INSTITUTE OF DIRECTORS
MALAWI

National Corporate Governance Review Committee (NCGRC)

The MALAWI CODE II

CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE IN MALAWI

OVERARCHING PROVISIONS

Officially launched on 1st June 2010

Global Corporate Governance Forum

IFC International Finance Corporation World Bank Group

FLANDERS FITS YOU

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INTRODUCTION

The first Code of Corporate Governance in Malawi was published in 2001. Since then corporate governance practices have developed through the introduction of laws, experience from further reported corporate scandals and a greater understanding in the sub-Saharan region of how the adoption of corporate governance practices can assist in sustainable development and greater access to capital.

Some significant lessons learnt, since the first Malawi Code was published, comprise the following:

- The drafters of the first Malawi Code intended to make it a general Code, applicable to a broad range of organisations. In practice, however, different paragraphs of the Malawi Code were too specific and/or too much leaning towards listed companies and other large corporations. Some examples of such paragraphs, not applicable to all types of organisations, were the requirements with respect to independent nonexecutive directors and a mandatory internal audit function.

  This seemed to be a disincentive for smaller organisations to commit to the first Malawi Code.

- Stakeholders' feedback also showed that there was a need for a more principle based Malawi Code that would further be specified and customized for its application in different sectors. This approach would also help to clarify how specific requirements of the Code should be interpreted in different situations.

- There was a clear need to address new and/or evolving concepts and principles that were lacking or insufficiently addressed in the first Malawi Code. This involved issues such as risk management, board evaluation, good corporate citizenship, related party transactions and sustainability.

- Although a Malawi Code had been published, many of the listed and other large Malawian Companies continued to refer in their annual reports only to their compliance with the King Code or the Cadbury Code. Undoubtedly a stronger and more up to date image of the Malawi Code was needed to induce all kinds of organizations, including listed companies, to publicly adopt and annually report on their compliance with it.

The Institute of Directors (IOD) therefore decided to review the Malawi Code and constituted a committee named “The National Corporate Governance Review Committee” (NCGRC). At the first meeting of the NCGRC it was decided that the new Code would comprise a set of ***Overarching Provisions*** **(OPs)** that would apply to all organisations in Malawi, not just incorporated entities. In addition the NCGRC envisaged some guidelines that would detail how the OPs would apply in specific cases or specific types of organisations.

The application of the Malawi Code to a larger number of organisations is in line with international best practice that recognizes that CG principles ought to be applicable to all organizations not just listed companies. This has been reflected in the proliferation of good governance practices and codes for NGOs, Parastatals, SMEs, Governmental Organisations, etc. It also reflects the fact that within Malawi all three sectors, the public, private and not-for-profit sectors, are interlinked, and, for the economy to develop, corporate governance practices need to be adopted by all.

The OPs should be appealing and applicable to all types of organisations in Malawi; this, however, does not imply that these OPs should be vague or sketchy. On the contrary, they are as concrete and as detailed as possible; while still remaining applicable to all types of organisations in Malawi.

The NCGRC explicitly avoided OPs with more demanding / stringent corporate governance requirements that are not applicable to all types of organisations. The usage of more stringent OPs, even with waivers for smaller organisations or specific types of situations, would have resulted in a code that would have been much more difficult to promote among all types of organisations in Malawi.

In addition to the OPs, the NCGRC and the IOD intend to develop, adopt and promote ***guidelines*** applicable to organisations in ***specific sectors***.[1] The sector specific guidelines will provide the necessary interpretation, best practice and, where appropriate, more stringent requirements for implementation in that sector.

[1] For financial institutions / banks, the Reserve Bank of Malawi (RBM) has, already in April 2010, issued Corporate Governance Guidelines that shall apply to all entities licensed under the Banking Act 1989 in Malawi. In addition the RBM is currently finalizing draft guidelines (minimum standards on corporate governance) for insurance companies.

The OPs should be considered as a voluntary Code. As a custodian of the Malawi Code II, the IOD is responsible for monitoring and measuring compliance with the OPs and will develop methods and systems to do so. The IOD's board composition, with all economic sectors represented, is an important element in its role as a custodian of the OPs.

The organisational compliance with sector specific guidelines will be monitored and measured by institutions which will be identified within the respective guidelines.

While developing and adopting such sector guidelines it will become clear in what respects these guidelines and/or directives should become mandatory, what kind of enforcement is needed and what organisation will have a specific mandate as enforcer.

By providing Malawi with these OPs, the IOD and the NCGRC have given a positive economic impulse. It is hoped that this will trigger the adoption of better corporate governance practices by organisations in Malawi. This in turn will lead to sustainable businesses, economic development, poverty eradication, improved transparency, increased trustworthiness and less corruption. Embedded in better corporate governance, this will not only foster sustainable development but should also, for those seeking capital, lead to easier access to capital at a lower cost.

Acknowledgements

This Revised Code was commissioned by the IOD following recommendations emanating from the World Bank Corporate Governance ROSC (Report on the Observance of Standards and Codes) which was completed in 2007. It aims at incorporating lessons learnt from the operation of the existing Code introduced in 2001 and international best practice. It is the result of the hard work of many people representing different organizations operating in Malawi.

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Mr. Dixies Kambauwa	Mr. John R. Kamanga
Executive Director	Chair
Institute of Directors in Malawi	NCGRC

DEFINITIONS

1. <u>Owners</u>

The owners of the organisation shall be understood as those who constitute the supreme authority of the organisation, for example, Government, Shareholders, Holding or Parent organisation, etc. There may be a sole owner of the organisation; the shareholders or the members might exercise their ownership role in the Annual General Meeting (or General Assembly); owners may entrust “trustees” to take on the “ownership role” on their behalf; or there may be another ownership arrangement appropriate to the type of organisation.

2. <u>Boards</u>

The board, often called board of directors, is a body of elected or appointed members who jointly oversee and direct the affairs of an organization. The body sometimes has a different name, such as board of trustees, board of governors, board of managers, governing board, governing council, board of commissioners, etc. It is often simply referred to as "the board."

A board's activities are determined by the powers, duties, and responsibilities delegated to or conferred on it by the owners of the organisation and/or as specified by laws and regulations applicable to the type of organization. While the “Owners” constitute the supreme authority of the organisation, they confer the supreme governing role to the board. The board therefore is the main governing body situated between the Owners and the Executive Management of the organisation.

3. <u>Member of the Board</u>

A member of the board shall be understood as any individual elected to or appointed as member of the Board (see definition above) e.g. Directors, members of governing councils, etc.

4. Private, Public and Not for Profit Sectors

Private Sector is that part of the economy which is both run for private profit and is not controlled by the state. It includes family owned businesses, private companies, Micro, Small and Medium Enterprises, as well as the informal sector.

Public Sector, sometimes referred to as the state sector, is a part of the state that deals with the production, delivery and allocation of goods and services by and for the government or its citizens, whether national, regional or local/municipal. It includes State Owned Enterprises, Parastatals and Public Authorities or Commissions.

Not for Profit Sector is that part of the economy where organizations are not for profit and are not part of the government. This sector is also called the third sector, in reference to the private sector and the public sector, or the Civic sector emphasizing the sector's relationship to civil society. It includes Non-Governmental Organizations, Community Based Organizations and other related organisations.

1. COMPLIANCE WITH THE CODE

1.1 The Malawi Code II is concerned with the establishment of an environment conducive to enabling organisations to grow, thrive, survive and create sustainable development for Malawi, whilst acting as good corporate citizens.

1.2 These Overarching Provisions (OPs) should thus be applied in all organisations be they large, medium or small; in the private, public or not for profit sector.

1.3 Organisations in their annual or directors' reports should state whether the Code has been adhered to or, if not, explain with reasons in what respects it has not been adhered to.

2. OWNERS

The owners of the organisation should:

2.1 Jointly and severally protect, preserve and actively exercise the supreme authority of their organisation.

2.2 Ensure that only competent and reliable persons with appropriate knowledge, skills and experience are elected or appointed to the board.

2.3 Decide the term to be served by non-executive members of the board and ensure that the board is refreshed on a regular basis; bringing new and unbiased viewpoints into discussions and decision-making.

2.4 Foster constructive relationships with the board to facilitate the success and sustainability of the organisation.

2.5 Ensure that the board is constantly held accountable and responsible for the efficient and effective governance of the organisation.

2.6 Change the Chairman and/or the composition of a board that does not perform to expectations or in accordance with the mandate of the organisation.

2.7 Ensure that their organization acts as a good corporate citizen, and in a sustainable manner, taking into consideration, as appropriate, the views of stakeholders.

2.8 Comply with all applicable pieces of legislation.

2.9 Respect the fiduciary duties of the members of the Board.

2.10 Ensure that the level of remuneration for members of the board and top management is sufficient to attract and retain the quality and calibre of individuals needed to run the organisation successfully.

2.11 The majority of Owners and the Members of the Board should appropriately respect the rights of minority Owners. The organisation's affairs may not be conducted in a manner which is unfairly prejudicial to the interests of minority Owners and/or to the purpose of the organisation.

3. BOARD STRUCTURE

3.1 The unitary (or one tier) board structure, comprising executive and nonexecutive directors, rather than the dual (or two tier) board structure adopted in some countries, is considered appropriate for Malawi as it provides greater interaction among all board members when dealing with matters such as strategic planning, performance, standards of conduct, resource allocation and communication with stakeholders.

3.2 While the size of the Board shall be determined by the organisation, and shall vary from organisation to organisation, the size should be such that it ensures that the organisation operates effectively.

4. THE ROLE OF THE BOARD

The Board should:

4.1 Ensure that the organisation complies with all relevant laws, regulations and codes, including the Malawi Code II, and, if appropriate, ask executive management to report periodically on such compliance.

4.2 Exercise leadership, enterprise, integrity and sound judgement in directing the organisation; so as to achieve sustainable success for the organisation.

4.3 Determine the organisation's mission, values and objectives; ensure that a strategy is in place to achieve these and hold management accountable for its implementation.

4.4 Ensure that appropriate procedures and practices, to protect the organisation's assets, resources and reputation, are in place and are effective.

4.5 Develop a board charter, based on the organisation's Constitution, Articles of Association, and the laws and regulations that apply to the organisation, in which roles and responsibilities are clearly defined.

4.6 Retain full and effective control over the organisation.

4.7 Ensure that decisions on material matters are in the hands of the Board. The Board should have a definition of materiality on matters such as the acquisition and disposal of assets, investments, capital projects and authority levels. The level or definition of materiality is a matter for each organisation to decide.

4.8 Define the responsibilities of and requirements for reporting by executive management and monitor their performance.

4.9 Ensure that plans are in place for orderly succession of Members of the Board and of the Chief Executive Officer.

4.10 Ensure that every member of the board is able to play a full and constructive role in the affairs of the organisation.

4.11 Develop policies and processes to avoid or minimise conflicts of interest.

4.12 As part of its decision making process, take into consideration wider societal interests and other circumstances affecting how the organisation fulfils its 'license to operate'.

4.13 Ensure that a dialogue, based on mutual understanding of the objectives of the organisation, exists between the Board itself and the owners of the organisation.

4.14 Ensure that it acts in the best interests of the organisation and that in doing so it meets the organisation's purpose.

4.15 Meet regularly. Each Board should decide how regularly it needs to meet to discharge its duties, having regard to the organisation's own circumstances.

4.16 On the appointment and throughout the duration of tenure of its members, ensure that the members are able to devote sufficient time to their responsibilities as members of the Board.

4.17 Ensure that its members have among them the right mix of expertise, experience, skills and knowledge appropriate to the organisation.

4.18 Ensure that it is adequately informed and where necessary invite executive management to clarify and/or provide additional information.

4.19 Ensure that its members are of sufficient calibre to bring independent judgement to bear on issues of strategy, performance, resources, standards of conduct, and evaluation of performance.

4.20 Ensure that the integrated reporting by the organisation is accurate and truthful, at the time of disclosure.

4.21 Consider using alternative dispute resolution as a method of resolving disputes arising both within the organisation and between the organisation and other parties. Alternative dispute resolution comprises among others: open communication, win-win arrangements, negotiations, mediation and arbitration.

5. BOARD EVALUATION

5.1 It is good practice for Boards to evaluate annually the mix of skills and experience of their members as well as the board's performance and processes. The level of evaluation would depend on the type of organisation. Large organisations may also consider evaluating the Chairman, other Members of the Board, Board Sub-committees and the Chief Executive Officer.

5.2 Organisations should agree in advance the type of evaluation suitable for their organisation and how to measure and report it in the organisation's Directors' or Annual Report.

6. BOARD SUB-COMMITTEES

6.1 Boards may find it useful to establish board sub-committees to deal with matters that can best be dealt with in a small forum. The number and nature of sub-committees will depend on the type of organisation. All sub-committees when established should be given, in writing, clear Terms of Reference.

6.2 Decisions of each sub-committee should be communicated to the Board as recommendations for its further consideration.

6.3 When constituting sub-committees, the Board should ensure that the subcommittees' members have the appropriate balance of skills, experience, independence and knowledge of the organisation and the sub-committees' Terms of Reference to discharge their duties and responsibilities effectively.

6.4 Sub-committees should also be provided with sufficient and appropriate resources to undertake their duties.

7. THE CHAIRMAN

7.1 The Chairman should preferably be non-executive.

7.2 The roles of the Chairman and the Chief Executive Officer should preferably be separate, but where they are combined, it is important that the Chairman encourages proper deliberation of all matters requiring the Board's attention and obtains optimum input from all Members of the Board.

7.3 The Chairman should ensure that all Board Members are as fully informed as possible on any issue on which a decision is to be made and afford each Board Member a reasonable opportunity to contribute to the Board's deliberations.

7.4 It is the responsibility of the Chairman, following a Board Evaluation, to recommend to the Owners the removal of Board Members who do not contribute effectively to the Board.

7.5 Where the Chairman is appointed by the Board, the members of the Board should ensure that only a person that can add value is appointed to the position. The organisation should determine the length of service of the Chairman.

7.6 Where the Chairman is required to exercise a casting vote, he should use it objectively.

8. MEMBERS OF THE BOARD

In carrying out their functions, Members of the Board should:

8.1 Exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with:

a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions of a Member of the Board of the organisation, and

b) the general knowledge, skill and experience that the Member has.

8.2 Both during and after their tenure of office, avoid using privileged information for their own personal benefit or that of other people associated with them.

8.3 Ensure that they devote sufficient time to their responsibilities.

8.4 Be diligent in discharging their duties to the organisation, endeavour to attend meetings regularly and be prepared and able where necessary, to express disagreement with colleagues on the Board including the Chairman and the Chief Executive Officer.

8.5 Be truthful and disclose all the information at their disposal to enable the Board to make an informed decision.

8.6 At the expense of the organisation, be entitled to seek independent professional advice about the affairs of the organisation. Before seeking independent professional advice, however, the member concerned should discuss and clear the matter with the Chairman or the Company Secretary. If to approach either of them is inappropriate in the circumstances of the matter, the board member must act within the best interests of the organisation.

9. NON-EXECUTIVE MEMBERS OF THE BOARD

Non-Executive Members of the Board should:

9.1 Be independent in character and judgement, even where there are relationships or circumstances which are likely to affect, or could appear to affect the judgement of the Members of the Board.

9.2 Not take part in the day-to-day management of the organisation.

9.3 Not have any benefits from the organisation other than their fees and other approved expenses. All sitting allowances are deemed to be part of fees.

9.4 Not undertake any advisory work for the organisation unless that work has been approved in advance by the Board and is limited in scope and time in order not to compromise the “non-executive” status of that member and to avoid any conflict of interest.

9.5 Be of sufficient calibre to bring independent judgement to bear on issues of strategy, performance, resources, standards of conduct, and evaluation of performance.

9.6 Constructively challenge and contribute to the development of strategy.

9.7 Scrutinise the performance of management in meeting agreed goals and objectives, and monitor the reporting of performance.

9.8 Satisfy themselves that financial information is accurate and that financial controls and systems of risk management are robust and sound.

9.9 Be responsible for ensuring that plans are in place to ensure the long term sustainability of the organisation. In this regard they may have a role in appointing and, where necessary, removing senior management and determining their levels of remuneration.

10. APPOINTMENT OF MEMBERS OF THE BOARD

10.1 The appointment of the Board should be appropriate for the organisation taking into account good governance and the requirements for the organisation to meet its goals and to ensure its long-term sustainability.

10.2 Appointments to the Board should be planned with strategic considerations and objectives of the organisation in mind.

10.3 The selection process must be managed by considering a balanced mix of experience and skills needed to add value to the strategic role of the Board. Depending on the type of organisation, the selection process may also consider appropriate diversity of gender and / or social and economic background.

10.4 An organisation should make appointments to the Board on merit.

10.5 The term served by both executive and non-executive Members of the Board should be decided by the organisation; taking into account the period that could reasonably be perceived to materially interfere with the Member's ability to act in the best interest of the organisation's goals and long-term sustainability.

10.6 Where appointments to the Board are done in an AGM or General Assembly, Owners should be provided with a list of candidates from whom to elect Members of the Board.

11. REMUNERATION OF MEMBERS OF THE BOARD

11.1 Remuneration of Members of the Board should be appropriate to the organisation and should take into account the long term sustainability of the organisation.

11.2 There should be a formal and transparent process for determining remuneration of Members of the Board and of top management.

11.3 Non-Executive Members of the Board should receive fees at levels that reflect time invested, commitment, performance and responsibilities. Organisations, may however choose for an arrangement where Members of the Board are fully committed to the mission of the organisation and therefore agree to work pro bono.

11.4 An organisation should disclose, at least on an aggregate basis, in its Directors' or Annual Report the remuneration, bonuses and other benefits received by Members of the Board. What is to be disclosed should represent the total cost to the organization.

11.5 When considering appointing Executive Members of the Board, the Board should seek proper legal advice in relation to termination clauses to avoid the risk of paying excessive amounts on termination of service.

12. TRAINING AND DEVELOPMENT OF MEMBERS OF THE BOARD

12.1 Members of the Board need proper knowledge of the organisations for which they are responsible. They should acquire a broad knowledge of:

12.1.1 the business of the organisation so that they can provide meaningful direction to it;

12.1.2 the statutory and regulatory requirements affecting the direction of the organisation and the environment in which the organisation operates;

12.1.3 their role, duties, responsibilities, and obligations as well as board practices and procedures.

12.2 The Board in developing training needs, should take into account any training needs identified during a Board Evaluation.

12.3 The Board should ensure that new Members undergo a tailored induction programme, particularly if the new Members have no previous board experience.

12.4 Every Member of the Board should keep abreast of both practical and theoretical developments affecting the environment in which the organisation operates as well as to ensure that their expertise and experience remain relevant to the Board and to the organisation. Members of the Board should be regularly exposed to matters relevant to legal reforms, Corporate Governance, changing corporate environment, risks, opportunities and other matters that may be of interest in the execution of their duties.

12.5 Executive members of the board should be encouraged by their organisation to take non-executive appointments in other organisations. However, the number of non-executive appointments should not be such that the members' executive responsibilities to their own organisation are adversely affected.

13. THE COMPANY SECRETARY

13.1 All organisations, where required by law, should ensure that they have access to a competent Company Secretary to render company secretarial services to the organisation. The appointment and removal of the Company Secretary should be a matter for the Board as a whole.

13.2 The Company Secretary should among other duties, be responsible for advising the Chairman and the Board on the implementation of the Code.

13.3 All members of the board should have access to the advice and services of the Company Secretary.

13.4 The Company Secretary should be responsible for ensuring effective information flows between the Board and top management and between the Board and its Sub-Committees.

13.5 Wherever possible the role of the Chief Executive Officer and that of the Company Secretary should be separated.

14. RELATED PARTY TRANSACTIONS

14.1 Organisations should identify, manage and document "related party transactions".

14.2 The following are "Related parties":

- (a) a member of the Board or of the key management personnel of the organisation;
- (b) any other person that significantly controls or influences the organisation;
- (c) any close member of the family (such as the individual's domestic partner and children, children of the individual's domestic partner and other dependants of the individual or of the individual's domestic partner) of any individual referred to in (a) or (b);
- (d) any entity controlled or significantly influenced by the organisation or by any individual referred to in (a) or (b);
- (e) any entity under joint control with the organisation;
- (f) any entity that significantly controls or influences the organisation.

14.3 A related party transaction shall be understood as a transfer of resources, services or obligations between related parties and the organisation, regardless of whether or not a price is charged. This includes, among others,purchases or sales of goods, property and other assets; rendering or receiving of services, leases, transfers of research and development; transfers under licence agreements, financial arrangements (including loans and equity contributions in cash or in kind), provision of guarantees or collateral, commitments to do something if a particular event occurs or does not occur in the future, including executory contracts, etc.

14.4 Owners should be informed of any “related party transaction” that may significantly affect the current and or future financial position, the performance, the capacity, the opportunities and/or the risks of the organisation. Such disclosure should explain what the nature of the transactions is and how the potential conflicts of interest or other risks for the organisation are being avoided and/or mitigated.

15. RISK MANAGEMENT AND INTERNAL CONTROLS

15.1 The Board should be responsible for the governance of risk.

15.2 The Board should regularly review the organisation’s risks, risk appetite and tolerance, and ensure that it has endeavoured to put in place measures to minimise or avert any identified risks. The Board should also regularly review the appropriateness of these measures.

15.3 The Board of an organisation that relies heavily on IT (computer) Systems should ensure that appropriate back-up measures are adopted and that measures are put in place to safeguard all information stored by the organisation.

16. ETHICS

Organisations should:

16.1 Ensure that they act ethically.

16.2 Consider developing a Code of Ethics aimed at fostering an ethical culture within their organisation. Where adopted, a Code of Ethics should:

16.2.1 Commit the organisation to the highest standards of behaviour;

16.2.2 Be developed with the full participation of all parties expected to abide by it;

16.2.3 Receive total commitment from the Board and the Chief Executive Officer of the organisation;

16.2.4 Be sufficiently detailed as to give a clear guide to the expected standards of behaviour of all employees.

16.3 Allow African “umunthu” values to thrive within the ethical framework of the organisation. Relationships within the organisation and with its stakeholders should therefore also be guided by the following concepts: thoroughly valuing others and in doing so valuing ourselves, cooperation, kinship and belonging within the community.

17. GOOD CITIZENSHIP

17.1 An organisation as well as being an economic entity is also a citizen of Malawi and as such has a moral and social standing within Malawian society, with all the responsibilities attached to that status. As such, when making decisions, an organisation should consider the impact of itsdecisions on its stakeholders (both internal and external), the environment and society as a whole.

18. SUSTAINABILITY

18.1 Organisations should conduct their operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. It means having regard to the impact that the organisations’ operations have on the environment, economic and social life of the community in which it operates. This should include its supply chain i.e. access to the resources and raw materials it needs to carry out its operations.

18.2 Organisations should report on how they have both positively and negatively impacted on the environment and on the economic and social life of the community in which they operate and how they believe they can improve the positive and eradicate or lessen the negative aspects in the coming year.

19. EXTERNAL COMMUNICATIONS

19.1 Society now demands greater transparency, accountability and responsibility from organisations. Organisations should consider making regular, timely, balanced and understandable statements about their activities, performance and future prospects.

19.2 Organisations should, where it is in their best interests, disclose publicly their reasons for making decisions which may appear compromised due to a perceived conflict of interest of the members making the decision.

20. INTEGRATED REPORTING AND AUDITING

20.1 Organisations should produce financial statements appropriate to them. To the extent possible the financial statements should be prepared in accordance with nationally recognised standards.

20.2 Where there is a requirement for auditing the financial statements, the audit should be done by an independent external auditor, who is provided with the opportunity to raise matters directly with the Board.

20.3 Sustainability reporting and disclosure should be integrated with the organisation's financial reporting.

20.4 The financial statements of the organisation should also comply with any obligation to disclose 'related party transactions", as is, for their type of organisation, specified in laws, regulations, directives or guidelines.