

# Measures to Enhance Fairness in the Ministry of Justice's Guidelines on Directors' Standards of Conduct

## I. Overview of the Ministry of Justice's Guidelines

The July 22, 2025 amendments to the Korean Commercial Code (“KCC”) expanded the beneficiaries of directors’ duty of loyalty from the “company” to the “company and its shareholders” (Article 382-3(1)) and introduced (i) a duty to protect the interests of all shareholders as a whole and (ii) a duty to treat all shareholders fairly and equally (Article 382-3(2)). To help directors comply with these statutory obligations in carrying out their duties, the Ministry of Justice (“MOJ”) issued the Guidelines on Directors’ Standards of Conduct in Corporate Restructuring (the “Guidelines”), which set out points for directors to consider and refer to.

The Guidelines cover: (i) the substance and interpretation of directors’ duty of loyalty; (ii) general standards of conduct for directors (including the business judgment rule); (iii) measures to enhance transactional fairness in conflict-of-interest transactions; and (iv) specific standards of conduct for inter-affiliate mergers and going-private transactions. Of these four topics, this article focuses on the practical details of items (iii) and (iv), which are most significant in practice.

## II. Measures to Enhance Fairness

### A. Scope and Significance of the Application of Measures to Enhance Fairness

In transactions that present conflicts of interest—whether between the company and its directors, controlling shareholders, or management, or between controlling and minority shareholders—directors may find it difficult to reach decisions that are, and are perceived to be, fair. Such transactions also tend to attract heightened scrutiny from outside parties. Accordingly, these Guidelines set out measures designed to enhance fairness that may be adopted in these transactions. Transactions with potential conflicts of interest include, for example: (i) mergers, spin-offs, and business transfers among affiliated companies; (ii) going-private transactions, including tender offers and cash-out share exchanges; and (iii) transactions involving assets, services, or financing transactions with a controlling shareholder or the controlling shareholder’s related parties.

The fairness-enhancing measures described in these Guidelines are voluntary and do not constitute legal obligations. The fact that one or more measures are not adopted does not, by itself, establish a director’s breach of the duty of loyalty. The significance of these Guidelines, however, is that when directors select and implement measures that are appropriate in light of the expected benefits and costs and serve the interests of the company and its shareholders, the risk of breaching the duty of loyalty can be substantially mitigated.

### B. Contents of Measures to Enhance Fairness

#### i. Special Committee

Where a proposed transaction raises a structural conflict of interest and information asymmetry, it should be considered to establish a special committee composed of independent outside directors to review (i) the legitimacy of the

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transaction’s purpose, (ii) the fairness of its terms, and (iii) the appropriateness of the process. Special committee members must be independent of both the controlling shareholder and the transaction. If a company has an insufficient number of outside directors, independent external experts may be appointed as committee members.

As a general matter, the special committee performs an advisory role, with final decision-making authority remaining with the board of directors under the KCC. While the board should accord the committee’s determinations to the greatest possible deference, if the board reaches a different conclusion, it should record detailed reasons in the minutes. To be effective, the special committee should be constituted as early as practicable at the stage when the company is deciding whether to pursue a transaction. Establishing the committee only after the material terms have effectively been finalized is inappropriate.

### **ii. Review by Independent External Experts**

It may also be considered engaging independent external experts with relevant expertise to assess the fairness of the transaction’s structure, process, and key terms. Where an independent valuation or appraisal of the transaction price is required under applicable laws and regulations (including the Financial Investment Services and Capital Markets Act), it must be complied with as a matter of legal obligation. Even when no such requirement applies, obtaining an external fairness assessment may be adopted voluntarily as a governance measure to reinforce fairness of the transaction.

### **iii. Complete and Faithful Disclosure to Shareholders**

In satisfying any notice, publication, disclosure, and reporting obligations under applicable laws and regulations, purely formal or boilerplate disclosures should be avoided. Instead, disclosures should clearly explain—from the perspective of shareholders—the decision-making background and criteria, the existence (or absence) of conflicts of interest, and the content and practical limitations of any measures to enhance fairness.

To further strengthen the fairness of the transaction, the following may also be disclosed: (i) the independence, qualifications, and expertise of the special committee members; (ii) the scope of authority delegated to the special committee and a summary of its activities; and (iii) whether, and on what basis, the special committee’s views are consistent with those of the board of directors.

### **iv. Issue of Approval by Disinterested Shareholders**

A “majority vote by the minority shareholders”—i.e., conditioning the transaction on approval by a majority vote of disinterested shareholders—may help secure the fairness of the transaction terms. Nevertheless, it is difficult to recommend this as a generally applicable fairness-enhancing measure because: (i) it may be viewed as inconsistent with the principle of equal treatment of shareholders; (ii) the KCC does not provide for a clear mechanism for implementing such a vote; (iii) it may be impractical to satisfy the voting thresholds required for shareholder resolutions; and (iv) the scope of “disinterested shareholders” may be unclear. That said, for transactions involving particularly acute conflicts of interest or heightened risk of shareholder harm, a practical alternative is to solicit and document minority shareholders’ views through a survey.

## **C. Review by Type of Transaction**

### **i. Merger Between Affiliated Companies**

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A merger between affiliated companies presents an inherent structural conflict of interest in setting the merger consideration, because a controlling shareholder can influence both sides of the transaction. Directors should therefore rigorously evaluate whether to proceed with the merger—and, if so, its timing, terms, and structure—from the standpoint of protecting the interests of all shareholders, ensuring equitable shareholder treatment, and promoting long-term corporate value.

Measures to bolster transactional fairness may include: (i) creating conditions that approximate an arm’s-length process, such as establishing a special committee for each constituent company; (ii) supporting the fairness of the merger consideration by obtaining independent external expert advice and adhering to valuation methodologies required under applicable statutes and regulations; and (iii) providing shareholders with complete and reliable disclosure by including, in the board’s opinion statement, concrete items such as the necessity of the merger, the rationale for the chosen timing, the expected impact on shareholder value, and the methodology used to calculate the merger consideration.

## ii. Going-Private Transaction

A going-private transaction refers to a series of steps through which a controlling shareholder causes a listed company to cease being publicly traded and become a privately held company. A common structure is a two-step process: the acquiror first conducts a tender offer and then acquires the remaining shares through a cash-out share exchange.

Measures to enhance fairness that may be considered in a going-private transaction include: (i) issuing a statement of opinion on the tender offer that includes views on the suitability of the tender-offer structure and the fairness of the offer price; (ii) obtaining an independent fairness verification from an external expert regarding the tender-offer price; and (iii) as to the cash-out share exchange, closely reviewing the terms to ensure that the exchange consideration is not lower than the tender-offer price. Where the tender offeror is the controlling shareholder, it may also be considered empowering an independent special committee to prepare and issue the statement of opinion.

## III. Conclusion

The Guidelines are not legally binding, and a director’s liability does not arise solely from a failure to follow them. However, directors’ serious consideration and implementation of the measures set forth in the Guidelines may enhance confidence in the company’s efforts to enhance shareholders’ interests and the overall fairness of the transaction. Accordingly, when undertaking a corporate restructuring transaction, it is advisable to accord full attention to these Guidelines to the extent feasible under the circumstances.

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