

A photograph of three business professionals in a meeting. A woman stands in the background, looking down at a document held by a man seated at a table. Another man is seated next to him, also looking at the document. The background is a blurred office or cityscape at night.

# The Trend and Outlook of Regulations on Gender Diversity on Board of Directors

Article 165-20 of the Financial Investment Services and Capital Markets Act (“FSCMA”), which stipulates the provisions regarding the gender composition of the board of directors, has come into effect on August 5, 2022. According to the addition of the article, a stock-listed corporation with total assets amounting to KRW 2 trillion or more as of the end of its latest fiscal year shall not cause its board of directors to consist of directors of one particular gender.

Though the amendment above does not have any separate penal provisions, Korean voting rights advisors and institutional investors are highly likely to apply the same criteria for gender diversity on the board of directors, which have been applied in other countries to date, in Korea as well pursuant to such amendment to the FSCMA.

In particular, the European Parliament and European Council has recently reached a tentative agreement on the guidelines on improving gender diversity of directors of listed companies through “Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures” (the “**Directive**”). Once the European Parliament and European Council officially approve and adopt the Directive, it will become effective 20 days after it is published in the Official Journal of the European Union and the EU member states will enforce the Directive by establishing and/or amending their national laws within two years after it becomes effective.

## The key provisions of the Directive are as follows:

- 40% or more of the non-executive directors and 33% or more of all directors of a listed company shall be those of the under-represented gender.
- The selection and appointment procedures of a director shall be clear and transparent based on the results of an objective evaluation of the candidate’s capabilities regardless of his/her gender.

### Procedures of the selection/appointment of a non-executive director

- If there are two candidates of different genders for a non-executive directorship and they have the same qualifications, a company that has failed to achieve the target of gender balance shall give priority to the candidate of the under-represented sex.
- Upon request from a candidate who fails to be selected, the qualification criteria shall be disclosed.
- Efforts shall be made separately for the achievement of gender balance on the board of directors.
- A company that has failed to achieve the target gender balance shall report the reason of such failure and its plan for improvement.
- Provisions to ensure the proper implementation of the Directive (including those on the imposition of fines for violation and invalidation or cancellation of the appointment of a director upon violation) shall be included in the national law.

Once the Directive is approved and implemented by the EU member states into their national laws, the Directive is expected to be used as a foreign benchmark for the establishment of applicable laws, best practices for corporate governance and guidelines on the exercise of voting rights of voting rights advisors and institutional investors.

Foreign voting rights advisors have included the same provisions as the amended provision of the FSMCA above in their guidelines for Korean companies with certain provisos attached thereto to allow further consideration of a specific business environment of each company to ensure the flexible application of their guidelines as the amended provision of the FSCMA has not become effective. In addition, it appears that foreign institutional investors analyze the impacts of the lack of gender diversity on the board of directors of each company on its value on a case-by-case basis and exercise their voting rights based on the results of such analysis. As the lack of gender diversity on the board of directors will constitute a legal violation once the amendment of the FSCMA becomes effective officially after the lapse of the grace period for the application thereof, the provisions of the guidelines above are likely to become stricter to the effect that the applicable laws must be observed.

Korean voting rights advisors and institutional investors, including the National Pension Service, have not yet published any guidelines on the exercise of voting rights that reflect the amendment of the FSCMA. As they are likely to amend their guidelines on the exercise of voting rights in the future by reference to the Directive, recommendations and activities of foreign voting rights advisors and institutional investors and domestic and overseas legislations, it is recommended to constantly monitor the recommendations and responses of Korean voting rights advisors and institutional investors.

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*\* The opinions expressed in this article are the author's own and do not reflect the views of KOTRA.*