Draft Enforcement Decree to the Kim Young-ran Law Announced for Public Comment

On May 13, 2016, the Anti-Corruption & Civil Rights Commission (the "Commission") announced for public comment its draft Enforcement Decree to the Act on the Prohibition of Improper Solicitation and Provision/Reception of Bribes (the "Act"). The Act, widely known as the Kim Young-ran Law, was enacted back in March 2015.

Various strata of Korean society have criticized the Act with some legal commentators arguing that the Act is unconstitutional as it excessively extends the scope of criminal punishment. The Blue House recently commented that the Act may become an obstacle to the nation's economic revitalization. Although the government, when the Act was enacted, announced that it would promulgate its Enforcement Decree shortly, the issuance of the draft Enforcement Decree was long delayed due to mounting criticisms and conflicting opinions. Now that the draft Enforcement Draft has been proposed, it seems that the final Enforcement Decree will come into effect soon.

A summary of the main issues of the Act and the draft Enforcement Decree and their implications are presented below.

1. Progress of Legislation

In August 2012, Kim Young-ran, a former Korean Supreme Court Justice and the chairperson of the Commission, submitted a proposed draft of the Act with the aim to close loopholes in existing criminal law which makes it impossible or difficult to punish government officials for their 'improper solicitations" or bribery taking unrelated to their duties. Since then, the draft bill had been hotly debated until it was finally passed at a plenary session of the National Assembly in March 2015, and the Act is scheduled to take effect starting September 28, 2016.

On May 13, 2016, the Commission announced the draft Enforcement Decree to seek public comments

and a final Enforcement Decree is expected to be issued after public hearings.

2. Main Issues

- Strengthened anti-bribery measures

Under the Act, if a 'public official, etc.' receives, demands or agrees to receive from the same person 'money or other benefits' worth more than KRW 1 million in one instance or KRW 3 million in aggregate during one fiscal year, such person may be subject to imprisonment of up to three years or a fine of up to KRW 30 million, irrespective of whether the payment or provision of money or other benefits was related to his/her duties.[1]

Even in a case where a public official, etc. receives, demands or agrees to receive money or other benefits below the threshold mentioned above (i.e., KRW 1 million in a single instance or KRW 3 million in aggregate per one fiscal year), the Act imposes an administrative fine (in the range of twice to five times the value of the money and other benefits received) on such person, if the money or benefit is received in connection with his/her duties.[2]

The Act defines the term "public official, etc." very broadly to include not only government officials in the conventional sense, but also teachers and employees of educational institutions, including private schools, and reporters, officers and employees of media outlets. This represents a significant expansion of applicability of anti-bribery regulation. While the Korean Criminal Code also punishes public official bribery, it requires that a benefit be given or received 'in connection with' the duties of a public official, if such benefit is to be deemed a bribe. For private commercial bribery, the Criminal Code imposes an additional element that an improper request be made (e.g., a request to award a bid in exchange for entertainment).

The scope of "money and other benefits" under the Act is also broad to encompass anything of economic value (whether tangible or intangible), including, among other things, money, food, liquor, entertainment, payment of debt, and employment.

Notably, the Act imposes a reporting obligation on public officials and other persons subject to the Act for their spouses' violation. If a covered person's spouse receives, demands, or agrees to receive money or other benefits in connection with such person's duties, then the covered person, as soon as he/she becomes aware of the violation, must (i) report in writing without delay to a relevant regulatory

1. If such public official, etc. (i) reports his/her receipt of such money and/or benefit in writing without delay to a relevant regulatory authority or (ii) declines to accept or returns the money and benefit, he/she shall not be subject to criminal punishment.
2. The exemption set out in footnote 1 shall also apply.

authority or (ii) decline to accept or immediately return the money or benefit. A person who fails to fulfill this reporting duty shall be subject to criminal punishment or an administrative fine.

- Social courtesy exemptions

The Act provides for exemptions for money or other benefits received within the boundaries of social custom or courtesy, such as: money or gift paid or given for congratulation or condolence; transportation, accommodation or food uniformly provided to all attendees in an official event; souvenirs or promotional gifts designed to be distributed to unspecified persons; and rewards or prizes given in a contest or by lot.

The draft Enforcement Decree specifies the types and amounts of foods, gifts and congratulatory and condolence gifts that are permitted under the Act.

For example, according to the draft Enforcement Decree, foods up to KRW 30,000 in value, gifts up to KRW 50,000 in value, and congratulatory or condolence gifts up to KRW 100,000 in value are allowed. Foods include any meal, refreshment, liquor and beverage, and gifts refer to any item other than money and foods. If foods and gifts are provided together, the total value must not exceed KRW 50,000. Congratulatory or condolence gifts include congratulatory or condolence money, and wreaths, flowers or foods provided in lieu of such money. If congratulatory or condolence money is given together with other gifts and foods, the sum of the values must not exceed KRW 100,000.

The draft Enforcement Decree also sets the upper limits of fees that can be paid to public officials for a speaking engagement or contribution of an article. Under the draft Enforcement Decree, in principle, the maximum amount of fee that can be paid to a public official for a speaking engagement for one hour or contribution of an article is KRW 500,000 for minister-level, KRW 400,000 for vice-minister-level, KRW 300,000 for officials with grade 4 or higher, and KRW 200,000 for officials with grade 5 or lower. If a speaking engagement lasts for more than one hour, the amount of additional fee may not exceed 1/2 of the upper limit amount regardless of the additional lecture time. If a public official who receives a fee in excess of the upper limit fails to report it to the relevant government agency and return the excess money to the payer, such public official may be subject to an administrative fine of up to KRW 5 million. However, there is no provision providing for punishment of a person who pays a fee in excess of the upper limit.

- Prohibition of improper solicitation

The Act makes it illegal to engage in any "improper solicitation" of a public official, etc., directly or indirectly through a third person, in connection with his/her performance of duties.

"Improper solicitation" means any request to a public official to conduct in such a way as to violate

a relevant law or exceed his/her authority granted under the relevant laws. The Act illustrates 15 behaviors which would constitute improper solicitation.

Ambiguity of the provisions relating to improper solicitation and their excessively broad scope have attracted sharp criticism. Among other things, innocent activities such as inquiring with a public official to explain his/her position on law or political views can easily be misconstrued as and fall under the scope of improper solicitation. Therefore, care should be taken in approaching a public official and presenting opinions.

- Corporate vicarious liability

The Act contains a corporate vicarious liability provision. Under Korean law, a corporate entity can be penalized only when vicarious liability is expressly provided for in the relevant law. The corporate vicarious liability under the Act is a departure from most of the other Korean criminal laws (including the Criminal Code which is the primary anti-corruption law in Korea) which do not provide for corporate vicarious liability. In the absence of a corporate vicarious liability provision, even if an officer or employee of a company paid a bribe to a public official in connection with the business of the company, only the individual officer or employee is held criminally liable.

The corporate vicarious liability under the Act is not strict liability, however. Therefore, if a company could demonstrate that it discharged its duty to adequately supervise its employees and has taken reasonable care to prevent violations, it may be exempt from vicarious liability.

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