SHIN&KIM
법무법인(유) 세종

Increased Transparency, Flexibility and Fairness for Public M&As in Korea

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The Financial Services Commission announced in March, 2024 that it will amend the Enforcement Decree of the Financial Investment Services and Capital Markets Act ("**FSCMA Decree**") and the Regulations on the Issuance and Disclosure of Securities. The aim of the proposed amendments is to increase transparency and flexibility for mergers and acquisitions (M&As) involving listed companies in Korea.

The proposed amendments include:

- mandatory disclosure of the board of directors' opinion regarding the proposed M&A transaction;
- exclusion of statutorily prescribed formula for merger consideration/ratio except for mergers with affiliates and de-SPAC transactions;
- quality and independence policy requirement for external valuation firms; and
- requirement for audit committee/statutory auditor's approval when engaging an external valuation firm for mergers of affiliates.

These amendments are intended to aid shareholders in evaluating whether a proposed M&A transaction is fair, provide them with opportunities to receive a more favorable price and protect them in related-party transactions. These amendments are expected to take effect in the 3rd quarter of 2024.

(1) Mandatory disclosure of the board's opinion

When a listed company files a registration statement or material event report related to an M&A transaction, it must attach the board of directors' opinion regarding the transaction. The opinion will set forth (i) the purpose of the transaction and its expected effects, (ii) the fairness of valuations, (iii) the fairness of merger ratio and other transaction terms and (iv) if there is any dissenting director, the reason for such dissent.

(2) Negotiated merger consideration/ratio

The statutorily prescribed merger consideration formula under the FSMCA Decree will apply only to mergers between (i) a listed company and its affiliate and (ii) a listed SPAC and another company. Mergers between a listed company and a third party will be free from this formula, and the parties may negotiate and agree to a merger consideration/ratio. Such negotiated price/ratio must be reviewed by an external valuation firm for fairness.

(3) Quality and independence policy requirement for external valuation firms

For the review of a merger consideration/ratio, a listed company can only engage external valuation firms with a quality and independence internal policy in place. Such policy will need to include measures to (i) ensure its independence, objectivity and fairness, (ii) check and avoid internal conflict at the time of engagement, (iii) ensure quality in preparation and delivery of reports, (iv) ensure confidentiality and prevent insider trading, and (v) deal with violations of such policy.

An external valuation firm involved in computing a merger consideration/ratio cannot be engaged to review such consideration or ratio. Another firm must be engaged to assess its fairness.

(4) Requirement for audit committee/statutory auditor's approval when engaging an external valuation firm for mergers of affiliates

If a listed company seeks to engage an external valuation firm to assess a merger consideration/ratio for a proposed merger with an affiliate, it will need to obtain the prior approval of such engagement from the company's audit committee or, if no such committee exists within the board, the company's statutory internal auditor.

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