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A Brief Overview of the Anti-Corruption and Bribery Prohibition Act

The Anti-Corruption and Bribery Prohibition Act, more commonly known as the Kim Young-ran Act (hereinafter referred to as the “Act” or the “Kim Young-Ran Act”), has most recently been promulgated and is set to take effect from September 28, 2016. Since its introduction, the Kim Young-ran Act attracted a lot of public attention for the concerns over its constitutionality and there is still an ongoing debate as to whether or not it should be amended. In light of such interest from the public, we have set forth below a brief overview of the Kim Young-ran Act and its ramifications in an attempt to provide some guidance as to what is expected from the enactment of the Act. We believe that private and public companies as well as government institutions may need to adopt or amend their existing internal anti-corruption rules & policies and codes of conduct etc., in compliance with the Kim Young-ran Act. Appropriate training and education programs may also need to be implemented in advance.

** We provide legal advice on anti-corruption laws such as the Kim Young-ran Act (including its interpretation, analysis on the constitutionality, advice on establishment of compliance system and legal services for criminal defense). Should you have any queries regarding the Kim Young-ran Act, please feel free to contact us at any time.*

1. Target

The Kim Young-ran Act is targeted at “Public Officials.” Public Officials under the Act include person(s) falling within the definition of public officials as defined in the related laws such as the National Public Officials Act and the Local Public Officials Act. Officers and employees of public service organizations under the Public Service Ethics Act such as the Bank of Korea, state-owned enterprises, government institutions and public institutions as defined in the Act on The Management of Public Institutions¹ all fall within the definition of Public Officials under the Act.

¹ Companies of which half or more of its gross income comprised of government subsidies; the government owns 50% or more of the ownership interest of; or the government owns 30% or more of the ownership interest of and has management control over.

What's interesting is that unlike the bribery offenses under the existing provision of the Korean Penal Code, Public Officials under the Kim Young-ran Act also include teachers, journalists and reporters. The scope of Public Officials covered under the Act include principals, teachers and staff at all levels of public and private schools that are established in accordance with the school-related laws such as the Early Childhood Education Act, Primary and Secondary Education Act, Tertiary Education Act and/or Private School Act, and the representatives, officers and employees of the media and the press under the Act on Press Arbitration and Remedies etc. for Damage Caused by Press Reports.

2. **Prohibition of Corrupted Requests**

The Kim Young-ran Act prohibits any person from making a corrupted request to Public Officials either directly or indirectly through a third party. A corrupted request generally refers to a request made to a Public Official to act beyond his/her legal rights or authority or in violation of laws and regulations. Specifically, any one of the following requests will constitute a corrupted request that is subject to prosecution under the Kim Young-ran Act.

- ① Request for illegal handling of a Public Official's duties relating to (i) granting licenses, permits, approvals or certifications; (ii) admissions, grades and performance evaluation at schools; (iii) military affairs such as physical examination for conscription or assignment to a certain corps, division or position; or (iv) investigation, trial, mediation, arbitration or reconciliation of a certain matter.
- ② Request for an exemption or a waiver of (i) tax, impost, fine or penalty, etc.; or (ii) various administrative actions relating to cancellation or revocation of a license or a permit.
- ③ Request for an illegal intervention or exercise of influence on the (i) human resources management of Public Officials including matters relating to their recruitment, promotion and/or assignment; or (ii) allocation or contribution to a specific individual, organization or entity of certain subsidies, grants, bonuses or funds.
- ④ Request for selection, exclusion or elimination of a certain individual, organization or entity (i) for or from a certain title or position engaged in the decision making of public institutions such as a member of various review, resolution or mediation committees or a member responsible for the examination or selection process supervised by a public institution; (ii)

for or from various awards, prizes or recognition granted by a public institution; (iii) as a contractual party to a certain contract in breach of contract-related laws; or (iv) as the target of an administrative order, crackdown, audit or inspection.

- ⑤ Request for unauthorized disclosure of confidential information relating to bidding, auction, development project, examination, patent, military, tax, etc.
- ⑥ Request for sale, exchange, transfer of possession of goods or services that are produced, supplied or managed by a public institution to a specific individual, organization or entity at prices beyond those set by the law or normal business practices.
- ⑦ Request for manipulation of the outcome of an assessment or decision made by a public institution.

The Kim Young-ran Act sets forth specific exceptions to the prohibition above. They are as follows:

- ① Requesting for a relief on the infringement or violation of one's rights in accordance with the procedure set forth in the laws, or proposing or suggesting the enactment, amendment or abolition of such laws.
- ② Requesting for completion of certain work within the period prescribed under the law, or inquiring on the progress or outcome of such work.
- ③ Requesting for a confirmation or proof of one's duty or legal matters.
- ④ Requesting for an explanation or interpretation of law, policy or procedure relating to one's duty through questioning or consultation.
- ⑤ Requesting for a certain act in a publicly open manner.
- ⑥ Elected Public Officials or member of a government party or non-governmental organization delivering a civil petition for grievance from a third party for public interest or proposing or suggesting (i) enactment, amendment or abolition of certain laws and regulations or standards, or (ii) improvement on a certain policy or scheme.
- ⑦ Other acts that do not contravene social rules and norms.

Penalties for Violation

Corrupted requests in violation of the Kim Young-ran Act will be subject to criminal penalty as

follows:

Penalty	Target	Relevant Clause of the Act
Imprisonment for up to 2 years or penalty not exceeding KRW 20 million	A Public Official who received a corrupted request and performed his/her duty pursuant to such demand.	Article 22(2)1 of the Act
Fine not exceeding KRW 30 million	A Public Official who made a corrupted request to other Public Official on behalf of a third party.	Article 23(1)1 of the Act
Fine not exceeding KRW 20 million	A person who made a corrupted request to a Public Official on behalf of a third party.	Article 23(2) of the Act
Fine not exceeding KRW 10 million	A person who made a corrupted request to a Public Official through a third party.	Article 23(3) of the Act

Please note that a person who himself/herself directly made a corrupted request to a Public Official for himself/herself is not subject to penalty.

3. Accepting, Demanding or Promising Benefits

Under the Kim Young-ran Act Public Officials are prohibited from receiving, demanding or promising to receive any money, valuables or benefits (hereinafter “Benefits”) ‘exceeding’ KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year(the “Threshold Amount”). It is important that Benefits above the Threshold Amount are prohibited regardless of the existence of relevance to duties of the Public Officials, or regardless of whether or not it was done as an act of reciprocity.

Benefits at or below the Threshold Amount are prohibited only if it is related to duties of the Public Officials. The meaning of ‘relevance to duties of the Public Officials’ for purpose of the Kim Young-ran Act is likely to not only include the duties carried out under the laws and regulations, but also any act closely related to such duties or the duties a Public Official is practically or actually involved in (which reflects the court precedents related to bribery charges). Please note that even in this case, it is not required that Benefits are given as an act of reciprocity.

Under the Kim Young-ran Act, spouses of Public Officials are prohibited from receiving, demanding or promising to receive Benefits in violation of the Act, provided that in the case of spouses of the Public Officials, such Benefits shall be received, demanded or promised to be received in relation to the duties of such Public Official.

The foregoing are the most important characteristics of the Act in comparison with the existing laws relating to anti-corruption. Under the Penal Code, punishment is possible only when there is proof of relevance and reciprocity in case of receipt of valuables. However, under the Kim Young-ran Act, the act is punishable if the value of Benefits received exceeds the Threshold Amount without proof of relevancy and reciprocity, and acts conducted by spouses of the Public Officials are also punishable.

Benefits

The category of Benefits prohibited under the Kim Young-ran Act is broad in its scope. It includes any and all kinds of valuables and benefits in the form of money, stock, real estate (including land use rights), membership, discount coupon and admission ticket etc. It also includes providing food and beverages, providing entertainment such as golf, providing convenience in the form of accommodation and/or transportation, waiving a debt obligation, providing employment, granting concession rights and any tangible or intangible economic benefits.

Exception to Prohibition

The following are cases where Benefits, even exceeding the Threshold Amount, can be given and

taken without violating the Kim Young-ran Act (Article 8(3) of the Act):

- ① Compensation for outside lectures approved by Article 10 of the Act;
- ② Benefits that a public institution pays to its Public Officials or dispatched Public Officials; or Benefits that a superior Public Official pays to its junior Public Officials for consolation, encouragement or award;
- ③ Benefits in the form of food, congratulatory or condolence money or gift for smooth performance of the duties, socialization, formality or mutual aid, of which values do not exceed those set by the Presidential Decree;
- ④ Benefits provided based on a legitimate source of right, such as the repayment of debt resulting from a private transaction (excluding those made as a gift);
- ⑤ Benefits provided by the relatives (as specified in Article 777 of the CIVIL CODE) of a Public Official;
- ⑥ Benefits provided by an association to which the Public Officials belong, such as employees' mutual aid association, alumni association, hometown alumni association, social gathering, religious group, social group, etc to its member according to its standards; and Benefits that a person who has a noticeably long and continued relationship with a Public Official, such as a member of the associations set forth above, gives to the Public Official under a hardship caused by illness and/or disaster;
- ⑦ Benefits in the form of transportation, accommodation, food, etc. uniformly provided by the host of an official event related to the duties of a Public Official to the participants within a general range;
- ⑧ Souvenirs or promotional material intended to be distributed to many and unspecified persons, or reward, prize, etc. provided through a contest or drawing; or
- ⑨ Other Benefits allowed by other laws, regulations, standards or socially established rules.

Penalty for Violation

The consequences for accepting, demanding or promising Benefits under the Kim Young-ran Act are as follows:

Penalty	Target	Relevant Clause of the Act
Imprisonment for up to 3 years or penalty not exceeding KRW 30 million	A Public Official who received, demanded or promised to receive Benefits exceeding KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year	Article 22(1)1 of the Act
	A Public Official who was aware that his/her spouse received, demanded or promised to receive Benefits exceeding KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year related to his/her duties and failed to make report of the fact	Article 22(1)2 of the Act
	A person who gave, promised to give or offered Benefits exceeding KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year to a Public Official or his/her spouse	Article 22(1)3 of the Act
Fines not exceeding 2 times the value of the Benefits up to 5 times the value of the Benefits	A Public Official who received, demanded or promised to receive Benefits at or below KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year related to his/her duties	Article 23(5)1 of the Act
	A Public Official who was aware that his/her spouse received, demanded or promised to receive Benefits at or below KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year related to his/her duties and failed to make report of the fact	Article 23(5)2 of the Act
	A person who gave, promised to give or offered Benefits at or below KRW 1 million per occasion or KRW 3 million in aggregate per fiscal year to a Public Official or his/her spouse related to such Public Official's duties	Article 23(5)3 of the Act

4. Miscellaneous

(1) **Public Officials' Obligations to File Reports (Articles 7 & 9 of the Act)**

Public officials are obliged to inform the person making the corrupted request that such request is a corrupted request and clearly decline such request. If, despite such declination, any Public Official receives further corrupted requests, such Public Official must file a report to the head of the institution he or she belongs to.

If any Public Official receives, is promised or is offered any prohibited Benefits, or if he/she learns that his/her spouse receives, is promised or is offered such Benefits, such Public Official must file a report thereof to the head of the institution he or she belongs to.

(2) **Restriction on Compensation for Lectures (Article 10 of the Act)**

The Kim Young-ran Act prohibits receipt of compensation for outside lecturing in the amount exceeding the limit set by a Presidential Decree. The scope of outside lecturing that is subject to review by the Kim Young-ran Act include activities related to promotions, negotiations, seminars, public hearings or other teaching, lecturing or writing of articles that are related to the Public Officials' duties or that the Public Official are requested to conduct, carry out or participate in as a result of his/her de facto influence arising from his/her position.

The Kim Young-ran Act also requires all outside lectures to be reported in advance in writing.

(3) **Restriction on Activities of Public Workers (Article 11 of the Act)**

The Prohibition against corrupted request and receipt of Benefits under the Kim Young-ran Act applies *mutatis mutandis* for execution of public work by Public Workers. The scope of Public Workers who are subject to the Kim Young-ran Act are as follows:

- ① Committee members who are not Public Officials among member of committees established by the Act on The Establishment and Operation of Committees Belonging to Administrative Agencies or other laws and regulations.

- ② corporations, groups, institutions or individuals entrusted or commissioned by public institutions pursuant to laws and regulations
- ③ Persons dispatched from private sector to a public institution to conduct public work
- ④ Individual, corporation or group conducting review or evaluation in official capacities pursuant to legislative laws

(4) Obligations of Heads of Institutions (Articles 7 & 9 of the Act)

Under the Kim Young-ran Act, if the head of an institution becomes aware of any corrupted request made to its Public Officials, he/she has the obligation to take necessary actions such as suspension of participation in work of said officials, appointment of a proxy for the suspended work, transfer of officials in question, etc.

If the head of an institution becomes aware of receipt of Benefits by its Public Officials, he/she has the obligations to file a report to the investigative agencies.

(5) Protections for Reporters (Article 15 of the Act)

The Kim Young-ran Act prohibits disadvantages against and provides protective measures such as confidentiality of identities, reduction of liabilities for persons reporting corrupted request, offer of Benefits or other violations of the Act.

5. Forecast

There are some controversies surrounding the Kim Young-ran Act, one of them being that the Act raises such issues of unconstitutionality as breach of freedom of conscience by having spouses of Public Officials be subject to the Act; discrimination against teachers and journalists by including them over other occupation with public characteristics; violation of the principle of ban on comprehensive authorization by allowing exceptions to prohibitions to the extent permitted by Presidential Decree, Etc. Another point of controversy is that the Act would raise the risk of investigative agencies' exercise of arbitrary powers as the Kim Young-ran Act allows the investigative agencies to investigate and prosecute under lower level requirements of relevancy

and reciprocity compared to the higher level of proof of relevancy and reciprocity required in bribery cases in the past.

Still and all, as significant aspects of the Kim Young-ran Act have been delegated to a Presidential Decree we will still need to wait and see how the Presidential Decree of the Act is legislated. Also it is worth noting that there already have been opinions voiced towards amending the Kim Young-ran Act to address some of the issues of unconstitutionality, so we will also need to wait and see whether there are any amendments made to the Act as well.