New Compliance Control Requirements for Listed Companies

Among the more notable features of the recently amended Korean Commercial Code (the "Amended KCC") are the significantly re-vamped corporate governance provisions, which are intended to promote fair and transparent management practices. These new provisions will take effect from April 15, 2012 (one year from the promulgation of the Amended KCC), and include new compliance control requirements for listed companies, an expanded definition of directors' self-dealing, restrictions on the misappropriation of a company's business opportunities, the introduction of an executive officer system, a tightening of audit committee and audit system requirements, more stringent directors' liability provisions, a strengthening of minority shareholders' rights and an expanded scope of directors' resolution practices.

This Update will focus on the new compliance control requirements for listed companies.

A. Background

In line with the global trend of enhancing business ethics and corporate responsibility, Article 542-13 of the Amended KCC requires listed companies with asset holdings above a certain threshold (to be specified in the Presidential Decree) to establish Compliance Control Standards and appoint at least one full-time Compliance Officer. Article 542-13 becomes effective as of April 15, 2012, but details such as the listed companies that will be subject to Article 542-13's requirements and the credentials required for becoming a Compliance Officer, have yet to be specified by further amendments to the Presidential Decree. Financial institutions are already subject to legal requirements to establish internal control standards and appoint compliance supervisors, but the compliance control requirements under the Amended KCC have been adopted with a view to managing legal risk in listed corporations that are not financial institutions.

B. Relevant Amendments

Under the Amended KCC, listed companies with asset holdings above a certain threshold to be specified by the Presidential Decree are required to (i) establish Compliance Control Standards in accordance with which their respective officers and employees are required to comply when performing their respective duties and (ii) appoint at least one full-time Compliance Officer responsible for monitoring compliance with the Compliance Control Standards.

The Compliance Officer may be appointed by resolution of a company's board of directors, and his/her term of office must be three (3) years on a full-time basis. A candidate for the office of Compliance Officer must possess the following qualifications: (1) a license to practice law, (2) a total of at least five years of experience in teaching law as an assistant professor or higher capacity at a school of higher education as specified under Article 2 of the Higher Education Act, or (3) other sufficient legal knowledge and experience as determined by the Presidential Decree. A Compliance Officer will be under a fiduciary duty to ensure compliance with the Compliance Control Standards, by conducting compliance reviews and reporting the results thereof to the board of directors.

C. Compliance Supervisors under Laws Governing Financial Institutions

Pursuant to existing laws governing financial institutions, such as the Bank Act, the Insurance Business Act and the Financial Investment Services and Capital Markets Act (the "FISCMA"), financial institutions are already implementing internal control standards and compliance supervisor systems similar to the Compliance Control Standards and Compliance Officer system provided under the Amended KCC. This can be seen by the internal control standards and compliance supervisor system requirements provided under Article 28 of the FISCMA, the objectives of which are compliance with relevant laws, sound asset management and prevention of conflicts of interest; there is also a requirement that at least one compliance supervisor be appointed by the board of directors of the financial institution.

One difference, however, is that, unlike the Compliance Officer under the Amended KCC, who has a duty to report to the board of directors, the compliance supervisor under the FISCMA has a duty to report compliance-related matters to the statutory auditor or the audit committee. In addition, to qualify as a compliance supervisor, the FISCMA requires a candidate for such office to possess: (1) a total of at least 10 years of experience working at the Bank of Korea or other financial institution subject to audit (including any corresponding foreign financial institution) under Article 38 of the Act on Establishment of the Financial Services Commission, or (2) a total of at least five years of experience working as a researcher at a research institute or as a full-time lecturer at a university, and holding a masters or higher degree in a finance-related field, or (3) a total of at least five years of experience working as a lawyer or a CPA in fields related to his/her professional qualification, or (4) a total of at least five years of experience working at the Ministry of Strategy and Finance, the Financial Services Commission, the Securities and Futures Commission, the Financial Supervisory Service, stock exchanges, associations or other finance-related legislative bodies. As can be seen by the foregoing, the professional qualifications required for serving as a compliance supervisor are of a higher standard than those required to serve as a Compliance Officer under the Amended KCC.

Despite the similarities and overlap of the compliance control provisions of laws governing financial institutions with those of the Amended KCC, it is unclear under the Amended KCC whether a financial institution that has implemented internal control standards and a compliance supervisor system in accordance with applicable finance-related laws is exempt from compliance with the Compliance Control Standards and the Compliance Officer system under the Amended KCC.

D. Implications

The Amended KCC adopts requirements for Compliance Control Standards and a Compliance Officer system for listed corporations, but the Presidential Decree specifying the details of listed companies that would be subject to such requirements has yet to be passed.

According to discussions thus far, while the Korea Listed Companies Association and the KOSDAQ Listed Companies Association argue that such Amended KCC requirements should apply only to larger companies with assets totaling at least 2 trillion won, the Korean Bar Association argues that the scope of applicability should be expanded to include KOSDAQ-listed companies and mid-sized companies with assets totaling at least 100 billion won. In addition, as noted above, it is as yet uncertain whether financial institutions that have already implemented internal control standards and compliance supervisor systems are exempt from the requirements under the Amended KCC.

As the scope of applicability of the new compliance control requirements under the Amended KCC remains subject to further discussion in and among legal, academic and political circles, companies are advised to pay close attention to the results of these discussions. Further, since there is no model precedent available for the Compliance Control Standards provided under the Amended KCC, companies are advised to consult with their legal advisers before implementing their Compliance Control Standards and systems.

If there is any question regarding the above, please contact us as set out below.

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