# Implementation of Kim Young-Ran Act: What is to be done for Corporations?

The Kim Young-Ran Act to be implemented in its current form after the Constitutional Court’s decision to uphold its constitutionality

On July 28, 2016, the Constitutional Court ruled that the “Act on the Prohibition of Improper Solicitations and the Receipt or Offer of Money or Thing of Value” (abbreviated as the “Improper Solicitation and Graft Act,” also commonly known as the “Kim Young-Ran Act”) conforms to the Constitution, paving the way for the Kim Young-Ran Act to go into effect on September 28, 2016 as scheduled.

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<thead>
<tr>
<th>Type</th>
<th>Violation</th>
<th>Sanctions</th>
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<tbody>
<tr>
<td>Prohibition of Improper Solicitation</td>
<td>A person who has made an improper solicitation to a public official through a third party</td>
<td>Administrative fine not exceeding KRW 10 million</td>
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<td></td>
<td>A person who has made an improper solicitation to a public official on behalf of a third party</td>
<td>If the person who made an improper solicitation is not a public official, Administrative fine not exceeding KRW 20 million</td>
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<td>If the person is a public official, Administrative fine not exceeding KRW 30 million</td>
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<td>Any public official who has discharged his/her duties in accordance with an improper solicitation</td>
<td>Imprisonment of up to 2 years or criminal fine not exceeding KRW 20 million</td>
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<td>Prohibition of Receipt or Offer of Money or Valuables</td>
<td>A public official who has received, demanded or promised to receive money or thing of value exceeding KRW 1 million in a single instance or an aggregate amount of KRW 3 million per year regardless of whether such action by the public official was made in connection with his/her official duties</td>
<td>Imprisonment of up to 3 years or criminal fine not exceeding KRW 30 million (subject to confiscation and collection)</td>
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<td>※ A public official who did not report the fact that his/her spouse has received, demanded or promised to receive such money or thing of value</td>
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<td>※ A person who has given or promised to give such money or thing of value to a public official or his/her spouse</td>
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<td>A public official who has received demanded or promised to receive money or thing of value not exceeding KRW 1 million in a single instance in connection with such public official’s duties</td>
<td>Administrative fine of two to five times the amount of money or thing of value received, demanded or promised to receive</td>
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<td>※ A public official who did not report the fact that his/her spouse has received, demanded or promised to receive such money or thing of value</td>
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<td>※ A person who has given or promised to give such money or thing of value to a public official or his/her spouse</td>
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<td>A public official who has failed to report and return an honorarium exceeding the threshold amount</td>
<td>Administrative fine not exceeding KRW 5 million</td>
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What are the implications of the Constitutional Court’s decision on the corporations?

Unlike the anti-bribery provisions under the Korean Criminal Code, the Kim Young-Ran Act prescribes the joint penal provision that punishes not only employees who actually violate the Kim Young-Ran Act, but also imposes fines on the corporations unless such corporations have not been negligent in exercising due care and supervision over the relevant duties of the employees to prevent such violation.

Given the joint penal provision of the Kim Young-Ran Act, a statutory sanction imposed against a corporation under the Kim Young-Ran Act would generally accompany (in addition to the actual penalties under the Kim Young-Ran Act) significant damages to its corporate reputation, and the corporations subject to the Foreign Corrupt Practices Act (FCPA) in the United States or any other foreign anti-corruption regulations may face possible enforcement actions under the FCPA or other foreign anti-corruption regulations that may result in significant managerial risks involving a large amount of monetary fines, disgorgement of profits and/or other penalties. Accordingly, the implementation of the Kim Young-Ran Act would pose greater regulatory compliance risks for the corporations than before its implementation.

Key features of the Kim Young-Ran Act that may be particularly problematic from the corporate perspective are as follows.

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**Improper solicitation by an employee on behalf of the corporation is subject to an administrative fine.**

(i) The Kim Young-Ran Act imposes an administrative fine when a person improperly solicits a public official on behalf of a third party or through a third party, while a person who directly makes such improper solicitation for himself/herself is not subject to an administrative fine.

(ii) Since a corporation and an employee are distinct and independent legal entities, an improper solicitation by an employee relating to a public official’s duties would constitute an improper solicitation on behalf of a third party (e.g., the corporation) under the meaning of the Kim Young-Ran Act, which would subject the corporation to an administrative fine.

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**Not only an employee who actually provides money or thing of value to a public official, but also the employee’s supervisor, may be punished.**

An employee’s supervisor, including the representative director of the corporation, who knowingly approves the employee’s misconduct or disbursement may be punished as a joint principal offender.

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The amount of money or thing of value triggering criminal sanctions (i.e., KRW 1 million in a single instance or KRW 3 million per year in aggregate) is calculated on the “same person” basis (e.g., the corporation).

(i) Whether the money or thing of value are provided by the “same person” is determined by identifying de facto giver and true source of such money or thing of value, not by the person(s) who physically delivered the money or thing of value.

(ii) Therefore, even if Employees A, B and C each provided a small amount of money or thing of value to a public official, the threshold amount for criminal sanctions will be deemed to have been met if the combined total amount of money or thing of value provided by Employees A, B and C is more than KRW 1 million in a single instance or KRW 3 million in aggregate per year.

A misconduct of an employee may subject the corporation to statutory sanctions under the Kim Young-Ran Act.

(i) If an employee is punished under the Kim Young-ran Act for provision of money or thing of value to a public official, the corporation may also incur a criminal liability pursuant to the joint penal provision of the Kim Young-Ran Act.

(ii) If an employee is imposed an administrative fine under the Kim Young-ran Act for provision of money or thing or value to or improper solicitation of a public official, an administrative fine may also be imposed on the corporation pursuant to the joint penal provision of the Kim Young-Ran Act.

A corporation that has exercised due care and supervision may be exempted from statutory sanctions.

1. If a corporation has exercised due care and supervision over its employees to prevent a misconduct, it may be exempted from statutory sanctions under the joint penal provision of the Kim Young-Ran Act.

2. Employing an effective anti-corruption compliance program may reduce the corporation’s risk of statutory sanctions under the joint penal provision of the Kim Young-Ran Act.
How should the corporations prepare for the Kim Young-Ran Act?

The implementation of the Kim Young-Ran Act will very likely expose the corporations to unprecedented regulatory compliance risks that may entail substantial reputational damages and financial losses to the corporations. Therefore, it is critical for the corporations to carefully examine and, if necessary, overhaul and reinforce in advance their current regulatory affairs system and their internal anti-corruption compliance policies and frameworks:

• Establish and revamp the internal guidelines for legal compliance (e.g., prepare and implement the code of conduct, procedural manual, work standards or other practical guidelines tailored to the practical needs and requirements of the corporation and/or its sub-divisions);

• Reinforce preventive, detective and corrective control relating to personal provision of money or thing of value by employees (e.g., verify whether costs, disbursements and expenses are used in compliance with the Kim Young-Ran Act during the expense approval process);

• Create and adopt a separate firm-wide process or system through which provision of money or thing of value to each public official during a certain period of time (which should not be less than one-year) can be comprehensively monitored for compliance with the Kim Young-Ran Act (particularly, since the threshold for “KRW 1 million in a single instance or KRW 3 million per year in total” is aggregated on the company level, it would be inadequate to track provision of money or thing of value by each employee or department); and

• Conduct continuous educational sessions with employees on “Do’s and Don’ts” to not only educate but also to provide updates in order for them to be in full compliance with the Kim Young-Ran Act.

Yoon & Yang’s Anti-Corruption and Kim Young-Ran Act Task Force (ACKA TF)

Yoon & Yang LLC has pioneered Korea’s first legal services for many domestic and multinational companies in the practice area of the Compliance Risk Management (CRM) in 2005, and continuously played a leading role by employing competent professionals who have expertise in the practice area, accumulating top-notch professional experience and critical know-how, as well as generating optimum results in in effectively managing the compliance risk of those companies.

Following the enactment of the Kim Young-Ran Act, Yoon & Yang LLC expanded its existing Anti-Corruption Task Force to reshape its Anti-Corruption and Kim Young-Ran Act Task Force (ACKA TF), specifically geared to advising and resolving issues and difficulties that our clients will face in trying to be in compliance with the Kim Young-ran Act. The ACKA TF offers the legal services of the highest quality that specifically respond to the idiosyncratic needs and challenges of our clients by diagnosing and identifying the legal risks that are commonly encountered during ordinary course of business, minimizing exposure to such legal risks through establishment of suitable and

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tailor-made risk-mitigating plan and preventing potential damages or losses to the clients and/or to their constituents with thorough preparation and effective implementation of appropriate preventive measures.

Yoon & Yang LLC has been closely tracking and updating all relevant information relating to the Kim Young-Ran Act by compiling and analyzing relevant statutes, cases, articles and other materials since the publication of our newsletter on the enactment of the Kim Young-Ran Act. We will continuously strive to provide an active support and assistance to our clients based on their individual needs and circumstances as they prepare for the implementation of the Kim Young-Ran Act.