



'Comply or Explain' Disclosure Statement

CG FOCUS

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HOW TO IMPLEMENT THE OJK-CORPORATE GOVERNANCE GUIDELINE FOR PUBLIC COMPANIES

The Financial Services Authority (OJK) has introduced Regulation No.21/POJK.04/2015 concerning the Implementation of the Corporate Governance Guideline for Public Companies (hereinafter 'CG Guideline'). The regulation, together with Circular Letter No.32/SEOJK.04/2015, requires public companies to make corporate governance disclosures in Annual Reports ending on 31 December 2016. The disclosures on aspects, principles and recommendations of good corporate governance are to be made on a 'comply or explain' basis. This note provides insights on how to draft the disclosure statement to ensure compliance with the regulation.

~ ARTICLE 2 ~

- 1. Public Companies are required to comply with the CG Guideline as referred to in Article 1 (1).*
- 2. In the case of non-compliance, Public Companies shall explain the reasons for non-compliance.*

WHAT IS MEANT BY 'COMPLY OR EXPLAIN'

In the 'comply or explain' regime, which has been adopted by many countries including Malaysia and Singapore, companies have the choice of either complying with the CG Guideline or explaining why they deviate. This regime provides some flexibility for companies to tailor their governance practices to specific company situations.

At the same time, the mandatory public disclosure of governance practices allows market participants to evaluate the effectiveness of the firm's governance system and to make informed assessments of whether noncompliance is justified in these particular instances. Several jurisdictions (for example, Belgium, the Netherlands and the United Kingdom) have published guidelines on the appropriate character of an explanation.

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The flexibility offered by “comply or explain” is attractive to us because corporate governance is not a science – it is a reflection of human behavior and, in practice, is rather nuanced.

Source: M. Edkins, Blackrock, MD CG and Responsible Investment, on the occasion of the 20th Anniversary of the UK Cadbury Code.

~ ARTICLE 4 ~

Disclosure of the implementation of the CG Guideline as referred to in Article 3, shall at least contain the following:

1. Statement that the company has implemented the recommendations of the CG Guideline;
and/or
2. Explanation for non-compliance, which at least contains:
 - (a) The reason for non-compliance; and
 - (b) Alternative implementation practice (if any).

RECOMMENDED ACTIONS UNDER 'COMPLY OR EXPLAIN'.

1. If the company complies with the CG Guideline in all aspects, then it should provide a statement in the Annual Report to that effect, specifically naming Regulation No.21/POJK.04/2015 and Circular Letter No.32/SEOJK.04/2015.

Corporate governance disclosure is often a separate statement in the Annual Report (and provided on the company website), which may be in the form of a tabular chart addressing each principle and recommendation individually, stating how the company complied with the provisions in the CG Guideline over the past year.

2. If there are areas of non-compliance with the recommendations in the CG Guideline, the company should provide a thorough explanation for each individual area of non-compliance.

CRITERIA FOR GOOD QUALITY EXPLANATIONS FOR DEPARTING FROM THE CG GUIDELINE:

- Explain the manner in which the company has departed from the requirements.
- Explanation should be convincing, understandable, company-specific and provide some context as to why the company has decided to depart from the requirements.
- Fully describe the departure and specify deviations from the provisions as well as from main principles.
- Describe mitigating actions taken to address any additional risk.
- The deviation should be time-bound (i.e. are only expected for a limited period) and the explanation states when the company expects to comply again.
- Explain how any measure/solution taken instead of compliance (an alternative) achieves the underlying objective of the specific recommendation and is consistent with the CG Guideline and contributes to the objective of good governance.

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Reasons should not be vague, general or formulaic and repeated over several years. The explanation should be carefully articulated, clear, accurate and comprehensive. There may be multiple reasons for one instance of non-compliance. Merely identifying an area of non-compliance is insufficient.

Fundamental disagreement with the CG Guideline is not an adequate reason for non-compliance. Companies should indicate when they will apply the CG Guideline and be prepared to engage in a dialogue with regulators and shareholders on any areas of non-compliance.

Example: Acceptable Non-compliance Explanation under the Singapore Code of CG.

Singapore Code of Corporate Governance 2012

The Company's Explanation

Guideline 2.4

The independence of any director who has served on the Board beyond nine years from the date of his first appointment should be subject to particularly rigorous review.

In doing so, the Board should also take into account the need for progressive refreshing of the Board. The Board should also explain why any such director should be considered independent.

In considering the independent director who has served on the Board beyond 9 years from the date of his appointment is still independent, the Nominating Committee (NC) takes into consideration the following factors:

- The conclusions of the annual Board evaluation;
- The ability to continue exercising independent judgment in the best interests of the Company;
- The attendance and active participation in the proceedings and decision making process of the Board and Board Committee meetings; and
- The high level of commitment, equity and integrity in discharging his respective responsibilities as a director of the Company.

The Board supported the NC's recommendation that Mr. Hans Miller and Mr Goh Kian Hwee be considered independent and have the ability to continue exercising independent judgment in the best interest of the Company in discharging their duties objectively as directors of the Company, despite their extended tenure in office.

Hwa Hong Corporation Limited – Annual Report 2014 (p.19)

Guideline 4.4

The Board should determine the maximum number of listed company board representations which any director may hold, and disclose this in the company's Annual Report.

Guideline 4.4 of the Code recommends that the Board determine the maximum number of listed company board representations which any director may hold and disclose this in the annual report. The Board is of the view that the limit on the number of listed company directorships that an individual may hold should be considered on a case-by-case basis, as a person's available time and attention may be affected by many different factors

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such as whether they are in full-time employment and their other responsibilities.

A Director with multiple directorships is expected to ensure that sufficient attention is given to the affairs of the Group. The Board believes that each individual Director is best placed to determine and ensure that he is able to devote sufficient time and attention to discharge his duties and responsibilities as a Director of the Company, bearing in mind his other commitments.

CapitaLand Limited - Annual Report 2014 (p. 31)

3. The Company should also provide information on any other alternative governance practice it has implemented and how it will achieve the underlying objective of the specific recommendation in the CG Guideline.

ABOUT IFC CORPORATE GOVERNANCE GROUP

The Group brings together staff from investment support and advisory operations into a single, global team. This unified team advises on all aspects of corporate governance and offers targeted client services in areas such as increasing board effectiveness, improving the control environment, and family businesses governance.

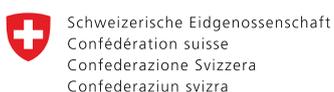
The Group also helps support corporate governance improvements and reform efforts in emerging markets and developing countries, while leveraging and integrating knowledge tools, expertise, and networks at the global and regional levels.

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