THE ROLE OF REGULATORS IN CORPORATE GOVERNANCE

Panel Discussion Remarks By
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Introduction

Good Corporate Governance is important to the conduct of business across any economy. Regulators within the financial services industry and the securities and capital markets, in particular, have responsibility for ensuring that the appropriate regime, standards and practices are developed, and applied, in relation to corporate governance principles.

As the nature of financial services continues to evolve, adherence to high ethical, policy and operational standards by those who operate in the sector, is imperative to ensuring stability and 'growth'.

The Commission, as a member of IOSCO, supports the best practices set out in the 2015 OECD Principles of Corporate Governance. The Commission's responsibility for the regulation and supervision of the capital markets, including its role as it relates to public issuers, the exchange, intermediaries, clearing facilities and of course brokers and dealers puts the Commission at the centre of any debate relating to corporate governance.

Best practices outlined in the OECD Principles are categorised into six main areas.

Principle I

The first principle requires members to ensure that there is a basis for an effective corporate governance framework. This is really speaking to the putting into effect of adequate legislative and standard setting policies relating to the governance and conduct of business, reflecting principles that promote transparent and fair markets and are consistent with the rule of law to support effective supervision and enforcement. Generally, public issuers rely on the provisions of the Companies Act to meet their corporate governance obligations. While there is no centralised legislation that speaks to corporate governance, its principles are embedded in various existing legislation. For the Commission's registrants and licensees, governance principles are included in the Securities Industry Act and Regulations, where business conduct, shareholders' rights, and disclosure requirements are addressed.

Principle II

Principle Two requires members to protect the rights and ensure the equitable treatment of shareholders. For Public issuers, basic shareholders' rights, including voting processes, annual general meeting requirements, rights to disclosure, and variation of share class rights are addressed in the current legislation. This applies also to the Commission's licensees, where shareholder's rights, specifically in the Securities Industry Regulations are addressed through conduct of business requirements. There is room, however, for greater specificity and expansion in the legislation.

For example, the protection of minority investors remains a pressing issue in corporate governance, but it is not adequately addressed in the legislative framework. The protection of minority shareholders and legal provisions for recourse in an event where minority shareholders are mishandled or abused are key gaps that should be addressed.

Principle III

Principle Three encourages a framework that provides appropriate measures to be addressed throughout the investment chain. This principle hones in on the need for realistic guidelines that serve the needs of all participants in the industry, including both institutional and retail investors. It encourages a framework developed with a holistic view of the markets, taking into account that there are complex relationships that may include independent financial institutions, such as institutional investors who administer nominee accounts. In this instance, standards may need to be specific to these types of institutions. The overarching idea is that the framework should appreciate the differences in the nature of company operations.

For public issuers as well as the Commission's market participants, this principle does not seem to be addressed. The Principles suggest that institutional investors disclose their corporate governance principles, especially when acting in a fiduciary capacity.

Principle IV

Principle Four recommends that the framework recognizes the rights of stakeholders established by law or through mutual agreement and encourages active cooperation between the company and their stakeholders. The rights of stakeholders should be properly established in business, insolvency and contract laws. The framework should speak to agreements between public issuers and their stakeholders and should make provision for lines of redress for stakeholders. While the protection of creditors is addressed in the Companies Act, this principle should be specifically incorporated in the legislation for public issuers as well as the Commission's market participants.

Principle V

Principle Five requires members to identify key areas for disclosure and transparency. It recommends that the framework ensures that timely and accurate disclosure is made on all material matters regarding the corporation including the financial situation, performance and ownership. With respect to this principle, it should be noted that the concepts of disclosure and transparency represent an overarching theme throughout the recommendations. The existing legislation places an obligation on public issuers to disclose details of operations through annual reports and financial statements and to meet a certain level of transparency and accountability, through audits. This also holds true for the Commission's registrants and licensees.

Here, there are key areas that must be addressed, including requiring public issuers to disclose related party transactions through audited financial statements, along with any other material information that may impact shareholder decisions. There is also a marked move by international organizations to require members to implement the disclosure of such information through registries as an essential element of financial reporting. The recommendation is that public issuers ensure that company assets are not being misused and that directors avoid any potential conflicts of interest. The Commission will seek to enhance the existing requirements in the context of the fact that directors have a fiduciary duty to the company, and in the case of public companies, to shareholders.

Finally, in regards to Principle Five, ensuring investor confidence in the markets is one of the main priorities of regulators in the industry. In order for the Commission to effectively monitor the market and for shareholders to make informed decisions, timely disclosure of relevant information by a public issuer is essential. Shareholders must have certain basic rights that are enforced and the regulator must take steps to protect minority shareholders from abusive actions by majority holders. This would require that as part of the ongoing disclosures that public issuers have to meet, that the Commission create the distinct legislative requirement and enforce enhanced measures in the area of disclosure and transparency.

Principle VI

Principle Six addresses the responsibilities of the board. The common theme in this principle focuses on the Board acting on behalf of shareholders. In this case, board members are expected to act in good faith and exercise diligence and skill in their fiduciary capacity. This requirement can be found within the Companies Act and is duplicated in the Securities Industry Act, which further provides for the establishment of board committees and qualifications for membership, the enforcement of business conduct and ethics, and the regulation of conflicts between the company's interest and that of its directors and officers.

The OECD, however, mentions a few areas that are not reflected in current legislation and should be discussed or considered among policy makers. For instance, the requirements that board members establish audit committees within the board, ensure proper risk management mechanisms are in place in company operations, and are held accountable for the accuracy and transparency of company financials. The Commission expects that our corporate governance framework will address all legislation gaps required by the OECD principles.

Principle Six also recommends an element which has previously not been required as part of the regulatory oversight, and that is public companies must implement internal risk management mechanisms.

This principle also recommends that board members regularly self-evaluate their performance with the objective of assessing whether there is an adequate mix of competencies and backgrounds relative to the business. Best practices dictate that boards include non-executive directors, that directors have relevant qualifications, that committees are established, and that a course of action exists when the board's view on company decisions differs from the views of shareholders.

Lastly, this Principle addresses the issue of whether persons in directorships are sufficiently skilled, or have experience relevant to the business of the public issuer. There is a recommendation that directors ought to be able to commit themselves to the business of the company, which means that as an individual a director ought not to spread himself or herself too thinly with multiple board appointments, notwithstanding the recommendation that members should also disclose the number of directorships they have accepted.

The Commission as Regulator of the Capital Markets

As regulator of the capital markets, the Commission realises the importance of clearly communicating and encouraging best practices to market participants. That said, rules and guidelines have been drafted and are undergoing internal review. The approach we have taken involves adapting the OECD principles to the governance requirements already in place in order to ensure a corporate governance regime which is holistic and relevant to the markets. In addition, the corporate governance standards for the securities sector must be consistent with those of the broader financial services industry as conflicting standards and overregulation will prove harmful.

Conclusion

In summation, there exist aspects of legislation which speak to core corporate governance principles; however, there still remains a call for regulators to develop legislation that speaks directly to corporate governance and what is expected in the various sections of the financial services industry. In developing such legislation, it is important that there is consistency among regulations to avoid legal conflicts and overregulation.

The Securities Commission is in support of enhancing the legislative framework to incorporate the principles discussed and is currently reviewing present legislation for this purpose. Of special note is the area which speaks to the protection of minority investors. A review of the recently published World Bank report on Ease of Business in The Bahamas indicates that a lack of minority shareholder protection heavily influences our place on the index.

Corporate Governance plays a pivotal role in the financial industry and also in the Bahamian economy at large. The Securities Commission of The Bahamas is working to ensure that good governance practices are enshrined into the legislative framework. By doing so, we are hoping to develop an environment where good businesses can thrive and shareholder value can be protected.