

*Enforcement Aspects of
Takeover Regulation
IOSCO Requirements on
Enforcement*

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“Takeovers, or the prospect of takeovers, provide benefits for shareholders, the corporate sector and the wider economy. In particular, they provide incentives for improved corporate efficiency and enhanced management discipline, leading ultimately to greater wealth creation.”

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Market events prompted the development of the IOSCO Principles

- The 90`s events made clear that the global markets are “linked”
- Political leaders decided that regulatory infrastructure is relevant to financial stability

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The Regulator`s approach: establishing the framework

- The IOSCO Objectives and Principles encourage countries to improve the quality of their securities regulatory systems....
- They represent international consensus on sound prudential principles and practices for the regulation of securities markets

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The IOSCO Objectives & Principles

- The IOSCO Principles state that there is often no single approach to a regulatory issue; they permit different ways to achieve the Objectives
- Legislation/regulatory structures vary between jurisdictions (because they tend to reflect local market conditions and historical development)
- The particular manner in which a jurisdiction implements the Principles must have regard to the entire domestic context

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The IOSCO Objectives

- Protection of Investors
- Ensuring that markets are fair, efficient and transparent
- Reduction of systemic risk

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The impact of IOSCO`s Objectives

It is these objectives that should provide the overarching framework for all securities regulation, independent of the size, complexity and development of the market and its cultural and legal environment

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Principles 1, 3 & 4: relating to the Regulator

- The responsibilities of the Regulator should be clear and objectively stated
- The Regulator should have adequate powers, proper resources and the capacity to perform its functions and exercise its powers
- The Regulator should adopt clear and consistent Regulatory processes

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Principles Relating to Enforcement/1

- The complex character of securities transactions & sophistication of fraudulent schemes require strong & rigorous enforcement of securities laws
- The Principles seek to determine a regulator's ability to monitor the entities subject to its supervision, to collect information on a routine & adhoc basis and to take enforcement action to ensure that all comply with the securities law

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Principles Relating to Enforcement/2

- The Enforcement Principles are interrelated with the specific regulatory functions and responsibilities described under other groups of Principles
- Enforcement Principles should apply to all jurisdictions, although it is not necessary that all responsibilities are allocated in the same agency

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Principles 8, 9 & 10: Relating to Enforcement

- The regulator should have comprehensive inspection, investigation and surveillance powers
- The regulator should have comprehensive enforcement powers
- The regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program

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Principle 8

- It addresses if a Regulator has the powers to conduct surveillance, undertake investigations, obtain information, and take the corresponding enforcement action in relation to regulated entities to ensure that they comply with relevant securities laws
- It addresses the Regulator's authority to conduct ongoing oversight and supervision of regulated entities as preventive measures

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Principle 8: Key issues

- ⊕ Power to obtain information in the ordinary course of business or as part of an enquiry
- Ability to require all information to comply with relevant standards
- ⊖ If power is delegated to an SRO it must be as confidential & disclosable as it is to the Regulator

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Principle 9

- Is intended to have a wider application
- It deals with courses of action open to the regulator where a breach of relevant securities laws by any person is identified

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Principle 9: Key Issues

- Comprehensive investigative & enforcement powers
- Ability to obtain data & information from any person involved in an enforcement enquiry or investigation
- Where enforcement requires the action of more than one regulator, prompt cooperation should be possible

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Principle 10

- Is designed to measure how effectively and credibly the Regulator exercises these powers
- The Regulator must demonstrate that an effective and credible use of inspection, surveillance, and enforcement powers has been made and will be made in the future

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Principle 10: Key Issues

- Effective & timely detection of breaches of the law
- Ability to gather relevant information
- Ability to use information to take action
- Compliance system that includes inspections & surveillance

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Principle 10 in relation to Principles 11-13 on Cooperation

- Wrongdoing occurs very often in the global market
- The inability of regulators to provide timely assistance can adversely affect efforts towards the implementation of an effective enforcement system
- Cooperation is vital to ensure that that investigations are not impeded by national boundaries

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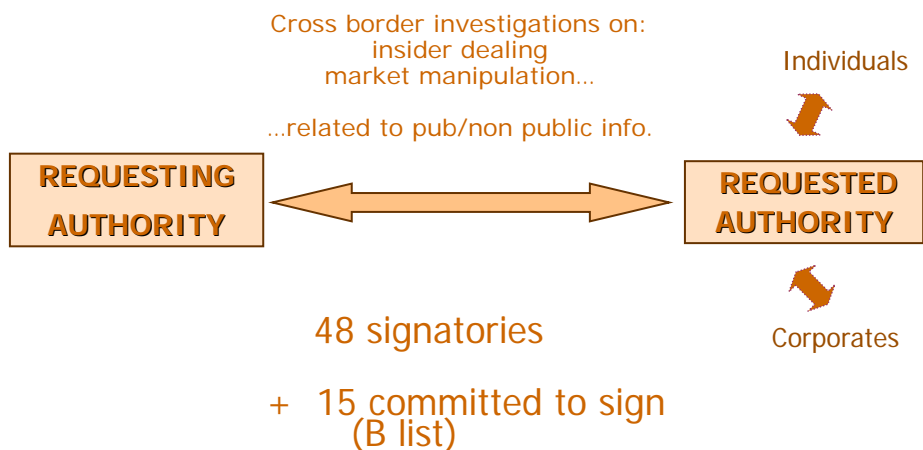
Principles 11, 12 & 13

- The Regulator should have the authority to share both public and non-public information with domestic & foreign counterparts
- ➊ Regulators should establish information sharing mechanisms that set out when and how they will share both public and non-public information with domestic & foreign counterparts
- ➋ The regulatory system should allow for assistance to be provided to foreign regulators who need to make inquiries in the discharge of their functions and exercise of their powers

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The MMoU: a tool for cooperation



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Principles 14 & 15: relating to Issuers

- There should be full, timely & accurate disclosure of financial results and other information that is material to investors` decisions
- Holders of securities should be treated in fair and equitable manner

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Principle 14

- The disclosure of current and reliable information necessary to make informed investment decisions is directly related to investor protection and to fair, efficient and transparent markets

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Principle 14: Key Issues

- The regulatory framework should ensure full, timely and accurate disclosure of financial results and other information that is material to investors making informed investment decisions on an ongoing basis
- Disclosure should be comprehensive, clear, reasonably specific, accurate and timely

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Principle 15

- This Principle requires an assessment whether the basic rights of shareholders are protected & whether shareholders within a class are treated equitably
- It addresses many of the same issues that are covered by OECD Principles on CG regarding the rights and equitable treatment of shareholders, particularly in connection with voting decisions, takeover bids, and other transactions that may result in a change in control or that may consolidate control

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Principle 15: Key Issues/1

Basic Rights of Shareholders

- a) The right to document & transfer ownership
- b) The right to participate on an informed basis in voting decisions
- c) The right to participate equitably in dividends
- d) The right to pass upon changes in the terms and conditions of rights attaching to their shares
- e) The right to have reasonable and equal opportunities to participate in any benefits accruing to the shareholders under any proposal under which a person would acquire a substantial interest in the company
- f) The right to hold company management accountable for its actions
- g) The right to receive fair and equal treatment (in particular, treatment of minority shareholders) in relation to the proposal

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Principle 15: Key Issues/2

Control-To safeguard fair and equitable treatment of shareholders, regulation should require disclosure of:

- a) Changes in controlling interests
- b) Information necessary to informed decision-making with respect to tender offers, take-over bids, and other transactions intended to effectuate a change of control or that potentially may result in a change of control, or that may consolidate control
- c) Shareholdings of directors and senior management
- d) Shareholdings of those persons who hold a substantial beneficial ownership interest in a company

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Principles 26, 27 & 28: on Secondary Markets

- ⊕ There should be ongoing regulatory supervision of exchanges and trading systems, which should aim to ensure that the integrity of trading is maintained through fair and equitable rules that strike an appropriate balance between the demands of different market participants
- ⊕ Regulation should promote transparency of trading
- ⊕ Regulation should be designed to detect and deter manipulation and other unfair trading practices

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The IOSCO Principles: How to implement them

It is important to note that IOSCO has stated: "There is often no single correct approach to a regulatory issue. Legislation and regulatory structures vary between jurisdictions and reflect local market conditions and historical development."

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"The search for an optimal regulatory model for takeovers keeps academics and practitioners busy around the world. The more one examines this fascinating topic from a comparative and interdisciplinary perspective, the more confusing it becomes: economies with similarly structured capital markets and ownership patterns have chosen opposing takeover regimes, while differently structured economies have opted for an identical regulatory model."

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"An investment group from Invaderland is here. To me it looks like a hostile takeover bid"



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Thank you!

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