

**Kobre & Kim's Cross-Border  
Disputes Team**

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**Daniel J. Saval**  
New York  
[daniel.savall@kobrekim.com](mailto:daniel.savall@kobrekim.com)



**Jian Wu**  
Shanghai  
[jian.wu@kobrekim.com](mailto:jian.wu@kobrekim.com)



**John Han**  
Hong Kong  
[john.han@kobrekim.com](mailto:john.han@kobrekim.com)



**Kunhee Cho**  
London  
[kunhee.cho@kobrekim.com](mailto:kunhee.cho@kobrekim.com)



**Naomi Jeehee Yang**  
Seoul  
[naomi.yang@kobrekim.com](mailto:naomi.yang@kobrekim.com)



**Robin J. Baik**  
Seoul  
[robin.baik@kobrekim.com](mailto:robin.baik@kobrekim.com)

## Opportunities for Global and Local Activist Investors are Growing in Korea

**Opportunities for activist investors in Korea are growing as the legal landscape evolves in a favorable direction. Global and local investors can take advantage, but given the intricacies of the Korean market and the dominance of chaebols, they should consider creative strategies to maximize the chances of success.**

Recent developments in the Korean legal landscape have created new opportunities for activist investors to assert their rights and interests more effectively in Korean companies, including *chaebols* (family-owned conglomerates).

Activist investors can leverage these opportunities with creative strategies that combine an international approach with local insight to maximize their return on investment.

### What Has Changed in the Legal Landscape?

- **The “3% Rule”:** Due to the recent amendment to the 3% rule, the appointment and removal of directors of a company’s audit committee – which plays an oversight role – is now one of the key battlegrounds for activist shareholders. The voting power for at least one of the audit committee members is now capped at 3%. For the largest shareholder, the 3% cap applies to that shareholder and affiliates in the aggregate. Taking advantage of the new rule, some activists have successfully supported their candidate of choice to the appointment to audit committee.
- **Restrictions on the “Split off and IPO” Tactic:** Previously, controlling shareholders were able to split off a lucrative business division to an affiliate controlled by the chaebol family without restraint, followed by an IPO of the affiliate. This effectively deprived the existing shareholders of the opportunity to participate in the growth of the business without an exit at a fair price, resulting in a decline in the parent company’s stock price. New regulations now require companies to explain the reasons and procedure for the planned divestment and entitle dissenting minority shareholders to a share buyback.

- **Financial Regulators' Efforts to Remove "Korea Discount":** The Financial Supervisory Service (FSS), Korea's financial regulator, is positioning itself to be the force behind removing the infamous "Korea Discount," including by acknowledging the positive impact of shareholder activism. In May 2023, it held a roundtable discussion to hear concerns and proposals from not only listed companies and institutional investors, but also activist funds. This was viewed as taking the heat off activist investors, giving them more freedom to push for changes in companies.

During the roundtable, the FSS proposed a new disclosure obligation on companies, including disclosure of shareholder proposals and letters they receive and details on their responses. The FSS's proposal, if implemented, would support transparency and efficiency in shareholder communication – not only with the companies but with other shareholders.

### How Can Activist Investors Respond?

Despite the reforms, the intricacies of the Korean capital market and legal practice, combined with the still overwhelming influence of chaebols, mean activist investors need to tread carefully. Creative strategies can maximize the chances of success:

- **Find Allies.** Many institutional investors hold significant stake in companies and have recently developed and published voting guidelines and investment philosophies. Activist investors can gain the support of these funds – including the behemoth Korean National Pension Service – by shaping shareholder proposals along those lines.
- **Generate Public Support.** An effective public relations campaign can be an essential ingredient in persuading other shareholders, both locally and overseas. One avenue is to work with local funds to find diverse communication channels. The campaign should have precise messaging supported by verifiable facts that reflect upcoming inflection points. At the same time, activist investors should also manage PR risks, ensuring their messaging fully complies with local laws.
- **Make Your Move.** Proposing a reasonable and economically attractive competing shareholder resolution can help secure the attention and support of other shareholders and proxy advisory firms. Beyond satisfying the holding requirements (i.e., for listed companies, either (i) 0.5% of total outstanding voting shares plus a six-month holding period, or (ii) 3% of the total outstanding voting shares), one could consider a difficult but more aggressive strategy such as proxy solicitation without a proposed resolution.
- **Play Nice.** In certain circumstances, a more cooperative approach may yield a better result, especially if the controlling shareholder views the activist as a palpable threat or if the activist has taken a "white knight" approach and cooperates with the controlling shareholder. Some controlling shareholders may be amenable to allowing the activist shareholder to become a strategic partner in exchange for concessions, though activists need to be wary of legal risks such as insider trading and "unfair trading" when communicating with management.

Activist investors – including overseas as well as local institutional investors – are finding more opportunities as the Korean investment landscape evolves in their favor.

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### About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct. Our team:

- Has significant experience in corporate governance matters, having led and defended initiatives on the formation and conduct of special investigative committees; organization of steering committees of equity holders to remove incumbent directors outside a regularly formulated election; the serving of statutory notices and pursuit of emergency actions relating to books and records access and related asset-freeze applications; applications for involuntary receiverships and liquidations; and other special strategies to place our clients in a position of strength to negotiate a satisfactory resolution.
- Avoids ongoing client relationships with common industry participants and instead focuses on special-situation engagements, allowing us to offer the most aggressive, creative and independent advocacy even in cases involving numerous, overlapping institutional stakeholders' interests.
- Includes native Korean-speaking lawyers from our Seoul and U.S. offices assisting clients dealing with Korean regulatory and criminal authorities such as the Korean Financial Supervisory Service and the Korean Public Prosecutors' Office.