I. Introduction

The American Bar Association Sections of Antitrust Law and International Law ("Sections") are pleased to offer the following comments on the Korea Fair Trade Commission Proposed Amendment to the Public Notification on Implementation of Leniency Program that was announced on November 23, 2015, and the Proposed Rules of Investigation. The Sections commend the Commission for its continued effort to promote justice in the implementation of the Korea Fair Trade Commission’s ("KFTC") leniency program. We appreciate the KFTC's interest in the opinion of companies and organizations, including the Sections. These comments are submitted in response to the Commission’s invitation for public comment.

II. Proposed Amendment on Notification on Implementation of Leniency Program

We offer comments on the proposed amendment: (1) to require employees of a leniency applicant to attend a KFTC hearing to testify before the Commissioners prior to leniency being granted; and (2) to disqualify a leniency applicant who discloses its filing for leniency to a third person without the KFTC's consent.

A. Unauthorized Disclosure to Third Parties

The Sections agree that disqualifying a leniency applicant for an unauthorized disclosure to a third party is sound public policy. Alerting a third party to the fact that a company is seeking to obtain leniency is the complete antithesis of cooperation.
The Commission could rightly disqualify such an applicant. The proposed amendment puts parties on notice of the consequences of their actions.

There are, however, situations where the leniency application is already a matter of public record and/or the confessor is required by law to make disclosure in another jurisdiction. The Sections recommend the following proposal to address these situations: “Where a voluntary confessor discloses the fact of its filing for leniency or the facts constituting the cartel activities to another competition authority, or where the voluntary confessor discloses such facts to a third person because it is required by law to do so, the voluntary confessor shall not be deemed to have breached its duties to the Commission if it provides notice to the Commission before disclosure or, if prior notice is not practical, within a reasonable time thereafter, not to exceed 48 hours. Otherwise, a voluntary confessor shall be considered to have not cooperated with the Commission if it has disclosed such facts to a third person without the Commission’s consent. The Commission shall not unreasonably withhold its consent for disclosure.”

B. Testimony Before Grant of Leniency

The Sections have significant concerns regarding the requirement that officers and employees of a leniency applicant attend hearings before the Commission prior to the grant of immunity and the use that can be made of the evidence obtained thereby. The concerns arise in part as a result of the January 2, 2015 amendment that abolished the system of conferring provisional (conditional) leniency on the applicant, and the amendment to Article 12 that allows evidential materials submitted to be used to substantiate cartel activities, even where the leniency application has been denied because the Commission considers the materials insufficient to substantiate cartel activities. If the November 23, 2015 amendment is adopted, a leniency applicant will be in the position of not only having to provide all the information and evidence (such as letter of confirmation, affidavit, and statement – see Article 4(1)2 and 3) required to obtain leniency, but the applicant’s employees will also be required to testify about cartel conduct before having even the benefit of knowing that the applicant qualified for leniency. Moreover, testifying personnel will
have no assurance that the evidence tendered will not be used against them and the applicant if the leniency application is denied. The proposed procedure would be outside the norm of practices in most jurisdictions. In the United States, for example, officers and employees who provide evidence prior to the grant of leniency do so with express assurances that any such evidence tendered will not be used against them. This step away from convergence could negatively impact the role of leniency in Korea by reducing the likelihood of companies coming forward to expose cartel conduct through the leniency process. The risk of providing such detailed information through the testimony of culpable employees will likely prove too great a risk for many applicants. In addition, it would be extremely risky for an individual to appear before the Commission and admit to illegal conduct before even a grant of provisional leniency is made.

The January 2, 2015 amendment eliminating provisional leniency has shifted a substantial and, in the Sections’ view, undue risk to a leniency applicant and its employees because they will be required to incriminate themselves while the Commission retains sole discretion to accept or reject the leniency application. There is no limitation on the use of the evidence provided in person by individuals, nor on the use of the evidential materials submitted, if the Commission rejects the leniency application. The Sections feel strongly that this procedure will create too much uncertainty and risk for the applicant and thus may greatly discourage applicants from coming forward.

The leniency process depends upon mutual trust and the KFTC is justified in establishing procedures that will ensure that leniency applicants fully meet their obligations to provide complete, timely, and truthful cooperation and prevent recanting material information in whole or even in part. While there is always a risk that an applicant will later dilute evidence offered before leniency is granted, by gathering detailed evidence as contemplated by Article 4 (Evidence Necessary to Substantiate Cartel Activities), this likelihood can be greatly reduced. Moreover the KFTC has remedies against leniency recipients if they fail to meet their obligations. The Sections recommend that in light of the abrogation of the provisional grant of immunity process, the Rules of Investigation Procedures should expressly provide
that any evidence tendered by an applicant, its officers, or employees prior to the decision on leniency will not be used against the applicant, its officers, or employees in the event the leniency application is denied for the reason specified in Article 12 (2) sub-paragraph 5 ( "Where the submitted evidential materials are not recognized to substantiate cartel activities").

III. Proposed Rules of Investigation Procedures

Article 13 (Counsel's Participation in Investigation Procedures)

The general rule of Article 13 of the Proposed Rules for Investigation Procedures is to “allow the counsel appointed by the investigated company to participate in the entire procedures of the investigation....” There are several exceptions, only one of which causes concern to the Sections. That is paragraph (2), which reads, “Notwithstanding Paragraph (1) above, any urgent investigation of cartel activities may be commenced and carried out regardless of the investigated company’s request for participation of counsel.” The Sections believe that the word “urgent” is so broad and undefined that it seriously undermines the general principle that counsel should be permitted to participate in the company’s defense. It also seems unnecessary because Article 13 (1)1 already provides an exception to the participation of counsel where “the investigated company’s request for participation of counsel is deemed to delay or interfere with the commencement or progress of the investigation.” This exception seems to apply to the situation where the investigating official is conducting an on-site investigation to gather evidence, and to wait for the arrival of counsel would delay the investigation and jeopardize the collection of evidence. It is unclear what other circumstances the investigation official may deem “urgent” such that the presence of counsel can be denied. The Sections therefore strongly recommend that proposed Article 13 (2) be deleted. The Sections also recommend that in Article 13 (1)1, the word “on-site” be added before “investigation.” This would clarify that this exception applies to the participation of counsel where “the investigated company's request for participation of counsel is deemed to delay or interfere with the commencement or progress of the [on-site] investigation.”
The Sections appreciate this opportunity to comment and are available to respond to any questions regarding this submission.