ROC's Second Report Under the United Nations Convention Against Corruption

Parallel Report

Presented by:

ACFE Taiwan Chapter

I. Foreword

Taiwan ranks among the top 30 in terms of global economy. However, due to the constraints of international political reality, it cannot become a member state of the United Nations. However, Taiwan still adheres to international regulations such as conventions of the United Nations and incorporates them into domestic laws, including the “Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights” enacted in 2009 and the “Act to Implement United Nations Convention against Corruption” enacted in 2015. The ROC’s Second Report Under the United Nations Convention Against Corruption is a periodic national report prepared and distributed by the Executive Yuan in accordance with the requirements of Article 6 of the “Act to Implement United Nations Convention against Corruption”, which serves as a channel for domestic review and international communication.

ACFE Taiwan Chapter (ACFE Taiwan) aims to develop and promote the professional knowledge and skills in fraud prevention and forensic investigation. Anti-corruption issues are also an important mission of ACFE Taiwan with continuous concern. The ROC’s Second Report Under the United Nations Convention Against Corruption proposes a parallel report, which is expected to serve as a reference for Taiwan to promote fraud and corruption prevention and governance in the future.

II. Summary

According to the Association of Certified Fraud Examiners (ACFE)’s Occupational Fraud 2022: A report to the Nations, the proportion of occupational fraud involving corruption has been increasing over the years (from 33% in 2012 to 50% in 2022). In terms of fraud countermeasures and strengthening internal control, "the establishment of hotline reporting" increased by 16% (54% to 70%), enhancing employees training increased by 14% (47% to 61%), and "anti-fraud

policy development" increased by 13% (47% to 60%), enhancing executive officers training increased by 12% (47% to 59%), and "performing fraud risk assessment" increased by about 11% (36% to 46%).

Based on the experience of domestic and foreign fraud incidents observed in the past few years and the current situation of domestic legislation and law enforcement, ACFE Taiwan lists seven relevant findings and recommendations that correspond to the UNCAC provisions as follows:

Serial Number	Observation and Findings	UNCAC	Page
I	Court information disclosure – Disclose appraiser or expert witness reports	Article 10. Public reporting Article 11. Measures relating to the judiciary and prosecution services Article 32. Protection of witnesses, experts and victims	P4-7
II	Transparency of legal persons – Establish a reporting and disclosure system for beneficial owners	Article 12. Private sector	P7-10
III	Legal person's criminal liabilities – Constructing a comprehensive legal system on legal person's criminal liabilities	Article 26. Liability of legal persons	P10-16
IV	Whistleblower protection – Formulating relevant regulations and supporting measures for whistleblower protection	Article 33. protection of reporting persons	P16-18
V	Enhanced punishments for misconducts – Punishments to public authorities for violating fiscal discipline	Article9. Public procurement and management of public finances	P18-23

III. Findings and Recommendations

I. Court information disclosure – Disclose appraiser or expert witness reports

(I) Observations and Findings: The appraisal reports (including expert witness reports) are not open to the general public

Open information shall be the legislative spirit of the Securities and Exchange Act. American Justice Louis Brandeis once indicated the advantage of open information by saying, "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman." In addition to the Securities Exchange Act, Taiwan has also promulgated four sunshine laws, including the Act on Recusal of Public Servants Due to Conflicts of Interest, the Act on Property-Declaration by Public Servants, the Political Donations Act, and the Lobbying Act, which collect relevant information from public officials, political parties, and candidates. In addition, the **general** public with access to court information also exerts the monitoring function of "disinfectants and the policeman". Similarly, one of the goals of Taiwan's judicial reform is to rebuild the relationship between the judicial system and the general public, that is, to achieve such goal by relying on "judicial openness and transparency" (point 7 of the reform plan) and "review mechanism for court's judgments" (point 10 of the reform plan), etc. The government promotes the disclosure of judicial information. In 2010 the judgments were disclosed, and in 2017 the indictments were also made available to the general public, which all aimed at making the judicial trial more transparent.

Reports issued by appraisers or expert witnesses are information about court activities, however, are not included in the scope of court's judgments and indictments; These reports can help judges obtain high-quality information and improve the quality of court's judgments; the disclosure of these information can also make possible for the review

and supervision by the general public, so that the general public can better understand the goal of judicial adjudication.

The current status of the disclosure of court activities information is as follows:

1. Legal regulations:
   In February 2005, Taiwan implemented the Freedom of Government Information Law. However, such Law is a common law, and the special law shall take precedence. In 2010, the amendment to Article 83 of the Court Organization Act was passed, requiring that courts and branch courts at all levels shall regularly...and in an appropriate manner... disclose judgments. However, the litigation files are not covered by such provision of public disclosure, and Paragraph 2 of Article 242 of Taiwan Code of Civil Procedure, "Where a third party files the application provided in the preceding paragraph with the parties' consent, or with a preliminary showing of his/her legal interests concerned, the court must decide the application." Therefore, under the regulations of the Freedom of Government Information Law (Articles 6, 7, and 18), the Archives Act (Articles 17 and 18), and the Taiwan Code of Civil Procedure (Article 242), whether procedurally or substantively, the general public faces obstacles for obtaining sufficient judicial information.
2. Relevant Judgements: Yes
   (1) 2019 Pan-Zi No. 274 of Supreme Administrative Court
   (2) 2016 Su-Zi No. 207 of Kaohsiung High Administrative Court
   (3) 2015 Shang-Yi-Zi No. 352 of Taiwan High Court
   (4) 2011 Chung-Shang-Geng-(II) Zi No. 73 of Taiwan High Court

By taking a closer look at the current judgments, the expert reports or appraisal reports have not been fully disclosed, and at most only part of the reports is used as the basis for expressing the court's opinion.

(II) Recommendations:

Information openness is necessary and meaningful. According to Point 7 of Taiwan’s judicial reform plan, "judicial openness and transparency," pursues the goal of rebuilding the relationship between the judicial system and the general public. To achieve this goal, government has established a five-year plan in open digital policy for the general public to enquiry, transmit, store and use judicial information. For related information, point 10 of the plan, "review mechanism for court’s judgments" aims at conducting analysis and research on the original definite judgments that have been discarded or revoked after a retrial or extraordinary appeal, and providing major cases to the Judges Academy as research materials and for discussing the relevant provisions on evidence matters in civil, criminal and administrative litigation. The use of appraisal system and expert witnesses, etc., will make fact-finding more rapid and correct. In principle, the appraisal reports shall be fully disclosed to allow the general public to inspect them and achieve the purpose of supervising the judicial system.

1. Recommendation: After the termination of a litigious relationship, the confidential part of the expert opinions can be hidden, and the rest shall be made public. At this point, the protection of the parties' right to litigate or the exercise of the right of defense will be terminated, and the disclosure of government information such as relevant litigation files shall only be limited to the protection of the general public's right to know.
2. Supporting measures:
   (1) Grant the parties or their agents th**e** right to apply to the court to obscure specific information: The parties or agents may request the court to obscure specific information on the grounds to reduce the risk of improper infringement on their privacy.
   (2) Exceptions to non-disclosure of specific types of documentary evidence: The disclosure of specific types of documentary evidence shall be excluded if it may cause major harm to public interests.

Remarks: (Reference regulations/related units)

- The Freedom of Government Information Law
- Court Organization Act
- Taiwan Code of Civil Procedure
- Archives Act

II. Transparency of legal persons – Establish a reporting and disclosure system for beneficial owners

(I) Observation and Findings

The robustness of a country's securities market relies on the timely and adequate disclosure of information by listed companies. Among them, the most important information for investors is the person who actually controls the company; it is equally important for competent authorities to identify the person who actually controls the company for the supervision and responsibility prosecution.

By taking a closer look at the operation of Taiwan's capital market, it is very common for corporate representatives to serve as directors and supervisors. Except for independent directors in many listed companies, all other directors and supervisors are corporate representatives. Since these representatives may be reassigned at any time, and these corporate shareholders may be corporate organizations under a certain layered structure, it is not easy for outsiders to identify who actually controls these corporate shareholders. Due to the opaqueness of corporate shareholders, the application of regulations and the pursuit of liability lawsuits face considerable challenges. For example, it is difficult to identify whether a company has transactions with persons who have an interest in the directors, or to identify who is a de facto director.

Not only in Taiwan but also in other countries where a natural person uses the opaqueness of the legal person to evade liability. All countries recognize that only the establishment of international standards can effectively deter criminal acts of abuse of legal persons. Otherwise, people

with the intention to set legal persons in jurisdictions with relatively loose regulations and use legal persons to cover their true identities, illegal purposes and criminal proceeds will lead to an inability to effectively prevent crimes.

In 2003, the Financial Action Task Force (FATF) issued 40 recommendations for money-laundering prevention and counter-terrorism financing, of which the 24th recommendation is "transparency of legal persons and beneficial owners". This Article states that "Countries shall take measures to prevent legal persons from being used as vehicle of money laundering or terrorism financing, and shall ensure that competent authorities have timely access to sufficient and accurate information on the beneficial owners of legal persons."

EU also issued the "Fourth Anti-Money Laundering Directive (4th AMLD)" in 2015[1], requiring member states to fully, timely and accurately grasp the information of the beneficial owners of legal entities such as companies established in their own jurisdictions. The relevant information shall be stored in places outside the companies, and member states shall establish a centralized information system (central database) to manage relevant information for law enforcement agencies and stakeholders to view. The EU also requires member states to implement this Directive by June 2017. EU's AMLD 5 [2]that came into effect in July 2018 clearly states that member states shall fully allow the general public to access the company's list of beneficial owners by January 10, 2020. In addition, each and all member states shall, by March 30, 2020, establish the list of trust beneficiaries which may be kept confidential, but its information shall be able to be exchanged between law enforcement agencies.

As far as individual countries are concerned, the United Kingdom and EU countries have amended relevant regulations in recent years and established beneficial owner reporting systems to improve the transparency of legal persons. The Cayman Islands, which was considered

1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L0849, last visited 11.15.2021.

2 https://eur - lex.europa.eu/legal - content/EN/TXT/?uri=celex%3A32018L0843, last visited 11.15.2021.

a tax haven in the past, also amended its laws in 2017 in order to establish accurate and real-time information on beneficial owners, which requires companies to prepare information on beneficial owners. The company can issue a "restrictions notice" to restrict the shareholder from exercising shareholder rights (including transfer of shares, voting, or receiving dividends, etc.) if the shareholder is unable to provide information on beneficial owners within a specified period of time. In addition, the authority of the Cayman Islands has also promised to disclose the materials regarding the information of beneficial owners to the general public in 2023 as the regulations of the United Kingdom[3].

Among Asian countries, Singapore has a relatively sound and robust system. Singapore's amended Company Act requires companies to prepare information on beneficial owners, which came into effect on March 31, 2017. In February 2020, the Singaporean competent authority under the authorization of the Company Act established a Central Register of Controllers for beneficial owners and ordered each company to upload the list of beneficial owners to the aforementioned reporting system[4].

At present, Taiwan has not yet established a substantial reporting system for beneficiary owners under the Company Act like other countries. The Company Act was amended in 2018 to add Article 22-1, which only requires companies to report the information of directors, supervisors and shareholders holding more than 10% of the shares, which is far different from the requirements for beneficial owners. The Financial Supervisory Commission has required listed companies and financial institutions to disclose shareholders holding more than 5% of the shares in the quarterly reports. The regulations are more stringent than the one in Company Act. However, as mentioned above, shareholders reporting and beneficial owners reporting are of different nature and requirements.

The impact of Taiwan's regulations being far different from international standards cannot be overlooked. As each and all of the

---

[3] https://caymannewsservice.com/2020/07/uk-confirms-ots-have-till-2023-to-make-bos-public/, last visited 11.15.2021.

[4] https://www.acra.gov.sg/compliance/register - of - registrable - controllers · last visited 11.15.2021.

countries have strengthened the transparency of legal persons and the regulations on beneficial owners, if Taiwan's legal system fails to keep pace, it will not only be detrimental to the maintenance of the order of Taiwan's capital market, but also may make Taiwan a "safe haven" for international criminals.

(II) Recommendation: Establish a reporting and disclosure system for beneficial owners

In 2028, APG will conduct the next round of evaluation. Taiwan's legislative and executive sectors shall face up to such issue as soon as possible, and have the general public understand the value and benefits of corporate transparency through regulatory amendments and policy promotion. Taiwan shall keep up with the international pace as soon as possible to maintain the sound and robust development of its capital market and protect the rights and interests of market participants.

In terms of relevant practices, it is recommended to amend the Company Act to establish a reporting system for beneficial owners. The FSC shall also amend relevant information disclosure regulations to require public companies disclose the beneficial owners of major shareholders, directors and supervisors.

Remarks: (Reference regulations/related units)

- Company Act / MOEA
- Money Laundering Control Act / MOJ
- Securities and Exchange Act / FSC

III. Legal person's criminal liabilities – Constructing a comprehensive legal system on legal person's criminal liabilities

(I) Observation and Findings:

1. Current Situation

In the second national report of the United Nations Convention against Corruption issued on April 20, 2022, regarding the criminal

responsibilities of legal persons (§26 I, II, IV), it was mentioned that Taiwan adopts the criminal law theory from the European civil law system. Although there is no provision for criminal responsibilities for legal persons in the Criminal Code of the Republic of China, the legislative practice is to supplement the insufficiency of the Criminal Code with the regulations in the supplementary criminal provisions, including Article 127-4 of the Banking Act and Paragraph 1 of Article 16 of the Money Laundering Control Act, Article 13-4 of the Trade Secrets Act, Article 49-5 of the Act Governing Food Safety and Sanitation, and Chapter VII of the Government Procurement Act, etc., which stipulate that legal persons are also subject to criminal liabilities.

In recent years, several corporate crimes have occurred in Taiwan, which not only severely affect the daily life of the general public, but also cause irrecoverable damage, these crimes include cases involving Yu Shen Chemical Company who illegally added plasticizer, Renwu Factory of FPC who illegally dumped sludge containing mercury, bribery to legislators by CTCMA, illegal lending by the Chinese Bank, and the illegal oil mixture by Chang Chi Foodstuff Factory Co., Ltd., etc. The violating enterprises and corporates may generally regard the misconduct as normal business procedure and inevitable problems. And because corporate activities involve complex decision-making procedures, for these behaviors, the terms “normal business procedures” and “inevitable problems” are often used as excuses, arguing that they shall not be held accountable. However, not only the relevant natural persons who shall be responsible for the misconduct, but also the legal persons shall also be held accountable for their improper corporate culture.

In July 2014, the 2014 Shin-Chi-Shang-Yi-Zi No. 13 criminal judgement by the Intellectual Property Court confirmed that Chang Chi Foodstuff Factory Co., Ltd. was sentenced to a fine of NT$38 million for violating the Act Governing Food Safety and Sanitation, but the illicit gains could not be confiscated due to lack of evidence in the law on the grounds that "the legal person has no capacity to commit crimes". In this case, based on the principle of double jeopardy and criminal priority, the

administrative penalty of NT$1.85 billion was revoked, so that the price borne by Chang Chi for violating the food safety law was only NT$38 million, which did not match the principle of proportionality comparing to its illicit gains of NT$ 1.85 billion, and thus aroused the public criticism. An extraordinary appeal was filed on January 13, 2015 by the Prosecutor General of the Supreme Prosecutors Office. [5]The Act Governing Food Safety and Sanitation was not amended until the occurrence of several major food safety incidents. The key amendments include four key points respectively known as: 1. Reversing the burden of proof, 2. Significantly increasing the fine for a legal person to NT$2 billion, 3. Contributing confiscated illicit gains to the Food Safety Fund, and 4. The separate management of feed and food production factories.

In 2013, Articles 13-1 to 13-4 of the Trade Secrets Act were added for the penalty provisions, of which Article 13-4 stipulates the adoption of a "Dual Penalty Model" which punishes both the perpetrator and his/her enterprise organization for the same criminal act.

For perpetrators, they are punishable based on their own illegal and criminal conduct; for corporates, they are punishable for their ineffective supervision. Due to the waiver of proviso of Article 13-4 stipulates that the legal person or natural person employer shall bear the burden of proof to prove that it/he/she has done its best to prevent the misconducts, in practice, many companies now require job applicants to sign an affidavit when recruiting as a proof to show that the company has no intention to require any applicant to bring any trade secrets of the former company when on-boarding. However, some argue that the waiver provisions of the proviso are based on the principle of "presumed negligence", and it is unclear to what extent the supervisory measures taken by a business organization can be regarded as "done the best to prevent certain acts". The determination for each individual case is full of a high degree of uncertainty, which makes business organizations concerned about being punished easily.[6]

[5] Hsieh, Bi-chu, Analysis of Whether the Legal Person can be the Subject of Crimes and Related Issues, Case Studies by Legislative Yuan, March 1, 2015.

[6] Wu Hsin-Yi, Review of Taiwan's Trade Secrets Legal System, Case Studies of Legislative Yuan, December 21, 2020.

2. The lack under current status and the advantages of the legal framework of "legal person criminal liability"

In recent years, in order to strengthen corporate governance, the competent authority of Taiwan's listed companies has continuously introduced various management mechanisms, including corporate governance 2.0, corporate governance 3.0 and other related measures. For example, for the establishment of the "Corporate Governance Officer" system, since March 2019, the Financial Supervisory Commission started to require listed companies and the financial and insurance companies with a paid-in capital of NT$10 billion or above to establish a corporate governance officer. Such regulation started to apply to where the paid-in capital exceeds 2 billion yuan for non-financial listed companies since 2021. The purpose is to provide the directors and supervisors with accurate, effective and real-time information, to assist the above personnel in carrying out their responsibilities, exert their supervisory functions, and serve as a bridge between the board of directors and various business units and competent authorities. On May 17, 2021, TWSE announced that in the future, any new company applying for listing shall establish a position of corporate governance officer, so that these companies will be familiar with the authorities and operations of the corporate governance officer before applying for listing, so as to achieve the purpose of seamless integration after listing.

For listed companies, these administrative regulations only cover administrative responsibilities but do not involve criminal responsibilities, which insufficiently bind the companies. It is even argued that these regulations will increase the company's operating costs. Lack of the willingness to comply with such regulations could lead company frauds that emerge in endlessly.

The advantages of the system of formulating the criminal liabilities of legal persons are as follows:

(1) Enable Taiwan’s legal system to respond to the needs of society and to be in line with international standards.

(2) In response to Taiwan’s participation in relevant organizations around the world, dealing with transnational corruption, if the issue of legal person's criminal liabilities is not properly-addressed, there will be a gap in the legal system with other countries around the world, which will hinder Taiwan’s integration into international standards.
(3) Effectively curb corporate illegality.
(4) Strengthen the concept of legal persons attaching importance to legal compliance.
(5) Legal persons actively engage in corporate governance.
(6) Establishment of a legal compliance system.
(7) Establishment of internal procedures and standards to optimize the detection and investigation of misconduct.
(8) Prevention of future economic crimes from occurring.
(9) The criminal procedures of prosecuting a legal person provide higher protection for the defendant than the administrative penalty procedures, and also higher protection for the legal due process of the legal person.

(II) Recommendations:

1. Taiwan shall actively establish a comprehensive legal system of legal person’s criminal liabilities

In the past, conventional criminal laws assumed that only natural persons would have the ability to commit crimes. Nowadays, the legal system of various countries states that the crimes committed by legal persons shall also be punished accordingly. Therefore, it is recommended that the legislation departments of Taiwan shall actively review the current logic and attribution model of legal person criminal responsibilities, and establish a comprehensive legal system of legal person criminal responsibilities, so as to be able to fight against the economic crimes that emerge in endlessly. Moreover, the attribution system of criminal responsibilities of common law has expressly provided the punishment of legal person crimes. Through the legal person's criminal liability, one may

ensure that the legal person can establish internal optimized procedures and standards for the detection and investigation of illegal acts, so that the legal person can actively engage in the establishment of corporate governance and legal compliance, and prevent the occurrence of economic crimes in the future.

2. Adopt the "organizational defects" as the basis for the criminal liability of legal persons[7].

In the process of corporate operation, if damage is caused, who is the decision-maker or perpetrator, senior executive officers or low-level employees? For illegal or criminal acts of low-level employees in organization, although being personal behaviors, they may also be the results of lack or failure of the internal supervision or control system. For such organizational defects, the legal person shall bear the criminal responsibility. Criminal liability for legal persons will be able to motivate legal persons to enhance their own supervisory responsibilities and actively control the illegal acts of insiders.

3. For the punishment to legal persons, one may refer to the Code Pénal (France). In addition to fines, measures such as dissolution, restriction of advertisements, and prohibition of certain operations can be adopted to effectively curb corporate violations.
4. The "Dual Penalty Model" combines individual and legal person liability.

For the illegality of any enterprise, the criminal responsibilities of both the person in-charge and the legal person shall be investigated simultaneously, so as to prevent the person in-charge of the enterprise with leadership and decision-making power from committing further crimes in the future.

5. Formulation of the specific content of corporate organizational supervision responsibilities.

Article 13-4 of the Trade Secrets Act stipulates that if the representative of a legal person has done his/her utmost to prevent a crime

[7]Wang, Huang-Yu, The Study on the Criminal Liability of Legal Persons, FJU Law, No. 46, December 2013.

from being committed, the legal person would not be punished. However, the standard of proof of what is meant by "done the best to prevent and avoid" is not specific and sufficiently clear, which has led to the controversy of proof and determination in the current litigation. Therefore, it is suggested that the specific content of corporate organizational supervision responsibility shall be established, such as stipulating that legal persons shall establish reasonable and necessary preventive measures like actively implementing a fraud risk management system, or establishing a mechanism to prevent and detect employees' criminal acts.

IV. Whistleblower protection – Formulating relevant regulations and supporting measures for whistleblower protection

(I) Observation and Findings: The Whistleblower Protection Act (draft) has not been ~~fully~~ comprehensive

According to the findings of ACFE's Occupational Fraud 2022: A report to the Nations, internal reporting is the most effective mechanism for fraud detection (42%), especially internal employee reporting, followed by internal audit (16%), and managers (12%). Therefore, the legislation of the whistleblower protection law and the establishment of an effective hotline reporting system are the most effective ways to mitigate corruption and bribery.

In May 2019, the Executive Yuan submitted the draft of the Whistleblower Protection Act (public-private merged version) to the Legislative Yuan for deliberation. Later, due to the re-election of legislators, no further deliberation was conducted. The current 2020 version of the draft was subsequently amended in 2020 and 2021, and is still under review by the Executive Yuan.

In addition, the draft adopts a hierarchical reporting procedure. The whistleblower of any fraud shall first report to the staff of first tier (i.e.,

internal supervisors or personnel with investigation authority), and only after such procedure can they report the fraud to the persons of second tier, which are legislators or press media, otherwise they will not be protected by the Act. The feasibility and appropriateness of hierarchical reporting can be referred to as foreign legislation.

In addition, the protection provided by the current draft includes prohibition of adverse measures, protection of the right to work, personal safety, aggravated punishment for retaliatory behaviors, and reduction of liability, etc. The draft indicates that only whistleblowers of real-name reporting can enjoy the protection. However, from the actual practice, whistleblowers concern the most about their identity confidentiality. Article 15 of the draft requires that the handling staff be responsible for the identity confidentiality of the whistleblowers, however, specific protection measures are still lacking.

At present, financial holding companies, securities sector, banking sector, insurance sector, and listed companies all have regulations on establishing relevant whistleblowing and reporting systems. The draft can mandate the private sectors formulate the content of the whistleblower reporting system and distribution of rewards.

(II) Recommendations:

1. Specifically explain the key points of the latest legislative amendments to the draft of the Whistleblower Protection Act.
2. The draft of the Whistleblower Protection Act shall describe foreign legislation of reporting by whistleblowers on a hierarchical basis.
3. The specific actions to strengthen the confidentiality of the identity of the whistleblowers shall be clarified and standardized in the system design and practical operation:
   (1) The goal setting, operation methods shall link with the company's integrity management and code of conduct.
   ~~(2)~~ The method to ensure confidentiality and security of

whistleblower's identity and content of report during the process of receiving, recording and archiving of report.

(3) Qualifications, rights and obligations of personnel responsible for handling reported fraud cases, and maintain independence in organizational operations.

(4) Company policy shall state and promise not to retaliate against whistleblowers in any manner.

(5) Implement education and training on the whistleblower reporting system for employees, suppliers and third parties.

(6) An independent unit regularly evaluates the performance of the company's whistleblowing reporting system.

4. Plan and formulate the contents of whistleblowing reporting system required and distribution of fraud disclosure rewards for the private sector which achieves a certain business scale, number of employees, or for listed companies, etc.

Remarks: (Reference regulations/related units)

- Draft of Whistleblower Protection Act/Executive Yuan
- Ethical Corporate Management Best Practice Principles for TWSE/GTSM Listed Companies/TWSE
- Corporate Governance Best Practice Principles for TWSE/GTSM Listed Companies/TWSE

V. Enhanced punishments for misconducts – Punishments to public authorities for violating fiscal discipline

(I) Observation and Findings: Insufficient sanctions against public authorities for violations of fiscal discipline

1. Operation of State Confidential Fees of Office of the Presidential

What the United Nations calls "grand corruption" refers to the widespread corruption at the highest levels of government, the severe abuse of power, which leads to rapid eroding of the general public's confidence in the rule of law, economic stability and good governance of the government[8]; what the U4 Anti-Corruption Resource Center calls

[8] United Nations(Sept. 2004), United Nations Handbook on Practical Anti－Corruption Measures for Prosecutors and

“grand corruption” has three characteristics: “Misuse or abuse of high-level power”, “large sums of money”, and “harmful consequences”[9]; Transparency International defines it as “the abuse of high-level power to benefit a few individuals at the expense of the many, causing severe and widespread harm to society, often without punishment[10]”.
Taiwan's "state confidential fee" is the approved fund (and recorded in written) for the execution of affairs by the President and Vice President of the Office of the Presidential. The false reimbursement of state confidential fees undermines the fiscal discipline of the government. These abuses of power are committed by the highest-level government officials and may fall into the category of "grand corruption".

In May 2011, the Legislative Yuan amended Article 99-1 of the Accounting Act to de-criminalize the offense of improper reimbursement of special expenses for the heads of general agencies, which would also not hold the heads of general agencies accountable for administrative and civil financial responsibilities. In March 2020, the Legislative Yuan proposed to amend Article 99-1 to align the regulations on state confidential fees with the ones on special fees of the heads of agencies; in other words, the legal system would not hold the head of the Office of the President accountable for criminal, administrative and civil financial responsibilities, and the exemption can be extended retroactively to 16 years (to 2006). In mid-May this year (2022), the Finance Committee of the Legislative Yuan reviewed the draft amendment and decided to keep the whole proposal without further amendment and submitted such draft to the general assembly for handling. Before the second reading, it shall be negotiated between the caucus. However, the ruling party, even being strongly boycotted by the opposition parties at the end of May, forcibly passed the amendment, which would de-criminalize the responsibilities of the false reimbursement.

Investigators, 23.
[9] U4 Anti－Corruption Research Centre (Oct. 2, 2020), U4 Helpdesk Answer.
[10] Transparency International (Sept. 21, 2016), *WHAT IS GRAND CORRUPTION AND HOW CAN WE STOP IT.* Transparency International. https://www.transparency.org/en/news/what-is-grand-corruption-and-how-can-we-stop-it

The state confidential fee and the agencies heads' special fee are of different nature and regulations, and the amounts also vary greatly: The agencies heads' special fee involves a large number of heads of agencies, including the principals of public primary and secondary schools, with more than 6,000 people, while the state confidential fee only involves very few which are two people and mainly the President; the powers of the two kinds of agencies heads are very different, and not a single person throughout Taiwan can overpower the President and Vice President. As for the regulations that half of the expenses can be reimbursed by invoices and receipts, in the case of special fee of heads of agencies, as early as 49 years ago (1973), the Directorate General of Budget, Accounting and Statistics, Executive Yuan issued special permission by official letter, which did not require the spenders to disclose the names and expenses of the final recipients of the fee. However, in the case of state confidential fee, there is no similar disclaimer in any form including an official letter. As for the amount of the two types of funds, the difference can be as much as 200 times: The state confidentiality fee once exceeded NT$4 million per month, while the special fee for heads of schools was only NT$20,000.

2. The operation of the labor fund by BLF of the Ministry of Labor

   The Bureau of Labor Fund (BLF) of the Ministry of Labor of Executive Yuan is in charge of six major funds[11] with a total amount of more than NT$4 trillion that cover 14 million people or 60% of the national population. The operation of the six major funds is either being operated by the agency itself or entrusted to other professionals. The domestic investment team and the international investment team of BLF are respectively assigned to be responsible by regions.

   Since 2007, the former Director of the domestic investment team of BLF has served as the Director of the financial management team of the

[11] The six major funds refer to the five funds, which are the new labor pension, the old labor pension, labor insurance, employment insurance, and advance payment of wages in arrears, and the National Pension Insurance Fund managed by the Ministry of Labor entrusted by the Ministry of Health and Welfare.

Labor Pension Fund Supervisory Board (the predecessor of BLF) and seven years later, upon the establishment of BLF in 2014, the Director of the domestic investment team. At the end of 2015, the Department of Government Ethics and the Labor and BLF received an anonymous report which stated that the behaviors of such Director were suspected of having violated the code of ethics for public servants. In the 4 years since 2015, there have been 4 similar reports, but all of them were finally closed due to a lack of solid evidence.

The BLF selects securities companies to make an investment on its behalf annually or quarterly. Such approach not only fails to take into account the quality of the research reports submitted by the securities companies for individual cases, but also forces the securities companies to obey the Director due to the company selection power held by such Director. In 2017, the proposal to have a new Director of BLF was made, but the official document originally issued was withdrawn.

The Director, who had many controversial acts, had been holding the office for a long time, and the Head of BFL failed to correct such acts. By July 2020, the fraud conducted by the Director and securities companies for speculating on the stock price was disclosed. In September, AAC found that there were funds of NT$9 million from unknown sources deposited in the Director's bank account. At the end of November, the case was referred to AAC for investigation. In March of the following year, the New Director of BLF took office, and emphasized the implementation of internal control. The Financial Supervisory Commission conducted a special project on investment trust companies and provided briefing to the Finance Committee of the Legislative Yuan. After the briefing, the Finance Committee of the Legislative Yuan urged the Financial Supervisory Commission to conduct audit of security companies in advance, and punish the investment trust companies with improper conduct in cooperating with the former Director of BLF, which was a strong message of corruption investigation that emphasized the importance of financial discipline.

The false reimbursement of state confidential fee by the Office of the Presidential and illegal stock speculation by securities companies and the Director of the domestic investment team of BLF of the Ministry of Labor both show the management style of the high-level executives of public agencies do not pursue the integrity of public servants, nor have they corrected their corruption, which harms fiscal discipline and is a defect of government internal control. In the case of state confidential fees, the Legislative Yuan amended Article 99-1 of the Accounting Act at the end of May 2022, which was a legislation based on specific individual case of the head of the Official of the President, and improperly compared the state confidential fee with the special fees of the agencies heads since Taiwan's top administrative head of the government elected by citizens will not be held accountable for criminal and administrative responsibilities, which ignored corruption investigation and covered the acts retrospectively, demonstrating that not only the internal control of the government has failed, but also the state internal control as well. Fortunately, in the case of fraudulent stock speculation by BLF of the Ministry of Labor, the Finance Committee of the Legislative Yuan heard the report of the Financial Supervisory Commission and urged the Financial Supervisory Commission to take action against corruption, impose sanctions on behaviors with poor financial discipline, and deliver a message to curb corruption, demonstrating efforts of the legislative departments to improve the internal control of the executive departments, and hence the effect of the internal control of the government is maintained.

(II) Recommendations:

If the regulations of sanctions imposed by laws can be implemented for a corruption investigation, the government's fiscal discipline can be expected to improve. The BLF, at last, referred the misbehaved public servants to Agency Against Corruption (AAC). After taking office, the new Director amended the original practice rules, emphasizing the importance of internal control, and demonstrated the will to reform through actions,

which is a good example. Supporting measures:

1. The state affairs confidential fee is not a confidential fee, and there are laws governing its reporting procedures and related accounting certificates and documents. All provisions formulated shall be implemented.
2. Article 99-1 of the Accounting Act or any law shall not be improperly amended. Any amendment to laws based on any individual case shall be avoided since it may cause certain people to seek evasion of liabilities.

Remarks: (Reference regulations/related units)

- Accounting Act/Directorate General of Budget, Accounting and Statistics, Executive Yuan

VI. Enhanced punishments for misconducts – Punishments to private organizations for issuing false evaluation reports

(I) Observation and Findings:

Tangible assets such as real estate and intangible assets such as patents shall be evaluated for the value of the transaction when trading, paying taxes, undergoing litigations, and financial reporting after such transactions. At this point, it is often necessary to rely on the assistance of external professionals. Real estate appraisals rely on real estate appraisers or architects; intangible assets appraisals rely on certified public accountants or other professionals.

When executing relevant matters and affairs including appraisal, professionals shall comply with the standards and professional ethics promulgated by the relevant industries, and shall not have improper behaviors, violate or ignore the due diligence obligations in business affairs. If professionals ignore their obligations and issue false appraisal reports, it may lead to unfair transaction conditions, damage the rights and interests of either of the parties, and may also become a tool to cover up the breach of trust such as distress sales and tunneling, and damage the quality of

financial reports.

In practice, transactions between related parties are not uncommon, and there are many types of transactions which can be the purchase or sale of real estate, the authorization to use patent rights, or the mutually-agreed merger and acquisition of enterprises. At this point, the counterparty of the transaction is a related party, the interests of both parties are the same, and those whose rights and interests are damaged are not the parties of the transaction but the interested parties of either of the transaction parties, such as, in a mutually-agreed merger, the minority shareholders of the merged company. These minority shareholders who are driven out by cash have no right of speech, and the cash consideration they can receive is often underestimated due to false appraisals. The harm of false appraisal reports to the fairness of private economic transactions is not limited to transactions, but also includes subsequent financial reports. Once the reliability of the information is damaged, other damages will be derived, and the fairness of the transaction and the maintenance of the transaction order will be adversely affected.

According to the current legal regulations, there are no administrative, civil and criminal responsibilities for false appraisal reports, but for its implementation, when referring to the list of CPAs punished by the Accounting Act for the last five years updated by the Financial Supervision Commission in February this year (2022), as well as the list of punishments for real estate appraisers in each and all counties and cities published by the Ministry of the Interior, we can find that very few were punished for their false appraisal reports, showing that although the regulations exist, its implementation is ineffective. The joint development project of Taipei MRT Xindian Depot (the Meihe City case) is one of the few cases where sanctions were imposed on false appraisal reports.

In the Meihe City case, the Taipei City Government provided the land, while the other party, Radium Life Tech Co., Ltd., provided the construction labor and materials. After both two parties jointly constructed

the Meihe City buildings complex for sale, the interests (referred to as "equity") were distributed proportionally. At this point, if the appraisal of the land was falsely underestimated, the rights and interests of Radium would naturally increase. The appraisal report issued by the real estate appraiser hired in this case underestimated the value of the land, and illegally sought profits for Radium. Radium not only had the appraiser issue false appraisal reports, but also conspired with the Director of the Joint Development Division of DORTS of Taipei City and the subordinates, in which the Director instructed the subordinates to alter the appraisal report to lower the value of the land and increase the equities that Radium could distribute, causing the City Government to suffer a loss of nearly NT$10 billion. In this case, the real estate appraiser was punished. In this year (2022), the Supreme Court sentenced the Director and the subordinates to 10 years and 4 years imprisonment respectively, in accordance with the Anti-Corruption Act, and the whole case was fully closed. Although the litigation period ranged for more than seven years, it was one of the few cases where sanctions were imposed on false appraisal.

Only when the appraisal report is correct can information be transparent and transactions be fair, and business order is maintained. Although there are regulations that can punish the issuance of false reports on real estate and shares, etc., under current laws, there are often situations where false appraisal remains unpunished. There is plenty of room for improvement in the implementation of laws. In particular, the transactions with false appraisals with huge transaction amount will severely harm the rights and interests of the counterparty in the transaction and the transaction order, which would be much more severe to related party transaction such as mutually-agreed corporate mergers and acquisitions. If the punishment for false appraisal reports is not fully implemented, and the misbehaviors of those with intentions cannot be effectively prevented, it would be as if the appraisers who issue the correct appraisal reports are being punished. The purpose of punishing the issuance of false appraisal reports is to avoid such discouragement to those who comply with laws.

(II) Recommendations:

Because law enforcement staff can impose a penalty on issuance of false appraisal reports, they shall first fully understand the content of the appraisal report and obtain supporting evidence to determine whether the appraisal data is reliable before making a decision on whether to impose any penalty. In addition, if the appraisal reports can be made public when necessary for public review, it can improve the quality of the appraisal reports. Therefore, the following supporting measures are recommended.

1. Establish a database to provide information on fair market prices. For example, the real estate registration system can provide objective information that can be used to identify whether the appraisal of real estate is false.
2. Cultivate the competency of law enforcement staff to understand the content of appraisal reports of real estate, enterprise or individual intangible assets (such as patent rights and trading secrets) to determine the quality of the appraisal reports.
3. Encourage the disclosure of appraisal reports and provide opportunities for public review and supervision. Formulate the regulations for public appraisal reports, set up an information disclosure platform, and provide a medium for the general public to obtain information.

Remarks: (Reference regulations/related units)

- Real Estate Appraiser Act/Ministry of the Interior, local county and city governments
- Certified Public Accountant Act, Securities and Exchange Act/FSC
- Tax Collection Act/MOF
- Criminal Code of the Republic of China/MOJ

VII. Enhanced fraud prevention and investigation training in the public and private sectors

(I) Observation and Findings: Public and private sectors shall strengthen internal control and fraud prevention training

The competency of organization members is one of the key factors in

the achievement of organizational goals. To develop the competency of organization members is also known as “training”.

According to ACFE’s Occupational Fraud 2022: A report to the Nations, in terms of countermeasures against fraud and strengthening of internal control, the rate of enhanced employee training increased by 14% (from 47% to 61%), and enhanced executive officer training increased by 12% (from 47% to 59%), which demonstrates that fraud prevention training has been attached with more importance, and relevant training is considered to be an effective method of fraud prevention.

Based on Article 15 of the government's “Guidelines of Internal Control and Supervision”, when internal auditors perform internal audits, they shall be aware of potentially risky business, and illegal or improper matters that may involve loss and waste of public funds; for such purpose, the training of government ethics official and internal auditors in fraud prevention and investigation shall cover the identification of red flags, fraud awareness, fraud risk management, fraud investigation skills, e-discovery, forensic accounting, cyberfraud and fraud related to emerging technologies (such as virtual currency).

(II) Recommendations:

1. Strengthen the training of procurement internal control in public sectors

   Some cases of government violations and dereliction of duty have been seized and punished. The National Audit Office calculates these cases and reports them in the "Annual Report of Government Audit". When analyzing the nature of the cases disclosed in government auditing annual reports, it was found that the weakness of government procurement and the lack of internal control were the top two deficiencies, indicating that the training in these two areas requires improvement. We hope to strengthen training and provide assistance on these two issues.

2. Fraud risk management is a part of internal control. The fraud

prevention training plan shall be designed according to the tasks and competency requirements of government ethics official and the internal audit units, and implemented in conjunction with the “Internal Control and Internal Audit Training Programs”.

3. Strengthen the education and training of the general staffs on fraud awareness, including the identification of signs of red flags, fraud reporting procedures, anti-corruption and bribery policies and fraud case analysis, etc. to improve the general staff's awareness of fraud, and instruct employees to work with ethic and integrity.

4. The qualification of International Certified Fraud Examiner shall be included in the employment conditions of internal auditors of public companies

   Article 11 of Regulations Governing Establishment of Internal Control Systems by Public Companies stipulates that, “A public company shall establish an internal audit unit under the board of directors, and shall appoint, according to its business size, business condition, management needs, and the provisions of other applicable laws and regulations, ‘qualified’ persons in an appropriate number as full-time internal auditors and have deputies in place for the internal auditors...”. The meaning of "qualified" is relatively unclear. Hence the competent authority has additionally stipulated the "competency conditions and training hours for internal auditors of public companies and their substitute staff". Point I (2) 5 of the regulations states that: Those who have passed the tests and obtained the license of a certified public accountant, the Certified Internal Auditors certificate issued by IIA, or the Certified Information Systems Auditor certificate issued by ISACA are qualified to serve as internal auditors. However, the international organizations included in the above-mentioned regulations include the Institute of Internal Auditors and the Information Systems Audit and Control Association, and the professionals include internal auditors and computer auditors, but still lack the Association of Certified Fraud Examiners, which is also an international organization. The Association

publishes its survey reports every two years: The Report to Nations which has a great influence and it organizes the CFE exam. The test subjects include Fraudulent Financial Transactions, Fraud Investigation, Legal Elements of Fraud, and Fraud Prevention and Deterrence, which are very helpful for internal auditors to play their role in investigating and preventing fraud. In addition, the rate of successfully passing the test is very low, making it hard to obtain a CFE certificate. If such qualification is omitted, the consideration of "competence conditions and training hours of internal auditors of public companies and their substitute staff" would be incomplete, and hence the competent authority (SFB) is suggested to take a further review. The Taiwan Chapter has already submitted the request for the Chinese version of the test questions to the Association, hoping to further enhance the popularity of the certificate among the industries and sectors of Chinese societies.

Remarks: (Reference regulations/related units)

- Guidelines for the Government's Internal Control and Supervision/Executive Yuan
- Regulations Governing Establishment of Internal Control Systems by Public Companies/Financial Supervisory Commission

ACFE Taiwan Chapter

http://www.acfetaiwan.com.tw
acfetaiwan@gmail.com