The Kim Young-Ran Act and Criminal Corporate Liability

The Improper Solicitation and Graft Act (commonly referred to as the "Kim Young-Ran Act", referred to hereinafter as the "Anti-Graft Act" or the "Act") took effect on September 28, 2016, after much heated debate during the course of its legislation. The Act applies to a wider scope of people, including not only public officials but also executives, employees of state owned enterprises and private media companies, teachers and employees at private schools, private persons performing public duties as well as the spouses of the aforementioned persons.[1]

Before the Anti-Graft Act, bribery of public officials and private commercial bribery was primarily governed by the Criminal Act. Since the Criminal Act did not recognize criminal corporate liability, individuals were punishable for acts of bribery while corporations were not. Also, in practice, many Korean subsidiaries of foreign corporations had a tendency to implement a relatively loose version of the global anti-corruption policies of their parent companies, as a reflection of local business culture.

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1. The term "public official" in the Act means any of the following persons:
   (1) civil servants under the State Public Officials Act or Local Public Officials Act, and persons deemed by other Acts as civil servants in terms of their qualification, appointment, educational training, service, remuneration, guarantee of tenure, etc.;
   (2) heads of public service-related organizations and public institutions prescribed in Article 3-2 of the Public Service Ethics Act, or Article 4 of the Act on the Management of Public Institutions and employees thereof;
   (3) heads of schools of various levels and educational corporations prescribed in the Elementary and Secondary Education Act, Higher Education Act, Early Childhood Education Act, and other Acts and subordinate statutes and employees thereof; and
   (4) representatives and employees of media companies as prescribed in the subparagraph 12 of Article 2 of the Act on Arbitration and Remedies, etc., for Damage Caused by Press Reports and employees thereof. (Article 2 of the Act).

   The term "private person performing public duties" in the Act includes any of the following entities or persons:
   (1) a member of a committee established under the Act on the Establishment and Management of Councils, Commissions and Committees under Administrative Agencies, or any other Acts and subordinate statutes, who is not a public official;
   (2) an individual, entity, or an organ belonging thereto, that has authority delegated from a public institution under Acts and subordinate statutes;
   (3) an individual on assignment from the private sector to a public institution in order to perform public duties; and
   (4) an individual or entity that conducts deliberation or assessment in relation to public duties in accordance with Acts and subordinate statutes. (Article 11(1) of the Act).

   For purposes of this article, we will simply refer to the aforementioned entities and persons as "public officials".

Not only does Anti-Graft Act now impose criminal corporate liability but it also introduces more stringent anti-corruption measures. As a result, now more than ever, corporations in Korea face a significant need to establish or update their internal anti-corruption policies.

Following is an overview of the key provisions of the Anti-Graft Act, its criminal corporate liability clause, and the policies and programs that corporations should implement to minimize criminal liability under the new Act.

1. Key Provisions

The Anti-Graft Act has two key components: (1) a prohibition on the provision of economic benefits to public officials and (2) a prohibition on improper solicitation.

If economic benefits in excess of KRW 1 million (approximately US$833)[2] on a single occasion or KRW 3 million (US$2,500) in total within one fiscal year are provided to a public official, the provision of such benefits is criminally punishable regardless of motive and regardless of whether the benefits were provided in connection with the duties of the public official.[3] When the economic benefits provided to a public official are less than the aforementioned amount, but the benefits are provided in relation to the duties of said public official, the provision of such benefits is punishable by an administrative surcharge, regardless of whether the benefits were actually provided in order to receive improper advantages. Please note that the following benefits are not prohibited under the Act: (i) food and drink, congratulatory or condolence money, or gifts that are offered for the promotion of normal business or social relationships, subject to the following cap amounts: the value of food and drink must be no greater than KRW 30,000 (US$25) per instance, the value of gifts must be no greater than KRW 50,000 (US$41) per instance, and the value of congratulatory or condolence money must be no greater than KRW 100,000 (US$83) per instance; (ii) transportation, accommodation, and food and drink, that is equally provided by an organizer of an official event related to the duties of a public official, to all participants thereof; (iii) souvenirs or promotional goods distributed to many and unspecified persons; and (iv) financial or other advantages that are permitted by any other act and subordinate statute, standard or social norm.[4]

2. Assuming an exchange rate of US$1 for KRW 1,200.

3. However, this provision does not apply to a private person performing public duties (Article 11(1) of the Act). Thus, if a private person working as a member of a government committee established under an official act receives benefits exceeding KRW 1 million on a single occasion and the benefits were not provided in relation to his duty as a member of said committee, then there would be no violation of the Act.

4. There are also certain other exemptions. Please refer to Article 8(3) of the Act for further details.

Improper solicitation refers to the act of requesting a public official to discharge his/her duties in violation of law, or beyond the scope of their authority granted under the relevant laws.[5] In principle, any person engaging in improper solicitation will be subject to an administrative surcharge regardless of whether he/she actually received financial benefits for exerting his or influence over the public official in question.[6]

2. Criminal Corporate Liability

Generally, if a representative, agent, or employee of a corporation ("corporate representative") violates the Act in connection with the business of the corporation, the corporation itself, as well as the corporate representative, may be subject to a criminal fine or administrative surcharge pursuant to Article 24 of the Act.

However, the Act provides safe harbor if the corporation in question fully performed its duty to supervise its corporate representative and took reasonable measures to prevent violations of the Act. Following are some key features of the Act and how they relate to criminal corporate liability:

A. Defining "in connection with the business of the corporation"

The Act holds a corporation responsible when its corporate representative engages in any prohibited practice while discharging his or her duties in connection with the business of the corporation.

To illustrate, in a case regarding a violation of the Customs Act, the Supreme Court of Korea held that the practice of an employee may be deemed "in connection with the business of [such employee's] corporation" if (i) there was a specific act by an employee which can be objectively recognized as having been performed for the business of the corporation, and (ii) the employee was aware and intended to perform his or her actions for the corporation's business.

The Supreme Court also said the assessment of the foregoing requirements should take into account

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5. There are fifteen (15) activities that constitute improper solicitation under the Anti-Graft Act, some of which are illustrated below. For the entire list, please refer to Article 5(1) of the Act.
   - soliciting a public official to process, in violation of relevant acts and subordinate statutes, tasks such as authorization, permission, license, patent, approval, inspection, examination, test, certification, verification or any other duties;
   - trading in influence so that duty-related confidential information on tender, auction, development, test, patent, military affair, taxation, etc., is disclosed in violation of relevant acts and subordinate statutes; and
   - trading in influence so that a specific individual, organization, or legal person is selected or rejected as a party to a contract in violation of relevant acts and subordinate statutes related to the contract.

6. Before the Act, influence peddling was punished only when the influence peddler received money for exerting his or her influence over a public official.

various facts and circumstances, including (a) the lawful scope of the corporation's business; (b) the title and position of the employee in question; (c) the relevance between the illegal act committed by the employee and the lawful business of the corporation; (d) the motive behind the illegal act and follow-up actions; (e) whether the corporation knew of the commission of the practice or was involved therein, and if so, to what degree; and (f) the source of the money used by the employee in committing the practice, and to whom the profit therefrom is attributed. (Supreme Court, 96Do2699, February 14, 1997). Since the wording of criminal corporate liability provisions in the Anti-Graft Act are similar to those of other acts such as the Customs Act, it is likely that the courts will apply a similar test to determine whether or not an employee acted "in connection with the business of the corporation."[7]

Therefore, if a corporate representative offers economic benefits to a public official based on a personal relationship, it could still put the corporation at risk of punishment if, under various circumstances (e.g., the employee's title and position, the motive and background for offering such benefits, the financial source of the benefits being provided, and whether the corporation recognized the commission of the actions), the corporate representative's actions can be interpreted as having been offered in connection with the business of the corporation.

B. Scope of "employee"

It should be noted that the scope of the term "employee of a corporation" as used in Article 24 of the Act will likely be informed by the following interpretations from the Supreme Court.

In previous corporate criminal liability cases, the Supreme Court of Korea has held that the 'employee of a corporation' shall include not only those who are formally employed by the corporation in question, but also those who directly or indirectly perform the duties for such corporation while under the direct control or supervision of the corporation. (Supreme Court, 93Do344, May 14, 1993). In another case, the Supreme Court ruled that a dispatched employee under the direction and supervision of the general contractor at a construction site without a formal employment contract should still be treated as an employee of that corporation. (Supreme Court, 2002Do2298, March 12, 2004).

C. Safe harbor under the Act

7. The criminal corporate liability provision in Anti-Graft Act is as follows, which is very similar to wording provided in other laws such as the Customs Act.

   "Where a representative of a legal person or organization, or an agent, employee or other servant of a legal person, organization or individual commits a violation under … , not only shall the violator be punished, but the legal person, organization or individual also shall be punished by a fine or administrative surcharge, prescribed by the corresponding provision. Provided, that this shall not apply where the legal person, organization or individual has not been negligent in giving due attention and supervision concerning the relevant duties so as to prevent such violation" (Article 24 of the Anti-Graft Act).

The following case precedent indicates certain circumstances in which corporations may be exempt from criminal liability under the Act:

In an unauthorized building construction case, the Supreme Court held that the question of whether a corporation fulfilled its obligation to fully supervise its representative, agent, or employee should be assessed by taking into account all facts and circumstances including, but not limited to, the following: (a) the intent and purpose of the law that the corporation is being charged with violating; (b) the degree of infringement of said law; (c) the intent of the legislator in imposing corporate criminal liability in regards to the violation in question; (d) the details of the violation and the degree of damages or consequences caused thereby; (e) the size of the corporation and the feasibility of supervising individuals who commit violations; and (f) the measures or actions taken by the corporation in order to ensure the prevention of such violations (Supreme Court, 2009Do5516, July 14, 2011). It is likely that other courts will apply a similar test for safe harbor.

It should also be noted that the Supreme Court of Korea has yet to establish clear standards on the specific measures and actions that should be taken by corporations in order to prevent violations. In one case where a violation of the Public Health Control Act was at issue, the Supreme Court held that exercising general supervision by training employees to ensure compliance with the Public Health Control Act and collecting signed pledges of compliance from employees when they entered the company does not automatically qualify a corporation for exemption from liability (Supreme Court, 92Do1395, August 18, 1992). The implication of this decision is that simply training employees or collecting compliance pledges may not suffice, and that corporations may need to implement more specific and tailor-made compliance programs in order to be exempt under the Act.

3. Necessary Corporate Policies and Programs – Need up-to-date & tailored compliance programs

Following is an overview of the types of policies and programs that corporations should implement in order to minimize criminal liability under the new Anti-Graft Act.

A. Internal anti-corruption regulations and manuals

Corporations should begin modifying their existing internal anti-corruption policies and manuals in ways that will ensure compliance with the Act. In particular, foreign corporations and their subsidiaries will need to align their global anti-corruption policies with the Act, since actions that are permitted under their global policies may be prohibited in Korea due to the Act. Furthermore, such modifications will need to be updated on a regular basis in order to reflect any developments in case precedent or judicial interpretation of the Anti-Graft Act.

B. Regular and effective employee training

Employee training should not be a mere formality but instead should be conducted to ensure that officers and employees will actually be able to familiarize themselves with the company's policy and the Act. It is also advisable that training provided to employees be documented (including the dates and contents thereof) and be linked to employee performance evaluations. It is not uncommon in Korea for management of a corporation to condone or even initiate corrupt practices. Therefore, it is important that management is not excused from such training.

C. Risk assessment

Assessment of corruption risk refers to the evaluation of factors which cause corruption and the analysis of business activities performed by each individual or department within a corporation in order to effectively understand risks and conduct supervision accordingly. It is advisable for corporations to examine the ways in which each of their departments perform business activities and conduct respective assessments of corruption risks. Based on such assessments, corporations will need to conduct tailored and proportionate supervision and monitoring.

D. Tailored process

As stated above, it is likely that the Supreme Court will take into account the size of the corporation and the nature of the affairs when assessing whether the corporation exercised adequate supervision over potential corrupt practices. Therefore, while smaller corporations might qualify for safe harbor through relatively simple measures such as communicating their compliance policies and manuals, holding regular meetings, and having a reporting system in place, larger-sized corporations will have to introduce more sophisticated systems, such as anti-corruption information management programs or a comprehensive system linked to existing accounting, reporting, or training systems.

E. Heavy disciplinary consequences when corruption is detected

A company may be tempted to be forgiving and sympathetic to violators of its anti-corruption policies instead of undertaking thorough investigations and imposing harsh disciplinary consequences. However, taking a soft approach could send the wrong message, implying that the company condones such practices and allowing violators to go unpunished with only a slap on the wrist.

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