office complies with the office-naming requirements of the Foreign Lawyers Law.
- F. Increase the Number of Qualified Legal Professionals. There exists a significant need to increase access for Japanese and international participants in the Japanese market to Japanese legal advice and judicial processes. The United States strongly supports efforts in Japan to consider new avenues of qualification for *bengoshi*, judges and public prosecutors. In the short term, the Japanese Government should increase the number of trainees admitted to the Supreme Court's Legal Research and Training Institute to not less than 2000 trainees per year as soon as possible, but no later than the class entering on or after April 1, 2001.
- G. Allow Consultations on Behalf of Third Parties. The Japanese Government should confirm and clarify that it is within the scope of permissible activities of *gaiben* to confer with Japanese government agencies and other authorities on behalf of clients.
- H. Remove Restrictions on Association with Quasi-Legal Professionals. The Japanese Government should allow complete freedom of association among all types of legal professionals and quasi-legal professionals (which include *benrishi*, *zeirishi*, *shiho shoshi* and *gyosei shoshi*). To that end, the Japanese Government should remove the partnership, employment and cost-sharing restrictions on

relationships between quasi-legal professionals and *bengoshi* and *gaiben*, and on relationships among the various quasi-legal professionals.

OTHER SECTORAL ISSUES

Japan, through its Road Traffic Law, maintains unnecessary restrictions on the operation of motorcycles on motorways, which do not contribute to highway safety, are not in accordance with international norms, and unnecessarily limit the use of large motorcycles. The Government of Japan should move quickly to remove these restrictions, specifically by harmonizing the speed limits for mini cars and motorcycles to the standard automobile speed limit of 100km/hour; and by eliminating the prohibition on tandem riding of motorcycles on motorways. The United States is encouraged by progress made by Japan's National Police Agency to study the possibility of raising the speed limit for motorcycles, and would like to see the speed limit law revised as soon as possible. The United States understands that a recommendation on the tandem riding issue is expected this December. The United States urges Japan to resolve this issue at the same time as the speed limit issue. Appropriate actions would include:

- A. By March 31, 2000, Japan should raise the highway motorcycle/mini car speed limit so that it is the same as the speed limit for automobiles.
- B. By March 31, 2000, Japan should eliminate the ban on tandem riding (carrying a passenger) of motorcycles on national expressways and motorways.

COMPETITION POLICY & ANTIMONOPOLY LAW

I. Japan Fair Trade Commission's Independence

Japan should take additional measures to ensure the continued independence of the Japan Fair Trade Commission (JFTC) when it is placed under the Ministry of General Affairs (MGA) in 2001, as part of the central government reorganization. In particular, because the Ministry of Posts and Telecommunications will also be placed under MGA., a Cabinet Order should be issued that will ensure that the JFTC's application of the Antimonopoly Law (AML) in the telecommunications area will not be influenced in any way by MPT or MGA, and that the integrity of the JFTC's personnel system and budget will also be maintained.

II. Anticartel Enforcement

Consistent with the OECD Recommendation (March 25, 1998) concerning *Effective Action Against Hard Core Cartels*, which recognized that "hard core cartels are the most egregious violations of competition law," the JFTC, Ministry of Justice (MOJ) and other relevant Japanese Government ministries should take measures to strengthen enforcement against cartels and bid-rigging. By April 2000 the JFTC in coordination with the MOJ should establish an "Anticartel Enforcement Reform Council" to review the JFTC's investigatory powers and recommend reform legislation, with a view to introducing reform legislation by April 2001. The council should examine:

A. Criminal Investigation and Accusation Powers

1. Reforming antimonopoly criminal accusation procedures and requirements to promote the filing of more criminal accusations;
2. Strengthening the JFTC's investigative powers for purposes of filing criminal accusations; and
3. Amending Chapter 10 of the AML (or other appropriate law) to make clear that the prescription period for violations of section 89 of the AML involving unreasonable restraints of trade only starts to run from the last act in furtherance of the agreement or conspiracy.

B. Sanctions for Obstruction of Investigations

1. Providing stronger sanctions against obstruction of investigations undertaken pursuant to §§40 or 46 of the AML (including the making or submission of intentional false statements to the JFTC or to JFTC

investigators), including providing for substantial imprisonment and fines for violations of AML §94 and §94-2; and

2. Adopting a policy of actively prosecuting individuals that obstruct investigations in a manner covered by §§ 92-2, 94 or 94-2 of the AML.

C. Reform of Administrative Surcharge System

1. Strengthening the surcharge system by:
 - a. Amending AML §7-2 to permit the JFTC to reduce or eliminate surcharges against a firm which notifies the JFTC of illegal cartel activity and fully cooperates with the JFTC; and
 - b. Eliminating the differential treatment for small and medium sized enterprises.

III. Measures Against *Dango*

To further combat *dango* (bid rigging) in central and local government procurement, Japan should adopt by April 2000 an Anti-*Dango* Program, which should include measures such as the following:

- A. Announcing a new initiative by the National Police Agency (NPA) and the prefectural police departments, including in particular the Tokyo Metropolitan Police Agency, to investigate criminal bid rigging under §96-3 of the Criminal Code;
- B. Establishing a liaison mechanism between the JFTC and the NPA and prefectural police departments for the purpose of increasing cooperation on the investigation of criminal bid rigging activities. Such cooperation might include such activities as training programs or information exchanges on effective investigation techniques in this area and the use of laboratory facilities to aid in investigation of such crimes;
- C. Adopting a policy that all Japanese Government procuring entities will seek damage compensation under the tort or unjust enrichment provisions of the Civil Code against companies found to have engaged in bid rigging on government contracts;
- D. Implementing a Government of Japan-wide policy and enforcement system for ensuring that government officials that knowingly provide assistance to bid rigging activities, especially through use of the designated bidder system or the improper disclosure of the ceiling price (*yotei kakaku*), are severely disciplined; and

- E. Developing a system of effective deterrents, including criminal penalties and/or administrative sanctions (including surcharges), to discourage companies from participating in or otherwise aiding *dango* activities by submitting complementary bids.

IV. Private Remedies

The United States strongly believes that the practical availability of injunctive relief and effective damage remedies through private litigation is an integral part of a comprehensive antimonopoly legal regime -- persons directly injured by anticompetitive behavior should have the ability to seek redress for violations of the AML directly from the courts. To this end, Japan should introduce legislation by April 2000 to:

- A. permit private parties to sue for injunctions against practices that are clearly anticompetitive and that violate the AML, particularly §§ 3 or 8(1)(i);
- B. ease legal impediments faced by plaintiffs in (i) meeting their burden of proof on the amount of damages and (ii) proving the causal connection between the AML violation and the damages suffered, in private damage actions based on alleged AML violations; and
- C. provide standing to prefectural and other local governments, and/or government-funded consumer organizations, to bring private lawsuits under the AMA or Civil Code to recover damages suffered by consumers within their jurisdiction because of antimonopoly violations. An appropriate mechanism for distributing any awards from such lawsuits should also be specified.

V. Promotion of Deregulation

A. Elimination of Anticompetitive Private Sector Regulation

- 1. Consistent with the Cabinet Decision (March 31, 1998) and the JFTC Survey of the Standards and Certifications of Public Interest Corporations (July 1998), the JFTC should report by April 2000 on measures it has taken to ensure the elimination of anticompetitive private sector regulations (*min-min kisei*) used by industry and nonprofit associations. (*See also Transparency and Other Government Practices, Private Sector Regulations*)

B. Public Utilities Deregulation

1. The United States supports the JFTC's preparation of guidelines on the application of the AML to the electricity and gas sectors in light of deregulation. In this regard, the JFTC should:
 - a. use the Public Comment Procedure, which became effective on April 1, 1999, to provide the public and foreign governments with the opportunity to comment on these guidelines before they are finalized;
 - b. seek to address the following general issues, among others, in these guidelines:
 - i. Proper product and geographic market delineation approaches, especially in light of time-sensitive shifting of transmission capacity;
 - ii. Explaining the scope of application of the AML to transactions and firms subject to continued full or partial regulation;
 - iii. Distinguishing procompetitive from anticompetitive coordination in transmission interconnection; and
 - iv. Prevention of anticompetitive practices by dominant firms to maintain or increase market power, including the removal of incentives (through structural or other measures) for companies to use their market power to impede market access to other integrated and non-integrated competitors;
2. The JFTC should continue to play an active role in promoting maximum deregulation in the electricity and natural gas sectors consistent with sound competition policy.
3. The JFTC should ensure that its study group currently examining deregulation and competition policy in the public utilities sector:
 - a. publicly discloses its work schedule, including when it expects to issue preliminary and final reports and/or recommendations;
 - b. holds a hearing in which interested parties can express their views; and

- c. provides an opportunity for public comment on any interim reports or preliminary recommendations of the study group, in accordance with the Public Comment Procedure or comparable procedures.

VI. Antimonopoly Law Exemptions

- A. Japan should repeal AML §21 exemption for natural monopolies, including for railway, gas and electricity, by April 2000.
- B. Regarding the application of Article V of the Industry Revitalization Law (Law No. 131, 1999), Japan should:
 - 1. affirm that the law in no way supersedes the AML or prejudices the JFTC's independence in enforcing the AML;
 - 2. ensure that the JFTC is notified of, and has the chance to review, all applications, especially joint applications, submitted under the law; and
 - 3. make all JFTC advice regarding such applications publicly available.
- C. Japan should review the necessity of § 10-5 of the Premiums and Misrepresentations Law, which provides an effective exemption for Fair Trade Councils from the AML, with a view towards abolishing that provision.

VII. Merger and Stock and Asset Acquisition Review

Japan should support active application of the AML to proposed mergers and acquisitions, whatever their form, that may substantially restrain competition. In this regard:

- A. Japan should amend the AML to require pre-notification of stock and other acquisitions that currently fall under AML Section 10.
- B. Japan should promote improvement in the ability of the JFTC to investigate fully and analyze rigorously complicated mergers and acquisitions by supporting increases in the JFTC's resources devoted to those purposes.
- C. The JFTC should take measures to increase the transparency of its review of mergers and acquisitions by, for example:
 - 1. disclosing a fuller analysis of the JFTC's reasoning for seeking changes in a proposed transaction during the prior consultation period, or for not seeking changes in transactions that appear to raise competitive concerns;

2. explaining in fuller detail how proposed changes to particular transactions will eliminate competitive problems; and
3. seeking the comments of interested third parties, and where possible the public at large, before finally approving a proposed transaction based on a restructuring of the transaction, and publishing those comments where not confidential.

VIII. Promotion of Competition in the Distribution Sector

With a view toward the promotion of a competitive and efficient distribution sector, the JFTC should:

- A. Initiate a survey on the extent and form of financial inter-relationships linking manufacturers and distributors in "highly oligopolistic industries." The survey, on an industry-by-industry basis, should cover equity ties, provision of loans or other capital sources, and the sharing of employees, facilities and equipment.
- B. Monitor closely the activities of local and prefectural governments that are considering requests to establish a large-scale retail store, and make submissions to such local and prefectural governments on the procompetitive benefits of large-scale retail stores.
- C. Initiate a mechanism whereby the Antimonopoly Law compliance plans of private companies, particularly in sectors that are highly concentrated, could be reviewed with a view to ensuring that such plans promote the highest standards of AML compliance.

IX. JFTC Budget and Resources

- A. Japan should increase the JFTC's staff levels by an extraordinary amount (at least 50 persons) for FY2000, including by taking advantage of the opportunity created by the government reorganization to allow the JFTC to accept permanent transfers from other agencies.

TRANSPARENCY AND OTHER GOVERNMENT PRACTICES

In recent years, the Japanese Government has begun to lay the foundation for a more transparent and accountable regulatory system, including through the implementation of an Administrative Procedure Law, the adoption of a Public Comment Procedure and the enactment of an information disclosure law. The United States welcomes these measures. However, it believes that additional measures are necessary to achieve the level of transparency and accountability recognized as essential in the 1999 OECD Review of Regulatory Reform in Japan (OECD Review). The OECD found that: “*Lack of transparency in regulatory and administrative processes is a major weakness of Japan’s domestic regulatory system. Non-transparency affects all potential market entrants and competitors, who must have adequate information on regulations so that they can base their decisions on accurate assessments of potential costs, risks, and market opportunities, but has disproportionate costs for foreign parties.*” The OECD concluded that: “*Investment, market entry, and innovation should be promoted by increasing the transparency and accountability of regulation.*”

The United States urges the Japanese Government to introduce a broad regulatory reform program designed to bring greater transparency and accountability to its regulatory system. The underlying premise of the reform program should be that ministries and agencies must justify to the public the rationale for the adoption of new regulations, as well as changes to and the continuation of existing regulations. Regulations should be the exception and not the rule, meaning that regulations that are not directly linked to public policy interests should be abolished or not adopted. The public should be given an effective means of participating in the development and assessment of regulations. The program should embrace both public regulations and private regulations (so-called *min-min kisei*).

I. Public Comment Procedure

With regard to the Public Comment Procedure, which the Japanese Government adopted on March 23, 1999 as an administrative measure, the OECD Review noted the potential benefits of the Procedure “*if implemented consistently and systematically across ministries.*” The United States acknowledges that the publication of proposed regulations by a number of ministries, agencies and advisory councils has made the rulemaking process in Japan more transparent. However, the United States is concerned that to date ministries, agencies and advisory councils appear in most cases to have given inadequate consideration to the public comments that they received. It is important that ministries and agencies actively demonstrate that they take the public comment process seriously by modifying final regulations to reflect public comments where warranted. Unfortunately, there is no independent review mechanism that the public can use to challenge implementation of the Public Comment Procedure. To address such deficiencies, the Japanese Government should begin preparations to incorporate the Public Comment Procedure into legislation.

- A. Follow-up of the Implementation of the Public Comment Procedure. In undertaking the follow-up of the implementation of the Public Comment Procedure, as provided for in the Second Joint Status Report, the Management and Coordination Agency (MCA) should, at the end of JFY 1999, invite public comments on the implementation of the Procedure. In its follow-up, the MCA should include the following in its findings:
1. With respect to each case in which the Public Comment Procedure was used: (1) a brief description of the relevant regulation or other measure; (2) the length of the public comment period; (3) the length of time between the submission of public comments and the finalization and adoption of the regulation or other measure; (4) whether the public comments were made available for public inspection; and (5) the extent to which the regulation or other measure was modified in response to public comments; and
 2. An assessment of whether the decisions by the ministries and agencies not to use the Procedure were appropriate.
- B. Enhancement of the Use of the Public Comment Procedure. To make use of the Public Comment Procedure more effective, the United States urges ministries, agencies and advisory councils to provide a 60-day comment period to the extent possible.
- C. Application of the Public Comment Procedure to Specific Measures. Given the extensive discretion allowed central government entities in applying the Public Comment Procedure, the Japanese Government should ensure, in particular, that the Procedure is fully used in the following cases:
1. Ministry of International Trade and Industry's (MITI) development of the "commentary" or other measures relating to the implementation of the Large-Scale Retail Store Location Law (*Daiten Ricchi Ho*);
 2. MITI/Ministry of Transport's development of regulations regarding the automotive sector;
 3. Ministry of Finance's and Financial Supervisory Agency's development of all regulations affecting financial services, including insurance, (allowing sufficient time for public comments and sufficient time between notice of final regulatory changes and their implementation to enable industry to make the necessary organizational, operational and systems changes);
 4. The Japanese Government's development of an Action Plan on the digitization of government procurement procedures in December 1999; and

5. MITI's development of regulations regarding deregulation of the electric utility and natural gas sectors.

D. Use of the Public Comment Procedure by Advisory Councils

1. Given the important role that advisory councils play in the regulatory process in Japan, the Japanese Government should require, by the end of JFY 1999, all advisory councils, including *shingikai*, *kenkyukai*, *kondankai* and *benkyokai* and their subcommittees and other subsidiary bodies (collectively referred to as “advisory councils”), to use the Public Comment Procedure or comparable procedures when they issue interim reports and preliminary recommendations (collectively referred to as “interim reports”). The United States notes that a number of advisory councils have provided an opportunity for the public to comment on their interim reports and encourages the broader use of this practice.
2. Pending implementation of advisory council-wide public comment procedures, referred to in paragraph 1, the Japanese Government should encourage advisory councils to use the Public Comment Procedure when they develop interim reports on regulations, legislation and other significant policies, including:
 - a. Ministry of Health and Welfare’s Central Social Insurance Medical Council (*Chuikyo*) in its discussions of medical device and pharmaceutical reimbursement rate-setting rules;
 - b. Ministry of Construction’s Central Council on Construction Contracting Business (*Chukenshin*);
 - c. MITI’s Electric Utility Industry Council; and
 - d. Ministry of Finance’s Customs Tariff Council’s subcommittee’s report and recommendations on revisions of the Customs Law.

II. Regulatory Reform Process

The OECD Review recognized the benefits of regulatory impact analysis (RIA) in Japan: “*Regulatory analysis would help officials understand the consequences of their regulatory decisions, improve the transparency of regulation, and identify more flexible and cost-effective policy instruments, such as economic instruments. Such alternatives are not widely used in Japan. RIA is more effective when it is part of public consultation, and the new public consultation procedures provide Japan an opportunity to improve its use of RIA.*” The OECD noted that while 24 OECD countries use RIA, its use is in its

infancy in Japan. Accordingly, the United States recommends that the Japanese Government take the following measures:

- A. Regulatory Impact Analysis. To enhance transparency in policy-making and administrative management, and consistent with the OECD Review (recommending that the Japanese government improve its RIA system) and the March 31, 1999 Cabinet Decision (calling for ministries and agencies to improve their policy evaluation capabilities), and building on MITI's proposed Policy Evaluation System, the Japanese Government, by the beginning of JFY 2000, should institute a government-wide regulatory impact system, which would subject regulatory changes with a significant economic impact to such analysis and public notice and comments. Specifically, the Japanese Government should:
1. On a government-wide basis, implement measures to apply cost/benefit analysis (both quantifiable and non-quantifiable) for proposed regulatory changes which will have a significant economic impact;
 2. Take measures to use the best available scientific, technical, and economic data when reviewing proposed regulations; and
 3. Provide an opportunity for interested parties and the public in general to comment on the cost/benefit analyses, as well as on the reasonableness of the assumptions and methodologies used.
- B. Regulatory Reform Entity. The Japanese Government should enact legislation to establish an office of regulatory impact analysis to review regulatory changes with a significant economic impact. To be effective, such an entity should be established by the highest legal authority with a secretariat that is independent of ministries and agencies and authorized to report directly to the Cabinet.

III. Administrative Procedures and Practices

- A. Improvements in Administrative Procedures and Practices Related to Licenses, Permits and Approvals. The United States has long raised its concerns with administrative procedures and practices related to the process for obtaining licenses, permits and other approvals (collectively referred to as "approvals") in Japan. Of particular concern, regulations often do not provide potential applicants with sufficient information upon which to prepare their applications; ministries and agencies use non-transparent administrative guidance in lieu of, or to amplify, regulations; and applicants must often engage in protracted consultations with ministries and agencies in order to be able to complete their applications satisfactorily. The MCA confirmed the existence of many of these problems in its extensive survey, issued in June 1999, on the fairness and transparency of

administrative procedures. The United States welcomes the MCA's recommendations, in particular, with regard to the handling of applications and the use of administrative guidance. The United States urges the Japanese Government to take the necessary measures to implement the MCA's recommendations. In line with those recommendations, the Japanese Government should require each ministry and agency to:

1. Accept every application that is submitted to it and, without delay, commence review of it, consistent with Article 7 of the Administrative Procedures Law (APL);
2. Not require or encourage applicants to engage in prior consultations, *i.e.*, discussions with the government entity regarding the content, scope or other aspects of a potential application, before formally accepting the application and commencing review of it;
3. Where it determines that an application does not contain all required information, provide the applicant with a written statement identifying all deficiencies in the application and the information that must be provided, consistent with Article 7 of the APL;
4. Not use administrative guidance to amplify requirements for approvals; and
5. Upon the request of an applicant, provide the applicant with a written statement of the status of the application and a statement as to when a decision (or disposition) of the application can be expected, consistent with Article 9 of the APL.

B. Improvements in Administrative Procedures and Practices Used in Specific Sectors. Improvements in the following administrative procedures and practices related to licenses, permits and approvals in the following sectors are particularly important:

1. Medical device and pharmaceutical sectors;
2. Financial products and services; and
3. Insurance products and services.

C. Introduction of New Regulatory Mechanisms. The United States urges the Japanese Government to consider the introduction of two new regulatory mechanisms that would increase the transparency and predictability and reduce the complexity of the regulatory process.

1. “No Action Letters.” Under this mechanism, a private sector entity would be allowed to make a written request to a ministry or agency regarding the application of an existing regulation to a specific factual situation. Where not applicable, the ministry or agency would issue within a specified period of time a “No Action Letter” that would state that, based on the facts presented, the ministry or agency would take no action. After a specified period of time, the contents of the “No Action Letter” would become a matter of public record with, where requested, information identifying the requesting party deleted.
2. “Letter Rulings.” Under this mechanism, a private sector entity would be allowed to request an interpretation of the application of a law or regulation to a specific factual situation. The ministry or agency would respond in writing within a specified time period and its response would be made public.

D. Administrative Guidance

Given that there have been, according to the OECD Report, only 33 public disclosures of administrative guidance despite the APL provisions for written guidance, the Japanese Government should take the appropriate actions to require all administrative guidance to be issued in writing, unless there is a specific compelling reason to not disclose it.

IV. **Private Sector Regulations**

As the Japanese Government removes and relaxes regulations, it is essential that special public corporations (*tokushu hojin*), industry associations and other private sector organizations (referred to collectively as “private regulatory organizations”) are not allowed to substitute private regulations (so-called “*min-min kisei*”) in place of government regulations. In addition, there is a need for greater transparency and monitoring of the role of private regulations in the Japanese economy. Private regulations, including rules on market entry and business operations, approvals, standards, qualifications, inspections, examinations and certification systems (collectively referred to as “private regulations”), can adversely affect business activities. Accordingly, the United States urges the Japanese Government to undertake the following measures:

- A. Monitoring Mechanism. The Japanese Government should provide for two types of monitoring of private regulations:
 1. The JFTC should ensure that private regulations are not anti-competitive (as elaborated upon in the Competition Policy section); and

2. The Japanese Government should designate a permanent administrative entity to oversee the use of private regulations, and provide it with the authority to:
 - a. Request each ministry and agency to provide, with respect to the private regulatory organizations under its jurisdiction: (i) a description of the regulations issued by the organization; (ii) the industry or enterprises subject to the regulation; (iii) the penalties for non-compliance; and (iv) the legal authority or basis for the regulation;
 - b. Establish a process for examining the need and authority for existing private regulations, and for eliminating those that are unnecessary or without statutory authority; and
 - c. Review new regulations proposed by private regulatory organizations prior to their adoption.

- B. Enhanced Transparency. To increase the transparency of private regulations, the Japanese Government should require private regulatory organizations that have been delegated public policy or governmental functions to use fair and transparent public comment procedures before adopting or issuing regulations, particularly the following:
 1. Japanese Federation of Bar Associations (Nichibenren);
 2. Japan Automotive Service Equipment Association;
 3. Life and Non-Life Policyholder Protection Corporations; and
 4. Non-life Rating Organizations.

- C. Industry Associations. The Japanese Government should ensure that the policies and procedures of industry associations are fair and fully transparent and that all members have equal access to association information and a meaningful role in the association's governance, including the right to vote and representation at the board and committee levels. Industry associations should represent and advance the interests of all of their members.

- D. Delegation by Governmental Entities. The Japanese Government should prohibit government entities from delegating governmental or public policy functions, such as product certifications or approvals, to private regulatory organizations, other than by express provisions in a law.

- V. **Information Disclosure by *Tokushu Hojin*.** The United States appreciates that the Japanese Government has established an advisory council to consider the disclosure of information by special public corporations (*tokushu hojin*). To provide the public with effective access to such information, the Japanese Government should take, as soon as possible, the measures necessary to require such entities to disclose information to the public, in the same manner and effective on the same date as the new Information Disclosure Law.