Foreign Investor Guidelines for Establishing a Presence in Korea

I. Corporate Forms

For a foreign investor, three typical types of corporate forms are often considered: (i) a joint stock company ("Jusik Hoesa" in Korean); (ii) a limited company ("Yuhan Hoesa" in Korean); and (iii) a limited liability company ("Yuhan Chaegim Hoesa" in Korean).¹ Once a corporate form is chosen, in general, such foreign investor will need to appoint directors to serve on a board, a representative director and/or a statutory auditor.

Under the Korean Commercial Code (the "KCC"), a Jusik Hoesa is in principle required to have three (3) or more directors and one (1) or more statutory auditors, provided that in case of the company capitalized at less than KRW 1 billion, it is allowed to have one (1) or two (2) directors and no statutory auditor.

II. Directors

1. Qualifications of Director

Under the KCC, except for an outside director², there are no limitations in terms of qualifications for a director.

¹ Currently, Jusik Hoesa accounts for about 95% of corporate forms of entities in Korea ("Status of Corporate Income Tax Returns – National Tax Service, 2020")

² It is not mandatory for a non-listed company to appoint and have an outside director. For a listed company, one-fourth of the total number of directors shall be appointed as outside director(s). Further, for a large-scale listed company with assets over KRW 2 trillion or more, three or more outside directors shall be appointed and a majority of the total number of directors shall be appointed.
2. Role and Authority of Director

While the day-to-day operations are managed by a representative director, the Board of directors (if applicable) should resolve all “important matters concerning the management of the company”. Under the KCC, generally, a director of a company has the following authority:

- To audit the other directors, including the representative director;
- To request that the management provide information relating to the company;
- To access financial books or other important documents of the company; and
- To bring a lawsuit in accordance with the KCC.

3. Duties of Director

Under the KCC, the directors of a Korean company have various duties towards the company, which include, among others, the followings:

**Duty of Care:** The KCC describes the relationship between a director and the company as a “mandate,” which is equivalent to a delegation under the Korean Civil Code. Accordingly, directors are deemed to be fiduciaries and are considered to owe a duty of due care to their company, the applicable standard of care being that of a good manager. It is generally understood that directors are required to act with care on the basis of their actual knowledge and such knowledge as they should have gained by reasonable care and skill.

**Duty of Loyalty:** The directors of a company must perform their duties faithfully for the benefit of the company in accordance with applicable laws and regulations and the Articles of Incorporation (“AOI”). In that regard, the Korean Supreme Court has held that such duty requires directors to act in the best interest of the company as opposed to the shareholder(s) of the company.

**Duty of Confidentiality:** The directors of a company have an obligation not to disclose any confidential information regarding the company’s business during and after their term of service with the company.

**Duty Not to Compete with the Company:** No director may, without the approval of the Board, be involved in a transaction falling under the scope of the business of the company for (i) his/her own account or (ii) the account of a third party where the interest of the company and the director may conflict (e.g., usurping a corporate opportunity from the company).

**Duty as to Transactions between Director and Company (Self Dealing):** Under the KCC, an approval of more than two-thirds of all directors (excluding the interested director) is required for transactions between a director and the company for the account of such director or a third party that may harm the interest of the company (e.g., self-dealing).

**Duty Not to Usurp Corporate Opportunity:** Under the KCC, a director is restricted from utilizing or causing third parties to utilize business opportunities by taking advantage of information that he/she has obtained during his/her employment or a business opportunity that is closely connected to business of the company, unless approved by more than two-thirds of the members of the Board (excluding the interested director).
4. Liabilities of Director

A breach of the above discussed duties by a director may subject such director to civil and/or criminal liability, as discussed further below.

**Liability to Compensate for Damages Incurred By the Company**: Under the KCC, if the directors of a company act in contravention of the requirements of laws, government regulations or the AOI, or if they neglect to perform their duties, they will be jointly and severally liable for damages incurred by the company as a result thereof.

The civil liabilities of a director may be extinguished in certain circumstances under the KCC. For example, under Article 400 (1) of the KCC, a director may be relieved of his/her liabilities to provide compensation for damages incurred by the company if all shareholders/members unanimously agree to discharge the directors from such liabilities. In particular, pursuant to Article 400 (1) of the KCC, a company may limit its director’s liability to six times (in the case of an outside director, three times) the amount of remuneration (including bonuses and profits from the exercise of stock options) for the preceding one-year period from the date of the director’s act.

**Liability towards Third Parties**: In order to protect third parties, the KCC provide that a director of a company will be liable to a third party for any damages suffered by the third party as a result of the director’s breach of his/her fiduciary duties to the company if such breach results from wrongful intent or gross negligence.

**Criminal Liability**: As discussed above, under the KCC, the directors of a Korean company owe a duty of care towards the company, pursuant to which the directors must perform their duties in good faith and in the best interests of the company in accordance with applicable laws and the company’s AOI.

In this regard, a director could be exposed to certain criminal liabilities (as well as civil liabilities) in case of a breach of his/her duties which may constitute a breach of trust under the Korean Criminal Code. Please note that, for a director to be found criminally liable, it must be shown that he/she (i) acted with “intent” and (ii) either benefited himself or herself or caused a third party (e.g., shareholders) to benefit, resulting in damages or “threatened damages” to the company. When a director is found criminally liable, then such director may be subject to imprisonment of up to 10 years and/or criminal fine of up to KRW 30 million.

III. Statutory Auditor

1. Qualifications of Statutory Auditor

Under the KCC, except for a full-time statutory auditor of a listed company, there are no limitations in terms of qualifications for an auditor.

---

3 Under the KCC, if a company does not take proper actions to seek damages from the directors, any shareholder(s) holding one (1) percent or more of the total number of issued and outstanding shares (or, in the case of a listed company, any shareholder(s) holding 0.01% or more of the total number of issued and outstanding shares for a period of at least 6 months) may demand in writing that the company initiate a suit to hold the directors liable. If the company does not initiate such suit within 30 days from the date of such demand, the shareholder(s) may initiate an action on behalf of the company against the responsible directors.
2. Role and Authority of Statutory Auditor

The statutory auditor is a separate corporate organ that acts an independent “watchdog” over the board of directors and management team.

To that end, the KCC grants the statutory auditor with certain rights, such as the right to attend Board meetings and state his/her opinion (but not the right to vote), investigate the affairs of the company, audit the accounting, and request the convening of a shareholders’ meeting.

3. Duties of Statutory Auditor

**Duty of Care:** The statutory auditor owes a duty of care to the company with respect to his/her duties. The statutory auditor should act as a “good manager.”

**Duty to Avoid Conflict of Interest:** As explained above, to ensure the statutory auditor’s independence and fairness in performing his/her duties, the KCC prohibits a statutory auditor from assuming the office of director, registered manager or some other position of management in a company or its subsidiary companies, concurrently with his/her office as a statutory auditor.

**Duty of Report to Board:** Fundamentally, the statutory auditor is intended to be an independent monitor of the directors’ management of the company. Thus, when in the opinion of the statutory auditor, a director acts or may act in violation of the law or the AOI, the statutory auditor should report the foregoing to the Board.

**Duty to Examine Documents for Shareholders’ Meeting:** The statutory auditor must examine the particulars of the agenda and documents to be submitted by the directors at the shareholders’ meeting, and state before the shareholders’ meeting if such particulars or documents include any matter(s) contrary to the law or the AOI, or is/are otherwise grossly inequitable.

**Duty to Prepare Audit Records:** The statutory auditor must prepare the written records of his/her inspection(s) and audit(s). The details of the inspection carried out by the statutory auditor and the results must be recorded in the minutes and bear the name and seal or signature of the statutory auditor who has conducted such inspection.

4. Liabilities of Statutory Auditor

The statutory auditor bears the same liabilities as a director (discussed in II.3. above). 4

---

4 Article 400 (“Extinction of Civil Liabilities”) and Article 403 (“Shareholder’s Rights to Seek Damages Incurred by the Company from Directors”) of the KCC applies mutatis mutandis pursuant to Article 415 thereof.