

Annual Reform Recommendations from the  
Government of the United States to the Government of Japan under the  
U.S.-Japan Regulatory Reform and Competition Policy Initiative

October 15, 2008

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The U.S.-Japan Regulatory Reform and Competition Policy Initiative (Regulatory Reform Initiative) remains an important vehicle for promoting reforms that help spur economic growth as well as for further deepening the economic and trade relationship between the United States and Japan. In this respect, the United States looks to Japan to continue to pursue a path of meaningful, growth-oriented reform.

The United States' recommendations to Japan in this eighth year of the Regulatory Reform Initiative outline areas where new progress can be made that would, for example, help further remove or streamline unnecessarily burdensome barriers to trade and economic activity, improve the business environment such as by enhancing the transparency of regulatory processes, and stimulate new business opportunity through enhanced competition and through the opening of new markets to better serve consumer needs.

The United States has proposed a broad array of recommendations for Japan take new measures, consistent with the above-mentioned objectives, in the areas of communications, information technologies, intellectual property, medical devices and pharmaceuticals, competition policy, commercial law and legal systems, transparency, privatization of government corporations, distribution, and agriculture, among others.

Recommendations submitted by both the United States and Japan are discussed over a period of several months in four Working Groups covering telecommunications, information technologies, medical devices and pharmaceuticals, and cross-sectoral issues, as well as separately at a senior level in the High-Level Officials Group. Progress achieved as a result of this work is then reflected in the Initiative's annual Report to the Leaders.

The Government of the United States continues to look forward to constructive discussions on its recommendations and also welcomes receiving recommendations from the Government of Japan.

## COMMUNICATIONS

The United States continues to monitor Japan's regulatory reform efforts in the telecom sector in response to evolving technologies and the growing convergence between telecommunications and broadcasting services. The United States believes that increased competition and a less prescriptive approach to technology would foster innovation and offer Japanese consumers greater choice at lower prices. Related to these broad goals, ongoing issues of interest include the Government of Japan's preparations for a decision on the reorganization of the dominant carrier Nippon Telegraph and Telephone (NTT) and plans for drafting a new law to cover converged services. The United States urges Japan to continue taking steps to ensure a competitive environment characterized by transparent development of regulation for the benefit of new entrants, competitive carriers, and equipment manufacturers.

### *RECOMMENDATION HIGHLIGHTS*

**Ensuring Market-Based Technology Decisions:**

Improve transparency and increase stakeholder participation in policymaking and regulations; promote efficient use of spectrum to increase opportunities for new services and technologies; foster a technology-neutral licensing regime where service providers can introduce innovative technologies.

**Strengthening Competitive Safeguards on Dominant Carriers:** Prevent anticompetitive behavior by carriers with market dominance as telecom services move to IP-based networks;

ensure a competitive playing field for both wireline and mobile interconnection; promote facilities-based competition across different broadband platforms.

**Developing a Regulatory Framework for Converged and Internet-enabled Services:**

Ensure that any new regulatory framework is developed in a transparent manner and minimizes burdens on operators while promoting new entry and competitive opportunities.

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## INFORMATION TECHNOLOGIES

The United States' recommendations seek to promote competition and confidence in government procurement of information technologies (IT), enhance the use of IT in Japan's financial and healthcare sectors, promote the strengthening of intellectual property rights (IPR) enforcement and protections, and ensure any revisions in the implementation of the Privacy Act also enhance the business environment.

### *RECOMMENDATION HIGHLIGHTS*

**Health IT:** Provide incentives for the use of innovative information-sharing technologies; promote technology neutrality and interoperability; promote harmonization with international standards.

**IT-Related Financial Reform:** Facilitate alternative non-bank payment services in the area of electronic payments; ensure communication and collaboration between relevant ministries and private sector.

**IPR Protection and Enforcement:** Promote innovation and economic growth by strengthening copyright enforcement, harmonizing approaches with international best practices, and streamlining patent procedures.

**IPR Cooperation:** Continue to cooperate bilaterally and through multilateral fora to promote strong IPR protection and enforcement with a focus on the Asia-Pacific region.

**Government IT Procurement:** Allow contractors to own the intellectual property rights to software they develop; limit vendor liability; prohibit backdating of contracts; expand use of competitive bidding rules; improve transparency.

**Privacy:** Ensure that any revisions of Privacy Act implementation enhance consistency and predictability, and do not restrict trans-border data flows.

## COMMUNICATIONS

- I. Ensuring Fair Market Opportunities for Emerging Technologies.** Consumer and operator choice in Japan’s telecommunications market continues to be constrained by an institutional structure where the Ministry of Internal Affairs and Communications (MIC) acts as regulator and industrial policy promoter for this sector. Absent moving regulatory functions to a fully independent governmental organization and divesting government ownership in specific operators, MIC could benefit from additional procedural safeguards to ensure impartiality through steps to improve transparency, promote more efficient use of spectrum, and institute technology-neutral principles.
- A. To foster greater transparency and objectivity in policymaking and revision of telecom regulations, the United States urges Japan to:
1. Open the selection process for participation in MIC-sponsored study groups, to prevent discrimination against any interested stakeholders (foreign or domestic), and ensure that participation in study groups is based on objective and transparent criteria;
  2. Ensure that financial or commercial interests of members of study groups which might benefit from specific recommendations are adequately identified;
  3. Ensure that any stakeholder with an interest in a subject matter addressed by a study group tasked with making recommendations to the MIC has an opportunity to provide proposed solutions and recommendations regarding the issue(s) under study;
  4. Ensure that proposals made to study groups are all given due consideration based on their merits, and that no proposal is given preference due to affiliation with any study group member or based on governmental interest in the entity making the proposal; and
  5. Ensure that, where study groups implement testing of new technologies, no entity is given unduly preferential treatment in the participation in such tests (e.g., through access to spectrum, test facilities, etc.).
- B. To enhance the ability of MIC to adapt more responsively to new technologies and services:
1. Analyze and provide public accounting of incumbents’ unused spectrum, or spectrum using outdated technology (e.g., Personal Digital Cellular) to determine criteria to identify “warehousing” (hoarding), and take steps to eliminate it;
  2. Develop open and transparent procedures to enable any interested party to formally petition MIC for the development, adoption, change, or deletion of

rules, and for MIC to act on a petition without requiring study group involvement;

3. Where MIC or any MIC-affiliated body is involved in any standardization effort (e.g., 4G) that identifies specific technologies, ensure that such process is subject to full and open notice and comment process, particularly where MIC will be advocating internationally for any such standard in fora such as the ITU;
4. Reconsider the feasibility of introducing auctions for particular spectrum bands, even only on a limited basis, to make it unnecessary for regulators to evaluate applicants on the basis of specific technologies; and
5. Consider revising service rules for specific spectrum bands to permit operators to use new technologies, subject to interference constraints, without new licensing – including use of video transmission services, such as mobile TV in bands originally designated for voice or data services (e.g., 700 and 800 MHz bands), or Time Division Duplex (TDD) technologies for use in bands designated as Frequency Division Duplex (FDD).

C. With respect to Next Generation Networks (NGNs):

1. Ensure any network requirements established by NTT involving interfaces necessary for interconnection with the NTT East or West networks are developed in an open and transparent fashion with all interested parties able to fully participate in the process (i.e., not discriminating against companies which have not been selected to participate in NTT-sponsored co-development programs);
2. Ensure that any new design by NTT East or West to deploy NGNs minimizes proprietary solutions that require interconnecting companies to invest in supplemental equipment; and
3. Ensure that NTT East and West publish plans in sufficient detail and give adequate advanced notice of proposed network changes to allow competing carriers ample time to introduce any necessary modifications into their own network.

**II. Strengthening Competitive Safeguards on Dominant Carriers.** MIC is beginning to develop policies and procedures to again consider fundamental change in the structure of NTT and its various affiliates. The United States urges Japan to ensure that decisions coming from this process adequately address means to safeguard competitive opportunities for new market entrants and equipment manufacturers and that the process is conducted in an open, unbiased manner without undue influence from NTT itself.

- A. Wireline Interconnection. Considering that application of the current Long-Run Incremental Cost (LRIC) model will expire at the end of FY2008, and to ensure a

competitive playing field under changing market conditions:

1. Re-evaluate whether the LRIC model has adequately brought interconnection rates in Japan down to internationally comparable levels;
2. Require NTT East and West to each set a cost-oriented interconnection rate, consistent with Japan's WTO obligations, taking into account differing costs of the respective regions; and
3. Eliminate the use of interconnection revenue as a source of cross-subsidization between NTT East and West.

B. Mobile Interconnection. For calls terminating on mobile networks:

1. Initiate a study, for timely publication, to determine whether mobile wireless termination rates are set at levels that reflect the principle of cost-orientation under efficient management, consistent with Japanese law; and
2. Analyze NTT DoCoMo's dominant position in the mobile sector, and the degree to which any existing mobile carriers exert market power in the sub market for call termination.

**III. Developing a Regulatory Framework for Converged and Internet-enabled Services.**

Rapid advances in technology allow consumers to access content in new ways (e.g. IPTV). Japan's regulatory approach needs to be flexible enough to allow innovation but also ensure that dominant players do not distort competition in this market. It is essential to develop any new rules for converged services in a transparent and non-discriminatory manner. Specifically, the United States recommends that Japan:

- A Provide an open and transparent procedure for assessing the need for new rules for convergent services (e.g., IPTV), and analyzing whether broadcasters unduly constrain competition; and
- B. With respect to consumer access to the Internet, clarify the authority and intent of MIC to ensure that ISPs and telecommunications carriers do not arbitrarily discriminate against users on the basis of usage of specific protocols, including peer-to-peer protocols, and review industry codes of conduct governing such matters.

**IV. Advancing International Cooperation.** Develop a basis for cooperating with like-minded WTO members to address trade policy implications of Members imposing surcharges on international communications in the name of capturing "network externalities."

**V. Other.** Continue to strengthen procedures and conditions for ensuring the impartiality of regulatory decision-making.

*(Provisional Translation)*

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

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October 15, 2008

## FOREWORD

The Government of Japan has engaged in comprehensive economic and social structural reform, and will actively continue the reform on its own in order to achieve further economic growth.

The first to seventh year dialogue of the Regulatory Reform and Competition Policy Initiative (“Regulatory Reform Initiative”) under the “Japan-U.S. Economic Partnership for Growth (“Partnership”)” established at the Japan-U.S. summit meeting on June 30, 2001, has deepened the bilateral economic relationship through harmonizing regulations and systems of the two countries. It has also contributed to the economic growth of both countries by reducing unnecessary regulations, strengthening competition, and improving market access.

The Government of Japan will continue the dialogue with the Government of the United States under the Regulatory Reform Initiative, with a view to further deepening the economic relationship between the two countries, which account for some forty percent of the world economy, and to reinforcing the multilateral free trade system by demonstrating a model of dialogue and cooperation between the two biggest economies.

The Government of Japan presents its recommendations regarding regulatory reform and competition policy to the Government of the United States upon the commencement of the eighth year dialogue of the Regulatory Reform Initiative.

This recommendation compiles U.S. regulations and systems that the Government of Japan believes need to be improved for the advancement of the Japan-U.S. economic relationship, incorporating views of Japanese private companies.

Specific items of this recommendation can be broadly classified into the following three categories: 1) Recommendations calling for the abolishment or improvement of regulations or measures that are inconsistent with the principle of free trade or impeding fair competition; 2) Recommendations urging that reinforced regulations in areas such as logistics and consular affairs not unduly impede smooth trade as well as movement of people between the two countries; or 3) Recommendations calling for the improvement of State-based regulations or regulations inconsistent with international standards, which are creating burdens on Japanese companies operating in the United States.

In particular, the United States should revise its regulations and systems that are inconsistent with the WTO agreement, on its own initiative to maintain the multilateral free trade system.

In course of the dialogue, the Government of Japan will keep urging the Government of the United States to improve its policy and further promote regulatory reform and competition policy by reflecting these recommendations sufficiently. The Government of Japan strongly hopes that the frank and constructive dialogue with the Government of the United States under the Regulatory Reform Initiative based on the principle of two-way dialogue will greatly contribute to further strengthening and deepening the bilateral economic relationship.

companies issuing Samurai bonds from withholding tax duties as long as they implement the necessary reporting duties. In response, the Government of the United States expressed its intention, in the guidance issued in October 2006, to “issue regulations providing that the foreign-targeted registered obligations will not apply, except to bonds issued after December 31, 2006, and before January 1, 2009, with a stated maturity of no more than 10 years from the date of issuance”.

The restriction on the application of the foreign-targeted registered obligations does not meet the needs of the Samurai bond market players and therefore the Government of Japan urged the Government of the United States to relax the above-mentioned restriction.

The Samurai bonds issued after January 2007 under FTRO amount to over 1 trillion yen (as of the end of August this year), indicating that there remains a strong need. Based on this fact, the Government of Japan urges the Government of the United States to relax the restriction of FTRO.

## XV. TELECOMMUNICATIONS

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

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

From these viewpoints, the Government of Japan has requested improvements in the past dialogues under the Regulatory Reform and Competition Policy Initiative, but the Government of the United States has not responded adequately to these requests. In addition, the Government of Japan considers that, in order to ensure open opportunities of market entry and promote fair competition, it is increasingly necessary, in the United States as well, to respond rapidly and properly to issues arising from technological innovation and market structural changes, evidenced for example in the increased usage of cellular telephones as well as IP-migration, broadbandization, and digitalization of networks.

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

### **1. Elimination or Improvement of Discriminatory Treatment to Foreign Corporations**

#### (1) Revision of Entry Barriers and Criteria Applied Only to Foreign Carriers

(a) Restrictions on Foreign Investment in the Licensing of Radio Stations for the Purpose of Telecommunication Business

Section 310 (b) (3) of the Communications Act of 1934 (hereinafter referred to as "the Communications Act") stipulates, as a criterion of licensing, that the ratio of direct foreign investment in radio stations shall be limited to not more than 20 percent. This restriction makes it

impossible for Japanese carriers to directly obtain licenses to establish earth stations in the United States to provide services such as international communications between Japan and the United States via satellite. As a result, Japanese carriers face difficulties to establish flexible networks.

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

In the previous Reports to the Leaders, the Government of the United States offered to provide information to the Government of Japan concerning the division between a common carrier and a non-common carrier, however the Government of Japan believes that such regulation itself should be abolished. The Government of Japan requests the Government of the United States again to abolish the regulations on both indirect and direct foreign investment in relation to the establishment of a radio station established for the purpose of telecommunications business as covered in Section 310 of the Communications Act.

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

Section 214 and Section 310 (b) (4) of the Communications Act provide several certification and licensing criteria for foreign carriers' entry into the telecommunications market of the United States (November 25, 1997, FCC97-398, FCC97-399). Among them, the criteria of "trade concerns" and "foreign-policy" are unclear and have little to do with telecommunications policy. Nevertheless, they could be applied to refuse issuance of certification or licenses. These criteria are, therefore, significant barriers preventing foreign carriers from entering the market of the United States. The criterion of "very high risk to competition" could be also applied to refuse the issuance of a license. However, this criterion is also ambiguous and, as a result, undermines the foreseeability for foreign carriers to develop their business plans. The Government of Japan therefore repeatedly requests the Government of the United States to:

(i) Abolish the criteria of "trade concerns" and "foreign policy", which have nothing to do with telecommunications, for ex-ante certifications;

(ii) Abolish the criterion of "very high risk to competition". If it is not possible to abolish it immediately, clarify and make public the conditions for its application, as the second-best measure.

(2) Entry Requirement in the Submission Form for the Importation of Radio Frequency Devices into the United States

FCC Rule 2.1205 requires that, any person who imports radio frequency devices into the United States must submit FCC Form 740 to the U.S. Customs Service. In this Form, it is required to enter the name and address of the manufacturer who assembled the products into their final form, as the "manufacturer" of the products. However, in cases where a Japanese manufacturer outsources the assembly of the products to an overseas manufacturer, and that Japanese manufacturer, after

conducting final inspection of such products, subsequently exports the same products to the United States, the above-mentioned entry requirement may cause inconvenience in the handling of a product liability issue for such products unless the above-mentioned entry requirement is deemed to be met by the entry of the name and address of the Japanese manufacturer, since the product liability for such product lies with the Japanese manufacturer. The Government of Japan requests the Government of the United States to take into account the actual production practices of manufacturers, and accept manufacturers that conduct the final inspection of products also as a “manufacturer” that is required to be entered in the Form.

(3) Local Contents Requirement for Federal Government Loans

The loan program for telecommunications equipment provided by the Rural Utilities Service (RUS) of the United States Department of Agriculture contains local contents requirement under which the loan must be expended for products of the United States or of “eligible countries”. The criteria for “eligible countries” are unclear, and such local contents requirement creates unfair competitive conditions in the procurement of telecommunications equipment by companies eligible for the loan in question. In the Seventh Report to the Leaders the Government of the United States reported that the United States Trade Representative (USTR) has the authority to waive the application of buy national requirements imposed as conditions of funding by RUS for telecommunications projects and that this waiver authority may only be exercised where USTR determines that another country provides reciprocal access to U.S. products and services and U.S. suppliers. However, the Government of Japan does not impose such buy national requirements as described above as conditions for funding for telecommunications project and believes that these requirements hamper free trade as well as efficient and optimum procurement of product components by U.S. companies. Therefore, the Government of Japan requests the Government of the United States again to abolish such local contents requirement and ensure fair treatment of telecommunications equipment procured by the borrowers of RUS’s loans by not discriminating between U.S.-made and Japanese-made telecommunication equipment.

(4) Procedures for Export Licenses, Approval of Technical Assistance Agreement and Other Measures concerning Commercial Satellites

(a) Ensuring Prompt Procedures and Transparency for Export Licenses

The examination procedures and the operation thereof by the Government of the United States with respect to export licensing for commercial communications satellites are unclear, and the standard processing time required has not been made public. Therefore, satellite makers need to bear risks in applying for the approval and suffer from delays in procuring parts in the production process, which reduces foreseeability in the commercial satellite business. Further, the operation of the licensing procedures is subject to change without notice, causing the situation where operators are unable to respond swiftly to changes in application procedures, and have to wait for a long time to obtain a license.

In this respect, in the Seventh Report to the Leaders, the Government of the United States reported that on January 22, 2008, President Bush issued an Export Control Directive, that will improve the manner in which the U.S. Department of State licenses the export of technical data, and expedite the processing of export license applications for items controlled by the U.S. Munitions List. However,

the actual state of implementation of the Directive is not necessarily clear. Therefore, the Government of Japan requests the Government of the United States to continue efforts to maximize transparency by making public export licensing procedures and their operation, and also to provide appropriate information on the current state of implementation of the Directive by, for example, conducting surveys on the time actually taken for examination.

(b) Ensuring Prompt Procedures and Transparency for Technical Assistance Agreement (TAA)

Regarding TAA, the criteria determined by the Government of the United States for information disclosure and TAA approval are not clear. Therefore, commercial satellite makers do not disclose technical information at their own risk and apply for the approval on the information for which approval is not required, thereby prolonging the time for obtaining the approval. Furthermore, foreign satellite communications companies cannot access indispensable information such as test procedures, reports on non-performance of the manufacturing process, and reports on problems in assembly or the ex-ante test. Moreover, foreign satellite communications companies need to shoulder additional costs due to undisclosed essential information. Consequently, Japanese satellite communications companies have concerns over current and future business activities.

Concerning the insurance TAA required in connection with the insurance contracts for the launch of communications satellites, the length of the required processing time is becoming longer due to insufficient examination staff and concentrations of applications. This makes it difficult for satellite companies to respond appropriately to technical questionnaires from insurance companies, thus inhibiting the smooth conduct of business.

In this respect too, in the Seventh Report to the Leaders, the Government of the United States reported that on January 22, 2008, President Bush issued an Export Control Directive, that will improve the manner in which the U.S. Department of State licenses the export of technical data, and expedite the processing of export license applications for items controlled by the U.S. Munitions List, but the actual state of implementation of the Directive has not been made clear. Therefore, the Government of Japan requests the Government of the United States to continue efforts, in accordance with the laws, regulations and policies of the United States, to minimize delays in the procedures and maximize transparency in the TAA approval processes, while providing appropriate information on the current state of implementation of the Directive. The Government of Japan also requests the Government of the United States to minimize the items of information which are undisclosed as a result.

(c) Ensuring Fair Procurement Conditions

When a U.S. satellite purchaser puts out a tender, Japanese satellite makers obtain related documents later than U.S. makers, due to the regulation by the U.S. Government on information disclosure. The Government of Japan is concerned that Japanese makers are put at a competitive disadvantage, and therefore requests the Government of the United States again to ensure fair competition for the satellite communications businesses in the procurement of satellites.

**2. Ensuring Consumers choice through Market Competition**

(1) Competition in the Navigation Devices Market in the Process of Transition to Digital Television

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

Thereupon, as reported in the Seventh Report to the Leaders, the Government of Japan requests the Government of the United States to continue a dialogue with the Government of Japan on how to enforce the above-mentioned Section of the Act, and to swiftly adopt rules to establish reasonable technical requirements to facilitate a competitive market for the supply of interactive navigation devices in the process of policy deliberation based on the FCC's third Further Notice of Proposed Rulemaking (FNPRM) of June 2007 (FCC07-120).

#### (2) Policies Concerning Establishment of Advanced Information Communication Infrastructure

Broadband communications services provide the basis for activities of companies and individuals. In the United States, however, the high-speed broadband communications network available for companies and individuals to send and receive high quality data graphics and images is not extensive enough as compared with other advanced countries, which could reduce the flexibility in activities of companies and individuals in the United States. According to the Fifth Report Examining the Availability of Advanced Telecommunications (706 Report) released by the FCC in June 2008, the number of high-speed lines (with speeds of over 200 kbps in at least one direction) has reached 100.9 million in June 2007. However, considering that more than half of these lines are ADSL and mobile communications, this number is not enough to meet the requirement of Section 706 of the Telecommunications Act of 1996, which requires the Government of the United States to facilitate the deployment of advanced telecommunications capability in a reasonable and timely manner.

Therefore, the Government of Japan requests the Government of the United States again to consider and promptly implement policies and measures to encourage expansion of the high-speed broadband communications network through market competition.

#### (3) Network Neutrality

In August 2008, the FCC approved an enforcement order against Comcast requiring improvement of its practice of blocking certain traffic in providing internet services, based on the judgment that such practice goes beyond reasonable network management. In addition, although the FCC released the Internet Policy Statement on August 5, 2005 (FCC05-151), it has not provided any specific criteria for judgment yet. Under such circumstance, dealing with a specific case based on that Policy Statement would reduce predictability for telecommunications carriers and thus significantly discourage active business operations by telecommunications carriers.

Therefore, the Government of Japan requests the Government of the United States to clearly set the specific criteria for judgment concerning matters to be complied with by telecommunications carriers and ensure predictability for telecommunications carriers, in order to ensure the

effectiveness of the Internet Policy Statement. In addition, the Government of Japan requests the Government of the United States to ensure that (a) consumers be entitled to connect any legal devices to networks; (b) consumers be entitled to access any lawful Internet content; and (c) consumers be entitled to select any application no matter which broadband service provider consumers choose, as long as their actions do not cause any harm to networks.

### **3. Promotion of Information Communications Policy in a Timely and Transparent Manner**

#### (1) Policy Making Process

The Government of Japan recognizes that the U.S. Congress launched an official investigation into the effectiveness and transparency of the policy making process of the FCC in January 2008, and requests the FCC, in the light of such situation, to ensure transparency and swiftness in policy making by improving predictability in the handling of public comments received concerning its information communications policies, and ensure predictability for companies doing business in the United States.

#### (2) Regulatory Reform in the Broadband Era

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

Unlike in other major countries, under the Communications Act of the United States, "Telecommunications services" are subject to a set of regulations including provision of unbundled network elements, contribution to the universal service fund and price regulations, while "information services" are not subject to those regulations. However, regarding a variety of new services including VoIP, which followed broadband diffusion and IP migration, the FCC determines which type of service a new service falls into, and what regulations are applied to it on a case-by-case basis, thus hindering the foreseeability for service providers. Furthermore, in spite of the FCC's classification of wireline broadband access services and broadband over power lines as "information services" as part of its deregulatory measures, the FCC has decided to apply to such services the obligations applicable for "telecommunications services", based on "ancillary jurisdiction" of the Communications Act. In this context, the Government of Japan requests the Government of the United States to:

- (a) Provide consistent criteria on what kind of services are classified as "telecommunications services" or "information services" to ensure foreseeability for telecommunications carriers;
- (b) Prevent the dichotomous classification of "telecommunications services" and "information services" of the Communications Act from hindering implementation of appropriate and reasonable

regulations based on bottleneck and market dominance; and

(c) Consider revising the dichotomy of the current service classification in the process of the revision of the Communications Act unless both (a) and (b) above are satisfied at the same time under the current framework of the Communications Act.

### (3) Access Charges

There are three different kinds of access charges in the United States: reciprocal compensation, intra-State access charges and inter-State access charges, which are imposed depending on, for instance, the types of accessing carriers. The Government of Japan requests the Government of the United States again to implement the ongoing process of notice of proposed rulemaking (NPRM) of access charges reform in a transparent manner, establish a unified intercarrier compensation regime, and eliminate disparity and inconsistencies among the three kinds of access charges.

Further, the Government of Japan requests that measures be implemented to secure transparency of the implementation of the current system in the interim until a unified intercarrier compensation regime is established.

In particular, on the issue of inter-State access charges, as rate levels which were decided under the Coalition of Affordable Local and Long Distance Service (CALLS) plan adopted in May 2000 are still applied, the Government of Japan requests the Government of the United States to validate whether such rate levels are reasonable under the present situation, and if necessary, adjust them to appropriate levels.

### (4) Universal Service

According to the universal service mechanism in the United States, the amount of disbursement continues to increase since multiple eligible telecommunications carriers, including wireless service providers, can be designated in a single region. The amount of contributions, however, is decreasing due to a decrease in the traffic carried by long-distance fixed phone operators. Due to an imbalance between expenditures and revenues in recent years, the financial condition of the universal service fund has deteriorated, raising concerns among the parties in the United States about the stability and sustainability of the funds.

As reported in the Seventh Report to the Leaders, in January 2008, the FCC issued two Notices of Proposed Rulemakings seeking comment on ways to reform the high-cost universal service program, including rules governing the amount of high-cost universal service support provided to eligible telecommunications carriers (ETCs) and comment on whether and how to implement reverse auctions (a form of competitive bidding). In May 2008, the FCC issued rules capping high-cost payments at 2007 levels.

However, these measures are merely provisional and the mechanism is in an unstable condition at present, and the Government of Japan continues to have a concern that the present situation is reducing foreseeability in the medium to long term for businesses engaged in telecommunications service in the United States. Therefore, the Government of Japan requests the Government of the United States again to conduct a review of the mechanism, including how disbursement and

contributions should be conducted, as well as to make policies for improving the efficiency of the operation of the mechanism, in order to ensure that the universal service mechanism of the United States is maintained and operated in a stable manner.

## XVI. INFORMATION TECHNOLOGY (IT)

Along with the wider use of the Internet and development of digital technologies, it has become necessary for each country to effectively align their measures with measures being adopted internationally.

Even though the United States is an advanced IT country, there continue to be some aspects of its efforts to protect copyright that are thought to be inadequate or inappropriate, therefore the Government of Japan urges the Government of the United States to improve its measures to secure the protection of rights and to enforce proper mechanisms in this regard. It also urges the Government of the United States to establish and enforce the system devised with adequate consideration paid to an appropriate balance between the right of copyright holders and that of copyright users, without affecting the benefits of smoother use of copyrighted works made available by the development of Information Technology.

Specific requests are as follows.

### **Legal Systems of the Government of the United States Covering Copyright and Neighboring Rights**

#### (1) Protection of Copyright and Neighboring Rights

Given the current situation that copyrighted works are freely distributed across borders due to wider use of the Internet and development of digital technologies, it is vital to ensure protection of copyright and neighboring rights in an internationally harmonized manner. In order to facilitate discussions on various issues concerning the age of digitization and networking, the Government of Japan continues to urge the Government of the United States to provide legal systems that are not unnecessarily complex for foreign rights holders in order to ensure clear and reliable protection of the following items which are not fully protected in the United States.

##### (a) Protection of Live Performances and Unfixed Works

Article 14 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Article 6 of the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT) require not just live music performances but live sound performances in general be protected. However, protection under the Copyright Act of the United States is provided only for live music performances among live performances. In addition, the U.S. Copyright Act does not provide protection for unfixed works, either. The U.S. Government's position is that these performances and works are protected under States' laws. However, it is not possible to confirm whether or not such protection is provided without viewing the laws of all the States, which is hardly desirable from the viewpoint of maintaining transparency. Therefore, the Government of Japan urges the Government of the United States to clearly stipulate the protection of live sound performances in general and