Major Provisions of the Presidential Decree of the Amended Korean Commercial Code

Over the past year, Shin & Kim has issued a series of eighteen (18) legal updates on various key issues concerning the newly amended Korean Commercial Code ("KCC"), which came into force on April 15, 2012. The amendments, being the most comprehensive since the 1962 enactment, encompass almost all areas of corporate law, ranging from corporate governance to corporate finance and M&A, among other topics. The amended KCC seeks to improve corporate transparency through tighter regulation of self-dealings and the introduction of new provisions prohibiting usurpation of corporate opportunity. It has also been lauded for its efforts to enhance corporate efficiency by providing a legislative basis for more diverse M&A structures and more flexible investment options for investors.

As the amended KCC delegates a substantial portion of its provisions to the Presidential Decree of the Commercial Code (the "Presidential Decree"), it is important to understand what is included in the Presidential Decree. A proposal for amendments to the Presidential Decree was announced late last year, and the Presidential Decree was promulgated in its current form on April 10, 2012, with the adoption of some modifications made by the Cabinet. This legal update provides a brief summary of the major provisions of the new Presidential Decree.

1. Exemption from Court Appraisals for Certain Contributions In-Kind (Articles 7 and 14)

The issuance of equity stock through in-kind contribution is generally subject to court appraisal procedures under the KCC; this is to prevent over-valuations of contributed assets and share issuances under a fair market value, which negatively impact existing shareholder value. However, the newly amended KCC and the Presidential Decree now waive such appraisal procedures in the following circumstances where the risk of over-valuation is regarded as low: (i) the total value of the contribution in-kind does not exceed 20% of the total value of the capital and amounts to KRW 50 million or less; (ii) listed securities are contributed at a price equal to or less than the market price; or (iii) a monetary claim is contributed at a price lower than its book amount in the balance sheet of the issuing company.

2. Share Repurchases (Articles 9 and 10)

Under the previous KCC, unlisted companies were prohibited from repurchasing their shares except under certain very limited situations (e.g. acquisition of treasury stock as a result of a statutory merger). Meanwhile, listed companies are permitted under the Financial Investment Services and Capital Markets Act (the "FISCMA") to freely repurchase their shares to the extent of their distributable income.

As of April 15, 2012, the amended KCC now permits all stock companies to repurchase their own shares to the extent of their distributable income. The new rule is in line with the "equal shareholder treatment doctrine" under the KCC by providing all shareholders an equal opportunity to sell their shares to the company.

As such, the methods of share repurchase by a company are limited as follows: (i) repurchase of its shares on the stock exchange, if listed, (ii) repurchase of its shares only after giving notice to all shareholders, or (iii) repurchase of its shares through the tender offer procedures provided under the FISCMA.

3. Specification of Accounting Principles (Article 15) and Financial Statements (Article 16)

Several provisions of the previous KCC regarding a company's accounting practices were inconsistent with established accounting principles such as K-GAAP and K-IFRS. Accordingly, the amended KCC, while keeping intact certain provisions governing trade books (Article 29-2 of the amended KCC), has removed provisions requiring companies to follow specific accounting methods and standards, and instead newly requires companies to follow generally accepted and suitable accounting principles. As such, the Presidential Decree now provides for different categories of entities so that different accounting principles can be applied for each category. Such categories of entities are: (i) companies that are subject to external audit, (ii) public institutions, and (iii) other types of companies. The Presidential Decree also specifies which types of financial statements need to be approved at a general meeting of shareholders.

4. Issuance of Various Types of Corporate Bonds (Articles 20 – 24) and Qualifications for Indenture Trustees (Articles 26 and 27)

As a means to provide companies more varied and expedient funding options, the amended KCC provides that companies may issue participating bonds and exchangeable bonds (Article 469 of the amended KCC), both of which were only permitted for issuance by listed companies under the previous

KCC. The amended KCC also permits the issuance of various other types of corporate bonds, including redeemable bonds and derivative bonds (Article 469 of the amended KCC). The Presidential Decree delineates the matters to be decided by the board of directors regarding the issuance of corporate bonds and the conditions, standards, and procedures required for issuing corporate bonds.

The amended KCC provides that a company, when issuing a corporate bond, may delegate to an indenture trustee (also known as a commissioned company) any matters related to bond issuance and management. The Presidential Decree further provides that banks, including the Korea Development Bank, the Industrial Bank of Korea, and the National Agricultural Cooperative Federation (Nonghyup), as well as the Korea Securities Depository and securities and finance companies, are eligible to act as an indenture trustee (commissioned company). However, affiliates of the bond issuer and other parties specially related to the bond issuer, such as its largest or major shareholders, are not qualified to act as its indenture trustee in order to prevent any conflicts of interest between bondholders, bond issuers and trustees.

5. Disqualifications for Outside Directors of Listed Companies (Article 34-5, Supplementary Clause 4)

The Presidential Decree of the amended KCC has modified the disqualifications for outside directors of listed companies such that a person holding the office of director, executive officer, or auditor of two (2) or more companies (either listed or unlisted) cannot become an outside director (either full-time or part-time) of a listed company. Further, for the avoidance of doubt, a supplementary clause provides that when a person appointed as an outside director under the previous law would be disqualified under the amended Presidential Decree, the company may appoint a replacement outside director in accordance with the Presidential Decree at the first general meeting of shareholders held after the coming into force of the amended KCC.

6. New Compliance Control Standards and Companies Subject to the Compliance Officer System (Articles 39 – 42, Supplementary Clause 5)

The amended KCC requires listed companies with asset holdings above an unspecified threshold to establish Compliance Control Standards and appoint at least one (1) full-time Compliance Officer (Article 542-13 of the amended KCC). What the specified threshold amount would be under the Enforcement Decree has thus been a topic of interest among listed companies. The threshold is now specified at an amount of KRW 500 billion or more. The applicability of the above requirements has also been deferred until December 31, 2013 for listed companies with assets totaling at least KRW 500 billion but less than

KRW 1 trillion. In addition, the Presidential Decree provides that lawyers, law professors and persons with a total of at least ten (10) years of experience working in a law-related division of a listed company are among those eligible to become a Compliance Officer.

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

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