

GOOD CORPORATE GOVERNANCE: THE KEY TO SUCCESS



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Many studies, both in developed and emerging investment markets, have shown that good corporate governance leads to better results for companies and for investors. The Chartered Financial Analyst Centre for Financial Market Integrity states in its “Corporate Governance for Listed Companies: A Manual for Investors” that several studies indicate that companies with sound corporate governance outperform other companies by 3% - 8.5% per year.

Corporate governance refers to the principles and guidelines that corporations follow in their management and operations. It includes the rules and corporate ethics that bind managers, directors and all other company officers, and takes into account issues such as management discipline, transparency, independence, accountability, responsibility, fairness and social responsibility. Since the financial sector meltdown of the 1990s, issues of corporate governance have become very important to regulators and company stakeholders in Jamaica. In this past decade several legal and non-legal corporate governance rules and guidelines have been developed. The legal rules are mandatory, binding and enforceable in a court of law, while the non-legal rules may have consequences internally but may not be enforceable in a court of law (unless they are incorporated as terms in a contract).

The Companies Act, 2004 of Jamaica imposes mandatory rules of corporate governance on all company officers. Company officers refer not only to directors and company secretaries, but also managers. The duties include:

- to act in the best interest of the company (and not of any particular group of shareholders, employees, personal interest or any collateral objective);
- to exercise the skill, care and diligence of a reasonably prudent person in comparable circumstances, taking into account the particular skill, knowledge and experience of each director, manager or company secretary; and
- to disclose to the company material contracts with the company in which the director, manager or secretary may have a direct or indirect interest.

There are also other legal rules which require directors and other company officers to, among other things:

- avoid situations where the personal interest of the director or officer conflicts with the interest of the company, but if any

conflict arises to make the proper disclosures to the Board of Directors for its decision and action;

- NOT make any secret profit as a result of occupying or carrying out the functions of the position;
- NOT be involved in insider trading; and
- keep all confidential information about the company and its affairs confidential, even after the termination of service to the company.

Officers of companies operating in the banking and financial sector also have more onerous obligations imposed on them by modern legislation and case law. Employment contracts may also impose higher or additional standards of governance than are imposed by law.

Where a manager, director or company secretary breaches the legal rules of corporate governance he will be personally liable to the company, and may be required to compensate the company for any losses suffered as a result of the breach. He/she may also become barred from serving as a director, manager or company secretary of banking and financial companies, as those past breaches may render the individual not a “fit and proper person” as required by the relevant statutes.

In many instances, the legal corporate governance rules are general, and company officers are likely to require more detailed guidance on methods of ensuring compliance. The Private Sector Organisation of Jamaica (PSOJ) Code on Corporate Governance (2006) states that it “sets out the core Principles and Best Practices” proposed for publicly listed companies in Jamaica and non-listed companies engaged in the provision of financial services. These principles are also recommended for all non-listed companies. This Code is currently not binding on companies.

In my estimation, the Code has set out in practical language how directors, managers and other company officers should prepare and put themselves in a position to carry out their legal duties, for example the duty of “skill, care and diligence”. The Code provides that the Board of Directors “should meet sufficiently regularly to discharge its duties effectively”; “non-executive directors should scrutinize the performance of management in meeting agreed goals and objectives”; directors should ensure that dissenting opinions are recorded in minutes; “the chairman is responsible for ensuring that directors receive accurate, timely and clear information”; and so on.

For all company officers (whether of large or small companies), adhering to best and ethical governance practices should be an item high on the “success agenda”. In some cases, it may be recommended that the company develop its own Code of Governance. It is also recommended that companies and their officers consult legal counsel about issues which are not very clear or for advice on courses of action that are more likely to ensure compliance with legal and non-legal rules of corporate governance.

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