

# Current Enforcement Environment in Korea



October 25, 2016



# CONTENTS

- I. Recent Compliance Trends in Korea
- II. Mitigating Risks for Companies and Executives
- III. Key Points of an Effective Compliance System



# Recent Compliance Trend in Korea

# Recent Compliance Trends in Korea



## *Government's Drive to Eradicate Corruption*



...



- **Aftermath of the *Sewol* ferry disaster: Focus on **safety****

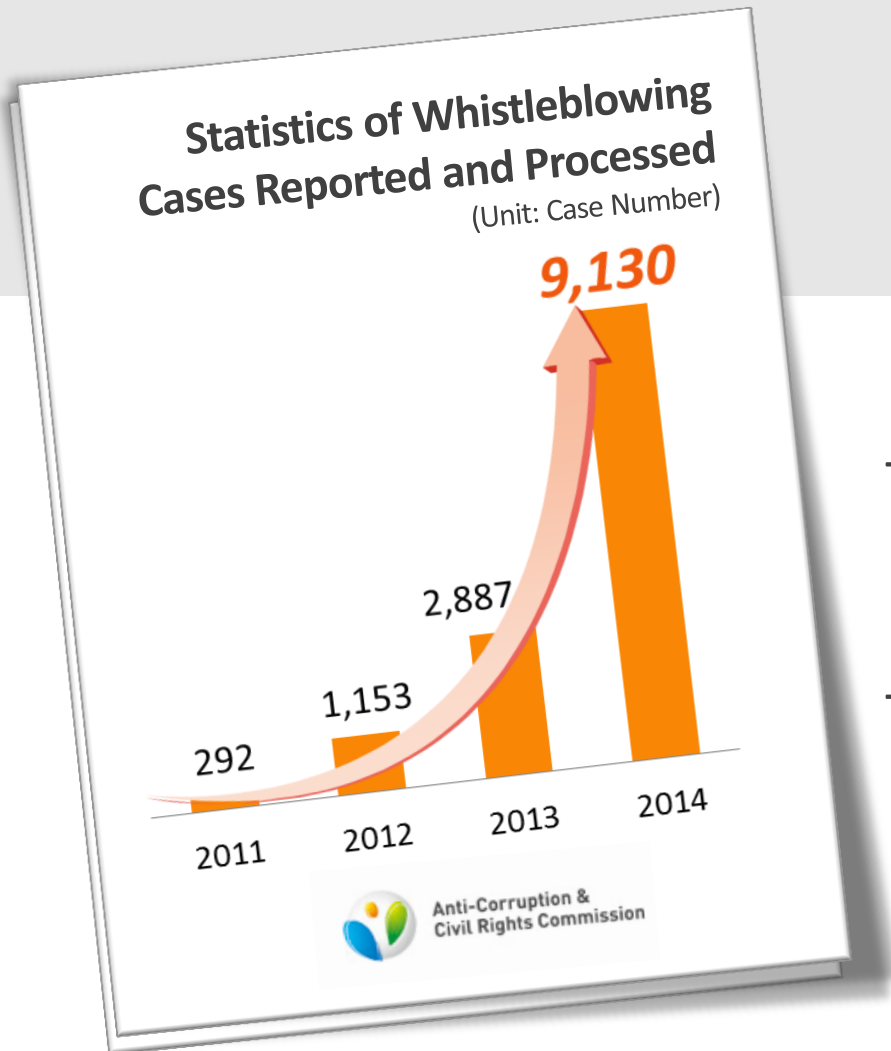
---

- **Supreme Prosecutor's Office Special Investigation Team on **Corruption****

---

- **District Prosecutors' Offices' Joint Investigation Teams for Various Industries**
  - Seoul Western District PO JIT on **Pharma Rebates**
  - Seoul Central District PO focus on **Defense Industry**
  - Seoul Southern District PO JIT on **Financial Crimes**
  - Seoul Central District PO focus on **Auto Industry** and **Household Goods**

# Recent Compliance Trends in Korea



## *Whistleblowing on the rise*

- Whistleblower Protection Act of 2011
- New Anti-Graft Act provision on protecting and rewarding whistleblowers

Anti-Corruption & Civil Rights Commission, Nov. 18, 2015.

<http://www.acrc.go.kr/acrc/board.do?command=searchDetailTotal&method=searchDetailViewInc&menuId=05060314&boardNum=51491>

# Recent Compliance Trends in Korea

## *Increase of expansive “dawn raids”*

### Prosecutors’ Office

- Obligation to comply with search and seizure warrant
- Company premises, executive offices, employee homes and vehicles

### KFTC

- Criminal penalties for resisting, obstructing, or avoiding investigation

### Nat’l Tax Service

- Field audits (regular and special)

### Customs Office

- On-site audits

### Financial Authorities

- On-site audits

- ▶ **Expansive and intrusive search and seizure (electronic documents)**
- ▶ **Government’s forensics capability (deleted emails/files recoverable)**
- ▶ **Findings from a dawn raid likely to expand investigation into other areas**

# Recent Compliance Trends in Korea: Anti-Graft Act

**Sept. 28, 2016**

***Effective date of the Anti-Graft Act***



**Expansive definition of “public officials”**



**Connection with duty of the recipient not necessary to impose liability**



**Prohibition against improper requests (even without any benefits exchanged)**



**Corporate liability**



# Mitigating Risks for Companies and Executives



# Liability Arising from Employee Misconduct

## Criminal Liability

- Corporate criminal liability
  - Criminal liability of executives and directors
- 

## Civil Damages

- **Liability of company:** For damages incurred due to actions of employees or executives in relation to their performance of duties
  - **Liability of directors** (breach of fiduciary duty)
- 

## Administrative Measures

- Administrative fines, cancellation of license/permit
- Debarment

# Defense: Duty of Due Care and Supervision

**Criminal Liability**

Civil Damages

Debarment

## **Due Care and Supervision to Prevent Employee Violation**

Due Care in Appointment of Employee and Supervision of Business

Due Care and Supervision to Prevent Violations in Government Bidding

# Defense: Duty of Due Care and Supervision

Criminal Liability

**Civil Damages**

Debarment

Due Care and Supervision to Prevent Employee Violation

**Due Care in Appointment of Employee and Supervision of Business**

Due Care and Supervision to Prevent Violations in Government Bidding

# Defense: Duty of Due Care and Supervision

Criminal Liability

Civil Damages

**Debarment**

Due Care and Supervision to Prevent Employee Violation

Due Care in Appointment of Employee and Supervision of Business

**Due Care and Supervision to Prevent Violations in Government Bidding**

# Corporate Liability and the Compliance Defense

- ▶ To be exempt from corporate liability, company needs to prove that it performed **due care and supervision to prevent the wrongdoing**



***“Actual actions undertaken to prevent the illegal activity”***

**The Supreme Court deems most important the “actual actions the corporation undertook to prevent the illegal activity,” with consideration for the following factors:**

- Regular employee training
- Monitoring for potential violations
- Company’s measures to address suspected violations
- Remedial action upon discovery of violation

# Management's Duty of Due Care and Supervision

*Korean courts have found that management's duties include the "duty of supervision"*

## Scope of Duty of Supervision

- Failing to investigate suspected illegal acts is a violation of the duty of supervision
- The duty of supervision covers business operations in general and is not limited to agenda of board meetings
- The duty of supervision extends to business operations of specialized areas that other directors are responsible for
- Part-time directors are not exempt from this duty

## Duty of Supervision as Required By Court Precedent

- Establishing information, reporting and internal control systems
- Taking measures such as disciplinary action or termination when violations are discovered
- Taking measures to mitigate damages

# Case Studies

# Case #1

## Unauthorized Access of Information Network (Criminal)

### FACT



Company

*Criminally liable?*



Employee

*Violation of the  
Information Network Act*

### COURT DECISION

#### Facts

Company's contracted debt collectors illegally obtained personal information of debtors by accessing the National Health Insurance Service system.

#### Holding

**Company was found guilty** because:

- Formalistic training sessions (even if held) are insufficient; the company (given its size) should have **substantially monitored whether debt collectors were abiding by laws and guidelines**
- Abundant evidence that Company pressured debt collectors to collect debt; prevalent practice within the Company for debt collectors to access the NHIS system.

*Takeaway: Formalistic training sessions not enough; continuous monitoring necessary*



## Case #2

### Discharge of Contaminants (Criminal)

#### FACT



Company

*Criminally liable?*



Employee

*Violation of the Marine  
Environment  
Management Act*

#### COURT DECISION

##### Facts

Employees negligently discharged diesel fuel into the ocean. Employees and company both indicted.

##### Holding

Subject employee found guilty, and the **company was also found guilty** because:

- **Simply delegating employee training duties to another company** does not constitute due care and supervision
- A training session of one or one and a half hour held only one day before boarding cannot be seen as sufficient training

*Takeaway: Substantive training necessary*

# Case #3

## Preparation of False Appraisal Reports (Criminal)

### FACT



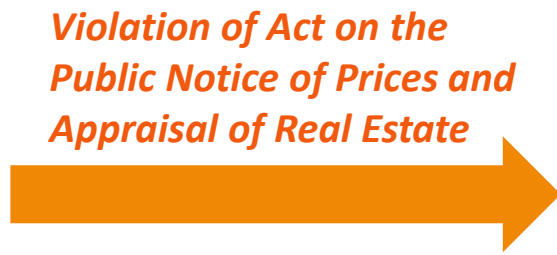
Company



*Criminally liable?*



Employee



*Violation of Act on the  
Public Notice of Prices and  
Appraisal of Real Estate*

### COURT DECISION

#### Facts

Employee prepared false appraisal reports in exchange for monetary compensation. Employee and company both indicted.

#### Holding

Subject employee found guilty, and the **company was also found guilty** because:

- Guidance and supervision and audits of branch offices performed by headquarters were extremely **formalistic and insufficient**
- The company did not take more **aggressive and substantial measures** to prevent such violations by employees

*Takeaway: Substantive preventive measures need to be adopted*

# Case #4

## Software Piracy (Criminal)

### FACT



Company

*Criminally liable?*



Employee

*Violation of Copyright Act*

### COURT DECISION

#### Facts

Employees installed pirated software without authorization. Employees and company both indicted.

#### Holding

Subject employee found guilty, and the **company was also found guilty** because:

- The company provided intellectual property law training **only about once a year**
- The company did not take **concrete and realistic measures to find** Copyright Act violations, such as **inspections of pirated software**

*Takeaway: Substantive training and monitoring necessary*

# Case #5

## Safety Violations (Criminal)

### FACT



Company



*Violation of The  
Occupational Safety and  
Health Act ("OSH Act")*



Employee



### COURT DECISION

#### Facts

Employees violated OSH Act. Employees and company both indicted.

#### Holding

Subject employee found guilty, and the **company was also found guilty** because:

- Guidance and supervision and audits of construction site performed by headquarters were extremely **formalistic and insufficient**
- The company did not take more **substantial safety measures** to prevent such accidents in construction site

*Takeaway: Substantive preventive safety measures need to be adopted*

# Case #6

## Unlawful Debt Collection Activity (Criminal)

### FACT



**Company**



*Criminally liable?*



**Employee**



*Illegal debt collection*

\*Act on Registration of Credit Business, Etc. and Protection of Finance Users

### COURT DECISION

#### Facts

Certain employees of tier 2 financing company engaged in illegal debt collection activities against borrowers (intimidation / threat) in violation of applicable statute.\* Employee and company both indicted.

#### Holding

Subject employee found guilty but **company was acquitted** because:

- **Weekly training sessions** to prevent illegal debt collection
- **Companywide customer satisfaction trainings** provided twice per year and similar trainings provided once or twice per month at each branch

*Takeaway: Establish compliance system & regular training sessions*

# Case #7

## Safety Violations (Criminal)

### FACT



Company



*Violation of The  
Occupational Safety and  
Health Act ("OSH Act")*



Employee



### COURT DECISION

#### Facts

Employees violated OSH Act. Employees and company both indicted.

#### Holding

Subject employee found guilty but **company was acquitted** because:

- Voluntarily received **on-site safety technology support** from the Korea Occupational Safety and Health Agency
- A **safety manager** was placed to perform full-time safety management duties
- **Internal safety inspections** were conducted as many as 17 times

*Takeaway: Put in place effective compliance system and conduct internal inspections*



# Key Points of an Effective Compliance System

# Tone from the Top – Sending the Right Signal

- ▶ Tone from the top is essential in setting the “right” company culture and determining the scope of liability for top management in times of crisis

## *Follow Up*

- Consistent messages to employees on **top level commitment on compliance**
- Cultivating compliance-friendly company culture
- Setting up a visible **compliance organization** with delegation of sufficient authority and duties



# Crises Management and Effective Public Relations Plan

- ▶ In times of crisis, it is critical to engage in effective communication with various stakeholders, including the public

## *Follow Up*

- Prepare Protocol for Crisis Management
- Review existing public relations protocol
- Monitor press and social media
- Prepare PR manuals for Dos and Don'ts

# Establish Continuous Monitoring and Audit System

- ▶ **Continuous monitoring and periodic audit necessary to confirm that employees are adhering to company guidelines and to detect any wrongdoings in advance**



## *Follow Up*

### Continuous Monitoring

- Periodic and ad-hoc audits, either internally or by independent third parties
- Employee hotline

### Periodic Internal Audit System

- Create document management system
- Consider introducing continuous monitoring program

# Compliance Training and HR Action

- ▶ **Conducting frequent and regular training helps show that the company has exerted due care and supervision to prevent violations**



## *Follow Up*

### Compliance Training

- Conduct periodic and as-needed training (online and offline)
- Follow up on compliance questions
- Monitor whether employees sufficiently understand and digest the content of the training

### HR Action

- Keep records of training attendance
- Provide HR policy that is consistent with corporate culture
- Establish disciplinary procedures for illegal/improper activities
- Maintain whistleblower policies and procedures

# Compliance System: Recommendations

- 
- 1. Review Existing Business Practices and Analyze Risks**
  - 2. Update or Adopt Internal Regulations and SOPs**
  - 3. Establish Continuous Monitoring Systems**
  - 4. Build Periodic Internal Audit Systems**
  - 5. Conduct Compliance Education and Training**
  - 6. HR Action**

*Process*

# Thank you

**KIM & CHANG**

39, Sajik-ro 8-gil, Jongno-gu, Seoul 03170, Korea

Tel: +82-2-3703-1114 Fax: +82-2-737-9091 / 9092 E-mail: [lawkim@kimchang.com](mailto:lawkim@kimchang.com) [www.kimchang.com](http://www.kimchang.com)