

NEWSLETTER

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Capital markets Group

CONTACT



Hyunjoo OH

T: +82,2,772,4690
E: hyunjoo.oh@leeko.com



Seunga HYUN

T: +82,2,772,4389
E: seunga.hyun@leeko.com



Dongyon KIM

T: +82,2,6386,6333
E: dongyon.kim@leeko.com



Sanghyun AHN

T: +82,2,6386,7809
E: sanghyun.ahn@leeko.com



Kyuhyeok CHOI

T: +82,2,6386,7821
E: kyuhyeok.choi@leeko.com

Strengthening Regulation of Unfair Trading through Amendment of FISCMA

A proposal for partial amendment (**Amendment**) to the Financial Investment Services and Capital Markets Act (**FISCMA**) for the purpose of strengthening the regulation of unfair trading passed the plenary session of the National Assembly of Korea on June 30, 2023 and was promulgated on July 18, 2023. The Amendment mainly aims to fill in the gaps that exist in the practical aspects of the criminal sanction on the use of non-public, material information, manipulation of market price, and unjust trading, and to deprive of the unjust enrichment gained therefrom. The substance of the Amendment is as follows:

1. Current System of Unfair Trading Regulations

The current FISCMA prohibits unfair trading that causes damage to other participants in the market by distorting the price formation functions of the market or using information asymmetry. The “three major types of unfair trading practices”, which are the use of non-public, material information, manipulation of market price, and unjust trading, are subject to criminal sanctions, and the wider disturbance of market order is subject to administrative sanctions that impose administrative monetary penalties.

Type of Act	Specifics	Sanction	
		Criminal Sanction	Administrative Sanction
Use of Non-public, Material Information (Article 174)	An insider of a company using, or causing others to use, non-public information of the company in trading of securities, etc.	O (Article 443)	
Manipulation of Market Price (Article 176)	Certain group deliberately causing fluctuation of market price of securities, etc.	■ Imprisonment, criminal fine, confiscation, collection	X
Unjust Trading (Article 178)	Deceiving investors by using unjust means or spreading rumors, etc.		

Disturbance of Market Order (Article 178-2)	Those acts that are not the “three major types of unfair trading practices”, but harm the soundness of the market	X	O (Article 429-2) ■ Administrative monetary penalties
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2. Expansion of Administrative Monetary Penalty System

Recently, while there have been a series of intelligent, systematic unfair trading, a strict burden of proof applied for criminal sanctions, which resulted in many cases of unfair trading not being sanctioned or only being subject to light sanctions, and this has faced some criticism. Responding to this, the Amendment provided grounds for imposing administrative monetary penalties on those engaged in the three major types of unfair trading practices, allowing for 1) the imposition of administrative monetary penalties equivalent to twice the amount of unjust enrichment gained from unfair trading on those engaged in the use of non-public, material information, manipulation of market price, and unjust trading, as well as those causing disturbance of market order, and 2) if it is difficult to calculate the amount of unjust enrichment, the imposition of administrative monetary penalties in the amount of KRW 4,000,000,000 or under.

The calculation of unjust enrichment, which was previously determined as ‘total earnings from the transactions involving unfair trading’, has also been modified to clarify that ‘total costs for such transactions are to be deducted’, and more specific details of the calculation is to be set forth under the presidential decree and the subordinate laws.

3. Link with Criminal Sanctions

The Amendment has actively adopted a system of imposing administrative monetary penalties, and at the same time, has made corresponding changes to the existing criminal sanction system. Specifically, 1) administrative monetary penalties are to be deducted or cancelled by an amount equivalent to the amount of criminal fine imposed as criminal sanctions. Further, 2) if materials related to investigation are needed in order to impose administrative monetary penalties, the Prosecutors’ Office may provide relevant materials to the Financial Services Commission. In order for utilization of the newly introduced administrative monetary penalties system and the existing criminal sanction system, the Amendment allows for 3) reduction or waiver of the administrative monetary penalties or criminal sanction if a person engaged in unfair trading voluntarily turns oneself in or makes voluntary reporting and as a result, becomes subject to administrative monetary penalties or criminal sanction.

The changes brought by the Amendment are briefly as follows:

Type of Act	Sanction	
	Criminal Sanction	Administrative Sanction
Use of Non-public, Material Information (Article 174)	<ul style="list-style-type: none"> ■ Reduction of criminal sanction/administrative monetary penalties, if voluntarily turns in or makes voluntary reporting (Article 448-2) ■ Cancellation/deduction of administrative monetary penalties by an amount equivalent to the criminal fine imposed (Article 429-2, Section 2) 	
Manipulation of Market Price (Article 176)		
Unjust Trading (Article 178)		

Disturbance of Market Order (Article 178-2)	X	O (Article 429-2) ■ Administrative monetary penalties
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4. Implications

The Amendment will be enforced starting on January 19, 2024, which is 6 months after the promulgation. While it is necessary to keep following up on the authority setting up guidelines for specific calculation of administrative monetary penalties and specific criteria for sanctions, with the enforcement of the Amendment, the level of regulation on unfair trading is expected to be heightened.

Lee & Ko’s Capital Markets Group will continue to monitor the amendment of applicable subordinate laws and the progress in sanctions on unfair trading, and will promptly provide more useful information.

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