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"Comply or Explain" or "Comply or Else"
By Joyce Koh

In addition to the installation of a new leadership at the Singapore Exchange (SGX), industry insiders are also sensing the emergence of a new approach to the regulatory regime.

For one thing, the regulator appears to be knuckling down on the Code of Corporate Governance. In October, Tan Boon Gin, SGX's new chief regulatory officer, remarked that he was surprised "at the number of times (the Code) was referred to as optional or best practice". He added that he plans to deal with the failure to properly "comply or explain" by using the new enforcement powers given to the Exchange, which include levying fines and denying a listed company access to the securities market.

At the same time, SGX announced it had engaged KPMG to examine the annual reports of over 550 mainboard-listed companies to determine how they are abiding by the Code's "comply or explain" requirements. It will then work, "one-on-one", with companies that fall short to improve how they comply with the Code.

Taken together, these moves have led some observers to conclude that SGX is moving from a "comply or explain" regime to a "comply or face the music" approach. This, they argue, is against what they believe to be the voluntary nature of the Code.

Voluntary or non-voluntary?

The first issue to address is whether the Code is, indeed, voluntary or optional.

Many companies take the "comply or explain" requirement at face value: the company can either choose to comply with the Code's guidelines if it wishes and, if it does not, it just has to explain why it is not complying.

What this approach misses, however, is that the "comply or explain" aspect of the Code is being given effect through the SGX Listing Manual – which is mandatory, not optional.

Specifically, Listing Rule 710 requires a company to "describe its corporate governance practices with specific reference to the principles of the Code in its annual report (and) it

must disclose any deviation from any guideline of the Code together with an appropriate explanation for such deviation in the annual report".

Read closely, this provision has two requirements.

The first is that the guidelines of the Code are preferred, almost required, even if they are not explicitly compulsory. Judging from Mr Tan's remarks, his view is that the guidelines are good, rather than best, practices. This implies that the majority of companies should be able to comply. In other words, SGX wants companies to adopt these good practices - unless they really cannot.

And when they really cannot, the second requirement is that the non-compliance must be justifiable – or, as the rulebook puts it, "the deviation" from the Code must be "appropriately" explained.

Non-compliance

From the regulator's perspective, it probably feels that far too many companies are failing on both counts.

Certainly, there are a few Code guidelines for which the level of non-compliance is high and, at the same time, the explanations for deviations have been less than adequate.

One of these is the nine-year rule. Guideline 2.4 requires that the independence of a director who has served more than nine years should be subjected to a "particularly rigorous review".

Yet, according to the SID-ISCA *Singapore Directorship Report 2014*, more than half of the listed boards had at least one director who had served over nine years on the board and was still declared independent. A typical explanation goes something like this: "Rigorous reviews have been carried out by the board to assess the independent status of Director A and Director B, who have served on the board beyond the nine-year mark. All of them are considered independent in accordance with Guideline 2.4 of the CG Code 2012."

This merely repeats the Code requirement. It does not adequately explain how the "particularly rigorous review" was conducted nor does it provide any justification as to why the director is considered independent.

Perhaps the most common non-compliance relates to remuneration disclosures. While the SID-SGX *Board of Directors Survey 2015* showed that attitudes are improving, still, some 55 per cent of companies are not disclosing detailed remuneration of each individual director and CEO on a named basis as required by Guideline 9.2.

Here, a common boilerplate for non-disclosure of remuneration is: "The remuneration of each individual director and key management personnel is not disclosed in dollar terms

because remuneration is a commercially sensitive matter and there could be potential poaching of employees by competitors."

While SGX has yet to rule on the general acceptability of the "fear of poaching" explanation, the fact is that this is clearly not a credible reason in some circumstances such as when the executive directors are major shareholders and their relatives are also employees of the firm.

Besides these examples, disclosures relating to risk governance, board diversity and sustainability are often singled out as lacking in comprehensiveness.

In summary, it is fair to say that SGX is not, in fact, veering towards a "comply or else" regime. Which is not to say that this is a green light for companies to continue to treat the Code casually. Responsible corporate governance requires otherwise; all the more to appreciate SGX's timely attempt to return to the original underlying philosophy of the Code, which is perhaps better restated as: "Comply – or explain satisfactorily why you have not done so."

The writer is the executive director of the Singapore Institute of Directors. This article first appeared in BTInvest,