

# PRACTICE NOTES

King III Amendment

February 2012

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**King III Amendment****Introduction**

When the King Code of Governance for South Africa 2009 and the King Report on Governance for South Africa 2009 (collectively referred to as King III) were released in September 2009, the basis for the Companies Act references in King III was the version of the Companies Act before the Amendment Bill.

Subsequent to the release of King III, amendments were made to the Companies Act and the final Companies Act, 2008 (the Act) and related Companies Regulations (the Regulations) were issued and became effective on 1 April 2011.

In order to address the possible amendment to King III to align it with the Amendment Act, the King Committee established a working group to consider how the Act affects the content of King III and to make recommendations.

It was agreed that amendments to King III as a result of the Amendment Act be limited to those that are deemed absolutely necessary to rectify direct conflicts. Where there are inconsistencies between King III and the Act in that King III recommends practices that go beyond what is envisaged in the Act, these will remain intact in King III as best practice. Similarly, where the Act now expands on certain matters that are incorporated in King III through mere reference, these would not be expanded on in King III, but the linkage would rather be clarified, if necessary.

Therefore, amendments to King III are only made where King III could, in light of the legislative changes, be regarded as misleading or directly in conflict with the legislative provision.

It needs to be noted that while attempts have been made towards the alignment of King III with the Companies Act, in so far as it is possible, King III is aspirational and may recommend practices that go beyond legislation; the legislation constituting the minimum standard in place. The responsibility is on the user of King III to ensure that King III is not relied upon to also ensure legislative compliance.

**Amendments to the King Code of Governance Principles for South Africa 2009**

Principle	Current content	Amended content
2.26	<p>Companies should disclose the remuneration of each individual director and certain senior executives.</p> <p>The remuneration report included in the integrated report, should include:</p> <p>2.26.1 all benefits paid to directors</p> <p>2.26.2 the salaries of the three most highly paid employees who are not directors...</p>	<p>Companies should disclose the remuneration of each individual director and prescribed officer.</p> <p>The remuneration report included in the integrated report, should include:</p> <p>2.26.1 all benefits paid to directors</p> <p>2.26.2 all benefits paid to prescribed officers...</p>

**Amendments to the King Report on Governance for South Africa 2009**

Chapter	Principle	Current content	Amended content
2	2.23 The board should delegate certain functions to well-structured committees but without abdicating its own responsibilities.	<p>130. Unless legislated otherwise, the board should appoint the risk, remuneration and nomination committees as standing committees. Establishing a social and ethics committee may be required for certain categories of companies (section 72(4) of the Act). The board may also consider establishing governance, IT steering and sustainability committees. Smaller companies need not establish formal committees to perform these functions, but should ensure that these functions are appropriately addressed by the board.</p>	<p>130. Unless legislated otherwise, the board should appoint the risk, remuneration and nomination committees as standing committees. The board of a public listed company, state-owned company or other company that has scored over 500 points in terms of the public interest score calculation, must establish a social and ethics committee. (section 72(4) of the Act read together with regulations 43 and 26(2)). The board may also consider establishing governance, IT steering and sustainability committees. Smaller companies need not establish formal committees to perform these</p>

2	Boards and directors	2.26 Companies should disclose the remuneration of each individual director and certain senior executives.	180. Companies should provide full disclosure of each individual executive and non-executive director's remuneration, giving details as required in the Act of base pay, bonuses, share-based payments, granting of options or rights, restraint payments and all other benefits (including present values of existing future awards). Similar information should be provided for the three most highly-paid employees who are not directors in the company.	functions, but should ensure that these functions are appropriately addressed by the board.
3	Audit committees	3.9 The audit committee is responsible for recommending the appointment of the external auditor and overseeing the external audit process.	78. The audit committee must define a policy, subject to board approval, terms under which the external auditor may perform non-audit services.	78. The audit committee must define a policy addressing the nature, extent and terms under which the external auditor may perform non-audit services.
3	Audit	3.10 The audit committee	85. As a minimum, the audit committee should provide the following	85. As a minimum, the audit committee should provide the following

committees	should report to the board and shareholders on how it has discharged its duties.	following information in the <u>integrated report</u> ...	information in the <u>annual financial statements</u> ...
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## **Amendments to Annex 3.1**

Annex 3.1 "Extract from the Companies Act no 71 of 2008" is replaced with the following:

### **94. Audit committees**

- (1) This section-
  - (a) applies concurrently with section 64 of the Banks Act, to any company that is subject to that section of that Act, but subsections (2), (3) and (4) of this section do not apply to the appointment of an audit committee by any such company; and
  - (b) does not apply to a company that has been granted an exemption in terms of section 64(4) of the Banks Act.
- (2) At each annual general meeting, a public company, state-owned company or other company that is required only by its Memorandum of Incorporation to have an audit committee as contemplated in sections 34(2) and 84(l)(c)(ii), must elect an audit committee comprising at least three members, unless -
  - (a) the company is a subsidiary of another company that has an audit committee; and
  - (b) the audit committee of that other company will perform the functions required under this section on behalf of that subsidiary company.
- (3) The first members of the audit committee may be appointed by-
  - (a) the incorporators of a company; or
  - (b) by the board, within 40 business days after the incorporation of the company.
- (4) Each member of an audit committee of a company must-
  - (a) be a director of the company, who satisfies any applicable requirements prescribed in terms of subsection (5);
  - (b) not be-
    - (i) involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year;
    - (ii) a prescribed officer, or full-time employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; or
    - (iii) a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and
  - (c) not be related to any person who falls within any of the criteria set out in paragraph (b).
- (5) The Minister may prescribe minimum qualification requirements for members of an audit committee as necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

- (6) The board of a company contemplated in section 84(1) must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises.
- (7) An audit committee of a company has the following duties:
- (a) To nominate, for appointment as auditor of the company under section 90, a registered auditor who, in the opinion of the audit committee, is independent of the company;
  - (b) to determine the fees to be paid to the auditor and the auditor's terms of engagement;
  - (c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;
  - (d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company, or that the auditor must not provide to the company, or a related company;
  - (e) to pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company;
  - (f) to prepare a report, to be included in the annual financial statements for that financial year-
    - (i) describing how the audit committee carried out its functions;
    - (ii) stating whether the audit committee is satisfied that the auditor was independent of the company; and
    - (iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;
  - (g) to receive and deal appropriately with any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to-
    - (i) the accounting practices and internal audit of the company;
    - (ii) the content or auditing of the company's financial statements;
    - (iii) the internal financial controls of the company; or
    - (iv) any related matter;
  - (h) to make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting; and
  - (i) to perform such other oversight functions as may be determined by the board.

- (8) In considering whether, for the purposes of this Part, a registered auditor is independent of a company, the audit committee of that company must-
- (a) ascertain that the auditor does not receive any direct or indirect remuneration or other benefit from the company, except-
    - (i) as auditor; or
    - (ii) for rendering other services to the company, to the extent permitted in terms of subsection (7)(d);
  - (b) consider whether the auditor's independence may have been prejudiced-
    - (i) as a result of any previous appointment as auditor; or
    - (ii) having regard to the extent of any consultancy, advisory or other work undertaken by the auditor for the company; and
  - (c) consider compliance with other criteria relating to independence or conflict of interest as prescribed by the Independent Regulatory Board for Auditors established by the Auditing Profession Act,
- in relation to the company, and if the company is a member of a group of companies, any other company within that group.
- (9) Nothing in this section precludes the appointment by a company at its annual general meeting of an auditor other than one nominated by the audit committee, but if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company.
- (10) Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board or the directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor.
- (11) A company must pay all expenses reasonably incurred by its audit committee, including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its functions.