

# The Metropolitan Corporate Counsel®

National Edition

www.metrocorpocounsel.com

Volume 22, No. 6

© 2014 The Metropolitan Corporate Counsel, Inc.

June 2014

## Doing M&A And Representing Korean Companies

*The Editor interviews Jin-Kyu Koh, a Member of the firm in the Detroit office of Dykema Gossett PLLC.*

**Editor:** Please describe your practice generally. You are also head of the Korean Business Initiative. What does this position entail?

**Koh:** I am the leader of our Corporate Finance Practice Group, and a majority of my practice is M&A. I also have experience in financing transactions, both debt and equity, venture capital and general corporate and business counseling. In terms of Korea, we have historically represented Korean companies for a number of years primarily out of our L.A. office where we do product liability defense work for Hyundai and Kia.

A little over two years ago, I was asked to lead our Korean Business Team. At that time, the Korea-U.S. Free Trade Agreement was on the horizon. Also, with the influx of Korean companies entering the United States, we believed then and still believe that there are significant opportunities to work with Korean companies operating in the United States.

I really enjoy the entrepreneurial aspects of building our Korean practice. We have increased our revenues with respect to Korean companies by over 500 percent in just two years. It's now a multi-million-dollar practice for us and keeps me and other lawyers at our firm very busy. Just before this interview, I was on the phone with a Korean law firm that we hope to partner with on a project involving certain regulatory issues here in the United States. I also got an email last night from a new Korean client asking for some assistance here in the U.S. Our clients include many of the major multinational corporations from Korea, including Kia, Hyundai, Samsung and LG. Our Korean client roster is now in the 25- to 30-client range. We have 25 lawyers on our Korea team, several of whom speak Korean fluently.

**Editor:** Could you describe the present M&A climate?

**Koh:** We have really seen a significant increase in M&A activity recently. Our group is very active on the M&A front. I personally have closed three deals with at least four additional deals in the pipeline. After speaking with our investment banking and other contacts in the M&A space, it seems like M&A activity has really picked up in the last few months.

**Editor:** Did that pickup involve any particular industries or was it general?

**Koh:** For me it's been across several industries – automotive, which is not surprising being here in Michigan, and IT have been particularly active. One of the public deals that I led closed in January and involved the sale of three business units from Compuware to a private equity firm, Marlin Equity Partners. I closed a transaction in April in the medical device field, and another transaction in February in the retail/cellular phones space. The healthcare industry has also had a lot of activity recently.

**Editor:** Please discuss the application of legal project management in the M&A area.

**Koh:** This is a tool that we are beginning to use not just in the M&A field, but across the entire spectrum of services we provide. We believe that it will reduce client costs by enabling us to serve clients more efficiently. Those that aren't familiar with the M&A space may look at the lawyer work stream as somewhat haphazard – and certainly inefficient. The idea behind the legal project management concept is to provide greater effi-



Jin-Kyu Koh

ciency, which will result, most importantly, in better client service. It's a framework that will better enable us to plan and manage the different stages and components of a transaction. Starting out with a budget and a timeline based on the various stages of the transaction, including due diligence, definitive agreements, ancillary agreements, etc., there are many steps in managing an M&A transaction. We believe that our use of the legal project management tool will reduce client costs by providing a framework to plan and manage the different stages and components of a transaction. A task force of the Business Law Section of the ABA is working on legal project management in the M&A space. One of my partners in Chicago is monitoring that and working with the task force. The hope is that lawyers, who are not known for being at the forefront of change, will take a hard look at providing their services more efficiently with the goal of better client service because that's what the clients are demanding nowadays, and we need to change. From what I understand, project management is pretty prevalent in virtually every other industry other than the legal industry.

**Editor:** How important is the term sheet in binding parties to go forward with a deal?

**Koh:** In my experience, most parties do not want a term sheet or a letter of intent to be binding. If that is the case, it is very important that the term sheet or the letter of intent expressly state that it is not binding.

**Editor:** How important are antitrust considerations when performing due diligence?

**Koh:** Well it's certainly an area that needs to be evaluated. However, the importance of antitrust considerations will depend on the particulars of a given transaction. My recent transactions, although certain

*Please email the interviewee at [jkoh@dykema.com](mailto:jkoh@dykema.com) with questions about this interview.*

of them have required Hart-Scott-Rodino filings, have not had any major antitrust issues.

**Editor: Given the emphasis on high tech today, how does the presence of intellectual property affect M&A deals?**

**Koh:** Depending on the transaction, intellectual property may be the most valuable aspect of the buyer's interest in a transaction. Not surprisingly, if the transaction has significant IP, there would be a fair amount of due diligence, including with respect to ownership and licensing issues, employee assignment agreements, collaboration agreements, development agreements, JV agreements or other agreements and information that may affect IP. Depending on the results of such due diligence, there may be significant drafting of provisions and negotiations regarding such issues as indemnification regarding IP.

**Editor: In terms of your involvement with the Korean Business Initiative, you must see a lot of activity coming out of South Korea in the IP area.**

**Koh:** We are representing Korean companies on a wide range of IP issues, including basic employee IP assignment agreements, IP opinions and litigation involving IP.

**Editor: What labor contracts and relationships with employees should be carefully scrutinized before entering a merger or acquisition, especially a cross-border merger?**

**Koh:** Labor and employee matters and employee benefit matters are areas that, whether it's a cross-border transaction or not, typically need to be very carefully scrutinized. There are a host of issues that come up, including what are we going to do with employee benefit plans? Are they

going to be assumed by the buyer? Are they going to be terminated? What are the time frames that we need to be sensitive to in order to accomplish the agreement between the parties? Will the employees get credit under the various plans for time served with the seller? In terms of the cross-border transactions, those issues become even more acute, particularly for those who aren't familiar with the labor, employment and benefit laws in foreign jurisdictions. They are different, particularly in the European Union.

**Editor: Can Korean companies get help finding communities in the U.S. that are hospitable to employees who come from abroad to work?**

**Koh:** I've been involved with an organization called KOTRA, which is a Korean government agency designed to help Korean companies moving into the U.S. They have offices not just in Detroit, but also in Atlanta, L.A., Chicago and New York. In Troy, Michigan, for example, they have put together an incubator program called the Korean Automotive Parts Park (KAPP). I've been appointed KAPP's legal advisor. They have twelve to fifteen Korean companies that they're currently incubating at KAPP.

**Editor: I would assume that the U.S. is active in Korea trying to attract companies to the U.S.**

**Koh:** Michigan's Governor Snyder, although he has gotten a lot of press for his visits to China, has made at least one trip to Korea for that purpose. The efforts of the private sector are also important. We take pride in our firm's efforts to assist in attracting major Korean companies to invest in the United States.

**Editor: Is it important to review investment banking engagement letters?**

**Koh:** We counsel our clients to make sure that investment banking engagement letters are carefully reviewed. It is important to make sure that the expectations of the company and the investment banker are aligned and that both parties understand the terms of the engagement letter. A transaction may be structured one way at the time that the engagement letter is signed, but frequently ends up getting structured a different way, leaving uncertain the amount and how and when those fees should be paid. For example, if a transaction involves an earn-out and/or an escrow, should the investment banker get paid a fee on such amounts even though the parties have not received them and may not ever receive them? This is but one issue that needs to be fully negotiated and vetted.

**Editor: We've talked about M&A. I would also assume that you're very much involved in other services for Korean companies locating in the U.S.**

**Koh:** That's right, and not just for Korean companies, but also for other foreign companies. For example, we assist them in setting up a U.S. entity and all the things that go with setting up and running that entity, including drafting the articles of incorporation and bylaws and preparing employee handbooks, confidentiality agreements and the like.

**Editor: What other important considerations come into play in cross-border deals?**

**Koh:** Compliance with the laws of the countries involved is an absolute imperative. Many foreign jurisdictions require more formalities than what one would have experienced here in the United States. For example, setting up a company in foreign jurisdictions sometimes takes weeks or months instead of days or hours.