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Legal Updates

Overview of the Amended Korea Commercial Code

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The amended Korea Commercial Code (the “Amended KCC") has taken effect on April 15, 2012, and brings sweeping changes to Korean corporate laws. On the whole, the Amended KCC represents the intent of lawmakers to increase both the effectiveness and transparency in business management. Also, the Amended KCC adopts information technology in corporate dealings, and manifests an effort to further bring the current corporate system in line with international standards.

The Amended KCC adopts new business forms. The old KCC allows for four types of corporations, while the partnership form was only acknowledged by the Civil Code and special regulations. However, in practice, the predominant business form used is that of a joint stock company, and the others are rarely found in Korea. Even companies with small market capitalization and only a few shareholders use the joint stock company form. The Amended KCC introduces new corporate forms: a Limited Liability Partnership ("LLP"), which differs from the partnership form specified in the Civil Code, and a Limited Liability Company ("LLC"). The former provides limited liability protection to partners despite the partnership form. The latter allows flexibility for members to agree on terms that relate to the establishment, operation, and corporate governance of an LLC. As we have seen from the U.S., the popularity of the new corporate forms will depend largely on the tax benefits they offer to various Korean companies.

The Amended KCC raises the flexibility and effectiveness of a company's issuance of securities. The minimum capital requirement under the old KCC is done away with, and non-par value shares are introduced, making it easier for a company to be established. Furthermore, while the old KCC recognizes only restricted variations of common and preferred shares, the Amended KCC permits a company to issue a wide range of preferred shares with various rights and obligations in accordance

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with agreement of parties. The Amended KCC also abolishes the ceiling for bonds issued by a company, and allows for the issuance of various types of bonds, including ones with participation rights in the profit distribution.

The flexibility in procuring capital conflicts with the capital adequacy principle in which the old KCC was firmly rooted. The old KCC did not allow for any system that strayed from the principle, and the Korean courts had been faithful in adhering to this inflexible principle in interpreting the laws. The Amended KCC relaxes the strict adherence to the principle in an attempt to increase the flexibility of capital procurement. A subscriber of a company's shares may set off receivables owed by the company to the subscriber with the subscription amount, which has not been possible with limited exceptions in special laws.

The Amended KCC increases the level of responsibility for a company's directors to enhance transparency in corporate governance. The old KCC did not recognize the concept of a director's usurpation of corporate opportunity. The Amended KCC addresses the problem of a company's directors, or specially-related persons, through establishing separate business entities, benefiting from business opportunities that should have been enjoyed by the company. The Amended KCC allows for such activity only after the approval from 2/3 of the board of directors with the board of directors being held responsible for any loss incurred by the company from such activity in case of a shareholder suit against them.

As yet another step in furthering transparency in corporate governance, the Amended KCC broadens the category of conflicts between a company and its director. A company's director who engages in a transaction that falls within this category of conflicts must disclose the main terms and conditions of such transaction to the board of directors in advance and can only proceed with the transaction upon obtaining approval by the board of directors through a special resolution.

Another main principle of the old KCC was one of equality among shareholders. This principle held that all shareholders were to be treated equally, and the laws and courts' interpretations of them had

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been informed by this unbending principle. Accordingly, under the old KCC, neither the squeeze-out of minority shareholders by the majority shareholder nor the cash-out merger was allowed. The Amended KCC takes a more flexible approach in favor of business effectiveness. The majority shareholder with 95% or more of the issued and outstanding shares of a company has the right to force minority shareholders to sell their shares to the majority shareholder. In the Amended KCC, minority shareholders can also force a sale of their shares to the majority shareholder as an exit option. Moreover, the Amended KCC introduces a cash-out merger in which cash instead of shares are used to buy out shareholders of the disappearing company.

Under the Amended KCC, a triangular merger, which was not permitted by the old KCC, is possible. In a triangular merger, shareholders of a disappearing company receive shares of the parent company of the merged entity instead of shares of the merged entity. Also, the requirement for a short form merger, needing only a board resolution and not shareholder approval, has been eased from 5% or less of new shares to be issued to 10% or less of new shares to be issued.

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