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# SAMPLE CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE IN KENYA

*(This sample Code is intended to assist companies develop their own governance codes and is neither prescriptive nor mandatory)*

## Authority and Duties of Shareholders

Shareholders of the company shall jointly and severally protect, preserve and actively exercise the supreme authority of the company in general meetings. They have a duty, jointly and severally, to exercise that supreme authority to:

- ◆ Ensure that only competent and reliable persons who can add value to the company are elected or appointed to the Board of Directors;
- ◆ Ensure that the Board of Directors is constantly held accountable and responsible for the efficient and effective governance of the company.
- ◆ Change the composition of a Board of Directors that does not perform to expectation or in accordance with the mandate of the corporation.

## Leadership of the Company

The Board of Directors shall exercise leadership, enterprise, integrity and sagacious judgment in directing the company so as to achieve continuing prosperity for the company and shall always act in the best interests of the company.

## Role and Functions of the Board

The Board of Directors shall exercise all the powers of the company subject only to the limitations contained in the law and the memorandum and articles of incorporation.

In this regard, it is expected that the Board of Directors shall fulfill the following functions:

- ◆ Exercise leadership, enterprise, integrity and sound judgments in directing the corporation so as to achieve continuing prosperity and to act in the best interest of the enterprise while respecting the principles of transparency and accountability;
- ◆ Ensure that through a managed and effective process, board appointments are made that provide a mix of proficient directors, each of whom is able to add value and bring

independent judgment to bear on the decision-making process;

- ◆ Determine the corporation's purpose and values, determine the strategy to achieve its purpose and to implement its values in order to ensure it survives and thrives, and ensure that procedures and practices are in place that protect the corporation's assets and reputation;
- ◆ Monitor and evaluate the implementation of strategies, policies, management performance criteria and business plans;
- ◆ Ensure that the corporation complies with all relevant laws, regulations and codes of best business practice;
- ◆ Ensure that the corporation communicates with shareholders and other stakeholders effectively;
- ◆ Serve the legitimate interest of the shareholders and the corporation and account to them fully;
- ◆ Identify the corporation's internal and external stakeholders and agree on a policy, or policies determining how the corporation should relate to them;
- ◆ Ensure that no one person or a block of persons has unfettered power and that there is an appropriate balance of power and authority on the board which is, inter alia, usually reflected by separating the roles of the Chief Executive Officer and Chairman, and by having a balance between executive and non-executive directors;
- ◆ Regularly review processes and procedures to ensure the effectiveness of its internal systems of control, so that its decision-making capability and the accuracy of its reporting and financial results are maintained at a high level at all times;
- ◆ Regularly assess its performance and effectiveness as a whole, and that of the individual directors, including the Chief Executive Officer;
- ◆ Appoint the Chief Executive Officer and at least participate in the appointment of senior management, ensure the motivation and protection of intellectual capital intrinsic to the corporation, ensure that there is adequate training in the corporation for management and employees, and a succession plan for senior management;
- ◆ Ensure that all technology and systems used in the corporation are adequate to properly run the business and for it to remain effectively competitive;
- ◆ Identify key risk areas and key performance indicators of the business and monitor these factors;
- ◆ Ensure annually that the corporation will survive, thrive and continue as a viable going concern.

**In Order to fulfill these functions, the Board of Directors shall:**

- ◆ Meet regularly and retain full and effective control over the company.
- ◆ Evolve procedures for the selection and removal of individual directors (including the chairman and chief executive) to facilitate regular alteration of the mix and composition of the Board ensuring relevant rejuvenation.
- ◆ Define the limits of authority of the Chief Executive and other top executives.
- ◆ Compile and communicate company policies, strategies etc. covering style of operation; external and internal relationships; markets and business; required rates of return and performance standards; growth and change policies; planning and budgetary procedures.
- ◆ Review and approve strategic plans and arrange that meaningful plans are produced at all levels on an on-going basis covering the longest realistic time-scale.
- ◆ Determine the (actual and potential) total resources of the company in terms of men, money, methods, equipment etc. and market position, and allocate these by unit and time-scale, defining closely what returns are expected and when.
- ◆ Devote sufficient time to their responsibilities.
- ◆ Structure and organize the company.

- ◆ Monitor management performance.
- ◆ Map out the mechanisms for internal and external liaison and communications.
- ◆ Define how the Board will operate including:
  - What information or reports it requires on a monthly or quarterly basis.
  - How, with what data, and by what means, it will constantly monitor management performance and the financial progress of the company.
  - How it will evaluate its own performance at least once every year.
- ◆ Ensure that the company is properly managed and for the attainment of lawful objectives.
- ◆ Ensure that the company's affairs are not managed or conducted in a manner oppressive to any of its shareholders or for fraudulent purposes.
- ◆ Ensure that the company complies with all statutory requirements.

### **Composition of the Board**

The Board shall include a balance of executive and non-executive directors (including independent non-executive directors) such that no individual or group of individuals or interests can dominate its decision taking.

*The Board shall be chaired by an independent director who is not managing the company.*

There are two key tasks at the top of the company, that of running the Board and that of the Chief Executive responsible for running the company. Therefore as a general rule, there is a clear division of these roles to ensure that a balance of power and authority is maintained, and that no one individual has unfettered powers of decision. Where these roles are combined, the reasons thereof shall be publicly explained.

#### **The roles of the Chairman are:**

- ◆ To lead the Board;
- ◆ To chair meetings of the Board and members, ensuring order, proper conduct of meetings, affording participants a reasonable opportunity to speak, ensuring decisions are fairly made, deciding on technicalities and to cast the deciding vote in case of ties;
- ◆ To organize and facilitate a balance of internal and external relationships, and
- ◆ To facilitate effective Board management.

Independent non-executive directors shall be independent of management, and free from any business or other relationship which would interfere with the exercise of their ability to bring an independent judgment to bear on issues of strategy, performance, resources, key appointments and standards of conduct. Independent non-executive directors shall be relied upon in matters where there is potential for conflict of interest e.g.:

- ◆ Financial reporting (Audit Committee)
- ◆ Nomination and remuneration of directors
- ◆ Evaluation of Board performance

It is suggested that:

- ◆ The company must contain at least one third of its members as non-executive directors.
- ◆ Persons with full time employment in any company or organization should not hold many non-executive directorships elsewhere [indicatively, not more that two].

- ◆ Persons without full-time employment in one organization (professional directors, consultants etc.) should not hold more than ten non-executive directorships.
- ◆ Executives from subsidiaries, the parent company or any other of its acquisitions cannot become non-executive directors on the parent company.
- ◆ Suppliers, direct customers or other trading associates of the company cannot become non-executive directors of the company.
- ◆ Persons with prior professional or social relationships with directors of the company cannot become non-executives directors in the company.

The company must always have a qualified, competent, fit and proper company secretary who must have the requisite knowledge and experience necessary to undertake the statutory duties and responsibilities of the post and advise the Board. The Company Secretary should have responsibility for ensuring that the company adheres to this code of best practice for corporate governance.

### **Appointments to the Board**

There will be formal and transparent procedures for nomination and appointment of new directors to the Board. In this regard:

- ◆ There shall be set up a search and nominations committee of the Board.
- ◆ The Board of Directors will formally review its composition and performance at least once every year to ensure that:
  - The mix of membership is appropriate and compatible with the needs of the Board and company.
  - Every non-executive director commits adequate time to his responsibilities and contributes effectively.

*[Each non-executive director should commit at least two days per month to his duties as a director and the actual time spent shall be recorded and reflected in the annual report].*
- ◆ Based on the priority needs of the Board and the Company, the nominations committee will recommend to the Board qualified, competent fit and proper persons to be nominated for election to the Board.
- ◆ All directors shall be required to submit themselves for re-election at regular intervals and at least once every three years.
- ◆ Service contracts of Executive Directors shall not exceed three years but these are renewable with the approval of shareholders on the recommendation of the Board.

### **Directors' Remuneration**

In order to avoid potential conflict of interest, the Board of directors shall set up independent remuneration committee to determine the remuneration of respective individual executive directors. The committee shall make a report to the shareholders every year.

The Committee shall:

- ◆ Establish a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual executive directors.
- ◆ Ensure that the level of remuneration shall be sufficient to attract and retain the quality and calibre of directors needed to run the company successfully while the make up should be so structured as to link corporate and individual performance.
- ◆ Ensure that the company's annual report contains a statement of the remuneration policy and details of the remuneration and benefits of each director, including family-

related benefits.

## **Disclosures of Information by Directors**

On first appointment and at regular intervals (at least once every year), or at any time when circumstances change, all directors shall, in good faith, disclose to the Board for recording and disclosure to the external auditors, any business or other interests that are likely to create a potential conflict of interest, including:

- All business interests (direct or indirect) in any other company, partnership or other business venture.
- Membership in trade, business or other economic organizations.
- Their shareholding, share options and/or other interest in the company.
- Any interest (direct or indirect) in any transaction with the company.
- Any gifts, monies, commissions, benefits or other favours extended or received from whatsoever party in respect of or in relation to any business dealings with the company.

At any time when a director resigns or is removed from office before the expiry of his term, he shall disclose to the company's external auditors and if necessary to the shareholders (if the reason for removal or resignation is refusal to compound fraud, corruption or other activities or behaviour incompatible with the shareholders' interests) the reasons for his resignation or removal.

## **Supply of Information to Directors**

For Board members to exercise informed, intelligent, objective and independent judgments on corporate affairs, they shall have access to accurate, relevant and timely information. In this regard:

- ◆ There shall be established a formal procedure to enable independent directors to take professional advice on any matter pertinent to their functions if and where they deem it necessary and at the company's expense but subject always to the limitations, restrictions and conditions stipulated by the Board.
- ◆ All directors shall have unlimited access to the advice and services of the Company Secretary who has a statutory duty to advise the Board on matters of procedures, rules and regulations, and to any other professional officer of the company.
  
- ◆ It is the duty of every director to demand and obtain any information he deems critical to the performance of his duties as a director.

## **Directors' Training and Development**

The weighty responsibilities placed upon a director, the level of commitment called for and the fast-changing corporate environment dictates that the company must now increasingly prepare those expected to assume these roles.

It is therefore recommended that all directors shall receive some formal training on their role, duties, responsibilities and obligations as well as Board practices and procedures on first appointment. This is particularly critical for those with no previous Board experience.

It is desirable that all company directors are exposed, at least once every three years, on matters relevant to legal reforms, corporate governance, changing corporate environment, business/commercial risks and other matters that may be of interest in the execution of

their role.

It is currently suggested that initial training of directors shall cover, inter alia:

- ◆ Role, duties and responsibilities of the Board and directors.
- ◆ Rights and obligations of a director.
- ◆ Statutory liabilities and duties of a director under criminal and company law.
- ◆ Board practices and procedures.
- ◆ Corporate strategy and organization.
- ◆ Disclosure and communication policies.
- ◆ Financial management systems, internal control procedures and internal audit.
- ◆ External Audit and the Board.
- ◆ The Corporate Environment.
- ◆ Performance targeting, monitoring and evaluation.
- ◆ Risk management.
- ◆ Information Technology and information to the Board.
- ◆ Any other matters of interest to the Board.

### **Accounts: Audit and Disclosure**

It is the statutory duty of directors, jointly and severally, to cause to be kept proper and accurate books of accounts in respect to all sums of money received and expended by the company, and the matters in respect of which receipt or expenditure takes place; all sales and purchases by the company; and of all the assets and liabilities of the company, as necessary to give with reasonable accuracy at anytime, the financial position of the company at that time; and to lay before the company's annual general meeting, a profit and loss account and a balance sheet reflecting a true and fair view of the profit or loss of the company and of the state of affairs of the company.

Consequently the Board of Directors is responsible for:

- Maintaining adequate systems of financial management and internal control over the company, including procedures designed to minimize the risk of fraud.
- Ensuring the integrity and adequacy of the accounting and financial systems.
- Ensuring that qualified, competent, fit and proper persons are employed to undertake accounting and financial responsibilities.
- Ensuring that the company complies with the accounting standards applicable.

The Board shall present to the shareholders balanced and understandable assessment of the company's position and prospects at least once a every year and preferably every six months.

It shall also establish formal and transparent arrangements for maintaining an "arms length" relationship with the external auditors, and ensure that there is timely and accurate disclosure to the shareholders of any information that would materially affect either the value or worth of their investment or earnings there-from including:

- Material changes in ownership structures, take over bids, shareholders arrangements, acquisitions, mergers, script splits and consolidations, or other arrangements.

- ◆ Material information on:
  - Company objectives
  - Financial and operating results
  - Material issues relevant to governance structures and policies
  - Changes or factors affecting members of the Board or key executives.
  - Directors' remuneration and benefits.
  - Government policies or legislative amendments
  - Technological or other material issues affecting sources of raw materials, suppliers etc.

All information affecting the shareholders shall be prepared, audited, [where appropriate] and disclosed in accordance with high quality standards of financial and non-financial disclosure and objectivity.

### **Extension of Scope and Duties of Auditors**

The Board of Directors shall ensure that persons who are qualified, reliable and independent of the Board and management are appointed as auditors. In light of developments elsewhere, the Board shall endeavour to:

- ◆ Extend the definition and scope of audit to cover:-
  - “to provide an independent opinion to those with interest in the company that they have received from those responsible for the direction and management of the company an adequate account of:
    - The proper conduct of the company's affairs;
    - The company's financial performance and position;
    - Future risks.
- ◆ Facilitate an extension of Auditors duties in regard to:
  - Reporting on whether the company has financial and other risk management controls
  - Evaluating and reporting on aspects of propriety and efficiency
  - Reporting directly to the Board, regulatory authorities and shareholders as appropriate, when illegal acts are discovered and to monitor basic ethical behaviour particularly in regard to the public interest
- ◆ Enhance the independence of the auditor from the Board and management;
- ◆ Extend the liability of Auditors to third parties.

### **The Role of Audit Committees**

A separate audit committee enables a Board to delegate to a sub-committee the responsibility for a thorough and detailed review of Audit matters, enables the non-executive directors to contribute an independent judgment and play a positive role in an area for which they are particularly fitted, and offers the auditors a direct link with the non-executive directors. The appointment of a properly constituted Audit Committee shall therefore be an important step in raising standards of corporate governance.

- ◆ The Board shall establish an Audit Committee composed of independent non-executive directors to keep under review the scope and results of audit, its effectiveness and the independence and objectivity of the auditors.
- ◆ The Audit Committee shall be given written terms of reference which deal adequately with their membership, authority and duties and shall meet at least twice a year.
- ◆ The Audit Committee will:
  - Review the half year and annual financial statements before submission to the

Board focusing particularly on:-

- Changes in accounting policies
- Significant adjustments arising from the audit
- Major judgmental areas
- Compliance with accounting standards, disclosure and legal requirements, and
- Subject the financial statements to independent critical appraisal
- Consider appointment, remuneration and the resignation or dismissal of external auditors.
- Discuss and agree on the scope, nature and priorities of audit.
- Discuss with external auditors any reservations and problems arising in the course of audit and any audit management letters and management responses prior to the issuance of the audit certificate.
- Review and discuss with the external auditors aspects relevant to internal control procedures, risk management and internal audit.
- Review major findings on internal audit and investigations and consider management response or actions thereto.
- Undertake such other duties or function as may be assigned by the Board which are relevant to audit and investigations.

### **Other Aspects Relevant to the Collective and Individual Roles of Directors**

In order to enable every director to be more clearly aware of their collective and individual accountability and liability in regard to their acts of commission and omission, the company shall provide every director with a detailed manual covering, *inter alia*, the following:

#### **❖ *Accountability of Directors jointly and severally to ensure that:***

- ◆ They provide direction to the company.
- ◆ They put in place independent and viable mechanisms to evaluate performance of the company and management.
- ◆ They appoint competent, qualified and able executives.
- ◆ They evaluate and manage risk.
- ◆ They manage effectively and efficiently all stakeholder relationships and reconcile any potential conflict of interest.
- ◆ They account for stewardship [efficient and effective use of entrusted resources] for the maximum benefit of shareholders.
- ◆ They ensure that the Company operates within the law and the legality of transactions.
- ◆ They ensure that the company operates within ethical guidelines that enhance integrity, social accountability and the reputation and credibility of the company.

#### **❖ *Liability of directors jointly and severally in the context of:***

- ◆ Criminal and penal laws relevant to companies.
- ◆ Fiduciary trust and agency.
- ◆ Fraudulent trading with an insolvent company.
- ◆ Fraudulent promotion or misrepresentation in the promotion of the company.
- ◆ Personal liability for fraud, secret profits, corruption and bribery.

### **Rights of Shareholders**



All shareholder rights shall be recognized, respected and protected.

***Basic shareholder rights include:***

- ◆ To secure methods of ownership registration;
- ◆ To convey or transfer shares;
- ◆ To obtain relevant information on the corporation on a timely and regular basis;
- ◆ To participate and vote in general shareholder meetings;
- ◆ To elect members of the Board; and
- ◆ To share in the residual profits of the company.

***Shareholders have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as:***

- ◆ Amendments to the statutes, or articles of incorporation or similar governing documents of the company;
- ◆ The authorization of additional shares; and
- ◆ Extra-ordinary transactions that in effect result in the sale of the company.

***Shareholders shall have the opportunity to participate effectively and vote in general shareholder meetings and shall be informed of the rules, including voting procedures that govern general shareholder meetings:***

- ◆ Shareholders shall be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meetings.
- ◆ Opportunity shall be provided for shareholders to ask questions of the Board and to place items on the agenda at general meetings, subject to reasonable limitations.
- ◆ Shareholders shall be able to vote in person or in absentia, and equal effect shall be given to votes whether cast in person or in absentia.
- ◆ Shareholders shall be provided with adequate information on competencies required on the Board and given options to elect directors from amongst a range of qualified, competent, fit and proper persons.

***Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership shall be disclosed.***

The Board shall endeavour to ensure that markets for corporate control are allowed to function in an efficient and transparent manner. In this regard, the Board shall always seek to ensure that:

- ◆ The rules and procedures governing the acquisition of corporate control in the capital market, and extraordinary transactions such as mergers and sales of substantial portions of corporate assets shall be clearly articulated and disclosed so that investors understand their rights and recourse.
- ◆ Transactions shall occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.
- ◆ Anti-take-over devices shall not be used to shield management from accountability.
- ◆ Shareholders, including corporate investors, consider the costs and benefits of using their voting rights.

***The Board of Directors shall ensure that there is equitable treatment of all***

***shareholders. In particular the Board shall ensure that:***

- ◆ All shareholders of the same class are treated equally.
- ◆ Equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders shall have the opportunity to obtain effective redress for violation to their rights.
- ◆ Within any class, all shareholders should have the same voting rights. All investors should be able to obtain information about voting rights affiliated with all classes of shares before they purchase them. Any changes in voting rights within or between classes of shares should be subject to shareholder vote.
- ◆ Votes shall be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.
- ◆ Processes and procedures for general shareholder meetings shall allow for equitable treatment of all shareholders.
- ◆ Company procedures do not make it unduly difficult or expensive to cast votes.
- ◆ Self-dealing and insider trading are prohibited.
- ◆ Members of the Board and managers disclose their material interests in transactions on matters affecting the corporation.

***The Shareholders in turn have a duty and are well advised to exercise the supreme authority of the company in general meetings to hold the Board accountable for stewardship of the company.***

### **Responsibilities to Other Stakeholders**

The Board of Directors and the company recognize the rights of stakeholders as established by law and shall encourage active co-operation between the company and its stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises. In this regard, the Board of Directors shall:

- ◆ Ensure that the rights of stakeholders that are protected by law are respected.
- ◆ Where stakeholder interests are protected by law, ensure that stakeholders have the opportunity to seek effective redress for any violation of their rights.
- ◆ Permit and facilitate performance-enhancing mechanisms for stakeholder participation.
- ◆ Ensure that where stakeholders participate in performance-enhancing mechanisms, they have access to all relevant information.

Those interested in receiving copies of the attachments relevant to the Code of Ethics (Annex 1), Framework for Board and Director Evaluation (Annex 2), Summary Duties of the Company Secretary (Annex 3) and Board Meeting Management and Procedures (Annex 4) can contact the PSCGT on the following address:

**Private Sector Corporate Governance Trust,**  
Brookeside Grove, Westlands,  
P. O Box 13936, NAIROBI, KENYA.  
Tel. No. +254-02-440003, Mobile 072 700 0180 or 072 725 069  
Fax No. +254-02-440427 E-mail: [pscgt@insightkenya.com](mailto:pscgt@insightkenya.com)

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Private Sector Corporate Governance Trust  
P.O.Box 13936, Nairobi, Kenya.

Telephone : (254 2) 440003  
[pscgt@insightkenya.com](mailto:pscgt@insightkenya.com)