Amendments to the Financial Investment Services and Capital Markets Act - Disclosure Obligations

Various amendments to the Financial Investment Services and Capital Markets Act (the "Capital Markets Act") were recently promulgated on May 28, 2013. This legal update is the third of a series of updates that will summarize the amendments made to the Capital Markets Act and discuss the major issues relating to such amendments.

The following is a summary of the amendments relating to disclosure and reporting obligations.

Unless otherwise specified in the amendments, the amended Capital Markets Act (the "Amended Act") will come into force on August 29, 2013, which is the date falling three months from promulgation. For provisions of the Amended Act that will come into force on a separately specified date, we have made note of such dates in our discussion below.

1. Stricter Disclosure Obligations for Changes in Financial Structure (Article 161(1) of the Amended Act)

- Currently, under Article 161(1) of the Capital Markets Act, a corporation is required to submit a report on material facts regarding changes in its capital (a "material fact report") in cases of dissolution, insolvency, business suspension, rehabilitation procedures, capital increase or reduction or similar events, but not changes in its debt status. The only disclosure to be made by a corporation in respect of a change in its debt status is set forth in the Disclosure Regulations of the Korea Exchange, which require that an ad hoc public disclosure be made in respect of an increase in its short-term borrowings beyond a certain amount, its assumption of, or exemption from, debts or its provision of collateral or guarantees beyond a certain amount.

- Under the Amended Act, the obligation to submit a material fact report will be triggered "upon a

resolution of the Board of Directors, etc. on changes in capital or debt, as such are prescribed by the Presidential Decree"; whereas, currently, the obligation arises only "upon the passing of a Board of Directors resolution on capital increases or reductions" under the Capital Markets Act. Accordingly, the Amended Act sets forth a stricter disclosure obligation regarding changes in financial structure; and the scope of the types of changes in debt status for which a material fact report is required will be prescribed by the Enforcement Decree, as amended.

- Under Article 171 (1) of the draft Enforcement Decree of the Capital Markets Act as proposed to be amended (the "Amended Enforcement Decree") in a prior announcement of legislation, the matters to be dealt with "as prescribed by the Presidential Decree" include only cases of capital increase or reduction. Accordingly, the Presidential Decree has not yet specifically prescribed the cases of "resolutions of the Board of Directors, etc. on changes in debts" for which a material fact report will be required. However, once the Amended Enforcement Decree prescribes such cases, it is possible that certain disclosure obligations will arise with respect to "resolutions of the Board of Directors, etc. on changes in debts".

2. Regulatory Relaxation on Registration Statements for Sales of Securities
(Article 119(6) of the Amended Act)

- Under Article 119 of the current Capital Markets Act, an issuer of securities intending to publicly offer or sell such securities is required to submit to the Financial Services Commission a registration statement regarding the public offering or sale of such securities.

- However, under the Amended Act, the issuer will be exempt from submission of a registration statement regarding a sale of its securities, subject to the satisfaction of certain requirements, such as sufficient disclosure having already been made and the securities to be offered/sold being the same; this is because it is viewed that there is no actual benefit from requiring that the same disclosure obligation be performed with respect to a sale of securities which have already been issued, and for which a registration statement was filed at the time of issuance.

- Also, Article 124-2 of the Amended Enforcement Decree provides for special exceptions to the obligation to submit a registration statement regarding a sale of securities. The major requirements for such special exceptions to apply include the following:

  (i) During the immediately preceding one (1) year period, the issuer shall have timely submitted its business report, semi-annual reports and quarterly reports;

  (ii) During the immediately preceding one (1) year period, the issuer or seller of the securities shall not have been subject to any sanctions for violation of public disclosure obligations;

  (iii) During the immediately preceding two (2) year period, a registration statement for the same

type of securities as those to be sold shall have been validly submitted; and

(iv) The seller of the securities shall not be the largest shareholder, major shareholder or officer of the issuer.

3. Deemed Withdrawal of Registration Statement in Case of Issuer's Failure to Submit a Corrective Registration Statement (Article 122(6) of the Amended Act)

- Under Article 122(1) of the current Capital Markets Act, if the issuer has submitted a registration statement containing any false description of a material fact or omission of a material fact and fails to submit a corrective registration statement as required by the Financial Services Commission, no sanctions are taken against the issuer, other than refusal of the Financial Services Commission to accept the registration statement. This has potential to mislead investors to believe that the procedure for issuance of securities is still in progress.

- The Amended Act contains a new Article 122(6), which provides that if the issuer fails to submit a corrective registration statement within the prescribed period in compliance with a request of the Financial Services Commission, such issuer shall be deemed to have withdrawn the registration statement in question.

- As for the "prescribed period", Article 130(5) of the Amended Enforcement Decree sets forth the period of three (3) months following receipt of a request for correction of the registration statement.

4. Disclosure of Remuneration for Individual Officers (Article 159(2) of the Amended Act)

- Under the Amended Act, a corporation required to submit a business report, such as a listed corporation, shall disclose, in its business report and other regular reports, the remuneration for each of its individual officers and the specific criteria and method of calculation thereof, if such remuneration is above an amount up to KRW 500 million as prescribed by the Enforcement Decree (which amount has been prescribed under Article 168(2) of the Amended Enforcement Decree as KRW 500 million). This is understood to be a legislative action taken to keep pace with the recent international regulatory trends for increased public disclosure of executive compensation.

- The remuneration for an individual officer which is subject to disclosure will be such officer's relevant portion of the total remuneration for the fiscal year paid by the corporation to all of its officers (including stock options under the Commercial Code or other applicable laws) (Article 159(2) of the Amended Act and Article 168(1) of the Amended Enforcement Decree).

- The above disclosure system for individual officers will become effective as from November 29, 2013.

5. Relaxation of Reporting Obligation of Officers and Major Shareholders on Stock Ownership (Article 173(1) of the Amended Act)

- Under Article 173(1) of the current Capital Markets Act, an officer or major shareholder of a listed corporation is required to report to the Securities and Futures Commission and the Korea Exchange on the status of specific securities held by him/her, within five (5) days from the day on which he/she became its officer or major shareholder, and thereafter, within five (5) days from the day on which any subsequent change occurs in the status of specific securities owned by him/her.

- Article 173(1) of the Amended Act adds the following provisions for exceptions:

  (1) As regards a report on a change in ownership status of specific securities, an officer or major shareholder shall be exempt from such reporting obligation if the matter to be reported falls within the scope of "minor" matters prescribed in the Enforcement Decree.

  (2) As regards a change in the ownership status of specific securities due to an "unavoidable" event prescribed in the Enforcement Decree, and as regards professional investors prescribed in the Enforcement Decree, differences in report details and filing deadlines shall be permitted.

- Article 200 of the Amended Enforcement Decree further provides as follows with respect to subparagraphs (1) and (2) above:

  (1) A change in the ownership status of specific securities shall be deemed "minor" if the change in the number of securities owned is less than 1,000 and the price of such acquisition or disposal is less than KRW 10 million (except where the aggregate change in the number or amount since the immediately preceding report date exceeds such number or amount).

  (2) A change in the ownership status of specific securities shall be deemed to be due to an "unavoidable" event if it occurs as a result of stock dividends, capitalization of reserves (bonus issue), stock split or consolidation, or capital reduction. In such case, the report period shall be extended until the 10th day of the month immediately following the month in which the event occurred.

  (3) Professional investors, such as the Korean government, Bank of Korea, Korea Deposit Insurance Corporation, bad banks, Korea Finance Corporation, Korea Credit Guarantee Fund, and various pension funds, are allowed to benefit from the extension of the report period until the

10th day of the month immediately following the month in which the event occurred.

6. Imposition of Administrative Fines for Violations of the Obligation to Report Substantial Holdings of Stock, etc. (5% Rule) (Article 429(4) of the Amended Act)

- A violation of the obligation to report substantial holdings of stock, etc. under Article 147 of the current Capital Markets Act carries no sanctions other than criminal sanctions.
- Under Article 429(4) of the Amended Act, a violation of the obligation to report substantial holdings of stock, etc. is subject to an administrative fine of up to KRW 500 million.
- Under the Amended Act, a violation of the obligation to report substantial holdings of stock, etc. is subject to an administrative fine in addition to criminal sanctions, at the discretion of the supervisory authorities.

7. Increased Responsibility for Investor Protection and More Stringent Public Disclosure Obligations for Credit Rating Companies

(Articles 335-11 and 335-12 of the Amended Act)

- The Amended Act contains new provisions for credit rating companies from Article 335-2 and onward.
- Under Articles 335-11(1) and 335-12 of the Amended Act, a credit rating company is required to determine the credit rating methodology pursuant to which it shall assign credit ratings. Also, a credit rating company is required, upon determining or changing its credit rating methodology, to submit the relevant credit rating methodology to the Financial Services Commission, the Korea Exchange and the Korea Financial Investment Association.

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