

Expansive Korean Anti-Corruption Law Comes into Force

Korea to introduce “Kim Young-ran Act,” significantly expanding the scope of the anti-corruption regulatory framework.

The Improper Solicitation and Graft Act of Korea (the Act), commonly known as the “Kim Young-ran Act,” after the former head of the Anti-corruption and Civil Rights Commission who led the preparation of the original bill, will take effect on September 28, 2016.

The Act is expected to significantly impact business activities in Korea involving national and local governments, quasi-government institutions, public and private educational institutions, and media companies by: 1) expanding the definition of public officials and others subject to regulation; 2) prohibiting improper solicitations to public officials regardless of whether such improper solicitation is accompanied by an offer to pay or payment of money or a thing of value; 3) setting relatively low ceilings on gifts, entertainment or other valuables that can be provided to public officials, regardless of whether such payment was related to the public official's duties; and 4) extending the prohibition relating to gifts, entertainment or other valuables to the spouses of public officials if offered or provided in connection with the public official's duties.

Background of the legislation

Prior to this new legislation, Korea's Criminal Act already prohibited domestic public officials from receiving, demanding or promising to accept a bribe in connection with their duties, and also prohibited individuals from giving or offering to give a bribe. In addition, the Act on Combating Bribery of Foreign Public Officials in International Business Transactions, enacted in 1998, regulates bribery related to foreign officials.

The Act was enacted in the wake of controversies relating to alleged corruption of prosecutors, as well as criticisms regarding the limitations of the existing anti-bribery and anti-corruption legal regime. In 2010, a former chairman of a construction company disclosed that he had regularly hosted lavish drinking parties for prosecutors. The implicated prosecutors, deridingly called “sponsorship prosecutors,” were ultimately found not guilty of bribery. In 2011, a prosecutor was indicted on charges of receiving lavish gifts from an attorney, including a luxury sedan and a designer purse. Subsequently, the Supreme Court affirmed a lower court's acquittal of the prosecutor. In both of these cases the courts determined that the requisite connection between any improper requests and the benefits the prosecutors received had not been established.

Following these acquittals and strong public demand for stricter anti-bribery and anti-corruption legislation, the Act was enacted in March 2015. However, the Korean Bar Association, the Journalists Association of Korea and others argued that the Act was unconstitutional based on the broad definition of

public officials, regulations involving the spouses of public officials, vagueness of essential terms of the Act, and delegation of threshold amounts to administrative rules (the Enforcement Decree of the Act). In July 2016, the Constitutional Court rejected these challenges and upheld the constitutionality of the Act.

Key provisions of the Act

Regulation of “public officials” (Article 2)

The Act focuses on domestic “public officials.” Under the Act, the regulation of “public officials” is expanded to encompass not only officials in the public sector, but also specific private sector employees: namely, employees of private schools established under the Private School Act and employees of media companies subject to the Act on Press Arbitration and Remedies for Damage caused by Press Reports. The Act does not require these private schools and media companies to have any element of state ownership or control. In addition, as discussed below, certain provisions of the Act also apply to the spouses of public officials.

These two elements of the Act appear to expand the regulation of “public officials” and those specifically subject to the provisions of the Act beyond the concept of public or government officials regulated by other anti-corruption laws. For example, the US Foreign Corrupt Practices Act (FCPA) and other US federal laws define public or government officials as including individuals elected or appointed to local, state or federal government positions; individuals working in local, state or federal government agencies or offices; officers or employees of a foreign government or any department, agency or instrumentality thereof, or of a public international organization. While US courts and enforcement agencies have expanded coverage to include individuals who work at certain types of commercial entities, there is a requirement that these commercial entities have some level of state control or ownership. Furthermore, while US courts and enforcement agencies will under certain circumstances seek to regulate the conduct of public officials’ spouses, neither the FCPA nor other US federal laws specifically regulate conduct related to the spouses of public officials.

Prohibition of improper solicitations (Article 5)

The Act prohibits improper *solicitations* to public officials. This provision appears to establish an expansive definition of prohibited and culpable conduct. Unlike the FCPA and other similar anti-corruption laws, the Act does not require that the improper *solicitation* be accompanied by any payment, offer, or promise to pay or provide, money or a thing of value.

The Act identifies 15 categories of requests to public officials as prohibited, improper solicitations, including, for example:

- Influencing authorizations, permissions, licenses, inspections or examinations
- Mitigating or remitting various administrative dispositions or punishments, or imposition of taxes, charges, fines or penalty surcharges
- Intervening or influencing the appointment, promotion, job transfer or any other personnel management regarding public officials
- Trading in influence so that confidential information regarding tenders, auctions or developments is disclosed

- Influencing investigations, judgments, adjudications, decisions, conciliations, arbitrations or settlement of a case or any other equivalent function¹

The Act also identifies seven categories of requests to which the Act does not apply.² These exceptions have been criticized as vague, lacking clarity and likely creating loopholes for public officials and others. Indeed, the final listed exception provides that the Act shall not apply to “*conduct not deemed as defying social norms.*” The vagueness and possible scope of this general exception have created significant controversy including a challenge in the Constitutional Court, which was rejected.

Prohibition of provision/reception of money and valuables (Article 8)

In another expansive provision, the Act prohibits giving money or anything of value to public officials above certain thresholds, even if there is no improper solicitation or corrupt purpose. The Act imposes criminal liability or administrative fines on giving to a public official, and a public official receiving, money or other benefits exceeding KRW1 million (approximately US\$900) in a single occasion, or exceeding an aggregate KRW3 million (approximately US\$2,700) in a one-year period, regardless of a link to the public official’s duties. The prohibition is extended to a public official’s spouse if there is a link to the public official’s duties.

While these thresholds may seem relatively high, even stricter thresholds are imposed through the Enforcement Decree of the Act. The decree sets limits of: KRW30,000 (approximately US\$27) for food and drink, KRW50,000 (approximately US\$45) for gifts, and KRW100,000 (approximately US\$90) for festive occasions and funerals. These fairly low thresholds are expected to significantly affect the Korean business culture of “jeopdae” (business entertainment), “ttokkap” (gift-giving) and “cheongtak” (solicitations based on existing relationships).

Unlike many other anti-corruption laws, the Act prohibits public officials from receiving, requesting or promising to receive any money or a thing of value, beyond the above thresholds, “*regardless of the relationship between such offer and his or her duties, and the motive for such offer.*” Under the FCPA, payment of money or providing a thing of value to a government official is prohibited if the purpose is to influence the official or otherwise to secure any improper advantage in obtaining, retaining or directing business. Under the Act, however, establishing a corrupt purpose is not required.

In addition, in what appears to be another expansive interpretation, the Act also prohibits public officials from receiving, requesting or promising to receive any money or thing of value, in connection with the public official’s duties, regardless of whether the amount exceeds the above thresholds and regardless of whether “*such offer is given in exchange for any favors.*”

Corporate criminal liability for an employee’s provision of money and valuables to a public official (Article 24)

Unlike the Criminal Act, which imposes criminal liability for bribery on individuals only and not corporations, the Improper Solicitation and Graft Act imposes criminal liability on a corporation for its employee’s violation of the Act, unless the corporation exercised due care and supervision to prevent such violation.

The corporate criminal liability provision is similar to the joint/vicarious penalty provision of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions. The provision is expected to expose corporations to a greater risk of potential liabilities for their employees’ violations of the Act.

Conclusion

With the Act coming into force on September 28, 2016, firms doing business in Korea should assess their compliance policies and programs to ensure conformity with the Act. At the same time, firms whose operations may be subject to both the Act and the FCPA should be mindful of the possibility that a violation of the Act, or an investigation into a possible violation of the Act, may trigger an FCPA investigation.

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¹ The full list of the 15 categories of improper solicitation under the Act is as follows:

1. Exerting influence so that authorization, permission, license, patent, approval, inspection, examination, test, certification, verification or any other duties, which are handled upon receiving an application from a duty-related party as prescribed by laws and regulations, are managed in violation of laws and regulations
2. Mitigating or remitting various administrative dispositions or punishments, such as cancellation of authorization or permission, and imposition of taxes, charges, fines for negligence, penalty surcharges, charges for compelling compliance, penalties or disciplinary actions in violation of laws and regulations
3. Intervening or exerting influence in the appointment, promotion, job transfer or any other personnel management of public officials or relevant persons in violation of laws and regulations
4. Trading in influence in violation of laws and regulations so that a person is appointed to or rejected from a position which intervenes in the decision-making of a public institution, including a member of various deliberation, decision-making and arbitration committees, as well as a member of a committee for a test or screening administered by a public institution
5. Trading in influence in violation of laws and regulations so that a specific individual, organization or legal person is chosen or rejected in the selection by a public institution for the recipient individual or organization of any award, prize or commendation for outstanding performance
6. Trading in influence so that duty-related confidential information on tender, auction, development, test, patent, military affair, taxation and others, is disclosed in violation of laws and regulations
7. 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 the laws and regulations related to the contract

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8. Intervening or exerting influence so that subsidies, incentives, contributions, investments, grants, funds and others, are assigned to, provided to, invested in, deposited in, lent to, used to make contributions to, or finance a specific individual, organization or legal person in violation of laws and regulations
 9. Trading in influence so that a specific individual, organization or legal person buys, exchanges, uses, benefits from or possesses goods and services that are produced, provided or managed by public institutions beyond the monetary value prescribed by laws and regulations or against normal transaction practices
 10. Trading in influence so that admission, grades, performance tests or other matters related to schools of various levels are handled and manipulated in violation of laws and regulations
 11. Trading in influence so that physical examination for conscripts, assignment to a military unit, appointment or any other matters related to military service are handled in violation of laws and regulations
 12. Trading in influence so that, in various assessments and judgments performed by public institutions, the assessment or judgment is made in violation of laws and regulations, or the results are manipulated
 13. Trading in influence so that a specific individual, organization, or legal person is selected or rejected as subject-matter of administrative guidance, control, inspection or examination, the outcome thereof is manipulated, or discovered violations are ignored in violation of laws and regulations
 14. Trading in influence so that the investigation, judgment, adjudication, decision, conciliation, arbitration or settlement of a case or any other equivalent function is handled in violation of laws and regulations
 15. Exerting official authority by a public official or relevant person beyond the limits of his or her position and authority granted by laws and regulations, or doing any act for which a public official or relevant person lacks legitimate authority regarding the duties that may be subject-matter of the improper solicitation prescribed by Subparagraphs 1 through 14

² The seven categories of requests to which the Act does not apply are:

1. Requesting certain actions, such as asking for the remedy against or resolution of infringement on a right, or suggesting or recommending the establishment, amendment or rescission of related laws and regulations, and standards in accordance with the procedures and methods prescribed by the Petition Act, the Civil Petitions Treatment Act, the Administrative Procedures Act, the National Assembly Act, other statutes and regulations, and standards (including rules, policy and standards of public institutions)
2. Publicly soliciting a public official or relevant person to take a certain action
3. Where an elected public official, political party, civil society organization and others, conveys a third party's complaints and grievances for the public interest, or suggests or recommends establishing, amending or repealing any laws and regulations and standards (including rules, policy and standards of public institutions), or improving policies, projects, systems and their management
4. Requesting or demanding that a public institution complete a certain duty within a statutory deadline, or inquiring or asking verification about the progress or outcome thereof
5. Applying or making a request for verification or certification of a certain duty or legal relations
6. Requesting explanation or interpretation of systems, procedures or laws and regulations related to a certain duty in a form of inquiry or consultation
7. Any other conduct not deemed as defying social norms