# Compliance

## Regulatory Uncertainty Remains In Energy Markets

BY SUEDEEN G. KELLY, JULIA E. SULLIVAN AND STEVEN F. REICH

The Federal Energy Regulatory Commission (FERC) has become increasingly aggressive in pursuing alleged acts of market manipulation. The Energy Policy Act of 2005 (EPAct) expanded FERC's enforcement authority and empowered FERC to impose civil penalties of up to $1 million per day per violation.[1] Since then, FERC has expanded its Office of Enforcement to more than 200 staff members, including lawyers, investigators, analysts and economists. In 2012, when FERC announced that it had imposed $148 million in civil penalties and ordered $119 million in disgorgements,[2] Chairman Jon Wellinghoff remarked that enforcement was "getting up to full speed."[3] If so, FERC enforcement went into overdrive in 2013. In July of this year, FERC assessed the two largest penalties in its history, ordering nearly $900 million in fines and disgorgement.[4] In one case, FERC also imposed penalties of $1 million on each of three traders and $15 million on the head trader.[5]

EPAct[6] amended the Federal Power Act (FPA)[7] and the Natural Gas Act (NGA)[8] to prohibit the use of "any manipulative or deceptive device or contrivance" in connection with natural gas and electricity trading that is subject to the jurisdiction of FERC.[9] The amendments were patterned after, and directly reference, §10(b) of the Security and Exchange Act of 1934 (Exchange Act).[10] In turn, FERC modeled its "Anti-Manipulation Rule"[11] after Securities and Exchange Commission (SEC) Rule 10b-5, and intended it "to be interpreted consistent with analogous SEC precedent."[12]

> The application of familiar securities law precedents in the novel context of FERC-regulated energy raises complex questions.

But FERC is still a relative newcomer to enforcement, and FERC enforcement cases can present a number of unique considerations for compliance officers. Most cases under FERC's Anti-Manipulation Rule have settled, meaning that there are few FERC precedents to guide corporate decision-making. The applicability of securities law precedents to the largely physical markets that FERC regulates is imperfect, and this increases risk. In practice, the difference between legitimate trading and illegal manipulation seems to turn on subjective matters of perspective and intent, rather than on objective factors that corporate compliance officers can easily monitor. The resulting regulatory uncertainty is a major concern, because accusations involving the manipulation of markets for an essential commodity like energy can have significant reputational and financial consequences. The critical need for comprehensive and carefully-crafted FERC compliance programs is clear.

### Increased Uncertainty

As noted, EPAct and FERC's regulations track the familiar language of the Exchange Act and Rule 10b-5, and FERC has stated that it will draw on SEC precedent. But FERC has provided little meaningful guidance about how SEC precedent will apply to unique electricity and natural gas markets. There are structural differences between the physical markets that FERC regulates and the securities markets, and FERC and the SEC have fundamentally different missions. FERC itself has observed "that the SEC does not have a duty to assure that the price of a security is just and reasonable, and [FERC's] duty is not to protect purchasers through a regime of disclosure."[13]

The application of familiar securities law precedents in the novel context of FERC-regulated energy raises complex questions. For example, FERC has recently focused on cross-market manipulation, involving alleged schemes to deliberately incur a loss in one market in order to benefit a position in a related market. FERC has found that deliberately incurring a loss ("uneconomic trading") can satisfy the "fraud or deceit" element of its Anti-Manipulation Rule.[14] This presents challenges for companies that simultaneously hold positions in related markets, because it is inevitable that some trades will settle out-of-the-money. In a recent matter, the bank initially determined to fight allegations of market manipulation based on uneconomic trading as a "point of principle" and argued that FERC's position regarding uneconomic trading was "radical."[15] However, on Jan. 22, 2013, FERC approved a Stipulation and Consent Agreement in which the bank agreed to pay a civil penalty of $1.5 million and disgorge $172,645 in unjust profits to resolve the matter.[16]

Significant industry participants that had been targeted by FERC's Office of Enforcement have begun to exit organized energy markets. For example, the fourth largest power wholesaler in the United States in 2012 has announced it is exiting physical commodities trading. A number of other firms have either stopped trading in the power markets or announced plans to close their trading desks. The departure of major players has resulted, in some cases, in a significant decrease in liquidity, arguably harming the same markets that FERC seeks to protect. In the California Independent System Operator (CAISO) market, recent departures resulted in a 36 percent reduction in physical wholesale sales at CAISO's three main delivery points between the third quarter of 2010 and the third quarter of 2012.[17] There also has been an overall decrease in trading, with power market sales decreasing 3.4 percent from 2011 to 2012.[18]

### Higher Publicity Risks

Because energy is an essential commodity, allegations of market manipulation receive significant attention in the press and frequently trigger congressional investigations or probes by other enforcement agencies. In fact, the enforcement and penalty provisions » Page 11

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## Anti-Corruption Enforcement In Korea: Is an Old Law Coming of Age?

BIGSTOCK (2)

BY MARK S. COHEN, JONATHAN S. ABERNETHY AND SOEUN NIKOLE LEE

Since 1999, South Korea has had on its books a law prohibiting bribery of foreign officials: The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions. The law, known colloquially as the Foreign Bribery Prevention Act or FBPA for short, was passed to implement the Organization for Economic Cooperation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), to which Korea became a signatory in January 1999.

Yet despite the FBPA being in effect for nearly 15 years, its history to date has been one of relative obscurity, with little enforcement activity and a total of just 10 convictions.[1] Most of the cases brought under the statute have involved bribery of foreign military officials stationed in Korea, not bribery in the commercial context.[2] In addition, just last month, the global anti-corruption group Transparency International released a report that listed Korea as one of 20 OECD Convention signatories with little or no foreign bribery enforcement.[3]

Despite this criticism, there are recent signs that Korean prosecutors are focusing more on bribery of foreign officials, broadly defined to include individuals working for state-owned and controlled companies. A recent prosecution of two individuals for bribing the president of the Korean subsidiary of China Eastern Airlines, in which the Chinese government holds a controlling interest, demonstrates this new approach. The case garnered significant media attention in Korea and resulted in the first ever trial under the FBPA in the commercial context. Although the defendants were found not guilty, Korean prosecutors have appealed that verdict all the way to the Korean Supreme Court, which has yet to issue a ruling.[4]

It is too early to tell whether Korean prosecutors will continue an aggressive approach to enforcement. Nevertheless, especially given the increasing foreign bribery enforcement climate globally and the prospect that the recent criticism from Transparency International could spur Korea into more action, a closer look at the FBPA is timely and warranted.

This article examines the key provisions of the FBPA and how the law differs from its U.S. counterpart, the Foreign Corrupt Practices Act (FCPA). It then proceeds to a discussion of the China Eastern Airlines case and how the case signals an increased focus on rooting out foreign bribery in the commercial context. Finally, it offers guidance to companies doing business in Korea on how to mitigate risks.

### What Is and Is Not in FBPA

The FBPA is refreshing in its brevity, a scant two pages long. It criminalizes the "promising, giving or offering [of a] bribe to a foreign official in relation to his/her official business in order to obtain [an] improper advantage in the conduct of international business transactions."[5] Like the FCPA, there is no monetary threshold; even small payments or gifts could potentially violate the FBPA. Violators are subject to up to 5 years in prison or a fine of up to 20 million Korean won (slightly under US$19,000), or, in the event the profit from the bribery exceeds 10 million won, a fine up to twice the amount of the profit.

Particularly when compared to the FCPA, the text of the FBPA is interesting both in terms of what is included and what is not. Of particular note are (i) the FBPA's definition of a public official, (ii) the narrowly drawn exceptions to criminal liability, and (iii) the vicarious liability of corporations. Missing in the FBPA are an explicit intent requirement, any discussion of bribery committed through intermediaries, and any reference to whether a non-Korean company can be subject to liability for acts done in Korea. We discuss these points below.

**Definition of Foreign Public Official:** The FBPA defines "foreign public official" as encompassing three separate categories of people:

(1) any individual appointed or elected to a legislative, administrative, or judicial office in any level of a foreign government;

(2) any individual working for a public international organization; and

(3) any individual who exercises a "public function" for a foreign government and who also does one of the following: conducts a business in the public interest delegated by the foreign government, works for a public organization or agency that carries out business in the public interest, or works in an enterprise over which the foreign government holds over 50 percent of its capital or exercises "substantial controlling power" over its management. There is an exception to this part of the definition if the individual works for an enterprise that operates "on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or other privileges."[6]

The test in this last category for when an employee of a state-owned or controlled » Page 11

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## Nonprofit Law Overhaul Changes The Landscape for New York Charities

BY COLEEN FRIEL MIDDLETON AND MARK THOMAS

In late June 2013, the New York state legislature passed the Nonprofit Revitalization Act of 2013 (NRA), which marks the first overhaul of New York's charities laws in more than 40 years. The legislation grew out of the Feb. 16, 2012 report to Attorney General Eric Schneiderman by the Leadership Committee for Nonprofit Revitalization, a blue-ribbon panel appointed by the attorney general. The Revitalization Act encompasses many of the committee's recommended improvements to update statutory provisions applicable to nonprofits and charitable trusts.

Attorneys who advise either officers and directors of charities or those who serve on boards of nonprofits should take note of this important piece of legislation. The changes will affect virtually every nonprofit corporation and wholly charitable trust in New York state that are governed under Not-for-Profit Corporation Law (NFPCL) and the Estates, Powers and Trusts Law (EPTL). The bill is awaiting action by Gov. Andrew M. Cuomo and, if enacted, would take effect on July 1, 2014.

This article examines the key provisions of the NRA that address governance issues; namely, audit oversight, related-party transactions, conflict of interest policy, whistleblower policy, authorizations of real property transactions and approvals of substantial transactions.

### Background

The bill was introduced in the Senate by Sen. Michael Ranzenhofer and in the Assembly by Assemblyman James F. Brennan, at the request of the Department of Law. As stated in the Sponsor's Memorandum in Support of the legislation, the purpose of the bill is "to reduce unnecessary and outdated burdens on nonprofits and to enhance nonprofit governance and oversight to prevent fraud and improve public trust." In its Justification Section, the Sponsor's Memorandum explains:

> [T]he success of the nonprofit sector depends on maintaining the public's trust. This requires that boards provide effective oversight over the charitable funds entrusted to them, and that the Attorney General have the necessary tools to protect charities and donors from fraud and abuse. This bill strengthens New York law to enhance governance and accountability by setting forth clearer expectations of board duties in key areas, such as providing financial oversight. It also includes new provisions to limit and, when necessary, remedy self-dealing.

Among other things, the legislation eliminates the current statutory classification of nonprofits into four types: A, B, C and D and replaces them with two categories, charitable corporations and non-charitable corporations. In addition, the legislation would raise the dollar thresholds for obtaining independently certified financial statements and submitting annual charitable reports to the attorney general. In several places the legislation includes references to a "key employee." The term is defined in proposed subdivision 25 of NFPCL §102 as hav- » Page 12

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### Inside

# **Staying in Bounds:** College Athletics Pose Compliance Hurdles

BY JEREMY H. TEMKIN
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While intercollegiate athletics are an important part of the college community, they are also big business. Each year, college sports generate billions of dollars in revenues for the NCAA and its member institutions. As with other business organizations, the enormous revenues generated through athletic programs create pressure to win and, with that pressure, temptation to engage in conduct inconsistent with universities' institutional mission and the rules of the NCAA.

There have been numerous attempts to address the special compliance challenges confronting universities and their athletic departments. The NCAA has amended its constitution and bylaws frequently, attempting to legislate compliance through voluminous regulations of matters large and small. Separately, a blue-ribbon panel established by a private foundation has made recommendations aimed at protecting the ideal of the amateur student-athlete. And some commentators have suggested paying college athletes as a means of relieving the tension between the prohibition of financial remuneration and the billions in revenues generated by the athletes' efforts.

Yet neither the enhanced NCAA rules nor the proposed reforms offer a panacea for the day-to-day enterprise risk created for some of America's finest institutions of higher learning by their popular and profitable athletic programs. As debates over systemic reform continue, individual universities are best served by continuing to draw from compliance principles used by large corporations, carefully tailored to the special challenges of college sports.

### Big Money

The NCAA is a diverse member association composed of more than 1,000 schools across three divisions as well as more than 200 conferences and related associations.[1] While the NCAA's member institutions offer students the opportunity to participate in over 40 men's and women's varsity sports, the Division I men's basketball and football programs generate the lion's share of revenues for all programs.

Through a 14-year, $10.8 billion media rights agreement with CBS Sports and Turner Broadcasting, the annual March Madness basketball tournament generates more than 80 percent of the NCAA's revenue.[2] Similarly, according to an NCAA report, in 2010-11, college football's Bowl Championship Series (BCS) generated more than $180 million in revenue through five postseason bowl games.[3] Not only do schools and conferences receive significant income from these pools, but they are cashing in directly as well. According to press reports, the 12 schools that make up the Big Ten each received more than $25 million last year from the conference's athletics revenue,[4] while the Pac-12's television deals could be worth as much as $4.3 billion over 12 years.[5]

The impact of athletic programs on colleges and universities around the country extends far beyond media and merchandising revenues. Studies suggest that successful sports teams may increase alumni donations[6] as well as the quantity and quality of the applicant pool.[7]

> Overemphasizing sports that generate a profit and enhance a university's popularity can **endanger the ideals of academic excellence and amateurism** that are supposed to form the core of college athletics.

These benefits come with significant risks. Overemphasizing sports that generate a profit and enhance a university's popularity can endanger the ideals of academic excellence and amateurism that are supposed to form the core of college athletics. Indeed, newspapers and magazines are replete with stories of recruiting violations, academic scandals, improper payments to athletes, and lapses in judgment caused by the fear of damaging a cash cow.

### More Money, Same Problems?

The challenges faced by college athletics programs are hardly novel. In 1929, the Carnegie Foundation for the Advancement of Teaching found that recruiting in college athletics had become corrupt, that professionals had replaced amateurs, that education was neglected, and that commercialism ruled the day.[8] While the concerns are not new, the explosion of revenues generated by college sports has increased both the incentive to cheat and the adverse consequences associated with getting caught.

In 1989, the Knight Foundation convened a blue-ribbon panel to address the "corruption [that] had engulfed big-time college sports in the 1980s." The transmittal letter accompanying the first report of the Knight Commission on Intercollegiate Athletics sounded the alarm that "abuses in athletics had reached proportions threatening the very integrity of higher education." According to the Knight Commission, during the 1980s the NCAA censured, sanctioned, or put on probation more than half of the universities playing at the NCAA's top level; one-third of such top-level schools had graduation rates under 20 percent for basketball players; and a survey of professional football players found that nearly one-third had accepted illicit payments in college.[9]

Over the 20 years from 1991 through 2010, the Knight Commission produced a series of reports proposing various reforms. The core recommendation of the Knight Commission reports issued between 1991 and 1993 was a "one-plus-three" model of governance. The "one" stood for increasing presidential authority over athletics, which in some cases lacked strong, centralized oversight at the university level. This executive would then oversee the "three" aspects of academic integrity, financial integrity, and independent certification.

In 2000, the Knight Commission noted progress by the NCAA and its member institutions, but cited the need for further reforms.[10] Thus, the 2000 report proposed a new iteration of the "one-plus-three" model: the formation of a "Coalition of Presidents" that would seek academic reform, de-escalation of the financial "arms race," and de-emphasis of the commercialization of college athletics.

Ten years later, the Commission focused on the rise of athletic department expenditures and the widening gap between money spent per student and money spent per athlete, noting, for example, that in 2008 the Southeastern Conference spent $144,592 per athlete, but only $13,410 per full-time-enrolled student.[11] The 2010 report made three main recommendations: achieve greater transparency in athletic spending, reward practices that prioritize academic values, and treat college athletes as students first.

Following each of these reports, the NCAA membership debated and implemented some—though certainly not all—of the Knight Commission's proposals. The NCAA Division I Manual has expanded over time and now contains more than 450 pages of rules governing college programs, addressing everything from fundamental principles such as academic eligibility, amateurism, and the prohibition of gambling, to minutiae, such as rules specifying the dimensions and contents of "institutional note cards" sent to recruits.[12]

Effective Aug. 1, 2013, the NCAA implemented a new enforcement structure with four levels of infractions: Level I violations, "Severe breach[es] of conduct," include lack of institutional control, academic fraud, and failure to cooperate with an NCAA investigation; Level II violations, "Significant breach[es] of conduct," include failure to monitor; multiple recruiting, financial aid, or eligibility violations; and other serious violations not rising to Level I; Level III violations, "Breach[es] of conduct," encompass misconduct that is isolated or limited in nature; and Level IV violations, "Incidental issues," are inadver- » Page 12

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# Energy

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of EPAct are in major part a congressional response to the Western Energy Crisis of 2000-2001, which was popularly attributed to energy market manipulation.

The significant reputational risk associated with energy market manipulation allegations adds a degree of complexity that may not be present in other industries. Media attention, public anger, and political oversight can cause a market manipulation investigation to snowball. The colorful language sometimes found on traders' recorded phone lines and chat room banter can grab headlines and create devastating reputational and legal risk. Documents and tapes produced at hearings and criminal trials that followed the 2000-2001 California energy crisis revealed conversations like this one, in which two traders lamented the possibility that regulators might order refunds of ill-gotten profits:

> They're f—g taking all the money back from you guys? All the money you guys stole from those poor grandmothers in California?
>
> Yeah, Grandma Millie, man. Yeah, now she wants her f—g money back. …

FERC's order assessing civil penalties against one bank and four of its traders emphasized the importance of contemporaneous communications.[19] Such communications may be used as evidence of intent that otherwise would have to be inferred from circumstantial evidence. However, chat room banter, instant messages, and recorded telephone calls are also the forums where traders, often using shorthand and colorful terminology, tend to speak casually and without great deliberation. In the harsh spotlight of an investigation, careless remarks and jokes can be seen by regulators as evidence of bad intent, sometimes with devastating consequences. Compliance officers need to make sure that traders are careful with their language and that they treat their business communications in a professional manner.

### Questions of Intent Are Central

FERC, in crafting its Anti-Manipulation Rule, recognized that a key feature of SEC Rule 10b-5 is the requirement of scienter,[20] the "intent to deceive, manipulate, or defraud."[21] FERC added an additional requirement of specific intent "to affect, or have acted recklessly to affect, a jurisdictional transaction," noting that its jurisdiction is narrower than that of the SEC.[22] But assessing intent can be tricky, especially in the energy trading context. There are seven organized electricity markets in the United States, each governed by its own set of detailed rules developed through a comprehensive stakeholder process and then approved by FERC.[23] The electricity markets are a work in progress, and are regularly the subject of FERC rate proceedings and rule-makings. On a daily basis, traders are expected to work within the complicated rules to maximize profits, yet the distinction between legitimate business opportunities and illegal market manipulation may be unclear in many cases. Even if there is a legitimate business purpose, FERC has stated that the transaction may be illegal if there is manipulative intent.[24] Thus, "it is often scienter…that is the only factor that distinguishes legitimate trading from improper manipulation."[25]

### Unresolved Jurisdiction Issues

FERC has jurisdiction over physical energy markets[26] and the CFTC has exclusive jurisdiction over transactions that involve futures contracts,[27] but it is not always clear which agency has jurisdiction over alleged schemes that involve both physical and financial markets. The agencies remain at odds over numerous such jurisdictional issues, despite a directive in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[28] that they sign Memoranda of Understanding (MOUs) clarifying their information-sharing policies and their respective jurisdictions by January 2011. In a recent letter to Senators Dianne Feinstein, Lisa Murkowski, and Ron Wyden, FERC Chairman Jon Wellinghoff stated that the commissions have not yet reached an MOU on information-sharing because of disagreements over FERC access to CFTC data.[29] As for the MOU on jurisdiction, it has been delayed by disputes over FERC's authority to police financial markets when manipulation in those markets affects physical energy prices. The inability of these key regulators to agree on their jurisdictional reach adds to uncertainty in the markets.

Issues relating to FERC's jurisdiction over financial markets were highlighted in the U.S. Court of Appeals for the District of Columbia Circuit's March 15, 2013 decision in *Hunter v. FERC*. In 2011, FERC assessed a $30 million civil penalty against Brian Hunter, formerly a natural gas trader for Amaranth Advisors, for allegedly manipulating natural gas futures prices. Hunter appealed to the D.C. Circuit, and the CFTC intervened to brief the jurisdictional issue. The court found that FERC lacked jurisdiction to fine Hunter for his actions in the natural gas futures markets, even if those actions affected physical natural gas prices.[30] FERC has elected not to seek certification of the decision by the Supreme Court and instead has opted to pursue legislative solutions.

*Hunter v. FERC* is a narrow decision that left many questions about FERC's jurisdiction unanswered. Hunter did not trade in the physical markets, confining his activities to financial instruments on organized exchanges, and his trades only involved natural gas. Therefore, the case actually does little to address the extent of FERC's jurisdiction over financial products generally, including derivatives that are bought and sold in organized electricity markets created and regulated by FERC. Although the CFTC has exempted certain transactions in those markets from most regulation under the Commodities Exchange Act, it has retained its anti-fraud and anti-manipulation enforcement authority over those transactions.[31] The CFTC also has not disclaimed jurisdiction over transactions in those markets that are not on its exempted list. Therefore, significant questions remain regarding whether FERC, the CFTC, or both have the authority to pursue particular forms of alleged market manipulation.

### Questions of Ethics, Fairness

Market manipulation investigations are often drawn out and document heavy, and the advice of experts is vital. Few traders have the personal resources to fund their own defense, and the interests of the company and certain of its employees may differ as an investigation proceeds. Therefore, as in many other complex white-collar investigations, company counsel must think carefully about whether individuals should be separately represented and whether, as is customary, the company will fund defense costs for individual employees. There is important ethical guidance in this area, including a seminal 2004 opinion from the New York City Bar.[32]

Careful attention must be paid to whether company counsel can or should represent individual traders in these investigations. In other industries, the clear trend has been for employees suspected of wrongdoing to be represented by separate counsel. Indeed, the Department of Justice and SEC often insist on separate representation of company personnel. As investigations of the energy markets become more complex and FERC's investigative authority crystallizes, it seems likely that the same trend will apply here and that the conclusion will be reached that company counsel in many instances should ensure that key individuals are separately represented.

### Conclusion

It is essential that companies participating in FERC-regulated markets develop and maintain comprehensive FERC regulatory compliance programs. FERC is likely to continue to aggressively pursue what it perceives as fraudulent schemes that impact the markets subject to its jurisdiction. Until the distinction between legitimate trading and market manipulation is better defined, and the limits on FERC jurisdiction are fully litigated, significant regulatory uncertainty—and the associated reputational and financial risks for trading companies—will remain.

1. 16 U.S.C. §§824v, 825o-1 (2006); 15 U.S.C. §717c-1.
2. Federal Energy Regulatory Commission, 2012 Report on Enforcement at 9, issued Nov. 15, 2012, Docket No. AD07-13-005.
3. Glen Boshart, "Wellinghoff: Enforcement Efforts Designed to Send a Message to Energy Traders," SNL FERC POWER REPORT, Nov. 21, 2012.
4. *Barclays Bank*, 144 FERC ¶61,041 (2013); *In re Make Whole Payments & Related Bidding Strategies*, 144 FERC ¶61,068 (2013).
5. *Barclays Bank*, 144 FERC ¶61,041 (2013). The bank and the traders elected to use a procedure under the Federal Power Act (FPA) pursuant to which FERC assesses a penalty without undergoing a trial-type hearing. If the bank and the traders do not pay the penalties and disgorgement within 60 days of the order, then FERC must seek to affirm the penalties from a federal district court. The court is authorized to review the penalties and disgorgement de novo, and may enforce, modify or set aside FERC's penalty.
6. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).
7. 16 U.S.C. §824v.
8. 15 U.S.C. §717c-1.
9. 16 U.S.C. §824v; 15 U.S.C. §717c-1.
10. 15 U.S.C. §78j(b).
11. 18 C.F.R. pt. 1c (2013).
12. *Prohibition of Energy Mkt. Manipulation*, 114 FERC ¶61,047 at PP 2, 30 (2006) (Order No. 670).
13. Id. at P 32.
14. 18 C.F.R. pt. 1c.
15. See Bruce W. Radford, "Trading on a Knife Edge," FORTNIGHTLY, Dec. 1, 2012.
16. *Deutsche Bank Energy Trading*, 142 FERC ¶61,056 (2013). The bank was accused of uneconomic trading in physical energy markets to benefit a financial position in congestion revenue rights (CRRs), a type of derivative that arises from the physical limitations of the electric transmission system. The bank stipulated that its physical "exports at Silver Peak raised prices at Silver Peak and caused its CRR position to gain value." The Office of Enforcement alleged that the bank's physical transactions "were not consistent with the fundamentals underlying the market price of Silver Peak, e.g., supply and demand, but rather were undertaken with the intent to change the value of CRRs."
17. See Jeffery Ryser, "JP Morgan physical trading exit culminates series of events," ENERGY TRADER, July 30, 2013.
18. Id.
19. *Barclays Bank*, 144 FERC ¶61,041 at PP 7, 75.
20. Order No. 670 at PP 49, 52.
21. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).
22. Order No. 670 at P 22.
23. CAISO, PJM Interconnection, ISO New England, New York Independent System Operator, Midcontinent Independent System Operator; Southwest Power Pool, and Electric Reliability Council of Texas.
24. *Barclays Bank*, 144 FERC ¶61,041 at P 61 (2013).
25. Id. at P 55 (2013) (internal citations omitted).
26. 16 U.S.C. §824; 15 U.S.C. §3431.
27. 7 U.S.C. §2; *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).
28. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).
29. Letter from Jon Wellinghoff, Chairman, Federal Energy Regulatory Commission to Senators Feinstein, Murkowski and Wyden (Aug. 29, 2013), available at http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=b431ada9-0ecf-4c10-8f16-23ead0eec085.
30. *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013).
31. Final Order in Response to a Petition From Certain Indep. Sys. Operators & Reg'l Transmission Orgs. to Exempt Specified Transactions, 78 Fed. Reg. 19,880, 19,884 (April 2, 2013).
32. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2004-02: Representing Corporations and Their Constituents in the Context of Governmental Investigations, available at http://www.nycbar.org/ethics/ethics-opinions-local/2004-opinions/815-representing-corporations-and-their-constituents-in-the-context-of-governmental-investigations.

# Korea

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entity is a "foreign public official" provides some refreshing clarity not seen in the FCPA's foreign official definition. The FCPA defines foreign official to include employees of "instrumentalities" of foreign governments[7] without providing any guidance on the meaning of "instrumentality," although courts have held that personnel from state-owned enterprises can be liable.[8]

The FBPA, by contrast, provides a bright-line rule for employees of companies more than 50 percent owned by the foreign government or in which the foreign government has substantial control over management, including decision-making and the appointment and dismissal of executives.[9] What remains unclear, however, is the scope of the exception for "enterprises operating on a competitive basis equivalent to entities of ordinary private economy." Many countries, particularly in emerging markets, have state-run entities that are important parts of the economy. If they are deemed to be like other competitive enterprises that are not state-run, the FBPA's exception, without further clarification, could effectively swallow the rule.

**Exceptions to Criminal Liability:** The FBPA has two exceptions: Individuals are not liable if the payment is permitted or if a "small pecuniary or other advantage is promised, given or offered to a foreign pubic official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official's business."[10] The first exception is similar to the FCPA's affirmative defense for payments that are lawful under the relevant foreign country's written laws;[11] the second is similar to the FCPA's facilitating payments exception which exempts facilitating or expediting payments for "routine governmental action."[12]

**Vicarious Liability:** Article 4 of the FBPA addresses criminal responsibility of a corporation for the acts of its representative, agent, employee, or other individual working for it. In such cases, the corporation will be subject to a fine up to 1,000,000,000 Korean won (approximately US$934,000). If the profit obtained from the offense exceeds 500,000,000 won (approximately US$467,000), then the fine will be up to twice the amount gained by the corporation. Of particular note is that a corporation will not be subject to any sanctions if it "has paid due attention or exercised proper supervision" to prevent an offense.

**What the FBPA Does Not Include:** Interestingly, the FBPA does not have an explicit intent requirement. Unlike the FCPA, which requires that the act in furtherance of bribery be done corruptly,[13] the text of the FBPA only requires the bribe to be done for the purpose of obtaining an improper advantage in international business transactions.[14] An aggressive reading of the FBPA is that it only requires an act, not a criminal state of mind, though it is unclear whether this would hold up in court.

Also unlike the FCPA, the FBPA does not by its terms contemplate a finding of liability for bribe payments made through intermediaries. In other words, there is no provision criminalizing the giving of a thing of value while knowing that it will be passed along to a foreign official, as in the FCPA.[15] That said, the relatively few FBPA cases that have been brought include cases where the bribes were paid through an intermediary.[16] Additionally, Korean criminal law allows for the conviction of accomplices and "co-principals" who assist in furthering a crime, so there appears to be no legal bar to proceeding against third-party intermediaries under the Korean law.[17]

Finally, the FBPA is silent on whether a non-Korean company can be liable for acts in furtherance of bribery of a foreign official done in Korean territory. A separate provision of the Korean Criminal Act, however, provides that the Act applies to foreign persons who commit acts in Korea, and so it appears that non-Korean companies can be subject to liability in these instances.[18]

> Given the **increasing foreign bribery enforcement climate** globally and the prospect that the recent criticism from Transparency International could spur Korea into more action, a **closer look at the Foreign Bribery Prevention Act is timely and warranted**.

### China Eastern Airlines Case

The recent case against two individuals for bribing the president of the Korean subsidiary of China Eastern Airlines illustrates a new approach to enforcement in the strictly commercial context in Korea. In May 2011, the Incheon District Prosecutor charged the CEO of a logistics company and the CEO of a travel agency with making bribe payments totaling more than $6 million in order to receive favorable freight fees and additional tickets at a sale price from China Eastern Airlines.[19]

At trial, the district court found the individuals not guilty because the prosecution had not met its burden of proof under Article (2)(c) of the FBPA—namely, that China Eastern Airlines was a state-owned enterprise.[20] The court did not indicate under which prong of the "foreign public official" definition it was basing its opinion. In addition, on its face, the ruling does not square with the fact that China East Airlines is well known as a state-owned entity.[21] Perhaps this is why the prosecution appealed the ruling in February 2013.

The appellate court affirmed the district court's ruling in February 2013, finding that the two individuals were not guilty of violations under the FBPA. The prosecution argued on appeal that the company was controlled by the Chinese government because it owned more than 50 percent of China Eastern Airline's capital and because the Chinese government appoints and dismisses the CEO of the company.[22] The prosecution also presented reasons why China Eastern Airlines does not conduct operations on a competitive basis to entities of ordinary private economy, citing as one of its reasons that the company received large amounts of government subsidies.[23] The appellate court affirmed without providing any reasoning, and so did not provide any guidance on the definition of "foreign public official."[24] The prosecutors have appealed again to the Korean Supreme Court, which hopefully will provide some clarification on the definition.

### Key Takeaway

While the full implications of the China Eastern Airlines case remain to be seen, one thing is clear: Korean prosecutors are pressing their view of the FBPA and its critical definition of a foreign public official all the way to their country's highest court. Time will tell whether this is a harbinger of an increased focus on foreign bribery enforcement in Korea.

Amidst the uncertainty, there is one key thing companies operating in Korea can and should do to mitigate risks of a violation of the FBPA: Enact robust anti-corruption compliance policies and train their employees on the importance of following compliance procedures. As noted above, the FBPA exempts corporations from liability if they "pa[y] due attention or exercise[] proper supervision" to prevent an offense. Although there has been no court opinion defining "due attention" or "proper supervision,"[25] a corporation with an effective anti-corruption compliance and training program should meet that standard.[26]

It is to be expected that implementation of such policies and the training of employees will involve additional resources. Nevertheless, given the risks of a violation and the costs and reputational damage of defending an investigation, it will be money well spent.

1. Min-woo Lee, "The Titular Foreign Bribery Prevention Act," Kyeonggi Ilbo (June 18, 2913), available at http://www.kyeonggi.com/news/articleView.html?idxno=685187 ("Since the passing of the Act, 1 case in 2002, 5 cases in 2004, 1 case in 2007, and 2 cases in 2008, 1 case in 2010 for a total of 10 cases have been held to be in violation of the Act.") (translation from Korean).
2. Id.; see also OECD Working Group on Bribery, "Phase 3 Report on Implementation of the OECD Anti-Bribery Convention in Korea" at 9 (October 2011) (OECD Phase 3 Report), available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf.
3. Transparency International, "Exporting Corruption; Progress Report 2013: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery," Oct. 7, 2013, at 56-57, available at http://issuu.com/transparencyinternational/docs/2013_exportingcorruption_oecdprogre.
4. Korea's Criminal Procedure Law Articles 357 and 358 provide for appeals within 7 days of a ruling.
5. English translation of the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA) at Article 3(1), available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2378002.pdf.
6. Id. at Article 2.
7. 15 U.S.C. §§78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).
8. See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011); *United States v. Carson*, SACR 09-00077-JVS, 2011 WL 5101701, at *3 (C.D. Cal. May 18, 2011). Although the tests these courts have used varies, one factor commonly taken into account is the foreign state's degree of control over the entity.
9. FBPA Article 2(2)(c).
10. FBPA Article 3(2).
11. 15 U.S.C. §§78dd-1(b), 78dd-2(b), 78dd-3(b).
12. 15 U.S.C. §§78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).
13. 15 U.S.C. §§78dd-1(a), (g)(1), 78dd-2(a), (i), 78dd-3(a).
14. FBPA Article 3(1).
15. 15 U.S.C. §§78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).
16. See OECD Phase 3 Report at 13.
17. Id.
18. Criminal Act of Korea, Art. 2 ("This Act shall apply to both Korean nationals and aliens who commit crimes in the territory of the Republic of Korea"). An English Translation of the Act available at the OECD Anti-Corruption Initiative, http://www.oecd.org/site/adboecdanti-corruptioninitiative/46816472.pdf; Minwoo Lee, "Incorruptibility Defines National Prestige—A Need for Stricter Regulations on Foreign Bribery," Kyeonggi Ilbo (June 19, 2013), available at http://www.kyeonggi.com/news/articleView.html?idxno=685529.
19. Young Hwan Kim, "Chinese State-owned Airline's Bribery Pandemonium," The Hankyoreh (May 18, 2011), available at http://www.hani.co.kr/arti/society/area/478659.html.
20. Decision of the Court, Incheon District Court, 2011 Gohap 277, 294, 757 (12th Crim. Dept. Feb. 14, 2012) ("The proof proffered by the prosecution that China Eastern Airlines was a state-owned entity relied upon information provided by China Eastern Airlines' employees. However, the employee testified at trial that it was difficult to explain the credibility of the data and could not guarantee the authenticity of its content; therefore, the burden of proof was not met.") (translated from Korean).
21. Joanne Chiu, "China Opens Skies to Privately Owned Airlines," The Wall Street Journal (May 29, 2013), available at http://online.wsj.com/news/articles/SB10001424127887324412604578512943973853754 ("China's civil-aviation market is dominated by the three state-owned carriers: Air China, China Southern Airlines Co. and China Eastern Airlines Corp.").
22. Decision of the Court, Seoul High Court, 2012 no 865, 2012 no 2685 at 1 Ga (4) (1st Crim. Dep't. Feb. 1, 2013).
23. Id.
24. Id. at 2 Na (4).
25. OECD Phase 3 Report at 18.
26. This makes the FBPA distinct from the FCPA, which has no "compliance defense," and more in keeping with the recently enacted U.K. Bribery Act, which allows companies a defense to a charge of failing to prevent bribery by showing they had adequate procedures to prevent it.

# Athletics

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tent, technical, or isolated infractions.[13] Depending on the number and seriousness of violations, punishments imposed on a university's athletic program can include loss of scholarships and eligibility for postseason play. Such sanctions can adversely affect revenues and recruiting, and can cripple a program for years to come.

### Challenges in Universities

In many ways, the Knight Commission's recommendations and other efforts to reform college sports attempt to apply the central elements of a corporate compliance program—board and executive involvement in compliance and ongoing monitoring and certification efforts—to universities and their athletic departments. Indeed, despite the appeal inherent in pursuing sweeping systemic changes, carefully applying the core elements of an effective corporate compliance program can help mitigate the risks associated with big-time athletics programs. This article outlines several elements of corporate compliance programs that can be crafted to the particular needs and resources of a university.

***High-level oversight by the board of trustees and the president.*** Whether viewed through the prism of the one-plus-three model proposed by the Knight Commission or the NCAA's requirement of institutional control over athletic departments, a university's board of trustees and president are responsible for promoting and encouraging ethical conduct and a commitment to compliance. This is accomplished by (a) delegating day-to-day responsibility to competent individuals with sufficient access to the trustees and president to ensure that any issues will be reported promptly to the highest levels of the institution, (b) allocating sufficient resources to the compliance effort, (c) regularly reviewing and monitoring the performance of both the compliance program and responsible persons, and (d) ensuring that risks are evaluated and mitigated. In satisfying their oversight obligations, trustees and presidents must account for several unique aspects of their athletic programs that require special attention.

*First*, coaches depend on fielding winning teams for job security; a successful coach can command multi-million dollar salaries and generate millions in additional revenues for the institution. This compensation model can create the perception that the coach is more important to the school than faculty members, deans, and even the president himself. For example, after Ohio State's former head football coach was alleged to have committed several serious infractions, the school's president reportedly joked that rather than considering firing the coach, he hoped the coach would not fire him.[14] Joking aside, a university's leadership must convey their commitment to compliance and make clear that even the most successful coaches will suffer negative consequences if they fail to abide by the standards set by the university, the conference, and ultimately the NCAA. By holding coaches accountable for violations that occur on their watch, and refusing to hire successful coaches with a track record of violations at other programs, an institution's trustees, president, and athletic director will set the "tone at the top" that long-term compliance is more important than short-term success.

*Second*, like corporate shareholders, alumni and boosters often condition their continued support on athletic success. However, unlike shareholders, alumni and boosters present compliance risks as their desire for immediate success can undermine an institution's compliance regime.[15] To mitigate this risk, a university's trustees and president should consider limiting the access that potentially unaccountable "supporters" have to athletes and coaches. While this might reduce the willingness of some individuals to support the athletic department financially, establishing a culture of compliance often requires forgoing lucrative but suspect opportunities.

*Third*, and most important, the student-athletes themselves present a high-risk population of talented but immature 18- to 22-year-olds, who lack financial resources of their own but are the object of attention from third parties happy to reward them for their athletic efforts. Moreover, some of the highest-risk athletes lack a long-term commitment to the university: At best they expect to attend for five years, but increasingly their goal of a professional career leads to a "one and done" mentality and little concern for the academic community. While the Knight Commission and NCAA seek to maintain the ideal of the amateur student-athlete whose sole compensation is a free education, some commentators have argued that student-athletes should be paid.[16] Paying student-athletes could reduce both the perceived hypocrisy of unpaid amateurs generating millions of dollars in revenue for their schools and the financial pressures that lead some players to accept improper payments for food or spending money. It should not, however, be viewed as a cure for all of the compliance challenges facing college athletic programs. Recruiting would still involve relentless pressures and risks; student-athletes would still face eligibility requirements; and star athletes inevitably would be offered under-the-table payments to supplement the permissible compensation. While it may not be possible to eradicate the risks inherent in the current system, trustees and presidents need to make clear that athletes are part of the university community, that misconduct will not be tolerated, and that standards of conduct will be applied consistently across conferences and the NCAA as a whole. This will uphold the institutional mission of their universities without putting compliant programs at a competitive disadvantage.

***Effective prevention in the field.*** Establishing a positive "tone at the top" must go hand-in-hand with prevention efforts in the field. *First*, strong compliance requires clear policies that take into account the realities and goals of the regulated groups. The compliance program must translate the NCAA's complex, arcane, and constantly evolving set of rules into comprehensible, context-specific guidance for athletes, coaches, trainers, and other participants in the process.

*Second*, these clear policies must be communicated through effective training and education. In particular, coaches, trainers, and athletic advisors—the people who spend the most time with student-athletes and who remain relatively constant over time—need regular in-person or online training sessions, including training on how to identify and respond to potential violations.[17]

*Third*, effective compliance requires risk assessment and abatement. Corporations regularly look to employees, contractors, and other stakeholders; media reports; and civil, criminal, and regulatory challenges faced by industry peers to identify risks. They also use external audits and benchmarking studies to test their programs. These tools are similarly available to colleges, which can look to groups such as the National Association for Athletics Compliance (NAAC) for guidance on best practices for their compliance programs.[18]

***Detection and disclosure.*** To facilitate detection of violations, there must be effective reporting without fear of retaliation. This is a special concern in the university setting where a whistleblower who fears being vilified for "bringing down" a beloved athletic program might opt to remain silent. An appropriate "tone at the top" empowers concerned individuals to articulate their concerns, but the university also should develop protected outlets for disclosure, such as compliance hotlines and anonymous email or website submission forms on the college's website.

Once a compliance breakdown is detected, the institution must promptly investigate and remediate. Some issues can and should be addressed internally or by the school's regular outside counsel, while others are sufficiently serious or implicate high-level personnel so that an independent investigation by outside counsel or investigators is appropriate. A prompt and thorough investigation by independent counsel, followed by steps to remediate the problem identified and modify the compliance program to avoid its recurrence, sends a message that the institution takes compliance seriously and will not "look the other way" in the face of potential misconduct.

Lacking subpoena power and the ability to reward and protect whistleblowers, the NCAA regulatory regime depends heavily on self-reporting of even the most minor of transgressions.[19] As with any enforcement regime, NCAA sanctions are often applied unevenly: Some schools investigate and self-report as required, while the same conduct at other schools may go undetected and unreported. In the corporate world, entities regularly weigh the nature and extent of the violations discovered, the ability to remediate the issues internally, and the costs and benefits of self-reporting in light of guidelines issued by the Department of Justice, the Securities and Exchange Commission, or some other government agency. The NCAA's new enforcement regime, effective Aug. 1, 2013, rewards effective compliance by identifying self-detection, self-disclosure, and "exemplary cooperation" as mitigating factors for penalty purposes.[20]

### You Play How You Practice

The concerns expressed in the Carnegie Report in 1929, and in the Knight Commission reports from the 1990s, 2000s, and 2010, reflect a striking continuity: misconduct during recruiting, amateurism giving way to professionalism, the emphasis of athletics at the neglect of education, and increasing commercialism. This continuity suggests that there are no easy fixes.

University compliance efforts face special challenges because of their people, their missions, and their unique place in American life. But just as in the business world, a successful compliance program must combine sound top-down structures with diligence on the ground, day in and day out. While this requires the commitment of significant time and resources, the chance to gather alongside the university community at Pauley Pavilion as championship banners wave from the rafters, or at Michigan Stadium as 115,000 people sing Hail to the Victors, seems well worth the effort.

1. http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW.
2. http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/revenue.
3. Bowl Championship Series Five Year Summary of Revenue Distribution 2006-07 Through 2010-11, NCAA (2011).
4. Stu Durango, "Big Ten payouts to hit $25.7 million per school," St. Louis Post-Dispatch (May 18, 2012).
5. Steve Berkowitz, "Pacific-12 Schools Will See Big Payday from TV Deals," USAToday (May 21, 2012).
6. Michael L. Anderson, "The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables," NBER Working Paper No. 18196 (June 2012), available at http://www.nber.org/papers/w18196.
7. E.g., Devin G. Pope and Jaren C. Pope, "Understanding College Application Decisions: Why College Sports Success Matters," Journal of Sports Economics (Nov. 26, 2008).
8. Howard J. Savage, et al., America College Athletics, Bulletin No. 23, New York: Carnegie Foundation for the Advancement of Teaching (1929).
9. Knight Commission, Introduction to the re-released 1991-1993 Reports (August 1999).
10. Knight Commission, A Call to Action: Reconnecting College Sports and Higher Education (2000).
11. Knight Commission, Restoring the Balance: Dollars, Values, and the Future of College Sports (2010).
12. NCAA Bylaw 13.4.1.1(i) (2013). The Division II and III Manuals run 368 and 284 pages, respectively.
13. NCAA Bylaw 19.1 (2013).
14. Pete Thamel, "Buckeyes' Trials with Tressel Are Test for N.C.A.A.," N.Y. Times (May 30, 2011).
15. NCAA Bylaw 13.02.14 (2013) (A booster involved in promoting the university can become a "representative of athletics interests" for whose conduct the university must answer).
16. E.g., Joe Nocera, "Let's Start Paying College Athletes," N.Y. Times Magazine, Dec. 30, 2011.
17. The main website of the University of Oklahoma's compliance department, for example, features a Question of the Week as well as an archive of previous questions. See http://www.soonersports.com/ViewArticle.dbml?DB_OEM_ID=31000&ATCLID=208805707.
18. See http://www.nacda.com/naacc/naacc-reasonable-standards.html.
19. NCAA Bylaw 19.2.2 (2013).
20. NCAA Bylaw 19.9.4 (2013).

# Nonprofit

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ing the same meaning as in Internal Revenue Code §4958 regarding intermediate sanctions.

### Audit Oversight

Every charitable corporation and charitable trust with revenue exceeding $500,000 registered to solicit charitable contributions in New York must file an independent certified public accountant audit report with the attorney general. The NRA requires those institutions to designate an audit committee of the board, consisting of at least three independent directors, for the purposes of overseeing the accountant and financial reporting processes of the corporation and the independent certified public accountant's audit of the corporation's financial statements. The corporation's entire board may constitute the audit committee, provided that only independent directors are present at and participate in deliberations and voting relating to audit committee matters. The committee must adopt a charter.

The audit committee must, at a minimum, perform the following:

• Retain and evaluate the independent auditor who shall report directly to the audit committee

• Review with the independent auditor the scope and planning of the audit

• Review and discuss with the independent auditor the results of any audit

• Oversee adoption, implementation of and compliance with any conflict of interest policy or whistleblower policy adopted pursuant to the act, if the function is not otherwise performed by another committee of the board comprising solely independent directors.

Note that the definition of an "independent director" is contained in proposed subdivision 21 of NFPCL §102. A director is not independent if the director or a relative is an employee of the corporation or an affiliate; or is a director, officer or employee, or has a substantial financial interest in, an entity that has transacted business of $25,000 or more with the nonprofit in the past three years. Financial contributions do not count toward the threshold.

The comparable provision for charitable trusts are found in subdivision (b) of proposed new §8-1.9 of the EPTL.

### Related-Party Transactions

The act requires every nonprofit corporation and charitable trust to take certain affirmative steps before entering into related-party transactions. "Related party" is defined in proposed subdivision 23 of NFPCL §102 as any director, officer or key employee of the corporation or any affiliate or a relative of such person; or any entity in which any of these individuals has a 35 percent or greater ownership or beneficial interest, or in the case of partnerships or professional corporations, a 5 percent or greater direct or indirect interest. "Related-party transaction" means any transaction, agreement or other arrangement in which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant.

The comparable provisions for charitable trusts are found in subdivision (a) and (c) of proposed new §8-1.9 of the EPTL.

No corporation or charitable trust may enter into a related-party transaction unless: proper disclosure has occurred or there is prior knowledge on the part of board members and the board (1) considers alternative transactions to the extent available and upon reasonable diligence determines that such alternative transactions would not be more advantageous to the corporation; (2) determines by a two-thirds vote of the board that the related-party transaction is fair, reasonable and in the best interests of the corporation and approves such transaction, and the related party with an interest in the transaction is not present at and does not otherwise participate in any deliberation or voting relating thereto; and (3) contemporaneously documents in writing the basis for its determination and approval of the transaction.

Under the act, the attorney general has the authority to take a myriad of steps with regard to related-party transactions. For example, the attorney general may (1) bring an action to enjoin, void or rescind any such transaction or proposed transaction that violates any law or is otherwise not fair, reasonable or in the best interests of the corporation or (2) seek other relief, including damages, restitution and the removal of directors or officers, or even seek to require any person or entity to pay, in the case of willful conduct, an amount up to double the amount of any benefit improperly obtained.

> The Nonprofit Revitalization Act of 2013 requires every nonprofit corporation and charitable trust to **take certain affirmative steps** before entering into related-party transactions.

### Conflict of Interest Policy

The legislation would enact a new NFPCL §715-a to provide that every nonprofit corporation and charitable trust adopt a conflict of interest policy to ensure that its directors, officers and key employees act in the corporation's best interest and comply with applicable legal requirements. The policy must include, at a minimum, the following:

• Procedures for disclosing a conflict of interest to the audit committee or, if there is no audit committee, to the board

• A requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict

• A requirement that the existence and resolution of the conflict be documented in the corporation's records.

Annually, directors or trustees must submit a statement disclosing any potential conflicts of interest.

Significantly, subdivision (d) of proposed §715-a provides that if the corporation has adopted and implemented a conflict of interest policy pursuant to federal or state law that substantially meets the requirements of §715-a, then the corporation is deemed in compliance with the section. It is conceivable, though not certain, that entities adopting policies along the lines of those recommended by the Internal Revenue Service pursuant to IRC §4958, may be deemed satisfactory.

Conflict of interest provisions applicable to charitable trusts are found in subdivision (d) of proposed new §8-1.9 of the EPTL.

### Whistleblower Policy

Proposed new NFPCL §715-b and subdivision (e) of EPTL §8-1.9 would require that every nonprofit corporation and charitable trust, respectively, that has five or more employees and in the prior fiscal year had annual revenue in excess of $1 million must adopt a whistleblower policy to protect from retaliation persons who report suspected improper conduct. The policy must provide that no director, officer, employee or volunteer of a corporation who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.

Any whistleblower policy must include the following provisions at a minimum:

• Procedures for reporting violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information

• Procedures for handling and investigating violations or suspected violations of laws or corporate policies

• A requirement that an employee of the corporation be designated to administer, implement and oversee compliance with the whistleblower policy, and to report to the audit committee or other committee of independent directors or, if there are no such committees, to the board

• A requirement that a copy of the policy be distributed to all directors, officers, employees and volunteers, with instructions on how to comply with the procedures set forth in the policy.

Similar to the provision regarding conflict of interest policies, subdivision (c) of this section provides that if a corporation has adopted and implemented a whistleblower policy pursuant to federal or state law that substantially meets the requirements of §715-b, the corporation is deemed in compliance. In this instance, it remains to be seen, for example, whether adherence to Labor Law §740 would be sufficient to satisfy §715-b.

### Real Property Transaction Authorizations

The NRA reduces the threshold for board approval of routine real estate transactions. It allows a charitable corporation to conduct most purchases, sales, mortgages or leases of real property with the authorization of a majority of directors or a committee of the board. Notably, however, if the purchase, sale, mortgage or lease of the real property would constitute all or substantially all of the assets of the charitable corporation, it requires the approval of two-thirds of the entire board or, if there are 21 or more directors, a majority of the entire board.

### Approvals of Substantial Transactions

The act allows a charitable corporation that seeks to sell, lease, exchange or dispose of all or substantially all of its assets to conduct a one-step approval process consisting of the attorney general's approval, instead of the more cumbersome two-step process currently in place (court approval followed by the attorney general's review). Similarly, charitable corporations that seek to merge or consolidate are allowed to seek approval from the attorney general alone, rather than requiring court approval followed by the attorney general's review. In either case, if the attorney general does not approve a transaction, the charitable corporation has the option to seek court approval.

### Conclusion

If signed by the governor and enacted into law, the NRA would be a landmark piece of legislation that changes the landscape for charitable organizations operating in the state of New York. While the foregoing has been a brief description of the legislation, if enacted into law, regulations may be issued which provide additional detail. It is essential for directors, trustees, officers and key employees to familiarize themselves with its provisions if enacted as well as any associated regulations.