LEGAL COMPLIANCE AND KOREA FINANCIAL SERVICES MARKET: STRATEGIC APPROACH

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Abstract: The purpose of this paper is to improve the compliance level in the Korean financial services market by proposing a more systematic approach to economic crimes. As one of the most important capital markets in Asia, policy directions in Korea weathered through past experience and challenges are valuable to other burgeoning capital markets around the world. This paper contributes to a better understanding of the compliance system in Korean financial services market. Based on a literature review, the three groups of counter-measures – criminal sanctions, administrative sanctions and civil remedies – are analyzed. The current situation is: criminal sanctions on individuals are overly relied upon; administrative sanctions on corporate entities have become increasingly important; civil remedies are not effective; and preventive efforts have been disregarded. The ultimate goal of regulations is to let the regulated comply with legal requirements. In regards to crimes in the financial servicesmarket, implementation of education and compliance programs should be important built-in enforcement tools. Enforcement mechanisms should encompass preventive and educational efforts. By redesigning new compliance structures, market players can be free from fastidious regulatory policies and the trust in the financial system can be improved with minimal social costs.

I. INTRODUCTION

On September 1, 2010, the International Monetary Fund Executive Board, based on in its Article IV Consultation-Staff Report, observed that the South Korean ("Korean") economy has had impressive success over the past year.[1] The real GDP for 2009 was KRW1,063 trillion ("T"), which is about US$1 T.[2] Growth is projected to recover to 6.1% in 2010.[3] Korea's trade volume would also reach $1T in 2011,[4] after reachingan expected $889 billion ("B") in 2010.[5] As for the financial services market, the market capitalization at Korea Exchange ("KRX") in 2009 was KRW972T.[6] The amount of listed bonds as of 2009 was KRW1,013T.[7] The amount

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[1] Article IV Consultation-Staff Report ("IMF Report"); Public Information Notice (PIN) No. 10/120 on the Executive Board Discussion; and Statement by the Executive Director are available http://www.imf.org/external/np/sec/pn/2010/pn10120.htm.

[2] IMF Report, *Supra* fn. 1, 24.

[3] Id., 7.

[4] Korea's exports would increase by an estimated 10.3 percent to hit $513 B ("B"), while imports are expected to surge by 15.1 percent to $488 B. Korean Ministry of Knowledge Economy, 2011 Business Plan, available http://www.mke.go.kr/news/bodo/bodoView.jsp?seq=65436&pageNo=3&srchType=1&srchWord=&pCtx=1.

[5] IMF Report, *Supra* fn. 1, 25.

[6] World Federation of Exchanges, Statistics available http://www.world-exchanges.org/statistics/annual/2009/equity-markets/domestic-market-capitalization.

of bank loans to corporate customers and individuals were KRW711T and KRW539T, respectively.[8] Thus, depth of financial services market[9] as measured by the ratio of the size of financial products to the GDP was about 3 in 2009.[10] Considering the global recession starting in 2007 is still lingering in Europe and the United States, the Korean financial services market is "an impressive success."[11] Table 1 shows the market capitalization of major exchanges in the world.

[TABLE 1] MARKET CAPITALIZATOIN OF MAJOR EXCHANGES (2009)

[???]exchanges	*[??? (unit?)]US$1,000*
NYSE Euronext	11,837,793 (US$1,000)
NASDAQ OMX	3,239,492
Shanghai SE + Shenzhen SE	2,704,778 + 868,374 = 3,573,152
Tokyo SE Group + Osaka SE + Jasdaq	3,306,082 + 138,329 + 89,567 = 3,533,978
Singapore	481,267
KRX	834,596*
HK	2,305,142
Bombay SE	1,306,520

*KRX is expected to exceed $1T by the end of 2010 because of the sound economy, QE, and KRW appreciation.
*source:World Federation of Exchanges

In contrast to the successful economic performance, the Korean business community has been in a vicious cycle of ad hoc criminal and administrative investigations, sanctions, and pardons.[12] As of 2010, several conglomerates are under investigation for crimes of breach of fiduciary duty or embezzlement, and

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[7] Public and private bonds were KRW 759 T and KRW254 T, respectively. Id., Statistics, Bonds.

[8] Available Bank of Korea, Economic Statistics System.

[9] The term "financial services market" includes insurance industry in most of the cases. However, it sometimes refers to only banking and capital market industries depending on the context. As to the role of financial intermediary services, *see* 2010 Economic Report of the President Ch. 6, pp. 162-166.

[10] McKinsey Global Institute, Mapping Global Capital Markets: Fourth Annual Report (Jan. 2008), Exhibit 3 also indicated the depth of Korean financial market as 3 although the bank deposits instead of bank loans were adopted in calculating the size of financial assets. This might be an indication of the failure of Korean policy to position itself as one of the financial hubs in Asia as it has been at that range for the past several years. As for the financial hub policy, *see* the Law on Formation and Development of Financial Hub and the Financial Hub Korea Center available http://www.fnhubkorea.kr/fhk_eng/center/center1.jsp. In terms of foreign interest inroad, the loan from 71 foreign banks as of FY2009 was KRW17T, while that from 7 Korean national banks, 6 local banks, and 5 special banks amounts to KRW962T. 2010 Bank Statistics Spreadsheet 19e9, Financial Supervisory Service ("FSS").

[11] As to the macro-prudential economic monetary and financial market conditions in Korea, *see* IMF Report, *Supra* fn. 1, 5, Figure 2. *See* also Jong-Goo Yi, *Policy Responses to Global Financial Crisis and Korea's Experience,* Presentation at Korea-FSB Reform Conference: An Emerging Market Perspective (Sept. 3, 2010).

[12] A vicious cycle, however, is not limited to Korea. Raaj K. Sah, *Social Osmosis and Patterns of Crime*, 99 J. POL. ECON. 1272, 1280 (1991)("an individual has a higher current propensity for crime if fewer resources were spent on the criminal apprehension system during a past period of his active life.. Fewer resources dilute the resources spent on apprehending each criminal."). *See generally,* Martin T. Biegelman & Joel T. Bartow, PREVENTION AND INTERNAL CONTROL (2006).

several executives relating to Hanwha and Taekwang groups were prosecuted.[13] On Aug. 13, 2010, a group of business leaders were pardoned including those whose sentences were finalized less than a year ago.[14] These cases indicate prevalent financial misconducts in Korea and disregard of legal compliance by top management in Korea.[15] The rule of law in Korea, as far as the business world is concerned, has a long way to catch up to be at par with the economic performace. The gap between the economic performance and the legal quagmire demonstrates the urgent need to develop a more effective enforcement mechanism. It is indeed one of many challenges that Korean lawyers, along with other parts of the Korean society, should devise.

Korea heavily relies on criminal sanctions for past conduct.[16] The Public Prosecutor's Office used to be and still partially is one of the most fearful agencies, along with the Natoinal Tax Administration and the Board of Audit and Inspection, if politics means demonstration of power. Thus, every crime including misconduct in the financial market is automatically led to criminal sanctions. The basic regulatory theory and principle seem to have been simple: severer penalties would

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[13] "Seoul prosecutors began an investigation Friday into allegations of embezzlement and breach of duty against Shinhan Financial Group President Shin Sang-hoon. Shinhan Bank filed a criminal complaint against Shin, saying he illegally provided huge loans to companies in poor financial health while serving as the bank's president." *Donga Ilbo, Sept. 4, 2010.* "Prosecutors on Thursday raided the Seoul headquarters of Hanwha Group and its affiliate Hanwha Securities, expanding its probe into allegations that the nation's 10th largest conglomerate created a slush fund." *Yonhap New, Sept 16, 2010."* Chairman Lim was additionally charged for crimes of fraudulent loans and manipulation of market price. *Chosun.com, Dec. 17, 2010.* A list of 10 multinational companies that paid the largest antitrust-related fines to the United States over the past decade includes four Korean heavyweights... The four companies - LG Display Co., Korean Air, Samsung Electronics Co. and Hynix Semiconductor Inc. - shelled out a combined 1.6 trillion won ($1.28 billion)" *JoongAng Daily Jun. 11, 2010. See* also Park, Yoon Bae, *The Corporate Governance Fix for Korea,* WALL STREET J. Feb. 22, 2011, at 11.

[14] Top management of Samsung, Dongbu, Posco, Aekyung and Hynudai was listed. Korean Ministry of Justice ("KMOJ"), *Policy News*, Aug. 13, 2010. Five Samsung executives were sentenced in 2009 for managing slush funds and avoiding tax. Chairman was pardoned at the 2009 year-end pardon exercise. Operators of more than KRW 4.5 T slush funds were cleared within three years from the date of investigation by special prosecutors. Samsung Securities, which was a conduit of operating the funds, was just warned. Samsung Life Ins. executives who destroyed evidence were released. This might be a necessity to balance the need to maintain the rule of law against the wider public interest. For discussions involving BAE bribery in UK, *see generally* Roman Tomasic, *The Financial Crisis and the Haphazard Pursuit of Financial Crimes*, 18 J. FIN. CRIME 7, 10 (2011).

[15] See increase of disputes in *Infra*, fn. 184 & unfair trade practices in *Infra*, fn. 121.

[16] Over-criminalization in the United States has been the subject of criticism. E.g., Steven Williams, *The More Law, the Less Rule of Law*, 2 Green Bag 2d 403(1999)("the commands of the state multiply, there is a corresponding decline in the fraction of those commands that people can be expected to comply with"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001)("criminal law does not drive criminal punishment.... the role [the definition of crimes and defenses] plays is to employer prosecutors, who are the criminal justice system's lawmakers"); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OX. J. LEGAL. STUDIES 173, 175-917 (2004).(deterrence does not work because of the legal knowledge hurdle, the rational choice hurdle, and the perceived net cost hurdle) As to the limited effect of sentence severity on compliance, *see generally* Anthony N. Doob & Cheryl Maire Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 145 (2003)("the deterrent impact of penalty size has been seriously challenged by most criminology"); Cass R. Sunstein, *The Law of Fear*, 115 HARV. L. REV. 1119, 1123 (2002)("people often neglect probabilities, focus on worst case").

automatically result in fewer crimes. Criminal sanction, however, is the instinctive and primitive response to ensure compliance founded on fear;[17] individuals fear going to prison when they violate law. Administrative sanction, especially civil fines, is another method grounded on fear. Corporate entities are loath to part with their hard-earned economic gains when they breach legal requirements.[18] Sanctions, however, are effective only for retributive justice, rather than for preventive justice. Sanctions have not been, and will not be effective in handling all crimes, ultimately leading to under-enforcement[19] As the Korean financial services sector is becoming more complicated in terms of depth and specialty and expanded in terms of size and geography, criminal and administrative sanctions tend to fail to chase the misconducts in the market. The number of cases and complains is increasing.[20] Under-enforcement then results in erosion of civic norms of obedience.[21] The way to avoid that situation is to strengthen preventive regulatory system.[22]

I argue future enforcement mechanisms should be more focused on systematic and strategic control of possible violations before breaches happen. Sanctions and preventions are not sequential; instead, they should co-exist. They are not a matter of choice, but a matter of focus and perspective. To combat economic crimes,[23]

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[17] Criminal sanctions are traditionally regarded most forceful. One peculiar feature of corporate fraud is so-called linkage, i.e., cessation of conduct does not benefit the criminal. *See* Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008). His suggested five strategies to link law and law enforcement include: i) increase sanctions; ii) increase the probability of punishment; and iii) increased sanctions and probability of punishment. He also listed undercover enforcement and amnesty as additional strategies.

[18] Not every lawyer agrees with utilitarian view, of course. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997)("the phenomena of social influence and social meaning matter for deterrence."); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL EDU. 661, 662-663 (1998)(law, social norms, market, and architecture are four types of constraints on behaviors).

[19] Sanctions and control mechanism match with fiat and structure. Edward K. Cheng, *Structural Law and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655 (2006). He explains legislatures generally ignore structure due to several reasons, such as predominant modes of thinking, institutional pressures, liberty concerns, law without morality, and political compromise. His example of structure-based approach was traffic violation, withholding tax and music downloads. His argument, however, would be true to more serious crimes such as financial market rule violations.

[20] See *Supra*, fn. 15.

[21] He also points out the problems associated with fiat as a substantial risk of arbitrary and discriminatory enforcement, harm to the authority of the law, and degradation of law enforcement into a sporting chance. Id., 659-661.

[22] Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, U. CH. John M. Olin Law & Economics Working Paper No. 406 also contrasts sanctions with making the outcome salient with the examples of mandatory legal rule operating in a property dispute and a default rule in a contract. This article lists legitimacy as another ground for compliance.

[23] The term "economic crime" in Korea is broader than white crime or corporate crime in other jurisdiction. It is at least not limited to the crimes listed in the Act for Specially Harsher Punishment of Certain Economic Crimes ("ASH"), which has been effective since 1983. According to most practitioners, especially public prosecutors, economic crime also covers customs duty violations and intellectual property right infringement crimes. It is characterized as profit-motivated, imitative, and corrupt. *See* Judicial Research Training and Institute, DISCUSSION ON ECONOMIC CRIMES, 3-10 (2009). Some use the term "financial crime" and they are classified into four groups: corruption, fraud, theft and manipulation. Each category has subsets of crimes. Corruption, for example, includes kickbacks, bribery, extortion and embezzlement. Petter Gottschalk, *Categories of Financial Crime*, 17 J.

enforcement efforts should be based on a forward-looking perspective and more focused on systematic and strategic prevention and incentivized rewards, accompanied by reasonably certain and severe penalties.

This article is an attempt to upgrade the compliance level by introducting preventive mechanism to the enfocement structure of financial services market crimes in Korea and thereby reestablish the authority of the law. This is an essential and necessary step before Korea is ruled by law and thus establishes itself as a financially advanced country. Part II reviews the regulatory structure of the financial services market in Korea. Part III explores the status of *ex post facto* counter-measures for economic crimes. It will show that criminal sanctions are the traditional answer to crimes in Korea. Administrative sanctions including civil fines are the second most popular response, and civil actions for compensation of damages are just emerging. Part IV provides an overview of *ex ante* mechanisms under current Korean laws. Although they appear ineffective and even perfunctory, some preventive control mechanisms are in place in several statutes. Finally, Part V presents proposals to make these existing mechanisms more effective. First, the company's preventive efforts should be factored in as a reward in the case of breaches. Especially, education, which has driven the economic development in Korea for the past several decades, should be utilized as a major part of the prevention-based enforcement. Second, the rules themselves must be clear and limit discretionary enforcement. Various sanctions should be coordinated to the effect that law enforcement is not left to chance. Finally, in striking a balance between public v. private and between criminal v. administrative, it should move towards the latter in both cases.

II. REGULATORY STRUCTURE OF FINANCIAL SERVICES MARKET

This Part provides an overview of Korean laws applicable to financial sectors in Korea. While financial services are in the process of convergence, the regulatory legal scheme is still departmentalized because three different statutes regulate banking, capital market, and insurance. On the regulatory agency level, the Financial Services Commission ("FSC") covers financial services in general and establishes regulatory policies. The Financial Supervisory Services ("FSS") then implements the policies across the board.

FIN. CRIME 441, 443 Figure 1 (2010). In this article, financial crime, economic crime or crime in the financial market are used without distinction.

A. [Figure 1] Regulatory Structure *Applicable Laws*

Banking Law ("BL"),[24] Capital Market Law ("CML"),[25] and Insurance Business Law ("IBL")[26] are three pillars that support the financial services market. Aside from the tripartite statutes, separate statutes govern special banks, such as Korea Development Bank, Industrial Bank of Korea, and Korea EXIM Bank.[27] Mutual savings banks and capital companies for small and medium enterprises, and consumers are governed by Mutual Saving Bank Law and Credit Facility Specialty Business Law.[28]

BL has been revised quite frequently. For the past decade, for example, there were five amendments.[29] Most recent amendment was to liberalize the scope of banking business sectors and to improve the corporate governance structure. The situation in insurance industry is similar. For the past decade, six overall or partial changes were made.[30] The most recent change was to increase the protection of insurance consumers by e.g. imposing duty to explain and making corporate governance more transparent. Most changes were not motivated by a concern for specific financial crimes or misconduct, but by the general industry practice trend from government-dominated implicit regulations for bureaucrats to more privatized lucid regulations for investors. The enforcemet of CML in 2009, however, was particularly significant bringing in sweeping changes because it consolidated six investment banking business-related laws, i.e., Securities Transaction Law ("STL"), Future Trading Law, Asset Management Business Law, Trust Business Law,

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[24] *Eunhangbup* [Banking Law] No. 5499 as most recently revised by Law No. 10303 effective Nov. 18. 2010. Act and Law are interchangeably used without any difference.

[25] *Jabonshijanggwa gwemyungtoojae gwanhan bup* [Capital Market and Financial Investment Business Act] ("Capital Market Law" or "CML") Law No. 8635 as most recently revised by Law No. 10366 effective Jun. 11, 2012. CML entered into effect on Feb. 4, 2009, in one year and six months after adoption by Law No. 8635 on Aug. 3, 2007.

[26] *Bohumupbup* [Insurance Business Act] Law No. 6891 as most recently revised by Law No. 10394 effective Jan. 14, 2011. Insurance contracts are regulated by Book 5 of the Korean Commercial Code. Welfare insurance such as employment , health care, occupational injury compensation is covered by independent statutes.

[27] Korea Development Bank Law No. 302 as most recently revised by Law No. 10303 effective Nov. 18, 2010; Industrial Bank of Korea Law No. 641 as most recently revised by Law No. 10303 effective Nov. 18, 2010; and Korea EXIM Bank Law No. 2122 as most recently revised by Law No. 10303 effective Nov. 18, 2010. While Industrial Bank of Korea ("IBK") is listed on KRX, an IPO of Korea Development Bank ("KDB") is under consideration. KDB, as a holding company, owns Korea Finance Corporation, Daewoo Securities, KDB Capital and KDB Asset Management.

[28] *Sanghojuchuoeunhanbup* [Mutual Saving Bank Act] Law No. 2333 as most recently revised by Law No. 10303 effective No. 18, 2010; *YeoshinjunmoonKeumyungupbup* [Credit Extension Specialty Financing Business Act] Law No. 5374 as most recently revised by Law No. 10062 effective Jun. 13, 2010.

[29] Law No. 10303 amended on May 17, 2010 effective Nov. 18, 2010; Law No. 9784 amended on Jun. 9, 2009 effective Oct. 10, 2009; Law No. 8906 amended and effective on Mar. 14, 2008; Law No. 6691 amended on Apr. 27, 2002 effective Jul. 28, 2002; and Law No. 6177 amended on Jan. 21, 2000 effective Apr. 22, 2000.

[30] Law No. 10394 amended on Jul. 23, 2010 effective Jan. 24, 2011; Law No. 8902 amended on Mar. 14, 2008 effecitve Jun. 15, 2008; Law No. 8520 amended on Jul. 19, 2007 effective Jan. 20, 2008; Law No. 8386 amended and effective on Apr. 27, 2007; Law No. 7971 amended and effective on Aug. 29, 2006; Law No. 6891 amended on May 29, 2003 effective Aug. 20, 2003.

Merchant Banking Business Law and Korea Securities and Futures Exchange Law. Before CML, the six laws were all regulating the financial intermediary with the same function, overseeing different business licenses.[31] Thus, CML was a game changer, moving Korea's institutional regulatory framework to a functional regulatory framework.

CML also delegated much of its rule-making and enforcement functions to self-regulating organizations ("SRO") such as KRX and Korean Financial Investment Association ("KOFIA"). For example, KRX has the authority to establish listing/disclosure standards and trading/settlement rules at the KRX exchange,[32] while KOFIA approves over-the-counter derivative products.[33] Accordingly, KRX and KOFIA have established many regulations on capital markets.

B. Regulatory Agencies

In contrast to the legal structure that regulates merchant banking, investment banking, and insurance industries by three different statutes, all financial services are regulated by one centralized agency. In another words, although the institutional fragmentation among financial intermediaries still exists among merchant banking, investment banking including asset management, and insurance industries, the regulatory organizations were completely unified immediately after the 1997 financial crisis into one agency, FSC.

FSC was launched as the policy development agency, taking over the role of the Ministry of Finance. Based on authorization from the BL, CML, and IBL, FSC establishes policies regarding financial markets in general.[34] Meanwhile, FSS, a private entity, was inaugurated as the implementation arm under the FSC[35] to handle enforcement functions primarily, although not exclusively.[36] The Securities and Futures Commission ("SFC") under the FSC maintains the primary authority to make decisions about the administrative (and other) sanctions for certain breaches

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[31] Desegmentation is still on its way in the sense that banking and insurance are still separately regulated by different statutes.

[32] Arts. 373 et seq. of the CML. *See* also http://eng.krx.co.kr/.

[33] Arts. 283 et seq. of the CML. *See* also http://www.ksda.or.kr/. KOFIA is the Korean equivalent of FIRNA.

[34] As for the rules and organizations of the FSC, *see* http://www.fsc.go.kr/eng/.

[35] Law Establishing FSC, Etc. ("LSF") Law No. 5490 as most recently revised by Law No.n10303 effective Nov. 18, 2010. Initially, Korea Finance Ministry used to retain part of policy functions, which was completely integrated into FSC in 2008. *See* Ko, Dong Won, Legal Review on a Reshuffled Financial Supervisory Organization, 4 K. J. FIN. L. 113 (2008).

[36] As for the details of the FSS, *see* http://english.fss.or.kr/fsseng/index.jsp.

under the CML,[37] and KRX and KOFIA, as SROs, have the authority to monitor and sanction its member organizations.[38]

C. Investigative Procedure

When violations of the tripartite statutes occur, the prosecutor can start the investigation if he reasonably believes that such investigation would lead to successful criminal prosecution under the Korean Criminal Procedural Law. [39] In practice, however, market regulators have the responsibility and power to monitor the market. Thus, in the case of irregularities,[40] the KRX has the primary authority to request that the financial investment licensee produce relevant materials, or to audit the status of the assets, books and other materials of its members.[41] The FSC may also request the KRX or the FSS use the audit process and file a report.[42] For banks and insurance companies, the FSC can ask the FSS to audit the questionable practices.

Such investigation must be performed upon presentation of the badge indicating such authority. The FSC may launch its own investigation procedure by requesting a relevant party to submit an affidavit, take the witness stand, or produce documents.[43] If the SFC wishes to investigate unfair trade practices,[44] it may secure a search warrant from the court for such exercise.[45] In the case of the most serious violations, [46] the FSC files a criminal complaint with the public prosecutor's office for indictment. [47] The public prosecutor's office can also investigate the KRX, FSS

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[37] Art. 439 of the CML. Unfair trading activities are regulated by the SFC. Unfair trading activities mean, in practice, inside trading, 5% rule, major shareholder reporting, short-term windfall profits, failure to file periodic disclosure documents, filing of false registration statement, and price manipulation.

[38] Korea Securities Lawyers Association ("KSLA"), A Study on Regulatory System under the CML, 172-178 (2006).

[39] Arts. 195 et seq. of the Korean Criminal Procedural Law.

[40] Art. 355 of the CML Enforcement Decree defines irregularities.

[41] Art. 404. KRX is required to institute Market Monitoring Comm. pursuant to Art. 403 of the CML. As to the actual practice of investigation, *see* Jang, In-Bong, *Practical Matters and Issues Relating to Finding Illegality in Unfair Transactions of Securities*, 8 K. J. SEC. L. 213, 218-220 (2007).

[42] Art. 410.

[43] Art. 426. SFC also can exercise investigatory authority on unfair trade practices. As to the investigation process of FSA in U.K., *see* Richard Burger, *FSA Enforcement Process Review*, 14 J.FIN. REG. & COMP. 1 (2006). FSA in the UK was also recommended to adopt: clarification of the FSA's approaches to the use of enforcement action; checks and controls during the investigation process; transparency; and separation between investigator and decision maker. Pursuant to the recommendations, FSA Business Plan 2005/2006 listed priorities as senior management responsibility, market abuse and insider dealing, breaches of the listing rules and principles, sponsors, conflicts of interest, and front-running.

[44] Arts. 172 et seq.

[45] Art. 427.

[46] Se Young Lee & Alison Tudor, *Korea Halts Deutsche Operations*, WALL STREET J. Feb. 24, 2011, at 17. FSC, Price Drop on Option Expiration Date, Press Release dated Feb. 23, 2011.

[47] According to 2009 FSS Yearbook, predominant cases were transferred to public prosecutor's office. Especially, in the case of unfair trading, more than 80 percent cases ended up with criminal indictment. *See* Table 2-

and other SROs with the assistance of experts from these organizations.[48] [Table 2 shows the outcome of investigations by the FSS for the past several years.]

[TABLE 2] DISPOSAL OF CASES]

Year	*Notice to Prosecutor's Office (%)*	*Order to return short windfall profit*	*Warnings, etc.*	*Total case numbers*
2005	186	56	17	259
2006	132	24	9	165
2007	138	50	14	202
2008	115	35	7	157
2009	142	16	18	176

*source: FSS 2009 Yearbook

III. *EX POST FACTO* MEASURES

Part III explores the types and scopes of legal sanctions imposed when violations occur. Depending on the legal nature of the initiating entity, legal sanctions may be public or private. Public sanctions comprise two types of sanctions: criminal and administrative. Criminal sanctions are commenced when the prosecutory organization issues criminal indictment and finalized when the court imposes sentences. By contrast, administrative sanctions are commenced and finalized by the administrative agencies such as the FSC. If the violator wants to challenge the administrative sanctions, he or she can file a complaint with the court and seek revocation of such administrative measures. Private sanctions are imposed by private individuals as a form of compensation for damages through the judicial proceedings at the courts.

A. Criminal Sanctions

Criminal sanctions are the most severe form of legal sanctions. The issues of what conducts constitute crimes and who are punishable concern important policy issues. Ever more significant is the process of criminalization.

18, FSS, 2009 YEARBOOK 69. All FSS materials available at http://www.fss.or.kr. *See generally* SFC Public Notice N0. 2009-5, as most recently revised by Pub. Notice No. 2009-50 dated Aug. 26, 2009, *Regulations on Securities-Related Crimes Investigation*; SFC Public Notice No. 2008-8, as most recently revised by Pub. Notice No. 2010-21 dated Jul. 21, 2010, *Regulations on SFC Operations*.

[48] Judicial Research and Training Institute, *Supra* fn. 21, 216-217.

1. Strata of Criminal Conducts

The tripartite statutes, BL, CML, and IBL, take the typical structure of a statute in Korea.[49] The last chapter of each statute is about penalties. In the case of BL, criminal conducts are subject to four tiers sanctions: group 1 for up to ten years imprisonment or a fine of KRW500M,[50] group 2 for up to five years of imprisonment or a fine of KRW200M,[51] group 3 for up to three years of imprisonment or a fine of KRW100M,[52] and group 4 for up to one year of imprisonment or a fine of KRW30M.[53] CML adopts the same four tier system: imprisonment of ten, five, three and one year(s); and a fine of KRW500M, 200M, 100M, and 30M, respectively (See Table 3).[54] IBL mandates a five-tier system: imprisonment of ten, seven, five, three and one years. The corresponding fines are lower than under the BL and CML: KRW 50M, 40M, 30M, 20M, and 10M, respectively (See Table 4).[55]

[TABLE 3] CRIMINAL CONDUCTS AND SANCTIONS UNDER BL & CML

Tier	*Sanctions*	*Statutory Provisions*	*[???]*
Tier 1	10 years/KRW500M	Art. 443* (Banking Art. 66, Para. 1)	Nine types (four)
Tier 2	5 years/KRW200M	Art. 444 (Art. 66, Para. 2)	Twenty-nine (one)
Tier 3	3 years/KRW100M	Art. 445 (Art. 67)	Forty-eight (two)
Tier 4	1 year/KRW30M	Art. 446 (Art. 68, Para. 1)	Sixty-three (eight)

*If the amount of damages arising out of criminal conducts exceeds KRW500M, the maximum sentencing limit can range from at lest 3 years to lifetime. Art. 443, Para. 2.
*source:BL & CML

[49] As the Korean Penal Code is applicable to financial institutions in general, management is subject to crimes including breach of fiduciary duty, misappropriation of corporate funds, and fraud under Art. 355 et seq. of the Korean Penal Code. In addition, ASH provides more severe penalties for management of financial institutions if they get involved in brokerage or commercial bribery. As for the definition of financial institutions, *see* Art. 2, Item 1 of the ASH and Arts 5 et seq.

[50] BL, Ch.12, Art. 66, Para. 1. Four criminal conducts are listed.

[51] BL, Art. 66, Para. 2. Banking without license.

[52] BL, Art. 67. Two violations are listed.

[53] BL, Art. 68, Para. 1. Eight violations are listed. Para.2 of the same article provides for KRW30M for banks for false advertisement. Art. 69 has a list of conducts subject to administrative fines. Art. 69 has a list of conducts subject to administrative fines.

[54] CML, Book 10, Arts. 443, 444, 445 and 446. Each article has a long list of criminal conducts: 9, 29, 48, and 63. Art. 449 is about administrative fines for relatively minor violations. (Figures in parentheses are for BL)

[55] IBL, Art. 209 is about administrative fines. It is not clear why the amount of fines under the IBL is lower than BL or CML. One reason might be that BL and CML were revised recently to increase the amount of fines while IBL had no chance to revise them. BL and CML are always subject to discussions for revisions while IBL seems to be pretty much settled in.

[TABLE 4] CRIMINAL CONDUCTS AND SANCTIONS UNDER IBL

Tier	*Sanctions*	*Statutory Provisions*	*[???]*
Tier 1	10 years/KRW50M	Art. 197	One type of conduct
Tier 2	7 years/KRW40M	Arts. 198 & 199	Five
Tier 3	5 years/KRW30M	Arts 200 & 201	Six
Tier 4	3 years/KRW20M	Art. 202	Six
Tier 5	1year/KRW10M	Art.203	Thirteen

*source: IBL

The current criminal sanctions are quite mechanical, at least in terms of statutory provisions. Minor failures to report a quarterly report, for example, go to the catch-all administrative fine section.[56] Except for those minor infractions, almost every violation of statutory prohibitions or other requirement falls within one of four or five categories and each category corresponds with a certain combination of imprisonment and a fine.

There is much room for improvement. First, it is undesirable to criminalize every violation of almost every section in the tripartite statutes.[57] This is the archetypal over-criminalization of government policies.[58] Criminal conducts should be limited to critical violations that would damage the system itself. Second, it is not clear why imprisonment for up to ten years should be alternative to a fine of KRW 500M.[59] Imprisonment along with the confiscation of economic gains would be a better option because violations could be more effectively deterred by making them costly.[60] Third, it should be considered whether ten years is an appropriate maximum term of imprisonment.[61] For example, in the case of capital market fraud,

[56] IBL,Art/ 449. Para. 1, Item 13. Violations that are subject to administrative fines are obviously regarded less egregious that those subject to criminal sanctions. However, such distinction does not always make sense. For example, a failure to institute internal control systems is subject to administrative fines, however, it is a serious violation. *See* IBL, Art. 449, Para. 1, Item 9.

[57] Jang, In-Bong, *Supra* fn. 37, 256. Only price manipulation, inside trading and false accounting should be conceptualized as securities crimes and guidelines from regulatory agencies about illegality were suggested. Especially, price manipulation is problematic relating to derivative trading such as equity linked securities, price maintenance by the underwriters immediately after an IPO and trading of treasury shares. *See* the most recent Seoul C. D. Ct. quilty decision on kick-out option price manipulation case in fn. 73.

[58] John Hasnas, *Ethics and the Problem of White Collar Crime*, 54AM. U. L. REV. 579 (2005); John Hasnas, *Foreword to Corporate Criminality: Legal Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1269 (2007). I do not believe my view is a promotion of ideologies to legitimize the minimal role of government in markets and a preference for industry self-regulation. Roman Tomasic, *Supra* fn. 14, 7.

[59] *Supra* fn. 46 and accompanying texts.

[60] Art. 447 provides for the possibility of dual sanctions: imprisonment and criminal fines; only for the tier 1 violations, the amount of fines will be treable damages, i.e., three times the amount of gains acquired or loss avoided under Article 447, Para. 2. This treble damage concept should be expanded to tiers 2 – 4 violations. It might not be easy to calculate the amount of gains acquired or loss avoided, depending on the type of violations.

[61] Art. 347 of the Korean Penal Code on fraud provides for the same sanctions. If the amount of gains acquired or loss avoided exceeds KRW500M, the minimum criminal sanctions will be imprisionment of at least three years. If the economic profits exceed KRW5B, the minium imprisonment term is five yars. *See* Art. 444, Para. 2.

the current maximum term of five years is disproportionate with the violations, and a longer term will be more appropriate.[62] Finally, the scope of discretion is too broad. The same violation could be subject to ten years imprisonment and/or a fine of KRW500M. This wide discretion within the hands of prosecutor's office and the judiciary branch should be controlled or at least checked to prevent any abusive discretion.[63]

2. Who Shall Be Punished – Criminals

All the prohibitions and requirements under the tripartite statutes are addressed to individuals, corporate entities, or both. For example, an individual has to not only certify the accuracy of periodic filing statements of investment banking houses as a CEO but also file their [own personal?] periodic reports with the FSC. Where criminal sanctions are concerned, the complex relationship between an individual and the corporate entity for which the individual is working presents a challenging legal issue.[64]

The tripartite statutes have one section in common, dual penalty clauses, the desirability and scope of which remains controversial.[65] The dual penalty clause is common to almost every regulatory statute in Korea. Under the clause, if an individual violates the obligations or prohibitions under applicable statutes, the corporate entity shall also be held responsible for a fine and vice versa. If the corporate entity breaches its obligation under the applicable statutes, the corporate entity as well as individuals shall be subject to criminal sanctions. Because corporation is a hypothetical legal creation, corporate criminal liability due to individual's misconduct creates a more mysterious precept.[66]

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[62] In the United States, the Sarbanes-Oxley Act ("SOX") had some impacts. *See* Peter J. Henning, *The Changing Atmospherics of Corporate Crime Sentencing in the Post-Sarbanes-Oxley Act Era,* 3 J. BUS. & TECH. L 243 (2008). Art. 444, Item 13 of the CML provides for imprisonment for up to five years in the case fraud in the registration statement or periodic disclosure documents. However, securities fraud in the United States would be subject to severer punishment. Although the basic concept of SOX was immediately incorporated into Korean capital market regulations, the reality is quite different. 18 U.S.C. § 1350(c)(1) & (2)."shall be fined not more than $1,000,000 or imprisoned not more than 10 years or both""$5,000,000, or imprisoned not more than 20 years, or both."

[63] CML Art. 447 provides for the possibility of simultaneous imposition of imprisonment and fine, which would not delineate the scope of wide discretion.

[64] Most recently, Meir Dan-Cohen, *Sanctiongin Corporations,* 19 J. L. & POL'Y 15 (2010).

[65] Art. 68-2 of the BL;Art. 448 of CML Art; and Art. 208 of the IBL.

[66] Especially for comments from a deconstructive comparative perspective, *see* Susanne Beck, *Meditating the Different Concepts of Corporate Criminal Liability in England and German,* 11 GERMAN L. J. 1093, 1110 (2010)("The English common law system, based on a utilitarian mindset, allows instant solution of the problem of corporations acting harmful [by accepting CCL]..The emphasis on egalitarianism, rights, deontological values in German criminal law is strongly built on a concept of personhood, human dignity, moral guilt, Rechtssicherheit (security of the law) and equality. From this emerges the need for coherence, for basing judgments onto existing laws, and for basing criminal sanctions on moral responsibility." Many scholars *see* CCL based on *respondeat superior*. *See* Elizabeth A. Plimpton & Danielle Walsh, *Croporate Criminal Liability*, 47 AM. CRIM. L. REV. 331, 332 (2010)("Courts began with the civil law-based doctrine.."); Abigail H,. Lipman, *Corporate Criminal Liability*, 46 AM.

The dual penalty clauses under the tripartite statutes raise a question as to whether a corporate entity could or should be subject to criminal sanctions, and if so, when and how.[67] Despite many discussions about the desirability or theoretical possibility of corporate criminal liabilities, corporations are, in reality, only subject to a fine. After all, the practical issue is under what conditions a corporate entity should be held responsible for individual's conduct. In general, corporations are liable for the acts of employees if the employees are acting within the scope of their employment for the benefit of the corporation.[68] The tricky question is whether the intent of the individual is automatically imputed to that of the corporation without its own negligence factor. Dual penalty clauses in many administrative laws used to have no reference to this issue. After the Korean Constitutional Court rendered unlimited dual penalty clauses unconstitutional in several cases,[69] however, new words were added to the effect that corporate entities are responsible only if it fails

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CRIM.L.REV. 359 (2009); Ved. P. Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?* 58 AM.J.COMP.J.605 (2010). *See* also Jay Martin, Ryan McConnell & Charlotte A.Simon, *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L. L. 3, 4 (Jan. 10, 2011)("2009 marked the hundred year anniversary of the Supreme Court's decision in *New York Central & Hudson River Railroad Co.v. United States*, which first minted the idea that corporations could be held criminally liable for the acts of anemployee.").

[67] John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporte Criminal Liability*, 46 AMER. CRIM. L.REV. 1329 (2009); Manuel Velasquez, *Debunking Corporate Moral Responsibility*,13 BUS. ETHICS. 531 (2003); Committee on Capital Market Regulations ("CCMR"), INTERIM REPORT OF THE COMMITTEE ON CAPITALMARKETS REGULATIONS, 13 (.. the Justice Department revise its prosecutorial guidelines so that firms are only prosecuted in exceptional circumstances of pervasive culpability throughout all offices and ranks."). As to the collateral consequences of prosecution in the United States, *see* Memorandum from Deputy Attorney General Larry D. Thompson (Jan. 20, 2003). Several approaches were proposed: deferred prosecution agreements; defense of bona fide defense program; and making criminal prosecution depend on preventive measures. *See* A. Weissman & D. Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411 (2007)("the government should bear the burden of establishing as an additional criminal element that the corporation failed to have reasonable policies and procedures to prevent the employee's conduct"); A. Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L.REV. 1319 (2007); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*,44 AM. CRIM.L. REV. 1537, 1538 (2007)("an affirmative defense should be offered to those who present :good faith" efforts to achieve compliance with the law"). There are also strong supports for CCL. E.g., Peter J.Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 45AM. CRIM. L. REV. 1417, 1421 (2009)("mens rea is not always required"); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481,1482 (2009)("corporations are not, fundamentally, fictional entities"); Barry J.Pollack, *Time to Stop Living Vicariously: A Better Approach to Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1393, 1413 (2009)(suggesting collective criminal intent approach).

[68] In the United States," within the scope of their employment" is the standard language regardless of the individuals' intent. The legal ground for corporate responsibility is *respondeat superior*. John Hasnas, "*Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics,"* 39 LOYOLA U. CHI. L. J. 507 (2008).

[69] K. Con. Ct. Decision Case No. 2008 HUNGA10 dated Jul. 30, 2009. As to the comment on this case, *see* Park, Chang Seok , *A Study on the Judgment of Unconstitutionality on the Point Penal Provisions*, 16 J. SOCIAL SC. 149 (2010). *See* also Cho, Byung-Sun, *Corporate Criminal Liability in Recently Revised Joint Penal Provisions*, 21 CRIM. POL'Y 351 (2009).

to exercise due care over the supervision of the relevant matter.[70] This new law compels corporate entities to use due diligene in order to avoid criminal sanctions.

In addition, the tripartite statute is unclear as to whether an individual or a corporate entity should be held responsible for having aided or abetted other companies that violated legal prohibitions or demands.[71] A traditional theory is that criminal sanctions based on regulatory administrative statutes can be imposed on aiders and abettors to the same extent as principals unlike the aider and abettor liability under the Korean Penal Code.[72] Such exceptional treatment for regulatory administrative law violators, however, should be clearly grounded in statute, not judicial interpretation. Furthermore, it is doubtful whether the concept of criminal sanctions based on regulatory administrative statutes as opposed to the crimes under the Penal Code is necessary.[73] If aiders and abettors are generally responsible under the Korean Penal Code[74] and corporate entities are also responsible for individuals under the dual penalty clause, the scope of corporate criminal liability might be expanded to the extent that an abusive prosecutor power would constitute a greater danger than individual criminals, triggering constitutional principles.[75]

3. *Investigative Procedure*

As mentioned above,[76] the FSC, the SFC and the FSS have the authority to investigate and determine market misbehaviors. For unfair transactions and other certain misbehaviors in the capital market, the SFC has the authority to determine the ultimate measures to be imposed on rule violating investment banks. At the

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[70] For example, Article 448 of the CML has a provision requiring failure of due care for corporate criminal liability.

[71] As to the civil liability of investment bankers as aider and abettor, *Central Bank of Denver, N.A. v. First Interstate Bank,N.A.*, 511 U.S. 164 (1994)(denying the aiding and abetting suit under Securities Exchange Act §10(b); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* 128 S. Ct. 761 (2008)(vendors and customers could not be liable with the issuer as primary actions under the Securities Exchange Act. As to the insurance coverage of disgorgement, *see Vigilant Insurance Co. v Credit Suisse First Boston Corporation*, 800 N.Y. Misc. LEXIS 1984 (Jul. 8, 2003), aff'd 782 N.Y.S.2d 19 (App. Div. 2004)(insured could not recover through its liability insurers the amount of settlement which represented the disgorgement of funds improperly acquired through violations of various securities regulations).

[72] Customs Duty Law Art.271; Law on Donation of Organs Art. 40. Art 32 of the Korean Penal Code provides for the reduced penalty for accomplices.

[73] Lee, Keun-Woo, A Critical Analysis on Administrative Criminal Law Theory, presentation at Korea Criminal Law Study Group (2009). *See* also Kwak, Kwan Hoon, The Problem and Improvement of the Administrative Regulations on Enterprise's Unlawful Act, 19 K. MGMT. L. 75 (2008).

[74] Arts. 31 & 32.

[75] John Hasnas, *Supra* fn. 63, 1335-38. Anglo-American liberal bias is true to Korean Constitution. Arts. 12, 13 & 27. Based on that constitutional judgment, he pointed three requirements: "its sanction should be applied only where doing so advances the purpose of punishment. .. criminal provisions be crafted to place objective limitations on prosecutorial discretion and provide adequate opportunity for parties to conform their behavior to the law….the criminal sanction is nevertheless regarded as a last resort rather than a favored method of social control."

[76] *See Supra* fns. 37 & 38 and accompanying texts.

same time, banks and insurance companies are subject to the sanctions imposed by the FSC. Thus, the relationship between the FSC and the SFC is not always clear.

Even if the violators are investigated and indicted by the Public Prosecutors, the initial phase investigation has been performed by FSS as a matter of practice. Most recently, however, Seoul Central District Court held that FSS officials had no authority to prepare legally valid interrogatories at the request of the SFC because they cannot be regarded as special police.[77] However, it seems legitimate and reasonable to support FSS investigatory authoritiesbecause it is the most important organization that has the expertise on the capital market and thus should be responsible for the initial phase investigation. A solution will be to add FSS as one of special police or to add procedural safeguards to the CML relating to the FSS investigation procedures.

B. Administrative Sanctions

For less serious violations, FSC, upon investigation, can issue administrative orders in addition to or instead of criminal sanctions. Such orders can be addressed to the firms and/or the individuals.[78] If revocation of business license is comparable to death sentence of an individual, suspension of license is to imprisonment. Furthermore, suspension of business license can cause more substantial economic loss to the business enity than a fine. Accordingly, administrative sanctions can be more effective and less costly for enforcement than criminal sanctions.

1. Revocation or Suspension of License

FSC can issue various orders to the financial investment business which has violated the CML.[79] The most devastating order is to revoke the business license. CML lists eight specific grounds for imposing such a measure in order to prevent abusive enforcement.[80] If a business' licenses are revoked, the business entity must

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[77] Seoul Central D. Ct. Decision 2010 KOHAP 11 dated Jan. 28, 2011 re Suk Woo Sohn & Min Ho Juhn of Deutsche Bank and Taihan Electric Wire case. This decision also decided on the existence of "inductive purpose" and "manipulative intentm" based on the telephone conference between traders and the knock-out option seller in HK. Such subjective standard for criminal sanctions is subject to many scholarly criticisms. *See* Yoon, Young Shin, *Price Manipulation byTrading*, 2 K.J. SEC. L 1 (2001).

[78] *See generally* FSC Public Notice No. 2009-15 as most recently revised by Pub. Notice No. 2010-26 dated Sep. 2, 2010, *Regulations on Capital Market Investigation Matters Schedule 2 ("Reg. Inv.")*; FSC Public Notice No. 2000-31, as most revised by Pub. Notice No. 2010-38 dated Nov. 12, 2010, *Regulations on Audits and Sanctions of Financial Institutions ("Reg. A&S")* Schedules 2 and 3 have formula for calculating the amount of civil fines. All FSC and SFC materials available at http://www.fsc.go.kr.

[79] BL provides for similar sanctions on banks and their executives. Special sections on private equity as shareholders are just for historical reasons. Art. 53 et seq. of the BL.

[80] Art. 420 Para. 1 of CML.

be liquidated.[81] Foreign financial investment business entities are also subject to the same sanctions, but on different grounds.[82]

Because revocation of licenses can be a death sentence to a corporation's existence, FSC is required to have formal hearings before issuing this sentence.[83] For less serious violations, the FSC can issue: i) suspension of all or part of a business for up to six months; ii) transfer of trust contracts; iii) correction or suspension of violations; iv) public announcement of sanctions;[84] v) warning; vi) reprimand; and vii) miscellaneous sanctions.[85] Due to the Administrative Procedure Act ("APA"), these measures also require notice and hearing.[86] As long as due process is secured, business license-related sanctions are desirable for efficiency and should be utilized more often [han criminal sanctions. This also would ensure the continuing business of financial institutions with their customers. The issue is then how to protect them with procedural safety pins.

2. Civil Fines

Civil fines were introduced into the Korean legal system as part of the Anti-Monopoly and Fair Trade Law ("AMFTL") in 1980.[87] Based on the AMFTL, the Korea Fair Trade Commission ("KFTC") has established a new financial model of developing additional revenue sources by imposing astronomical amounts of civil fines for the past several years.[88] Table 5 shows the enomosity of civil fines perpetuated by the KFTC.

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[81] Art/420, Para. 2.

[82] Art.421.

[83] Art 420 Para. 1.

[84] As to the constitutionality of mandatory public apology, *see* K. Con. Ct. Decision 89HUNMA160 dated Apr. 1, 1991. Public announcement of illegal conduct itself and sanctions imposed is not regarded unconstitutional.

[85] Ar. 420 Para. 3. The FSC may be able to sign with the applicable financial institutions a confirmation about the improvement of situations or a memorandum of understanding to rectify the wrongs. FSC Reg. A&S Art. 20-2. In the case of financial institutions in default, the FSC also has the authority to take a variety of measures including a petition for bankruptcy pursuant to the Law on Restructuring of Financial Institutions. *See* also K.S Ct. Decision 2004 DOO13219 dated Jul. 28, 2006 (denying the administrative proceeding about the legality of such petition).

[86] APA Art. 3. Reg. Inv. Art. 36 requires FSC notify the firm or individual subject to sanctions of the administrative measure under consideration ten days prior to the decision. Upon receipt of such prior notification, the firm or individual can submit their views orally, in writing or via telecommunications network to FSC. Such notification is not necessary for criminal indictment request, in the case of urgency or undesirable or unnecessary situations.

[87] Park, Hae-Shik, *Civil Penalties on Unlawful Assistance under AMFTL*, 8 K. COMP. L. STUDY 225, 231-232 (2002). At the beginning, civil fines were initially imported from Japan to recapture unlawful profits from the market dominant enterprises (Art. 6). By the first amendment of AMFTL by Law No. 3875 in 1986, cartels were covered by the civil fines, which amount would be determined by up to one percent of sales revenue (Art. 14). Sales revenue as opposed to unlawful profits from cartel as the basis point for calculating the amount of fines was simply for administrative convenience.

[88] Korea Fair Trade Commission, *Status Report to National Assembly*, 28 (Oct. 5, 2010). The amount of civil fines tends to increase rapidly except for election periods. For 2010, the number of cases is less than the annual average while the total amount of civil fines far exceeds the 2009 total even in August.

[TABLE 5] KFTC CIVIL FINES RECORD

Year	*Amount of Civil Fines Imposed (KRWMillion)*	*Number of Cases*
2004	36,308	91
2005	259,063	274
2006	175,261	157
2007	423,398	326
2008	272,869	141
2009	371,035	78
Aug.2010	458,762	39
Total	1,996,696	1,106

*source:

Civil fines are imposed in the case of almost every violation of the AMFTL. Other government agencies such as the FSC and the Korea Communications Commission ("KCC") followed suit.[89] Civil fines are sometimes offered as an alternative to revocation of business license. Civil fines are sometimes levies to pollutants. Nowadays, civil fines become panacea for all administrative statutes.

Strong criticism and legal challenges against excessive amount of civil fines under the laws were made unsuccessfully.[90] In reality, the economic effet of civil fines is the same as criminal fines. It was a thorny issue whether procedural safeguards under the Korean Criminal Procedural Law should apply for civil fines.[91]

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[89] FSC, *Study on Civil Fines on Unfair Trade Practices in Capital Market*, Mar. 4, 2010 Press Release. In addition to FSC, KCC has been frequently levying civil fines to telcos. E.g., *see* KCC, *Civil Fines on Three Wireless Data Service Telcos*, Dec. 2, 2010 Press Release. The amount of fines was KRW8.4 B, which is modest compared to the huge sales revenues of oligopolistic telcos.

[90] Bae, Young-Kil, *A Study on the Administrative Money Penalty System*, 3 K. PUB. L. STUDY 241, 246. As of 2001, 51 statutes have civil penalty clauses. The initial purpose was to deprive the violators of the illegal profits. Mutant civil fines turned up like deterrence civil fine as certain percentages of sales and alternative to the revocation of business license. Levies on pollutants are another variation. As of Apr. 2002, the number of statutes were 75. Han, Sang Kook, *Money Penalties for Tax Crimes,*76 FIN. FORUM 6, 12 (2003). *See* also Oh, Seung Gyu, *The Penalty Surcharge under Act on the Registration of Real Estate under Actual Titleholder's Name*, 2 K. L. & POL'Y 293 (2002). As to the classification of civil fines, *see* Constitutional Court Case No. 99HUNGA18, etc. dated May 31, 2001(Con. Ct. rejected the challenge to the constitutionality of civil fines).

[91] Chung, Byung-Duck, A Study of the Legal Characterization of the Penalty Surcharges in Monopoly Regulation and Fair Trade Act, 15 K.MGMT.L. EV. 465 (2005); Hong, Dae-Sick, *Comparative Study on Administrative Fines System under the Competition Law with a Focus on EU and German*, 14 K. COMP. L. STUDY 216 (2006); Jeong, Ha Myong, *Global Application of Civil Penalty and Korean Administrative Surcharge System*, 7 K. PUB. L. STUDY 369 (2006); Kim, Sung Hoon, *A Study Regarding Administrative Fine on the Cartel*, 20 K. COMP. L. STUDY 358 (2009). English name of this animal is all different: civil fine, administrative fine, civil penalty, money penalty, administrative surcharge, etc. In this article, civil fine is used while administrative fine is for minor misbehaviors. Civil fines should be distinguished from enforcement penalty. Enforcement penalty is the monetary sanction if the agency's order is not comformed and thus it assumes a specific administrative order from agencies. Since 1991 when the Construction Law introduced this system, it also spread to other statutes that as of 2008 21 statutes adopted this system including Banking Act. *See*, Kwak. *Supra* fn. 69, 87. Art. 65-9 of BL authorizes FSC to

Legal challenges based on double jeopardy, due process, presumption of innocence, uncontrolled discretion, or proportionality principle [92] have been futile. Alternatively, other milder procedural control methods have been discussed. [93] Explanations of reasons for the decision,[94] legal refinement of relevant market and violation period,[95] and two factors (impact and materiality) formula[96] are examples that have been proposed and partially implemented by the KFTC. As of now, further improvements for the protection of violaters are not de lege lata any more, but de lege ferenda.

Civil fines became part of the enforcement mechanism relating to financial services market crimes when STL and BL were revised in 2001 [97] and 2002, [98] respectively.[99] Civil fines for financial market crimes are tightly regulated compared to the AMFTL; the illegal conduct subject to civil fines is restricted. In the case of capital markets, only violations on related party transactions, [100] registration statement,[101] tender offer filing[102] and periodic disclosure[103] are subject to civil fines. Only if the case involves malice or gross negligence, are the context, degree, period, frequency and unlawful gains, weighed in determining the amount of a fine.[104] Relevant parties shall have the opportunity to present their opinions or materials.[105]

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issue enforcement penalty if a bank fails to dispose of shares in excess of legal limits when ordered. *See* generally, Civil Money Penalty for Financial Institutions, KSLA Report (2004).

[92] K. Cons. Ct. 2001HUNGA25 dated Jul. 24, 2003; K.. Sup. Ct. Case No. 2000TII6206 dated Feb. 9, 2001; 2006DOO4554 dated Jul. 12, 2007; 2001DOO6517 dated Apr. 23, 2004; 2001DOO7220 dated Mar. 12,2004; 2006DOO4226 dated Feb. 15, 2008.. *See* also Chun, Sam-Hyun, *A Legal Problems of Surcharge on the Unfair Trade Act*, 21 K. COMM. CASE STUDY 203 (2008).

[93] Even empirical studies turned up. Kim, Iljoong et al, The Administrative Monetary Penalty Against Regulatory Violation: An Empirical Analysis of the Determinants of the Surcharges Imposed by the Korean Fair Trade Law, 51 S. L. J. 147 (2010).

[94] Park, Hae-Shik, *Supra* fn. 83, 247.

[95] Yoo, Jinsoo & Kwon, Sookmyung, *Policies Against Collusion*, 15 IND. ORG. STUDY 83, 96-99 (2007).

[96] Taehi Hwang, A Legal Study on Setting the Basic Amount of Surcharges in Relation to the Cartel, 50 S. L.J. 402.

[97] STL Art. 206-11 et seq. CML Art. 428 et seq. As for the recent changes in Japan about the civil fines to individuals, *see* Kim, Yong-Jae, *A Study on Civil Money Penalties Against Individuals in Japan,* 4 K. F L. REV. 167 (2007).

[98] Ko, Dong-Won, *An Analysis on Some Problematic Issues Under the Banking Act*, 22 K. COMM. L. REV. 155, 196 (2004). BL, Arts. 65-3 et seq.

[99] IBL Art. 196 also provides for civil fines. BL Arts. 65-4 to 65-8 are applied mutatis mutandis. In addition to IBL, *Sangho Jeochook Eunhangbup* [Mutual Saving Bank Law] ("MSBL") Arts. 38-2 et seq., *Yeoshin Chunmoon Gwemyungupbup* [Credit Facility Specialty Business Law] ("CFSBL") Art. 58, and G*wemyung Jeejoo Hoesabup* [Finance Holding Company Law] Art. 64 also provide for civil fines as part of enforcement mechanism.

[100] CML Arts. 428, Para. 1 & 34. This is an alternative to suspension of business activities under Art. 420, Para. 2.

[101] CML Arts. 429, Para. 1, 119, 122 & 123.

[102] CML Arts. 429, Para. 2 & 142.

[103] CML Arts. 429, Para. 3, 159, 160 & 161.

[104] CML Art. 430. In the case of SEC in US, refer to Statement of the Securities and Exchange Commission Concerning Financial Penalties (Press Release No. 2006-4, January 4, 2006) listing seven factors.

[105] CML Art. 431.

One may object to such an order within 30 days to the FSC in which case it has up to 90 days for reexamination.[106] The BL and IBL follow a similar procedure.[107]

Civil fines for financial market crimes have a lot of room for improvement in terms of substance and procedure. The violations subject to civil fines are inconsistent among banks, financial investment firms, and insurance companies. Table 6 shows the overall schematics of civil fines. The difference in nature of financial business among banking, insurance and investment banking does not justify such inconsistency and thus should be rectified. In addition, the amount of penalty is inadequate considering the impact on the investor's trust in capital markets, especially compared to the amount of fines under the MRFRA;[108][109] the size of fines should be increased so violators are paying more when they are fined. Finally, the prior notice and hearing procedure should be more formally regulated to ensure procedural safeguards.[110]

[106] CML Art. 432.

[107] *Supra* fn. 83.

[108] According to Reg. A&S, in the case of banks and insurance companies, the amount of excess over the legal limit, for example, is the basis. In contrast, in the case of cartel in the case of antirust laws, the base line is simply the gross sales amount. The amount of excess over the legal limit is staggered from KRW1B to 1T and five rates from 7/10 to 7/160 are applicable. In the case of kickbacks for insurance business, a separate formula is applicable. According to Reg. Inv. Schedule 2, in the case of misrepresentation in the registration statement or tender offer filing, the amount of offering is the basis. The applicable rate is 3/100. In the case of misrepresentation in periodic/continuous disclosure, daily average trading volume in the past is the basis, but not bigger than KRW1B. The applicable rates are 3/100 or 10/100, which can be reduced case by case. FSC Policy Release, *Sanctions Modernization Plan*, dated Aug. 13, 2008. Available http://www.fsc.go.kr/policy

[109] Lee, Yong-Chan, *Monetary Sanction on Financial Institutions in Korea*, 9 Choongang L. REV. 537, 557-564 (2007). His argues that the number of minor violations subject to administrative fines should be expanded, while civil penalties could be more restrained. However, crimes subject to civil fines seem to be serious enough to warrant civil fines. The real regulatory policy seems to be consistency among three business lines.

[110] *Supra* fn. 83. The KFTC Regulations on Comm. Meeting and Case Management KFTC Pub. Notice No. 2000-8, as most recently revised by Pub.No. 2009-64 dated Dec. 7, 2009 can be one example.

[TABLE 6] CIVIL FINES UNDER THE BL, CML, & IBL

	grounds	*basis*	*rates*	*factors*
Banks	Loan limit to one entity, limit on equity investm't, loan limit to large sh's, limit on investm't in large sh's equity, limit on investm't in real estate, etc.; influence by large sh's (18 items)	Excess over limit	7/10-7/160 (5 step)	+/-50% Duration, track record, damage/profit, motive, remedy, report, due care.
Ins. Cos.	Kickback, limit on asset managem't, transaction with large sh's (5 items)	Excess, kickback	Same (except kickback)	
Fin. Invest m't	Transaction with large sh's, investm't in large sh's, misrepresentation in registration statem't, tender offer report, periodic/continuous disclosure	Excess, offer amount, daily trade volume	3/100 10/100 (disclosure)	Serious violation (impact on operating profits or equity, cash flow, contingent liability), cooperation, track record, report, loss to investors,

*source:BL, CML, & IBL

In practice, fines have not been prevalent. For the first half of 2010, SFC filed 89 cases based on disclosure violations, among which only eight cases resulted in civil fines (totaling KRW471M.)[111] As for banks and insurance companies, the FSC issued 11 civil fines in 2010, which ranged from23M to 4.5B.[112] The trend seems to

[111] FSS, *Sanctions for 2002 H1*, press release dated Aug. 1, 2002. Three cases were indicted, one case recommendation of management termination, nine cases administrative fines, and the remainder warnings.

[112] Available http://www.fsc.go.kr/info/con_sanc_list.jsp?menu=7220300&bbsid=BBS0122

OCBC Bank Seoul Br.	*Loan limit to one entity*	*+ duration – no damage to credit or risk of loss*	*KRW(M) 99*
Cardiff Dam. Ins.	Special benefits/asset mngt.		228
Paransae Mutual	limit to large loans	-cure with/3 mns	354
Moodung Mutual	Loan limit, loan classif'n	ditto	23
Suil Mutual	ditto	ditto	100
Kyunggi Mutual	Loan limit	ditto	1,270
Youngnam Mutual	ditto	ditto	319
Hankook	ditto	ditto	870
Hyundai Mar. Ins.	Limit on investment in related party assets	+duration-no damage	1,633
KDB Life Ins.	ditto	ditto	4,500
Doosan Capital	ditto	ditto	123

For 2010, 86 banks including mutuals were warned while in 35 cases executives were reprimanded.

be moving towards more frequent civil fines.[113] Nevertheless, the amount of fines itself is meager. The basis amount should be the amount involved in the illegal transaction rather than the fixed amount stipulated in the rules. Furthermore, the rates of fines should go up in order for the civil fines to effectively work as sanctions and deterrence.

3. Censure of Executives

In addition to corporate responsibility or as an alternative, executives can be held responsible even on an individual level. FSC has the authority to directly issue censures to executives while employees are subject to the similar sanctions at the request of the FSC to the firm.[114] The censures include: termination;[115] suspension for up to six months; warning; reprimand; notice; and misc.[116] As to employees, reduction of compensation is one option. Like the case for revocation of business license, termination or request for termination requires hearing.[117] The FSC must

[113] According to FSS press releases, for 2010, SFC adopted sanctions on disclosure violations six times and all those resolutions included civil fines. Available http://www.fss.or.kr/kr/nws/nbd/bodobbs_v.jsp?seqno=14755&no=38&gubun=01&menu=nws020100.

Nov. 19 (24th sess.)	False statement in registration statement, failure to report business transfer, failure to report major items	7 Cos.	Civil fines KRW(M) 5.2 - 344
Oct. 27 (17th)	Failure to report major items	4 Cos.	1.6 - 24
Sep. 8 (15th)	Failure to file merger report, major items	2 Cos. & 1Indi.	20 - 939
Jul. 14 (13th)	Failure to file annual report	9 Cos.	14 - 205
Jun. 3 (10th)	Failure to file biz transfer, major items, annual report	8 Co.s	2.5- 51
Mar. 24 (6th)	Failure to state major items in registration statement or H1/Q1, failure to disclose	6 Cos. & 1 Indi.	10 - 396
For disclosure violations in 2009			
Dec. 29 (24th)	Failure to disclose purpose of funds	1 Co.& 1 Indi.	700 & 20
Dec. 23 (22nd)	False report on change of control..	3Cos. & 2 Indi.	2.5-162
Sep. 30 (16th)	Failure to report change of funds, sub. share sales..	6 Cos & 1 Indi.	3.75-164
Jul. 22 (12th)	Failure to report business transfer, delayed report of dis.	14 Cos.	2.5-456
May 27 (8th)	Delayed H1report, failure to report share purchase/sale	9 Cos.	5.2-50
Feb. 25 (3rd)	Failure to disclose major changes, delayed report..	9 Cos.	6-40

In the United States, some argue that market enforcement such as loss of market value when news of misconduct is reported can be much effective than civil fines. J. Karpoff, D. Lee & G.Martin, *The Cost to Firms of Cooking the Books*, 43 J. of FIN. & QUAN. ANA. 581-611 (2008).

[114] Art. 422 of the CML; Arts. 54 & 54-2 of the BL.

[115] As to the effect of termination, BL Art. 18, Para. 1, Item 9. *See* also CML Art. 24 and CML-ED Art. 27. For five years, they cannot be officers of another financial institutions.

[116] Choi, Dong-Jun, *A Study of Current Situation and Legal Issues about the Disciplinary Warning Against Officers*, 4 K. J. SEC. L. 129 (2007). 2003DU14765 K. S. Ct. Decision dated Feb. 17, 2005 (reprimand under CFSBL as administrative action subject to legal review).

[117] Art. 423 of the CML.

maintain records of such censure,[118] and the individual can file an objection with the FSC.[119]

Under the regulatory scheme, while FSC is no in privy to the executives or other employees of financial institutions, it nonetheless may request financial institutions take disadvantageous measures to remedy managerial mistakes. It, therefore, seems more desirable to have the shareholders of the financial institutions consider about the future of the incumbent management.

C. Private Enforcement

Although the regulatory agencies are primarily responsible for the protection of investors and efficient operation of the market system, they should be cautious not to be overly intrusive. With too much authority on the part of regulatory agencies that entails too much responsibility, paternalistic protectionism would outgrow market-based management. Additionally, the regulatory agencies would not afford the financial cost of such penultimate supervisory responsibility. In that sense, private enforcement should be a pivotal component of the enforcement mechanisms.

1. Pre-litigation Mechanisms

In cases of disputes involving financial transactions, alternative dispute resolution fits the situation best, because the judiciary branch, among other reasons, lacks expertise. Furthermore, solutions might have to come from collective remedial measures such as establishment of funds. Prospective measures, such as revision of general terms and conditions might be desirable. Rituals at courts on a case by case basis do not always provide the best solution. Thus, using pre-litigation mechanisms is usually preferrable, depending on the situation.

Mediation is one solution.[120] Although mediation is not binding, and thus of limited effect, the FSS has the standing Dispute Resolution Committee.[121] The thorniest issue is whether disputes are prone to mediation in light of their nature. For example, if a consumer argues about suitability or misrepresentation, whether it would be subject to mediation is not clear.[122] In addition, there is a potential conflict issue as the regulatory agency might be partially responsible for the disputes. Nonetheless, FSS has been extremely successful and active in Korea in addressing

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[118] Art.424 of the CML.

[119] Art. 425 of the CML.

[120] Kim, Sang Soo, Financial Dispute and ADR:Mainly the Comparison between Korea and Japan, 7 K. J. F. L. 145 (2010).

[121] LFE, Book 5, Ch. 5, Art. 51, et seq.

[122] LFE Art. 53, Para. 1, Item 2 provides for the possibility of rejection by the Comm.

consumer disputes involving financial intermediaries.[123] Thus, FSS has a plan to make the mediation mandatory prior to litigation at courts and mediation unilaterally binding to the financial institutions.[124] In addition to FSS, KRX has been operating the Market Audit Committee, which has dispute resolution functions.[125] KOFIA also runs a dispute resolution center for its members.[126]

Arbitration can be more effective than mediation, as abitration decisions are binding. Unlike in the United States,[127] most Korean contracts do not contain arbitration clauses in standard financial transaction documents. It might be partly due to the lack of expertise in arbitration at KRX and KOFIA. Even if we assume the relevant institutions have the capability to arbitrate disputes, it remains unclear to what extent they can be resolved by arbitration. For example, whether churning, unauthorized trading or misrepresentation issues in violation of the CML should be arbitrated or not is not clear. Because the FSC did step in regarding KIKO disputes[128] or POWERINCOME fund[129] disputes involving suitability issues,[130] and

[123] FSS, *2009 Disputes Statistics*, Press Release dated Mar. 5,2010.

2009	*Banks & Consumer Fin.*	*Financial Investment*	*Life Ins.*	*Damage Ins.*
Filed	6,976	2,225	10,661	10,212
Mediation Accepted	50.2%	37.1%	43.7%	
2008	5,200	1,163	7,393	7,269
2007	2,020	561	7,603	6,895
2006	2,154	470	8,681	7,084
2005	3,861	424	7,631	6,766

See, FSS, *2009 Litigation Statistics*, Press Release dated Mar. 11, 2010.

Out of 28,988 cases filed with the FSS, 1,656 suits were filed with courts. 1,435 litigations were filed by financial institutions, not by consumers. Out of 1,656 suits, 478 cases were settled.

	Banks, etc.	*Financial Investment*	*Life Ins.*	*Damage Ins.*
Court cases	82	56	161	1,357
Plaintiff FIG	30.5%	44.6%	73.3%	93.4%

[124] FSS, *Id.*, citing the case in Germany and UK. *See* also the Bill 1809789 proposed by Cong. MHCho, et al. on Nov. 3, 2010 to amend the LFE. Art. 56 of the bill requires the mandatory mediation before a suit is filed.

[125] Art. 405 of CML. More information available http://www.krx.co.kr/m11/m11_1/m11_1_5/m11_1_5_5/UHPKOR11001_05_05.html.

[126] More information available http://www.ksda.or.kr/. *See* also Post Office Deposit and Insurance Law Art. 48-2; Electronic Financial Transaction Law Art. 27.

[127] Han, Cheol, Securities Arbitration as a Means of Securities Disputes Resolution, 22 K. COMM. L. STUDY 393 (2003).

[128] In 2008 many Korean banks sold kick-in-kick-out foreign currency products to many small and medium export companies. As US dollar was appreciated contrary to expectations in the market, Korean exporters had to pay a huge amount of KRW back to the counterparty of the KIKO products, which was ensued with many court cases. Most court decisions rejected fraud or suitable arguments made by Korean buyers of KIKO. As of Nov. 2010, 141 cases were pending at Seoul C. D. Ct. where 99 plaintiffs were rejected. MK News, Nov.23, 2010. Suwon D. Ct. Decision 2009KAHP3756 dated Jan. 14, 2011; Seoul C. D.Ct. Decision 2009KAHAP21886 dated Nov. 29, 2010; Decision 2008KAHP108359, 200KAHP28276 dated Feb. 8, 2010. *See*, however, Seoul C. Ct. Decision 2008KAHAP3816 dated Dec. 30, 2008 issuing an injunctive order.

Korean courts tend to interpret a case'sarbitrability broadly as opposed to a narrow reading of public order for revocation of an award,[131] arbitration based on agreement can be more widely adopted in Korea.[132]

2. Litigation for Compensation of Damages

In the case of banks or insurance companies, account holders or insurance buyers can recover damages from the institutions if a breach of contract occurs. Likewise, capital market investors can be compensated for damages by dealers and brokers. For churnings[133] and unauthorized trading,[134] Korean courts tend to allow such litigations liberally although the amount of damages is usually limited.

In the case of misrepresentation, insider trading, and unfair trading, the CML stipulates a private cause of action. [135] Misrepresentation, or omission of representation, on material items in a registration statement would lead the issuers, directors,[136] and advisors (such as accountants[137] and underwriters[138]) to be jointly and severally liable for damages.[139] They[140] are also responsible for the damages due to misrepresentation or failure to represent major items in periodic and continuous disclosure documents.[141] Any insider trader is also liable for damages to

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[129] 50% loss shared, Joins.com, Nov. 12, 2008. Woori Bank that sold fund products were ordered to share a 50% of the loss. *See* the status of several cases pending at Seoul App. Ct. at hannurilaw.co.kr

[130] FSC Press Releases dated Oct. 22, 2008 and dated Nov. 11, 2008.

[131] Arbitration Law, Art. 36, Para. 2, Item 2(A) on revocation of an award. Arbitration Law has no specific section on arbitrability. Mok, Yong-Jun, Arbitrability in Court Administration Office, 7 PROBLEMS IN CIVIL PROCEEDINGS 423 (1993).

[132] As for U.K. Eilis Ferran, *Dispute Resolution Mechanisms in the UK Financial Sector*, Presentation at KSLA Special Seminar in 2001. Available http://ksla.org/. In the United States, customer-broker-dealer allows pre-dispute arbitration clause. *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987)(claim under §10(b) is arbitrable); R*odriguez de Quijas v. Shearson/AmericanExp., Inc.*, 490 U.S. 477 (1989)(pre-dispute agreement t arbitrate under the Securities Act was enforceable) . It is not clear whether mandatory arbitration clause between corporate issuers and shareholders would be held valid despite SEC's objection.

[133] Kim, Yongjae, Suggestions to the Reform of the Churning Regulation under the Capital Market and Financial Investment Services Act, 8 K.J. SEC. L.117 (2007);

[134] Kwon, Gi-Hun, Restriction on Discretionary Transactions in Futures Trading, 15 K. COMM. CASE STUDY 328 (2003); Hong, Bok-ki, A Claim for Damages Caused by Discretionary Trading of Stocks and Unreasonable Recommendation by Brokers, 15 K. COMM CASE STUDY 131 (2003).

[135] *See* generally, KSLA, Study on Substantive Aspect of Securities-Related Damage Claims (2003).

[136] K. S. Ct. 2006DA68636 dated Sep. 11, 2008 (re Daewoo directors); Seoul App. Ct. 2006NA14648 dated Sep. 13, 2006 (re the same).

[137]Seoul C.D.Ct2003KAHAP77160 dated May 19, 2005 (re CPA firm of POSNIK); K. S. Ct. 97DA26555 dated Oct. 22, 1999 (re CPA firm of Korea Steel Pipe).

[138] Seoul D. Ct. 2000NA32740 dated Nov. 23, 2000 (re underwriter of Hanil Phar.); Seoul App. Ct. 2000NA10828/10835 dated Jan. 9, 2001 (re underwriter of Yent).

[139] Art. 125 of CML. Art. 14 of the STL. As to the standing for plaintiff, Kang Dae-Sub, Standing to Sue Claims under Section 14 of the Securities Exchange Act, 19 K. COMM CASE STUDY 219 (2006).

[140] 2002DA38521 K. S. Ct. dated Oct. 11, 2002 (re Daewoo Electronics).

[141] Art. 162 of CML. Art. 186-5 of STL.

investors who experienced loss in connection with insider trading.[142] Any unfair trader, including one who has manipulated market price, is also liable for the damages arising out of such trading.[143]

3. Class Action

After plenty of debate over the pros and cons of class action,[144] the Securities-Related Class Action Law ("SCAL") passed the National Assembly in 2004, with the effective date of January 1, 2005.[145] As for the listed companies, whose assets are less than KRW2T, it applies to actions after Jan. 1, 2007. Large listed companies also had a two-year reconciliation period. Since SCAL fully entered into effect on January 1, 2007, not a single class action had been filed until recently. On April 13, 2009, the first class action against Jinsung TEC for its failure to disclose loss from derivative trading in H1 till Q3 report was filed, but subsequently settled.[146] Due to, among other things, lack of compensation for the class representative's time and

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[142] Art. 174 of CML. Art. 188-3 of STL. 92KAHAP11689 S. D. Ct. S. Branch dated May 6, 1994, confirmed by 94NA21162 S. H. Ct. dated Jun. 14, 1995 (re Shinjung Paper). The plaintiff was limited to the investors "at the same time" with the inside trading (so-called contemporaneous trader test). The amount of damages was limited to the difference between the purchase/sale price and the market price at the time when hearing is closed or actual disposal price prior to the closing of hearing. Kang, Dae Sub, *Case Comments*, 7 K. COMM CASE STUDY 359 (1996); Park, Im-Chool, *A Study on Damage from Insider Trading* (2000), KSLA Round Table on Damages (Aug. 2003); Cho, Inho, *A Reexamination of Korea's Securities and Exchange Act Art. 188-3*, 9 K. J. SEC. L. 93 (2007).

[143] Arts. 177 and 179 of CML. Art. 188-5 of STL. Kim, Joo-Young et al, *Calculation of Damages in Stock Price Manipulation Cases*, 2 K. J. SEC. L. 111 (2001). 2000NA22456 S.H. Ct. dated Dec. 5, 2000 (re Daehan Textile). The highest price for the past six months was deemed market price.

[144] Shin, Jong Seok, *A Study on Securities-Related Class Action*, 34 K. L. STUDY 295 (2009); Choi, Jin-Yi, A Study on the Issues and Improvement of the Class Action Law Concerned with Securities, 23 K. ENT. L. R.299 (2009); Choi, Jung Sik, *A Study on the Class Certification of a Securities-Related Class Action*, 6 K. J. SEC. L 139 (2006); Choi, Moon Hee, *A Study on the Proportionate Liability n the Securities Class Action*, 6 K. J. SEC. L. 73 (2006); Oh, Jung Hoo, *Critical View on Class Action from Civil Procedural Law*, 5 K. J. SEC. L. 255 (2004); Yi, Jun-Seob, *Issues on Reform on Legal Liability System in Securities Exchange Act after the Introduction of Class Action*, 4 K. J. SEC. L. 1 (2003); Kim, Jungho et al, *Economic Observation on Securities Class Action*, 1 K. J. SEC. L. 171 (2000); Kim, YongJu, *Positive Effect of Class Action*, 44 LISTED COS J. 9 (2001).

[145] Securities-Related Class Action Law ("SCAL"), Law No. 7074 adopted on Jan. 20, 2004, most recently amended by Law No. 10208 on Mar. 31, 2010.

[146] Kim, Sung Tae, *A Study on Representative Parties in the Securities Class Action Law*, 24 SOONGSIL. L. REV. 195 (2010); Kim, Jae-Ho, *Securities Litigation Practice*, LISTED COS J. 73 (Mar. 2010); Ham, Seung-Wan, Several Issues Involving Class Action Proceedings, 43 BFL 69 (Sep. 2010). *See* public notices of Soowon D. C. decisions to permit class actions, settlement agreement, etc. available onhttp://www.scourt.go.kr/stock/stocklist_temp.jsp. More recently, on Jan. 7, 2010, the second class action was filed against RBC which placed sell orders for massive SK shares on the expiration date of the ELS (equity linked securities) and thereby unfairly lowered the closing price thereof. As for details *see* http://www.hannrilaw.co.kr. As to the unfair trading involving ELS, Hee-Whal Sung, *Unfair Trading under CML*, KSLA Mar. 2009 seminar material. *See* also 2009KAHAP116043 Seoul C. D. Ct. Decision dated May 28, 2010 & 2009KAHAP90394 S. C. D. Ct. Decision dated Jul. 1, 2010 (both involving SDI shares and Daewoo Securities). The third class action agaist Samsung Life filed on Feb. 22, 2010 for distribution of retained earnings before demualization was recently dismissed. Ho-Joon Son, *Insurance Policy Holders Lost*, FINANCIAL ENWS, Feb. 8, 2011. Available fnnews.com.

efforts, many expected SCAL would become dead letters, if not yet now. Abusive action is just phantom horror as there has been only one class action.[147]

It is proposed that limits under SCAL on causes of action and legal representation, among others, be abolished.[148] Currently, the cause of action is limited to misrepresentation in registration statement, misrepresentation in periodic/continuous disclosure documents, insider trading, and outside auditor's liability.[149] The current list of causes of action for class action should be expanded more broadly so that any massive disputes such as product liability and other types of investor loss could be resolved by class action. [In addition, SCAL limits legal representation on three cases for three years.[150] The restriction on representation of plaintiffs in class action should be immediately abolished.[151]

[147] This is contrary to the situation in the United States where the benefits from securities class action are highly questioned: defendant firms have greater liquidity problems; 25-30 percent of recoveries go to plaintiff class action lawyers; the current shareholders pay damages to the class shareholders; the prospect of corporate liability would not deter individuals from committing fraud as ins. companies and defendant corporations pay the settlement amount; the market would be the most effective deterrent; strong public enforcement systems explain good financial outcomes; it deters foreign companies from listing and issuing securities in the United States. As to the worry of less competitive financial market in the United States due to too many class actions, *see* L.Bai, J. Cox & R.Thomas, *Lying and Getting Caught: An Empirical Study of the Effect of Securities Class Action Settlements on Targeted Firms,* 158 U. PENN. L. REV. 1877 (2010); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement,* 156 U. PENN. L. REV. 229 (2007); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Consequences to Managers for Financial Misrepresentation,* 88 J. FIN. ECON. 193(2008); Rafael LaPorta, Florenc Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Laws,* 61 J. FIN. 1 (2006); Howell Jackson & Mark J.Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence,*Harvard Public Law Working Paper No. 08-28 (Mar.2009); Richard A. Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism,* 62 VAN. L REV. 1 (2009); Peter Mattil & Vanessa Desoutter, *Class Action in Europe: Comparative and EC Law Consideration,* BUTTERWORTHS J. INT.BANK. & FIN. L. (Oct. 2008).

[148] Bill No. 1803630 is pending at the National Assembly to delimit the restrictions on cause of action, etc. Alternatively, a wider class action system including product defects liability was also proposed. *See* Bill No. 1801701.

[149] SCAR, Art. 3.

[150] Art. 11, Para. 3.

[151] In the United States, one proposal to be free from abusive class action was no-class-action-arbitration-clause in the securities litigation context. Compare *Jenkins v First Am. Cash Advance of Georgia,* 400 F.3d 868 (11th Cir. 2005)(claims that payday loan agreements were adhesive were for arbitrator); *Caley v. Gulfstream Aerospace Corp,.,* 428 F. 3d 1359(11th Cir. 2001)(dispute resolution policy that provided for arbitration of any covered claims between employees and the employer was not unconscionable); *Williams v. Geier,* 671 A.2d 1368 (Del. 1996)(amendment to corporation's certificate of incorporation proving for tenure voting valid) with *Kristian v. ComCast Corp.,* 446 F.3d 25 (1st Cir. 2006)(arbitration agreements with cable television customers that prohibit treble damages, attorney fees and costs, and class action were invalid); *Re American Express Merchants Litigation, Italian Colors Restaurant v. American Express Travel Related Services Company,* 554 F.3d 300 (2009)(question as to enforceability of class action waiver provision contained in arbitration clause in card acceptance agreement was for court, rather than arbitrator and such provision was not enforceable); *Kirleis v Dickie, McCamey and Chilcoe,* 560 F. 3d 156 (2009)(shareholders could not be compelled to arbitrate claims against firm pursuant to corporate bylaws to which she did not explicitly assent). As to the most recent oral argument about the validity of arbitration clause at U.S.S.Ct., *see* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-893.pdf.

IV. *EX ANTE* MEASURES

Korea is keen to limit *ex post* facto measures on violators and utilize more *ex ante* measures because prevention is always less costly and more effective. Like infectious diseases, it is best to prevent legal disputes from occurring by all means. Accordingly, Korean law calls on financial institutions to take seemingly vigorous ex ante measures.

A. Compliance Officer

A compliance officer within a corporate organization is directly linked to corporate governance issues. Within the basic structure of financial institutions in Korea, the board has a "duty of care" to monitor business operations.[152] For large financial investment companies,[153] the board is required to have three or more non-standing, outsider directors,[154] set up outside the director nomination committee[155] and audit committee.[156] For smaller financial investment companies, standing independent auditor is required.[157] They are all subject to outside audits for accounting matters.[158] Corporate governance of banks and insurance companies are the same as for large investment companies.[159] Together with this panoply of gatekeepers which are confusingly diverse, the compliance officer system was introduced to financial institutions in 2000 in the midst of recession of the Asian financial crisis.[160]

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[152] K. S. Ct. 2002DA60467/60474 dated Dec. 10,2004 (re Dongbang Peregrin director purchasing unguaranteed CP, buying back Midopa shares acquired in the name of third parties, and investing in pre-KOSDAQ shares); K. S. Ct. 2006DA68636 dated Sep. 11, 2008 (re Daewoo director for cooking books). About most recent discussions about duty of oversight in the United States, Michael D. Greenberg, DIRECTORS AS GUARDIANS OF COMPLIANCE AND ETHICS WITHIN THE CORPORATE CITADEL, RAND Center for Corporate Ethics and Governance Conference Proceedings (2010).

[153] If the asset is KRW2T or more, it is a large financial institution regardless of whether its shares are floated or not. As such, many life insurance companies are treated large even before their demutualization.

[154] CML Art. 25. As for the qualification of outside directors, Art. 25,Para. 5.

[155] One half of the nomination comm. must be outside directors. Art. 25, Para. 2.

[156] CML Art. 26. Two thirds must be outside directors. One member must have expertise in accounting.

[157] CML Art. 27. If the asset is less than KRW100B, this requirement is waived. CML-ED Art. 20. Thus, smaller financial institutions mean the companies which assets are between KRW100B and KRW2T. If the company has audit committee, then standing auditor is not required.

[158] Law on Audits by Outsider of Stock Companies ("LAOS") Art. 2; LAOS-ED Art. 2. The threshold is asset of KRW10B or more. Outside audit must be done by a group of certified accountants or their firms.

[159] BL Arts. 22 23& 23-2; IBL Arts. 15 & 16.

[160] Lee, Jin Gook, Criminal Implications of Compliance as Preventive Mechanism of Corporate Crime, 21 K. CRIM. REV. 65 (2010); Seo, Seong-Ho, et al, Review on Discussions on Establishing Internal Control System Within Corporations Pursuant to Japanese Corporations Law, 24 K. ENT. L. STUDY 173 (2010); Yoon, Jong-Mi, Study on the Internal Control System to Prevent Conflicts of Interest, 24 K. ENT. L. STUDY 217 (2010); Suh, Wan-Suk, Internal Control System and Compliance Program, 23 K. ENT. L. STUDY 289 (2009); Won, Dong-Wook, Compliance Officer's Role with Relation to Internal Control System, 22 K. ENT. L. STUDY 239 (2008); Jeong, Byungseok, For the Generalization of Compliance Systems on Korean Corporations, 26 K. COMM. L. STUDY 261 (2007); Kim, Byoung-Youn, A Study on Internal Control System and Compliance Program, 20 K. ENT.L. STUDY

The board of financial institutions is required to nominate a compliance officer.[161] His or her qualifications such as working or research experience are rigorous. To ensure independence, compliance officers are prohibited from engaging in other business activities. Compliance officers have the authority to request that management produce or submit information or documents, and are responsible for monitoring compliance in order to report to the audit committee or standing auditor.

Unfortunately, the inside gatekeeper does not appear to be functioning. The compliance officer system is yet ineffective and perfunctory because the financial institutions are often managed by family members of the founder, not by professional managers.[162] The only remaining option to rectify the situation is to have the board dominated by non-standing directors who are independent of the controlling shareholders. In the end, financial institutions should work for the benefit of the investors—the public.

B. Internal Control System

Another criterion for compliance is that financial institutions establish an internal control system as required. Along with the compliance officer, an internal control system was also introduced to financial institutions in 2000. Its coverage is extremely broad to include the following in the case of investment banking business:[163]i) division of business and organizational structure; ii) risk management guidelines for operation of proprietary and investor assets; iii) standard operation procedure manual; iv) establishment of efficient management information delivery system for decision making; v) verification procedure for compliance and counter-measure procedure on violations; vi) procedure and standards to prevent unfair trades including transaction reports; vii) procedure setting up internal control standards; viii) appointment procedure of compliance officer; xi) cognizance and management of conflicts; x) compliance procedure on voting right exercise on collective assets or trust assets; and xi) selection of brokers and dealers for collective investment and trust assets.[164] FSS,[165] KOFIA,[166] and Bank of Korea[167] offer various standard forms and manuals.[168]

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273 (2006); Chung Dae, A Study on Internal Control System of Financial Institutions, 22 K. COMM. L. STUDY 131 (2003); Lee, Sung Woong, Corporatization of Compliance System, KYOUNGSANG U. L. REV. 201 (2006); Lee. Jung Sook, Background of Compliance Program in US, 5 K. J. SEC. L. 221 (2004); Ahn, Soo Hyun, et al., Revisit Compliance Program and Compliance Environment, 3 K. J. SEC. L. 73 (2002)

[161] BL Art. 23-3; CML Art. 28; IBL Art. 17. Min, Byong-Jo et al, COMPLIANCE OFFICER 207-225(Korea Banking Institute 2009)(the internal education on compliance was practiced once or twice a year for most securities companies).

[162] E.g, Yoon, Jong-Mi, *Supra* fn. 155.

[163] CML-ED Art. 31. As for banks and insurance companies, BL-ED Art. 17-2 & IBL-ED Art. 22. The listed items are almost same.

[164] FSS Financial Investment Business Regulations Pub. Notice No. 2008-5, as most recently revised by Pub. Notice No. 2010-30 dated Sep. 1, 2010. Bk. II, Ch. 4 and Schedule 6 provide for more details. Art. 2-22 et seq. lists

In 2003, the Korean government expanded the mandatory internal accounting control system to the companies subject to outside auditing,[169] which was modeled on Section 404 of the Sarbanes-Oxley Act of the United States.[170] Such system should include: i) cognizance, measurement, classification, recording and reports of accounting information; ii) control errors in accounting information and rectification method; iii) periodic check and reconciliation of accounting information; iv) books and records management and control of falsification, modification or distortion; v) division of responsibility among management for production and disclosure of accounting information.[171] A company's board is required to adopt the system, which is to be disclosed to the public investors. Under the system, the CEO shall designate one standing director as internal accounting system manager. The manager shall report to the audit committee or auditor the operational reality annually. The outside auditor for accounting matters is also required to report the status to the board and attach its views to the annual audit report.[172] The CEO and the officer for public disclosure matters are also required to certify the compliance, and that their the internal accounting control system[173]meets legal requirements. FSS provided guidelines for a standard practice of internal accounting control system in 2005, and subsequently two commentaries in 2007.[174]

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the additional items to be addressed by the internal control system: i) branch establishment and control; ii) derivative business management and investor protection; iii) investor accounts management and supervision; iv) order handling; v) client asset management; vi) press release procedure; vii) investor information protection; viii) money laundering transaction report; and ix) dispute resolution procedure. Basel Framework for Internal Control Systems in Banking Organisaions (1998) was referenced. 1992 COSO Financial Controls Framework and 2004 Enterprise Risk Management (ERN) COSO Framework were also taken into account.

[165] Available http://www.fss.or.kr/kr/bbs/list.jsp?bbsid=1207388738482.

[166] Available http://www.kofia.or.kr/kofia/index.cfm?event=ksda.ksda_001_viewer&sub_rules_idx=12&idx=15.

[167] Available http://dl.bok.or.kr/srch/index_sub.html.

[168] Bill No. 1805701 abortively attempted to mandate compliance officers in public corporations.

[169] LAOS Art. 2-2. Companies which asset is less than KRW100B are exempt. This was modeled on Sec. 404 of SOX.

[170] As to the discussions in the United States, Joseph A. Grundfest & Steven E. Bochner, *Fixing 404*, 105 MICH.L. REV. 1643 (2007); Maria E. Nondorf, Zvi Singer & Haifeng You, *A Study of Firms Surrounding the Threshold of Sarbanes-Oxley Section 404 Compliance*, Working Paper (Sep. 2007)(firms would reduce their market value to avoid the Sec. 404 compliance in light of the net costs of the regulation). As to the IT compliance, *see* John S. Quartermann, RISK MANAGEMENT SOLUTIONS FOR SARBANES-OXLEY SECTION 404 IT COMPLIANCE (2006).

[171] LAOS-ED Art. 2-2 lists additional items to be covered by such system: establishment and amendment procedure of such system; compliance procedure of management in producing and disclosing accounting information; counter measure in response to CEO who orders to produce or disclose false accounting information in violation of the system, and censure procedure for officers who violate this system.

[172] LAOS-ED Art. 2-3.

[173] CML Art. 119, CML-ED Art. 124, Item 4.

[174] Standard Practice dated Jun. 23, 2005 from FSS. *See* also Commentaries for Small Medium Companies dated Jun. 2007 & Commentaries for Large Companies. Available http://acct.fss.or.kr/acc/sub/page.jsp?pageNum=7&subNumber=1.

It is not clear whether this legal requirement of internal control system has helped reduce the possibility of accounting fraud. As seen from the fact that many accounting firms are still sanctioned by the FSC for defective audits,[175] this system does not appear to work air-tight.[176]

C. Whistleblower Protection

The CML also has a special section for protection of whistleblowers. Anyone who has found unlawful conduct under the CML including those unfair trades in Book 4,[177] or has been urged or offered to violate the CML, may report such facts to FSC.[178] FSC shall keep confidential the identity of the informer. The organization to which the informer belongs may not, directly or indirectly, discriminate against him or her. The informer, on the other hand, may be compensated by the FSC up to KRW100M.[179]

In practice, however, not a single compensation has been paid out. The number of cases incurred by inside informers seems to be extremely rare in the case of unfair trading at capital markets. FSS investigated 166 new cases during 2010 Q3, out of which 48 cases were initiated by FSS and 157 cases notified by KRX. This is a stark contrast with the practice in the United States where corporate frauds are largely revealed by employees and media.[180]

V. PROPOSALS - STRATEGIC APPROACH

1. Concern about Ineffective Sanctions and Due Process

The current Korean legal structure for regulating finantial services market has incorporated most of major enforcement mechanisms adopted in both civil law and

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[175] FSC Review of FY 2010 Financial Statements, Press Release dated Jan. 14, 2011. Sample review indicates more defective audits in 2010 (38/217) than in 2009 (24/212).

[176] As to the liability of officers and outside auditors to shareholders, *see* K. S.Ct. Decision 2006DA16758/16765 dated Oct. 25, 2007 (re Daewoo Electronics); 2007DA60080 dated Dec. 13, 2007 (re Dongah Construction); 2006DA19603 dated Nov. 30, 2007 (re Haitai Confectionary).

[177] Book 4 of CLM addresses inside trading and unfair trading.

[178] CML Art. 435; CML-ED Art. 384.

[179] FSS, *2010 Q3 Investigation Status Report*, Press Release dated Oct. 28, 2010. *See also* Arts. 62 et seq. of the Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission as most recently revised by Act No. 9402 on Feb. 3, 2009; LAOS Art. 15-3.

[180] According to one empirical study in the United States, corporate frauds are largely revealed by employees and media. I.J. Alexander. Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud*, European Corporate Governance Institute Finance Working Paper 156/2007 (Jan. 2007)(reviewing 216 reported fraud cases in large US companies between 1996 and 2004, 34.3% was from insiders); Geoffrey Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U.L.REV. 91 (2007)(Sec. 806 of the SOX not sufficient, proposing bounty model).

common law jurisdictions. It adopted criminal and administrative enforcement mechanisms administered by public authorities, which is a traditional civil law jurisdiction approach. Private enforcement based on strict liability and class action, which is a US approach, is also available. All the features of the Sarbanes-Oxley Act, including a board with outside independent directors, an independent audit committee, whistleblower protection, certification of CEO and disclosure officer, are furnished.

Although the current mechanism looks comprehensive and all-inclusive, the reality is far from the purported aim of such legislative moves. The current system is ineffective in addressing crimes in the financial services market. Violations of the laws seem rampant across-the-board. The ongoing investigation of slush funds in a borrowed name, and stock price manipulation with corporate funds, and other unlawful behavior[181] by business leaders demonstrates the insensitivity on legality of doing business by the top business executives. They may be just a few bad apples. They, however, are more likely the tip of the iceberg. It is because if top top notch business leaders behavior themselves this way, there is no doubt that small and medium business managers must be much wore. The statistics also illustrate the situation.[182]

Not just a few corporations appear to have secret funds that are not recorded on their books, but coffined in false names, which is a violation of accounting rules.[183] Although most related party transactions between financial institutions and controlling shareholders or their affiliates are, for the purpose of managing the entrusted funds from their clients, subject to strict regulations – some are prohibited, some are to be approved of or reported,[184] these regulations do not seem fully complied with.[185] Loans in excess of legal limits have been made to affiliates, and entrusted funds are invested in group affiliates. Initial and continuous public disclosure requirements in a timely and accurate manner are not infrequently disregarded.[186] Registration statements are not accurate and period disclosure

[181] *See* press reports in fn. 13.

[182] *See Supra*, fn. 15.

[183] Most recently, FSC, Sanctions on Shinhan Bank for Violation of Real Name Financial Transactions System, Press Release dated Nov. 18, 2010.

[184] *See Supra* Table 6.

[185] FSC Nov. 18, 2010 Meeting Minutes (mutual savings loan practice for project financing) available at http://www.fsc.go.kr/info/con_fscc_list.jsp.

[186] Most recently, FSC, *Sanctions on Disclosure Requirements Violations*, Press Release dated Nov. 24, 2010 (SFC resolutions on violations from false statement of purposes for financing to failure to disclose major transactions). SFC has to meet almost every other week to adopt sanctions on disclosure violations. *See* http://www.fsc.go.kr/info/ntc_news_list.jsp?menu=7210100&bbsid=BBS0030 and search Sanctions.

documents contain false or misleading information. Conjured rumors are spread, and prices are manipulated.[187]

Why do violations occur?[188] It is true that some will always commit crimes, as it is part of human nature. However, truism is not sufficient for financial market crimes as they are linked to the fundamentals of the economic system that allocates and mediates financial resources.[189] Many reasons can explain these phenomena. Some may argue that sanctions are not grave enough to deter potential violators. This is true of some violations, but not for all.[190] Others may argue that violators easily avoid the loose network of investigations, and therefore the regulatory agencies should have broader investigatory authorities.[191] More basically, however, I argue that it is because the regulatory framework has not been accepted as norms to be complied with by the players in the market. Rules of the game then should become clearer and incentivized so that they can understand what is prohibited and what is allowed and they should be rewarded if they comply. Players need to be educated about the rules to be observed, the odds of being caught, and the resulting severe hardship. Only when they think they should play the game following the rules, can these rules become norms. If regulatory powers are centralized to certain governmental agencies and their power is largely discretionary, one tends to believe that the norms can be changed if you have the power to change them and the norms cannot be applicable to you if you have the power to let the regulatory agencies pass. This type of norms would not be accepted as true norms by the public and the market players.

Discussions about the general theories of punishment or theories about theories on punishment or discussions about expressivist are beyond the scope of this article. As to the white collar crime, I would repeat the point made earlier that "corporate and white-collar crime prosecution differs from street crime prosecution because of its different mix of retributive and deterrence concerns, which leads corporate crime policy to take greater advantage of our knowledge of how social norms interact with law, of the social costs that accompany punishment, and of the alternatives to criminal law. .. Our white-collar crime policy has a much better mix

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[187] Most recently, FSC, *Sanctions on Unfair Trade Practices in Capital Market*, Press Release dated Jan. 19, 2011 (SFC resolutions on unfair trade practices from price manipulations to failure to report 5%). At least the number of violations discovered by the authorites has been increasing rapidly. See the statistics on unfair trade practices in the capital market available http://www.fss.or.kr/scop/main.jsp.

[188] Ch. 3 Theories of Corporate Crime and Truly Effective Compliance Programs, ABA, Antitrust Compliance (2005), 29-36 lists: Genetics; Greed; Intent to Benefit the Employer; Ignorance; JanValjean Theory; Master of the Universe; Bad to the Bone; and Milgram Effect.

[189] FSC thus recently adopted policy directions to liberalize regulations for small and medium growth companies and venture companies despite the possible insidious corruptions at KOSDAQ. FSS, *Development of KOSDAQ*, dated Jan. 26, 2011.

[190] *See Supra* fn. 58 and accompanying texts.

[191] *See Supra* fn. 73.

of regulatory strategies, civil remedies, and criminal sanctions."[192] The financial services market in Korea is responsive to sanctions and deterrence. However, the focus of enforcement efforts should move towards civil and preventive aspect of the policy tools as the regulatory target is much more complicated than guilty or not guilty situations.[193] Furthermore, if criminal or administrative sanctions are imposed by less controlled haphazard authorities, avoidance of such sanctions may become a sporting game.

How to make the Korean financial market more advanced[194] in the sense that all the players compete in accordance with the rules and any violators, if any, are found and punished? Modeling on every prevalent current foreign law prevalent is to chase a phantom. To improve the situation, the remedies should be coordinated and strategically focused based on the peculiar business environment of Korean national economy. All in all, I have two concerns about the current situation: i) after-the-fact sanctions would not be workable any more; and ii) the procedural safeguards against less controlled discretionary practice should be established.

2. Proposal

I propose four strategic approaches. The first approach is to utilize incentives, including education. By offering incentives to implement preventive compliance programs, the Korean regulatory agencies can improve the efficacy of the regulatory system. The preventive compliance programs should be intertwined with the enforcement mechanism. The other approaches are to formulate clearer rules and to find the right balance among various enforcement tools—between private and public and between criminal and administrative. If all sorts of implementation measures and resources are devoted to stopping misbehavior in the financial services market, it would lead to fastidious discretion of enforcement agencies and inefficient

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[192] Darryl K. Brown, *Street Crime, Corporate Crime, and the Contengency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1897-98 (2001). As to the objection to this, see Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L.REV. 1 (2002). As to the classification theory of theories on punishment, see Heidi M. Hurd, *Expressing Doubts About Expressism*, 2005 U. CHI. LEG. F. 405 (2005)(five theories are corrective justice, rehabilitation, utilitarian, mixed (retributive.utilitarian), and retributive theory). Another classification is consequentialism, rebributionism and harm theory in Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment,* 2004 CHICAGO-KENT L. REV. 1215 (2004).

[193] This is as a matter of fact not new. Choi, In-Sub et al, The Current States of Financial Crime and Socio-Legal Countermeasures in Korea, K. INST. CRIM. (2002); Jang, Young-Min, et al., Die Bekaempfung der Boersenkriminalitaet, K. INST. CRIM. (1994).

[194] Diverse rules can apply to measure the financial market in a specific venue. The size of the market capitalization is an easy rule. The number of IPOs by foreign corporations can be another tenet of competitive markets. In terms of motivations, compliance cost and benefits ensued with international financing such as lower capital cost and bonding premium can be a reason. Trustworthiness of the rules in the market would be one important deciding factor. Scott, *Supra* fn. 202, 48-55. Committee on Capital Market Regulation, 2006 INTERIM REPORT SCORECARD available at http://www.capmktsreg.org/pdfs/2006_Scorecard.pdf.

allocation of public capital. Depending on the type of financial crimes, specific enforcement structures would have to be designed. Government agencies and private players in the market would have their own objectives and relative positions within specific time lines.

A. Incentive to Compliance Program

As mentioned above, financial institutions are required to have full time compliance officer as well as internal control and accounting systems.[195] However, a failure to meet such requirements leads to sanctions, while vigorous execution of the requirements leads to no rewards. Rewards, however, incentivizes the business community to stricter enforcement of such *ex ante* measures and would ultimately lead to fewer violations. Such a compliance programshould thus be considered in determining the legal liability of a company. If companies have implemented compliance programs, sanctions on the unfortunate incident should be ameliorated.

The Korean Court Organization Law[196] was revised to require establishment of the Sentencing Commission ("KSC") effective Apr. 27, 2007.[197] The KSC has vigorously built up the sentencing guidelines for several categories of crimes since then; by 2010, murder, bribery, sex crimes, embezzlement, and perjury were covered.[198] In line with the KSC's efforts, the KMOJ has been discussing the standards for arrests.[199] As the KSC and the KMOJ make great progress in refining and expanding guidelines for arrest and sentencing, one factor to be considered is the compliance program of a corporate entity. As discussed above,[200] a corporate entity cannot be held responsible for its employees or agents without negligence in its supervision and operation. Thus, compliance programs of a corporate entity would have to be reviewed in determining the existence of negligence on the corporate side.[201] As civil fines on corporate entities also require a finding of negligence, compliance program practice can work as a defense.[202] Depending on the level of in-house compliance programs, the prosecuting authority should consider deferring the prosecution.

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[195] *See* discussion above in IV. A. & B.

[196] Art. 81-2 of the Court Organization Law

[197] As for the US practice and its most recent changes to Ch. 8 of the Sentencing Guidelines, *see* http://www.compliancebuilding.com/2010/04/14/revisions-to-u-s-sentencing-guidelines-for-compliance-programs/

[198] Minutes of the KSC meetings available http://sc.scourt.go.kr/sc/main/Main.work.

[199] KMOJ, Press Release on International Symposium on Sentencing and Arrest, Dec. 11, 2009. As for US practice, *see* Thomson memorandum in fn. 51and subsequent developments especially relating to privilege.

[200] *See* Korean Con. Ct. decision in fn. 65.

[201] *See* fns. 52 & 53 and the accompanying texts. It is not clear whether no negligence is a defense from the corporate side or whether negligence should be proved beyond reasonable doubt by the prosecutors. Kwak, Kwan-Hoon also indicated similar options. *See* Kwak, Kwan-Hoon, The Study on the Prevention of Corporate Crime in Corporate Law, 32 GANGWON L. REV. 163, 175-177 (2011).

[202] As to the argument that the prosecutor has the burden of proof, *see* Weissmann, *Supra* fn. 63.

Even once a corporate entity has been held to be responsible for the individual's misconduct, compliance programs practice should be one of the factors for the court to consider when determining fines. The current regulations require the amount of civil fines be determined in accordance with a more detailed formula than the amount of criminal fines.[203] The current regulations on unfair trading in the capital market provides for the possibility of a 20% reduction if the financial institutions have operated persevering compliance programs.[204] As such, as long as civil fines are concerned, compliance program practice is a substantial incentive, although it is rarely applied. This incentive should be expanded to the effect that the sanction itself, or selection of sanction, would be decided considering the compliance program practice.[205] Like the case for an anti-trust compliance program, the FSC should grade the compliance program and grant appropriate benefits to the higher-level compliance programs.[206]

In incentivizing compliance, education in corporate life should be credited and supported. Many explain that the driving force behind Korean economic development for the past several decades has been education.[207] Education in Korea often means to achieve higher individual scores at entrance exams at high schools and colleges. Education after graduation, however, is possible and desirable. Continuing education will contribute to higher collective achievements of social goals such as legal compliance. Education programs for compliance should be developed and utilized by corporations. It is true that KRX, KOFIA and KLCA[208] have been operating many seminars and education programs. Korean law colleges and schools did the same. However, not many compliance-related programs have been offered yet. By having corporate entities run education programs about compliance, Korea, Inc. should be able to finally become a respected member of the global corporate world.[209]

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[203] CML Art. 430, CML-ED Arts. 379 & FSC Reg. A&S.

[204] Reg. A&S Schedule 2, Item 5.C.(4). Cooperation with the investigatory authorities also would be considered. C(2) provides 30% reduction for voluntary remedial measure while C(3) permits 20% reduction in the case of voluntary reporting of violations. As to the leniency measures initiated from the antitrust enforcement by the KFTC, Pub. Notice No. 2005-7 most recently revised by Pub. No. 2009-46 dated Aug. 20, 2009. However, not a single case has been found from FSC and SFC decisions on the amount of fines based on the compliance program. *See Supra* fns. 107 & 108.

[205] KFTC Pub. Notice No. 2008-17 most recently revised by Pub. Notice No. 2010-2 effective Apr. 1, 2010 provides for rules of grading compliance programs into eight groups. KFTC ab initio investigation can be waived depending on the level of compliance programs.

[206] As to the SEC practice, *see* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release no. 44969 (Oct. 23, 2001)(setting forth thirteen Seaboard factors).

[207] Wikipedia "Education in South Korea" last visited Dec. 29, 2010.

[208] http://www.klca.or.kr/

[209] As a *post facto* measure, the KFTC can request the firm get educated. KFTC Operating Manual on Corrective Measures dated Nov. 1, 2005 as revised on Aug. 12, 2009, Art. VII.3(c).

B. Clearer Rules

Some argue that the principle-based regulation in the U.K. provides a better alternative to the rules-based U.S. approach because market always works better than regulations.[210] Many regard the U.K.'s more principle-base system, as compared with the more rules-based approach in the U.S., makes the financial market more competitive[211] The argument of preferring one over the other is not convincing. Not only that the concept of principle-based regulation itself is not clear,[212] law is always a combination of principles and rules. Without principles, the full meaning of rules is hard to grasp. Without detailed rules, the full significance of principles is hard to enforce. They are not mutually exclusive; rather, they are complimentary. Seperating rules and principles would not help to frame the future regulatory framework for capital markets.

In terms of relative weight, Korea needs more rules because too many rule-making functions have been delegated to the executive branch in the name of efficiency over the past several decades. As Korea needs to make law based on political consensus and a more democratic process, the legislators need more training and time. Nonetheless, no policy or statute can be enforceable based on skeleton authorization from the legislative branch and enforcement from the executive branch. The statutes should be more focused on rules as a legitimate check toexecutive discretion. Unclear rules would leadcitizensto turn to politics instead of trying to comply with rules, which is what politicians and decision-makers seem to want to maintain. Korea needs more detailed rules, not principles.[213]

One of the most persuasive arguments for the executives broad authorizationin regards to the financial market is that it is volatile and policy responses should be prompt. In terms of quantity, it might be true. However, there are many ways for the regulatory agency to respond to the market. In terms of quality, the core value of compliance with law is civil culture and legitimacy of law and thus formulation of

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[210] For example, Prof. Scott believes "[t]he U.S. clearly seems to be more enforcement oriented, through the use of actions, than its capital market competitors, and this may be partially responsible for its loss of competitiveness." Hal S. Scott, INTERNATIONAL FINANCE, 156 (17th ed. 2010). He is also critical of the fact that SEC as an agency is dominated by lawyers and the economists play a marginal role in the formulation of regulation or enforcement policy. He suggested SEC uses cost-benefit analysis in connection with its proposal. *See* also Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC's Stalled Mutual Reform Effort,* 12 STAN. J. L. BUS. & FIN. 1 (2006); Luigi Zingales, *The Costs and Benefits of Financial Market Regulation,* European Corporate Governance Institute Working Paper 21/2004 (Apr. 2004)(supports disclosure and whistleblower as least costly). *See* also *Chamber of Commerce v. SEC,* 412 F.3d 133 (DC Cir. 2005) & *Chamber of Commerce v. SEC,* 443 F.3d 890 (DC Cir. 2006).

[211] Julia Black, Martyn Hopper & Christa Band, *Making a Success of Principles-Based Regulation,* 1 L. & FIN. MKT. REV. 191 (2007). Paul Nelson, CAPITAL MARKETS LAW AND COMPLIANCE 19-53 (2008).

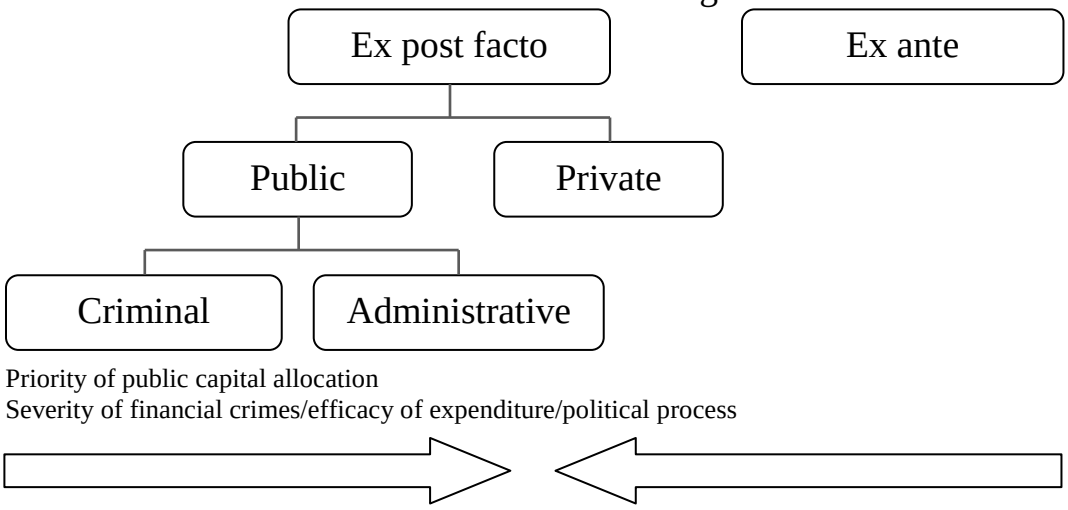
[212] Lawrence Cunningham, A Prescription to Retire the Rhetoric of Principle-Based System in Corporate Law, Securities Regulation and Accounting, Boston College Legal Studies Research Paper 127 (Mar. 2007).

[213] Ministry of Government Legislation, *Project Report on Delegated Legislation* available at http://www.moleg.go.kr/knowledge.

principles and rules should be reserved for the legislative branch. This was why the former Korean Ministry of Finance used to regulate corporate finance of listed companies under the Securities Transaction Law before the CMA entered into effect as Feb. 4, 2009. After most sections were reassigned to the Korean Commercial Code,[214] the Korean capital market worked without any serious crisises. The actual market situation for the past couple of years is a demonstration that rules can and should regulate the capital market.

C. Balance between Public and Private Enforcement

Public and private enforcement mechanisms have much room for improvement.[215] In addition, the right balance should be struck between public and private enforcement. The equilibrium balance between *ex post facto* measures and *ex ante* programs also should be parsed. Under the Korean Constitution, public powers may intrude into private domains, including the self-sufficient market, for limited purposes pursuant to the process and explicit authorization.[216] Accordingly, public capital should be used in the order of priority following the assumptions and maxims of the model. Such expenditures thus are to be allocated depending on the severity of financial crimes and the efficacy of such spending, among other things.[217] Such allocation is, in reality, the outcome of political process, of course. Figure 1 shows the overall enforcement mechanism and ensuing resrouces allocation depending on the severity of violations and efficacy of public spending. While the current flow of public resources in the diagram runs from left to right, I argue the more desirable direction of the flow should be from right to left. It is because the efficacy of diverse enforcement tools also runs from right to left.



[214] CMA Arts. 165-2 et seq. still provide for listed companies, though.
[215] *See* discussions above III.A.1, B.2 & C.3.
[216] Jeremy Bentham, THE PRINCIPLES OF MORALS AND LEGISLATION, Chs. XIII, IVX & VX.
[217] *See* diagram above.

[Figure 2] Priority of Diverse Enforcement Tools

The starting point for change is to provide the opportunity to remedy first to private entities unless such violations involve moral principles.[218] Regardless of whether the sanctions are from the court in response to the public prosecutor's indictment or from the FSC as a result of its investigation, their basic aim is to impose hardship on the violators for their past misconduct, and thus to prevent future violations committed by the violator and others. While retribution is not forward-looking, prevention is the reason for sanctions. However, preventive effect of punishment is always suspicious. The deterrent effect is proved to be limited at most.[219] Thus, the basic approach to sanctions should be to minimize them. In particular, criminal sanctions should be limited to the cases in which social impact is enormous.[220]

One way to measure the balancing point between public and private is cost-benefit analysis. The financial services industry in Korea accounts for 6.9% of the 2009 GDP. In terms of employment, it attributes approximately 3.5% of the total employment.[221] If official costs of enforcement are the sum of the FSC and FSS budgets,[222] they are 1.6% of the government spending.[223] If official costs of enforcement, benchmarked to GDP, are calculated, about $47,000 are total regulatory costs for the financial services industry per billion dollars in 2010.[224] If

[218] One may argue all financial crimes are just from greed and thus not violation of moral principles. However, certain crimes that are equivalent of fraud are related to moral principles such as CML Art. 174 (insider trading). Violation of filing requirements can be regarded mechanical.

[219] *Supra* fn. 15.

[220] As to the extraterritorial application of sanctions, *see* KSLA, A Study on Legal Consistency of Sanctions, 99-109 (2006). As for the practice in Australia, Gail Pearson, FINANICL SERVICES LAW AND COMPLIANCE IN AUSTRLIA 502 (2009)("[C]riminal penalties are viewed by regulators as a matter of last resort, particularly as they take up significant resources and criminal standard of culpability, ..is harder to prove")

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	Financial services (KRW B)	*GDP*	*Employees total(Thousand)*	*Financial services*
2005	53,394.8	865,240.9		
2006	55,234.7	908,743.8	23,151	786
2007	61,114.0	975,013.0	23,433	806
2008	65,132.2	1,026,451.8	23,577	821
2009	66,283.3	1,063,059.1	23,506	766

http://ecos.bok.or.kr/.

[222] Compliance cost of the firms also should be part of the total cost to be weighed against the benefits.

[223]

2009 (KRW million)	Total budget 199,875,979	FSC 2,883,772	FSS 246.4

http://www.mosf.go.kr/_lib/lib02/lib02index.jsp.

[224] FSS is substantially financed by financial institutions' contribution. Art. 47 of the LFE. Official costs of enforcement, of course, can be expanded to include KDIC and KAMCO budgets and other government think-tank costs. For 2010, annual budget of KDIC was KRW 178B. Available at https://www.kdic.or.kr/introduce/estimate.jsp. For 2009, liability of KAMCO was KRW2.45T. Available at http://www.kamco.or.kr/home/man/04_03.jsp. FSS, however, is partially financed by financial institutions' contribution. Art. 47 of the LFE.

KDIC[225] budget and KAMCO[226] liabilities are counted as part of the enforcement costs, it would go up to almost $90,000.[227] Compared to the figures in the U.K. and U.S.[228] in terms of the ratio of the enforcement cost to the size of the financial market, Korea seems to be at high end. As such, private enforcement is the logical alternative to be encouraged.

This, however, does not mean Korean public officials are corrupt, captured or less trained. This argument does not stem from the concerns about politically biased actions from public authorities. Korean bureaucracy seems to have been the mostly competent and the mostly apolitical. This also does not deny the possibility of private enforcement being abused. It appears true in many cases that private enforcement actions are initiated on the back of factual records created by public authorities.[229] Factual investigation and corresponding policy formation still shall largely remain with the public enforcement agencies. However, as the size and complexity of the Korean economy expand, the coverage of the bureaucracy should be decreased.[230] In proportion, private enforcement would be able to supplement their efforts. I believe the right balancing point between public and private enforcement should move towards the private enforcement side.

More specifically, the current class action system would have to be liberalized to the effect that small investors could have an access to legal representation in calling for compensation of damages.[231] As mentioned above, SFC ordered civil money penalties relating to ten cases of disclosure violations in 2009/2010.[232] Without private enforcement possibility, however, the current scale of civil fines

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[225] Korea Deposit Insurance Corporation, which works like FDIC in the United States.

[226] Korea Asset Management Corporation that handles all sorts of bad assets on behalf of divere financial institutions.

[227] For 2010, annual budget of KDIC was KRW 178B. Available at https://www.kdic.or.kr/introduce/estimate.jsp. For 2009, liability of KAMCO was KRW2.45T. Available at http://www.kamco.or.kr/home/man/04_03.jsp.

[228] US $108,000 in 2001. $425,000 for 2003/2004. Howell E. Jackson, *An American Perspective on the FSA: Politics, Goals & Regulatory Intensity*, 39, 56 in L.J.Cho & J.Y.Kim, (eds.) REGULATORY REFORMS IN THE AGE OF FINANCIAL CONSOLIDATION: THE EMERGING MARKET ECONOMY AND ADVANCED COUNTRIES (KDI 2006). Howell E.Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. REG. 253 (2007). The cost for 2010 would be much substantial. Prof. Jackson's figure includes FDIC budgets.

[229] 2005DA28082 K. S. Ct. Decision dated Jan. 11, 2007 about the starting date of the statute of limitation. The toll runs from the point where the SFC recommended the sanctions to the ministry or the competent ministry made a decision on the proper sanctions. As to the practice of administrative measures in the midst of criminal cases in U.S., *see* Steven P. Younger & Jenya Moshkovich, *Parallel Proceedings in Securities Enforcement Actions: The Growing Trend Against Automatic Grants of Government Requests for Stays of Civil Cases*,3 J. SEC. L. REG. & COM. 307 (2010). A review of 2009 SEC enforcement action reveals 43% criminal charge (108 of 154).

[230] The relationship among FSC, SFC, FSS and SRO (e.g., KRX and KOFIA) is beyond the coverage of this paper.

[231] One example is to expand the coverage of the KCAL to breaches of the CML. Restrictions on legal representation also should be obviated.

[232] *Supra* fn. 108 and accompanying texts.

would not be a deterrent considering the certainty of public enforcement. The most probable reason for the lack of private legal action seems to be small investor's limited access to legal remedies. The accessibility could increase by increasing the number of professional lawyers who are free from captured interest of conglomerates which dominate the economic scene in Korea.[233] To reach critical mass for legal representation, especially class action suits, attorneys should be readily available for all causes of action.

D. Balance between Criminal and Administrative Sanctions

Based on the modern nation-state model, minimization of criminal conduct is the first principle. The second principle is that criminal penalties should be proportionate to the crimes. The third principle is that all powers should be institutionalized and systemized in order to be controllable. These are also the legal foundations of the mandate of power to the government including the prosecutor authorities. Even from a policy point of view, a prosecutor without principles has no legitimacy and would thus lose the confidence of the public quickly. Without the institutional trust from the public, no public agency could survive. If law enforcement institutions are ineffective, more crimes occur. Fewer resources would be allocated and available, which would in turn lead to more crimes. This is a typical vicious circle at institutional levels.[234]

The financial services market plays a pivotal role of distributing limited financial resources within a society.[235] It is a nerve center of the economic system. However, that does not mean violations in the financial market should be penalized. Nor does it mean that corporate entities in addition to individuals should be fined. As explained above though,[236] the current situationis dreadful. Every violation of the applicable laws involving the financial market is subject to severe criminal sanctions. Corporate entities are subject to dual penalties. Only the public prosecutor has the monopolistic power to file an indictment. Any failed prosecution is not checked by outsiders. In reality, however, public prosecutors lack the investigatory expertise or instruments for financial market crimes. Thus, public prosecutors should narrow their jurisdiction over criminal conducts which in turn would advance the efficiency of criminal sanctions.

Therefore the KMOJ should revisit the scope of crimes under the foregoing tripartite statutes on financial markets. After scoping down the reach of criminal sanctions, the severity of the punishment should be increased so that it is measured

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[233] As to the class action, *see supra* fn. 141.

[234] *See Supra* fn. 12.

[235] K. S. Ct. 2000DA9086 dated Mar. 15, 2002 (acknowledging special functions of banks, K. S. Ct. indicated stricter fiduciary duty imposed on management).

[236] *See Supra* fn. 53 et seq. and accompanying texts.

proportionate to the crimes. Finally, the KMOJ should develop a control mechanism to prevent illegitimate discretion. It should seriously consider developing guidelines and criteria to measure its discretionary power in writing.[237] Thomson memo style guidelines might have to be memorialized in writing[238] as opposed to hierarchical approval procedures. The Internal Audit Committee and the Prosecution Citizens Committee should be more activated.[239]

Compared to the KMOJ, the FSC has developed more detailed rules to calculate the amount of civil fines, for example. To make them more effective, however, the amount of civil fines should substantially increase.[240] The capital market cannot be developed by applying loose rules to the issuers of securities. Rather, the regulator's policy goals should be to cogently protect investors. In the case of price cartels, the amount of fines is based on the gross sales revenue during the collusion, not limited to unusual gains from the collusion. Likewise, the amount of fines does not have to be capped to KRW2B.[241] To make administrative sanctions more certain, the FSC should have extensive power to investigate the players in the market. The FSC should develop formal procedure for hearings and other fact gathering methods[242] by expanding Reg. Inv. and Reg. A&S in order to fully develop due process. At the same time, the procedural protection of individuals as well as firms should be clarified in writing.[243] All in all, the balance between criminal and administrative sanctions should move towards administrative sanctions with due process safety pin.[244]

VI. CONCLUSION

Discussion about the most desirable regulatory structures for the financial services market in Korea is an important topic. An increasingly important topic for Korea now seems to be how to establish an effective regulatory scheme and how to maximize efficacy and procedural and distributive justice within the system. Korea has phenomenally built an industrial complex from green fields over the past several decades. Now, Korea has to develop the financial intermediaries and ensure the framwork is efficiently constructed. The size of the financial market in Korea is

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[237] *See Supra* fn. 59 and accompanying texts.

[238] *See Supra* fn. 192 and accompanying texts.

[239] KMOJ, *2011 Business Plan*, 14 available at http://www.moj.go.kr.

[240] *Supra* fn. 104 and accompanying texts.

[241] CML Art. 429, Paras. 1 (lesser of sales or 2B for distribution in the primary market), 2 (lesser of 3/100 or 2B for tender offer) and 3 (lesser of 10/100 of daily trading or 2B). *See* also Art. 428 limiting 20/100 of the violated amounts.

[242] *Supra* fn. 73.

[243] *See Supra* fn. 94 and accompanying texts.

[244] For the same line of arguments in the United States, *see* Geradine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement,* 46 AM. CRIM. L. REV. 1459 (2009).

already substantial,[245] and it is not standing alone any more but connected to international financial markets.[246]

Korea should aggressively consider formulating more enticing mechanism for the players in the market to comply with as part of their business practice. Korean regulatory framework should be shifted from backward looking to forward leaning. Threats of sanctions for past conduct are not a sufficient deterrent, and compliance should be legally factored in to determine the criminal and administrative liability. Education, which made the Korean economic development possible, is a critical component to operate effective compliance program. The magnitude of sanctions is not sufficient. The certainty of sanctions really matters.[247] The lack of certainty is not ignorable considering the size and interconnection of the financial services market in Korea. The rules must become clearer. The current enforcement system is full of gestures and postures, a facade. They, however, should not only be part of the code, but also be lively functioning within the system.

[245] *Supra* Table 1.

[246] Foreign investors ownership ratio for the past several years in terms of market price. Available at http://www.krx.co.kr/m2/m2_5/m2_5_6/m2_5_6_2/JHPKOR02005_06_02.jsp.

2009	30.44%
2008	27.25%
2007	30.94%
2006	35.16

[247] Paul H. Robinson & John M.Darley, *Supra* fn. 15. Anthony N. Doob & Cheryl Marie Webster, *Supra* fn. 15.