

## **THE GUIDELINES ON CORPORATE GOVERNANCE PRACTICES BY PUBLIC LISTED COMPANIES IN KENYA**

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### **1. Introduction**

- 1.1. The Capital Markets Authority (the Authority) has developed these guidelines for good corporate governance practices by public listed companies in Kenya in response to the growing importance of governance issues both in emerging and developing economies and for promoting growth in domestic and regional capital markets. It is also in recognition of the role of good governance in corporate performance, capital formation and maximization of shareholders value as well as protection of investors' rights.
- 1.2. Corporate governance, for the purpose of these guidelines is defined as the process and structure used to direct and manage business affairs of the company towards enhancing prosperity and corporate accounting with the ultimate objective of realising shareholders long-term value while taking into account the interest of other stakeholders.
- 1.3. These guidelines have been developed taking into account the work which has been undertaken extensively by several jurisdictions through many task forces and committees including but not limited to the United Kingdom, Malaysia, South Africa, Organization for Economic Cooperation and Development (OECD) and the Commonwealth Association for Corporate Governance.

The Authority has also supported development of a code of best practice for corporate governance in Kenya issued by the Private Sector Corporate Governance Trust, Kenya, whose efforts have also been useful in the development of these guidelines and are supplementary thereto.

- 1.4. The objective of these guidelines is to strengthen corporate governance practices by public listed companies in Kenya and to promote the standards of self-regulation so as to bring the level of governance in line with international trends.
- 1.5. The Authority, in developing these guidelines has adopted both a prescriptive and a non-prescriptive approach in order to provide for flexibility and innovative dynamism to corporate governance practices by public listed companies.
- 1.6. Good corporate governance practices must be nurtured and encouraged to evolve as a matter of best practice but certain aspects of operation in a body corporate must of necessity require minimum standards of good governance. In this regard the Authority expects the directors of every public listed company to undertake or commit themselves to adopt good corporate governance practices as part of their continuing listing obligations.
- 1.7. It is important that the extent of compliance with these guidelines should form an essential part of disclosure obligations in the corporate annual reports. It is equally important the extent of non-compliance be also disclosed.
- 1.8. Every public listed company shall disclose, on an annual basis, in its annual report, a statement of the directors as to whether the company is complying with these guidelines on corporate governance with effect from the financial year ending during 2002, as prescribed under the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations.
- 1.9. All issuers of fixed income securities or debt instruments through the capital markets such as bonds and commercial paper shall also comply with these guidelines. The issuer of the fixed income securities or debt instrument shall disclose in the information memorandum the extent of compliance with these guidelines.
- 1.10. Where the company or Issuer is not fully compliant with these guidelines, the Issuer shall identify the reasons for non-compliance and indicate the steps being taken to become compliant.

[Subsidiary]

- 1.11 Whilst these guidelines have been developed for public listed companies and issuers of fixed income securities and debt instruments in Kenya's capital market, companies in the private sector are also encouraged to practice good corporate governance.

## 2. Principles of Good Corporate Governance Practices

There are a number of principles that are essential for good corporate governance practices of which the following have been identified as representing critical foundation and virtues of good corporate governance practices:

### 2.1. Directors

Every public listed company should be headed by an effective board to offer strategic guidance, lead and control the company and be accountable to its shareholders.

#### 2.1.1 The Board and Board committees

- (i) the Board should establish relevant committees and delegate specific mandates to such committees as may be necessary.
- (ii) the Board shall specifically establish an audit and nominating committee.

#### 2.1.2 Directors' Remuneration

- (i) the directors' remuneration should be sufficient to attract and retain directors to run the company effectively and should be approved by shareholders.
- (ii) the executive Directors remuneration should be competitively structured and linked to performance.
- (iii) the non-executive directors' remunerations should be competitive in line with remuneration for other directors in competing sectors.

Companies should establish a formal and transparent procedure for remuneration of directors, which should be approved by the shareholders.

#### 2.1.3 Supply and Disclosure of Information

- (i) the board should be supplied with relevant, accurate and timely information to enable the board discharge its duties.
- (ii) Everyboard should annually disclose in its annual report, its policies for remuneration including incentives for the board and senior management, particularly the following:—
  - (a) Quantum and component of remuneration for directors including non-executive directors on a consolidated basis in the following categories—
    - (aa) executive directors fees;
    - (bb) executive directors emoluments;
    - (cc) non-executive directors fees;
    - (dd) non-executive directors emoluments.
  - (b) A list of ten major shareholders of the Company.
  - (c) Share options and other forms of executive compensation that have to be made or have been made during the course of the financial year; and
  - (d) Aggregate directors' loans.

#### 2.1.4 Board balance

The Board should compose of a balance of executive directors and non-executive directors (including at least one third independent and non-executive directors) of diverse skills or expertise in order to ensure that no individual or small group of individuals can dominate the board's decision-making processes.

- 2.1.4.1 "Independent Director" means a director who—

- (i) has not been employed by the Company in an executive capacity within the last five years;
- (ii) is not associated to an adviser or consultant to the Company or a member of the Company's senior management or a significant customer or supplier of the Company or with a not-for-profit entity that receives significant contributions from the Company; or within the last five years, has not had any business relationship with the Company (other than service as a director) for which the Company has been required to make disclosure;
- (iii) has no personal service contract(s) with the Company, or a member of the Company's senior management);
- (iv) is not employed by a public listed company at which an executive officer of the Company serves as a director);
- (v) is not a member of the immediate family of any person described above; or
- (vi) has not had any of the relationships described above with any affiliate of the Company.

2.1.4.2 "Non-executive Director" means a director who is not involved in the administrative or managerial operations of the Company.

#### 2.1.5 *Appointments to the Board*

There should be a formal and transparent procedure in the appointment of directors to the board and all persons offering themselves for appointment, as directors should disclose any potential area of conflict that may undermine their position or service as director.

#### 2.1.6 *Multiple Directorships*

Every person save a corporate director who is a director of a listed company shall not hold such position in more than five public listed companies at any one time to ensure effective participation in the board and in the case where the corporate director has appointed an alternate director, the appointment of such alternate shall be restricted to three public listed companies, at any one time, subject to the requirements under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations.

#### 2.1.7 *Re-election of Directors*

- (i) all directors except the managing director should be required to submit themselves for re-election at regular intervals or at least every three years.
- (ii) executive directors should have a fixed service contract not exceeding five years with a provision to renew subject to—
  - (a) Regular performance appraisal; and
  - (b) Shareholders approval.
- (iii) disclosure should be made to the shareholders at the annual general meeting and in the annual reports of all directors approaching their seventieth (70th) birthday that respective year.

#### 2.1.8 *Resignation of Directors*

Resignation by a serving director should be disclosed in the annual report together with the details of the circumstances necessitating the resignation.

### 2.2 *Role of Chairman and Chief Executive*

- 2.2.1 There should be a clear separation of the role and responsibilities of the chairman and chief executive, which will ensure a balance of power of authority and provide for checks and balances such that no one individual has unfettered powers of decision making. Where such

[Subsidiary]

roles are combined a rationale for the same should be disclosed to the shareholders in the annual report of the Company.

- 2.2.2 Every person who is a Chairperson of a public listed company shall not hold such position in more than two public listed companies at any one time, in order to ensure effective participation in the board, subject to the requirements under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations.

## 2.3 Shareholders

### 2.3.1 Approval of Major Decisions by Shareholders

There should be shareholders participation in major decisions of the Company. The Board should therefore provide the shareholders with information on matters that include but are not limited to major disposal of the Company's assets, restructuring, takeovers, mergers, acquisitions or reorganisation.

### 2.3.2 Annual General Meetings

- (i) the board should provide to all its shareholders sufficient and timely information concerning the date, location and agenda of the general meeting as well as full and timely information regarding issues to be decided during the general meeting;
- (ii) the board should make shareholders' expenses and convenience primary criteria when selecting venue and location of annual general meetings; and
- (iii) the directors should provide sufficient time for shareholders questions on matters pertaining to the Company's performance and seek to explain to the shareholders' their concern.

## 2.4 Accountability and Audit

### 2.4.1 Annual reports and Accounts

The board should present an objective and understandable assessment of the Company's operating position and prospects. The board should ensure that accounts are presented in line with International Accounting Standards.

### 2.4.2 Internal Control

The board should maintain a sound system of internal control to safeguard the shareholders investments and assets.

### 2.4.3 Independent Auditors

The board should establish a formal and transparent arrangement for shareholders to effect the appointment of independent auditors at each annual general meeting.

### 2.4.4 Relationship with Auditors

The board should establish a formal and transparent arrangement for maintaining a professional interaction with the Company's auditors.

## 2.5 General

### 2.5.1 Public Disclosure

There shall be public disclosure in respect of any management or business agreements entered into between the Company and its related companies, which may result in a conflict of interest.

### 2.5.2 Chief Financial Officers of Public Listed Companies

- (i) The Chief Financial Officers and persons heading the accounting department of every issuer shall be members of the Institute of Certified Public Accountants established under the Accountants Act (Cap. 531).
- (ii) where the persons referred to in paragraph (i) are members of other internationally recognized professional bodies and are yet to register as members of the Institute of Certified Public Accountants such persons shall register as members of the Institute within a period of twelve months from the date of appointment to

such position, subject to requirements under the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations.

### 2.5.3 *Company Secretaries of Public Listed Companies*

The Company Secretary of every public listed company shall be a member of the Institute of Certified Public Secretaries of Kenya established under the Certified Public Secretaries of Kenya Act (Cap. 534).

### 2.5.4 *Auditors of Public Listed Companies*

The auditor of a public listed company shall be a member of the Institute of Certified Public Accountants and shall comply with the International Auditing Standards.

## 3. *Recommended Best Practices in Corporate Governance by Public listed Companies*

The adoption of international standards in corporate governance best practices is essential for public companies in Kenya in order to maximize shareholders value through effective and efficient management of corporate resources. As a matter of best practice, every public listed company should endeavour to achieve the following:

### 3.1. *Best Practices Relating to the Board of Directors*

#### 3.1.1 *The Role and Responsibilities of the Board of Directors*

The board of Directors should assume a primary responsibility of fostering the long-term business of the corporation consistent with their fiduciary responsibility to the shareholders. The board of directors should accord sufficient time to their functions and act on a fully informed basis while treating all shareholders fairly, in the discharge of the following responsibilities, among others—

- (i) define the company's mission, its strategy, goals, risk policy plans and objectives including approval of its annual budgets;
- (ii) oversee the corporate management and operations, management accounts, major capital expenditures and review corporate performance and strategies at least on a quarterly basis;
- (iii) identify the corporate business opportunities as well as principal risks in its operating environment including the implementation of appropriate measures to manage such risks or anticipated changes impacting on the corporate business;
- (iv) development of appropriate staffing and remuneration policy including the appointment of chief executive and the senior staff, particularly the finance director, operations director and the company secretary as may be applicable;
- (v) review on a regular basis the adequacy and integrity of the Company's internal control, acquisition and divestitures and management information systems including compliance with applicable laws, regulations, rules and guidelines; and
- (vi) establish and implement a system that provides necessary information to the shareholders including shareholder communication policy for the Company;
- (vii) monitor the effectiveness of the corporate governance practices under which the Company operates and propose revisions as may be required from time to time;
- (viii) take into consideration the interests of the Company's stakeholders in its decision making process.

#### 3.1.2 *A balanced Board Constitutes an Effective Board*

- (i) the board of directors of every listed company should reflect a balance between independent, non-executive directors and executive directors.
- (ii) the independent and non-executive directors should form at least one-third of the membership of the board.

[Subsidiary]

- (iii) the structure of the board should also comprise a number of directors, which fairly reflects the Company's shareholding structure. The Board composition should not be biased towards representation by a substantial shareholder but should reflect the Company's broad shareholding structure. The composition of the board should also provide a mechanism for representation of the minority shareholders without undermining the collective responsibility of the directors.
- (iv) A substantial shareholder, for the purpose of these guidelines is a person who holds not less than fifteen per cent of the voting shares of a listed company and has the ability to exercise a majority voting for the election of the directors.
- (v) In circumstances where there is no major shareholder but there is a substantial shareholder the board should exercise judgment determining the representation on the board of such shareholder and of the other shareholders that effectively reflects the shareholding structure of the Company.
- (vi) The board should disclose in its annual report whether independent and non-executive directors constitute one third of the board and if it satisfies the representation of the minority shareholders.
- (vii) The size of the board should not be too large to undermine an inter-active discussion during board meetings or too small such that the inclusion of a wider expertise and skills to improve the effectiveness of the board is compromised.
- (viii) the board should monitor and manage potential conflict of interest at management, Board and shareholder levels.

### 3.1.3 *Appointment and Qualifications of Directors*

- (i) the board of every public listed company should appoint a nominating committee consisting mainly of independent and non-executive directors with the responsibility of proposing new nominees for the board and for assessing the performance and effectiveness of directors in the Company.
- (ii) the nominating committee should consider only persons of calibre, credibility and who have the necessary skills and expertise to exercise independent judgment on issues that are necessary to promote the Company's objectives and performance in its area of business.
- (iii) the nominating committee should also consider candidates for directorship proposed by the chief executive and shareholders.
- (iv) the board, through the nominating committee, should on an annual basis review its required mix of skills and expertise that the executive directors as well as independent and non-executive directors bring to the Board and make disclosure of the same in the annual report.
- (v) the Board should also implement a process of assessing the effectiveness of the board as a whole, the committees of the Board, as well as of each individual director and such task should be assigned to the nominating committee.
- (vi) newly appointed directors should be provided with necessary orientation in the area of the Company's business in order to enhance their effectiveness in the Board.
- (vii) the nominating committee should recommend to the board candidates for directorship to be filled by the shareholders as

the responsibility of nominating rests on the full board, after considering the recommendations of the nominating committee.

- (viii) The process of the appointment of directors should be sensitive to gender representation, national outlook and should not be perceived to represent single or narrow community interest.
- (ix) No person shall be a director in more than five public listed companies at any one time in order to ensure effective participation in the board.

#### 3.1.4 *Remuneration of the directors*

- (i) The Board of Directors of every listed company should appoint a remuneration committee or assign a mandate to a nominating committee consisting mainly of independent and non-executive directors to recommend to the board the remuneration of the executive directors and the structure of their compensation package.
- (ii) The determination of the remuneration for the non-executive and independent directors should be a matter for the whole board.
- (iii) The remuneration of the executive director should include an element that is linked to corporate performance including a share option scheme so as to ensure the maximization of the shareholders' value.
- (iv) The consolidated total remuneration of the directors should be disclosed to the shareholders in the annual report specifying the following categories—

#### 3.2 *Best Practices Relating to the Position of Chairman and Chief Executive*

- (i) Every public listed company should as a matter of best practice separate the role of the chairman and chief executive in order to ensure a balance of power and authority and provide for checks and balances.
- (ii) Where the role of the chairman and the chief executive is combined, there should be a clear rationale and justification which must—
  - (a) be for a limited period;
  - (b) be approved by the shareholders;
  - (c) include measures that have been implemented to ensure that no one individual has unfettered powers of decision in the Company; and
  - (d) include plan for separation of the role where such combined role is deemed necessary for a limited period during the restructuring or change process.
- (iii) Chairmanship of a public listed company should be held by an independent and non-executive director.
- (iv) No person shall be a chairman in more than two public listed companies at any one time in order to ensure effective participation in the board.
- (v) Every public listed company should also have a clear succession plan for its chairman and chief executive in order to avoid unplanned and sudden departures, which could undermine the company's and shareholders' interest.
- (vi) The chief executive should be responsible for implementing the Board corporate decision and there should be a clear flow of information between management and the board in order to facilitate both quantitative and qualitative evaluation and appraisal of the company's performance.
- (vii) The chairman of the board should undertake a primary responsibility for organizing information necessary for the board to deal with and for providing necessary information to the directors on a timely basis.

[Subsidiary]

- (viii) The chief executive is obliged to provide such necessary information to the board in the discharge of the board's business.

### 3.3 *Best practices relating to the rights of the shareholders*

The essence of good corporate governance practices is to promote and protect shareholders' rights—

- (i) a board of a public listed company should ensure equitable terms of shareholders including the minority and foreign shareholders.
- (ii) all shareholders should receive relevant information on the company's performance through distribution of regular annual reports and accounts, half-yearly results and quarterly results as a matter of best practice.
- (iii) the shareholders should receive a secure method of transfer and registration of ownership as well as a certificate or statement evidencing such ownership in the case of a central depository environment.
- (iv) every shareholder shall have a right to participate and vote at the general shareholders meeting including the election of directors.
- (v) every shareholder shall be entitled to ask questions, seek clarification on the Company's performance as reflected in the annual reports and accounts or in any matter that may be relevant to the Company's performance or promotion of shareholders' interests and to receive explanation by the directors and/or management.
- (vi) every shareholder shall be entitled to distributed profit in form of dividend and other rights for bonus shares, script dividend or rights issue, as applicable and in the proportion of its shareholding in the Company.
- (vii) the board should maintain an effective communication policy that enables both management and the board to communicate effectively with its shareholders, stakeholders and the public in general.
- (viii) the annual report and accounts to the shareholders must include highlights of the operation of the Company and financial performance.
- (ix) all shareholders should be encouraged, to participate in the annual general meetings and to exercise their votes.
- (x) Institutional investors are particularly encouraged to make direct contact with the Company's senior management and board members to discuss performance and corporate governance matters as well as vote during the annual general meetings of the Company.
- (xi) companies, as a matter of best practice, are encouraged to organize regular investor briefings and in particular when the half-yearly and annual results are declared or as may be necessary to explain their performance and promote interaction with investors.
- (xii) every public listed company should encourage the establishment and use of the Company's website by shareholders to ease communication and interaction among shareholders and the Company.
- (xiii) every public listed company should encourage and facilitate the establishment of a Shareholders' Association to promote dialogue between the Company and the shareholders. The Association should play an important role in promoting good corporate governance and actively encourage all shareholders to participate in the annual general meeting of the Company or assign necessary voting proxy.
- (xiv) Shareholders while exercising their right of participation and voting during annual general meetings of the Company should not act in a disrespectful manner as such action may undermine the Company's interest.

### 3.4 *Best Practices Relating to the Conduct at Annual General Meetings*

The Board of a public listed company should ensure that shareholders' right of full participation at annual general meetings are protected by giving shareholders—



- (i) sufficient information on voting rules or procedures;
- (ii) the opportunity to quiz management;
- (iii) the opportunity to place items on the agenda at annual general meetings;
- (iv) the opportunity to vote in absentia;
- (v) sufficient information to enable them to consider the costs and benefits of their votes.

### 3.5 *Best Practices Relating to Accountability and the Role of Audit Committees*

As a matter of best practice, the constitution of audit committees represents an important step towards promoting good corporate governance. The following shall represent the recommended best practice relating to the role and constitution of audit committees by public listed companies:

#### 3.5.1 *The Audit Committee*

The board shall establish an audit committee of at least three independent and non-executive directors who shall report to the board, with written terms of reference, which deal clearly with its authority and duties. The chairman of the audit committee should be an independent and non-executive director. The board should disclose in its annual report whether it has an audit committee and the mandate of such committee.

#### 3.5.2 *Attributes of Audit Committee Members*

Important attributes of committee members should include—

- (i) broad business knowledge relevant to the Company's business;
- (ii) keen awareness of the interests of the investing public and familiarity with basic accounting principles; and
- (iii) objectivity in carrying out their mandate and no conflict of interest.

#### 3.5.3 *Duties of Audit Committees*

Audit Committees should have adequate resources and authority to discharge their responsibilities. The members of the audit committee shall—

- (i) be informed, vigilant and effective overseers of the financial reporting process and the Company's internal controls;
- (ii) review and make recommendations on management programs established to monitor compliance with the code of conduct;
- (iii) consider the appointment of the external auditor, the audit fee and any questions of resignation or dismissal of the external auditor;
- (iv) discuss with the external auditor before the audit commences, the nature and scope of the audit, and ensure co-ordination where more than one audits firm is involved;
- (v) review management's evaluation of factors related to the independence of the Company's external auditor. Both the audit committee and management should assist the external auditor in preserving its independence;
- (vi) review the quarterly, half-yearly and year-end financial statements of the Company, focusing particularly on—
  - (a) any changes in accounting policies and practices;
  - (b) significant adjustments arising from the audit;
  - (c) the going concern assumption;
  - (d) compliance with International Accounting Standards and other legal requirements;
- (vii) discuss problems and reservations arising from the interim and final audits, and any matter the external auditor may wish to discuss (in the absence of management where necessary);
- (viii) review any communication between external auditor(s) and management;

[Subsidiary]

- (ix) consider any related party transactions that may arise within the company or group;
- (x) consider the major findings of internal investigations and management's response;
- (xi) have explicit authority to investigate any matter within its terms of reference, the resources that it needs to do so and full access to information;
- (xii) obtain external professional advice and to invite outsiders with relevant experience to attend, if necessary; and
- (xiii) consider other issues as defined by the Board including regular review of the capacity of the internal audit function.

#### 3.5.4 *Audit Committee and Internal Audit Functions*

The Board should establish an internal audit function. The internal audit function should be independent of the activities they audit and should be performed with impartiality, proficiency and due care. The Audit Committee should determine the remitting of the internal audit function and in particular—

- (i) review of the adequacy, scope, functions and resources of the internal audit function, and ensure that it has the necessary authority to carry out its work;
- (ii) review the internal audit program and results of the internal audit process and where necessary ensure that appropriate action is taken on the recommendations of the internal audit function;
- (iii) review any appraisal or assessment of the performance of members of the internal audit function;
- (iv) approve any appointment or termination of senior staff members of the internal audit function;
- (v) ensure that the internal audit function is independent of the activities of the company and is performed with impartiality, proficiency and due professional care;
- (vi) determine the effectiveness of the internal audit function; and
- (vii) be informed of resignations of internal audit staff members and provide the resigning staff members an opportunity to submit reasons for resigning.

#### 3.5.5 *Participation in the Meetings of Audit Committees*

- (i) the finance director, the head of internal audit (where such a function exists) and a representative of the external auditors shall normally attend meetings of the audit committee while other board members may attend meetings upon the invitation by the audit committee.
- (ii) at least once a year the committee shall meet with the external auditors without executive Board members present.
- (iii) the audit committee should meet regularly, with adequate notice of the issues to be discussed and should record its conclusions.
- (iv) the board should disclose in an informative way, details of the activities of audit committees, the number of audit committee meetings held in a year and details of attendance of each audit committee member at such meetings.

4. The Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya (G.N. 369/2002) are revoked.