The information contained in this King IV Practice Note is of a general nature and is not intended to address the circumstances of any particular individual or entity. The views and opinions do not necessarily represent the views of the King Committee and/or individual members. Although every endeavour is made to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. The Institute of Directors in Southern Africa shall not be liable to any loss or damage whether direct, indirect, and consequential or otherwise which may be suffered, arising from any cause in connection with anything done or not done pursuant to the information presented herein. As copyright subsists in this paper, extracts of this paper may only be reproduced with acknowledgement to the Institute of Directors in Southern Africa.
Purpose

The purpose of this practice note is to clarify the view in the King IV Report on Corporate Governance™ for South Africa 2016 ("King IV") on the recommendations concerning declarations of interests by a member of the governing body as recommended in practice 25 and 26 of the King IV Code Part 5 ("King IV Code") as included in the King IV Report.

Introduction

General declaration

Part 5.3, Principle 7, Practice 25 of King IV recommends that:

25. Subject to legal provisions, each member of the governing body should submit to the governing body a declaration of all financial, economic and other interests held by the member and related parties at least annually or whenever there are significant changes.

Guidance for this recommendation was taken from the general declaration of personal financial interests’ provision as stipulated in s75(4) of the Companies Act 71 of 2008, as amended ("the Companies Act"), which reads as follows:

“At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director."

Specific declaration

In this respect, Part 5.3, Principle 7, Practice 26 of King IV recommends that:

26. At the beginning of each meeting of the governing body or its committees, all members should be required to declare whether any of them has any conflict of interest in respect of a matter on the agenda. Any such conflicts should be proactively managed as determined by the governing body and subject to legal provisions.

The recommendation to make a general disclosure of relevant interests as alluded to above is in addition to the recommendation for a specific declaration to be made at the beginning of each meeting of the governing body or its committees of any conflict of interest that a member of the governing body may have in respect of a matter on the agenda.

Directors and prescribed officers of companies are advised to, as a minimum, at all times adhere to the statutory requirements set out in s75 of the Companies Act relating to the declaration/disclosure of personal financial interests (as defined in the Act) of the individual and related parties.

Members of governing bodies that are subject to similar statutory requirements should, as a minimum, also ensure adherence to such requirements. At the same time, members of all governing bodies, including
those that are not subject to specific statutory provisions as far as declarations of interest are concerned, should be guided by the recommended practices set out in the King IV Code in this regard.

Rationale: Fiduciary Duties and Business Judgement Rule

As fiduciaries, members of governing bodies have a common law duty to avoid any conflict of interest and to act in the best interest of the entity at all times. This is in addition to the statutory duties of members of governing bodies relevant to specific entities such as companies and state-owned entities.

Conflicts of interest may arise where an individual’s personal or family interests and/or loyalties conflict with those of the entity. As a general rule, no conflict between the personal interests of members of a governing body and the interests of the entity which they serve should be allowed.

Where a potential conflict of interest cannot be avoided, same has to be managed in such a manner as to ensure that the interests of the entity are at all times protected. It is for this reason that the law in certain instances as well as best practice recommendations call for disclosure of interest in any matter on the agenda of the governing body or any of its committees.

However, considering that a matter may not necessarily find its way onto the agenda of the governing body and/or its committees, it is recommended that each member of a governing body submits a general declaration of interests that could assist the entity in identifying potential conflicts between its interests and that of the members of its governing body or parties related to such members. King IV supports this practice in the interest of good governance, transparency and accountability and it is for this reason that recommended practice 25 has been included in the King IV Code.

It is worthwhile to also note that correctly managing a conflict of interest could be of value and assistance to a member of the governing body wishing to rely on the business judgement rule as part of his defence in the event of legal action being taken against him in his capacity as a member of the governing body.

General Declaration: Unpacking the recommended practice

Part 5.3, Principle 7, Practice 25 of King IV provides:

“Subject to legal provisions, each member of the governing body should submit to the governing body a declaration of all financial, economic and other interests held by the member and related parties at least annually or whenever there are significant changes.”

“Subject to legal provisions”: As indicated above, relevant statutory and regulatory provisions can be found in statutes such as the Companies Act and others. As a minimum, these requirements must be adhered to by those subject to such laws. The constitution of an entity, such as the memorandum of incorporation of a company or deed of a trust, may contain specific provisions relating to the disclosure of interests which similarly need to be adhered to as a matter of law.

Members of governing bodies are encouraged to ascertain the existence and extent of such legal provisions, if any.

“declaration of all financial, economic and other interests”: It is recommended that guidance as to the meaning of this phrase be taken from the Companies Act that defines “personal financial interest” as follows:

(a) a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but
(b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment.

© 2017 Institute of Directors in Southern Africa. All rights reserved
In terms of the Companies Act, “material”, when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is —

(a) of consequence in determining the matter; or
(b) might reasonably affect a person’s judgement or decision-making in the matter.

Based on the above, a relevant interest that calls for disclosure would be:

(a) material; and
(b) of a financial, monetary or economic nature.

“held by the member and related parties”: For purposes of the King IV Code, the definition of “related parties” is similar to that contained in the Companies Act:

(a) an individual is related to another individual if they—
   (i) are married, or live together in a relationship similar to a marriage; or
   (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with section 2(2) of the Companies Act.

This then means that the member’s “first degree” relatives would include the natural or adopted consanguinity parents, siblings and children and with “affinity” would include the mother- and father-in-law, sisters- and brothers-in-law. The “second degree” relatives are the member’s natural or adopted consanguinity or affinity grandparents, grandchildren, aunts, uncles, nephews, nieces or half-siblings.

Considering the extent of the definition of “related parties” and the number of individuals that could potentially be included in this group, members of governing bodies are urged to take reasonable steps to identify those individuals in the group who, based on their business and other interests, may potentially be interested in a matter that could also be of interest to the entity which the member of the governing body serves and which could, in the circumstances, be regarded as material to such related party. The general declaration of the member of the governing body should then, as a minimum, also list such related parties and the relevant interests.

“At least annually or whenever there are significant changes”: It is recommended that the governing body approves a declaration of interest policy and procedure that not only provides guidance to members as to what should be disclosed but also as to when such disclosures should be made, i.e. during the first month of the new financial year and whenever there are significant changes. It is to be noted that the responsibility to keep such declaration up to date is that of the member and not other officials such as the company secretary or individual providing secretarial services to the governing body.

Specific Declaration: Unpacking the recommended practice

Part 5.3, Principle 7, Practice 26 of King IV provides:

“At the beginning of each meeting of the governing body or its committees, all members should be required to declare whether any of them has any conflict of interest in respect of a matter on the agenda. Any such conflicts should be proactively managed as determined by the governing body and subject to legal provisions.”

The reader is again reminded that in certain instances, the general and/or specific declaration of interests is governed by law and compliance to these statutory provisions is non-negotiable. In addition, having included a specific interest in the general declaration as elaborated on above should not be regarded as being sufficient in the event of a specific conflict of interest of the member of the governing body or his related parties being identified. It will be imperative for such member to ensure that the members of the governing body are formally informed/reminded of such interest and that the specific declaration is duly noted and recorded.

© 2017 Institute of Directors in Southern Africa. All rights reserved
“At the beginning of each meeting of the governing body or its committees, all members should be required to declare”: From a practical point of view and to facilitate the application of this recommended practice, the governing body is encouraged to ensure that a specific, standard item on “declarations of interest” forms part of the agenda of each and every meeting of the governing body and its committees. Considering that specific declarations should be made “at the beginning of each meeting”, the item should be positioned on the agenda prior to any formal business being conducted and it is therefore generally positioned immediately after the standard formalities forming part of the opening of the meeting.

As part of this item, the chair of the meeting should specifically ask the members whether any one of them has any conflict of interest to declare in respect of a matter on the agenda and allow time for members to respond.

“Any such conflicts should be proactively managed as determined by the governing body and subject to legal provisions”: In the event of a member answering in the affirmative and proceeding to declare such conflict, the chair has to ensure that such declaration is not only duly noted by the meeting and recorded in the minutes of the meeting but that the meeting also applies its mind to the nature, extent and potential implications of the declaration to ensure full compliance with all relevant regulatory requirements and/or governance policies and practices applicable to the organisation and its governing body.

Example

An example of what would be required in the event of a company which is subject to section 75 of the Companies Act of 2008 in respect of “personal financial interests”:

1 Does the interest as declared constitute a “personal financial interest” as defined in the Companies Act of 2008?

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

If yes, remind the member of his responsibility to declare anything he knows concerning the matter, that the governing body should know, before it deliberates on the item.

Thereafter request the member to leave the meeting.

If no, determine whether the interest as declared is of such a nature that the principles of good corporate governance (or the provisions of the company’s memorandum of incorporation or a relevant policy) require the governing body to request the conflicted member to leave the meeting or to take such other steps as deemed appropriate by the governing body under the circumstances and in terms of the governing body’s own governance policies and/or procedures.

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

If yes, follow the agreed procedure and ensure that same is properly noted and recorded in the minutes before proceeding with the meeting.

If no, briefly record the declaration and the nature and conclusion of the deliberation on the matter and proceed with the meeting.

---

1 The regulatory provisions applicable and relevant to the specific organisation need to be adhered to. This example only addresses the required procedure to be followed for a company that is subject to the Companies Act of 2008.
Conclusion

It is important to highlight that the recommended practices in the King IV Code forming the subject matter of this practice note were included not only to promote good governance, transparency and accountability but to also assist members of governing bodies in limiting the risk of a failure in statutory and/or fiduciary duties of conduct expected from such members which in turn could lead to personal liability and exposure.

In addition, members of governing bodies should take note that “ignorance is no excuse”. Once again, guidance can be taken from the Companies Act that contains a definition of knowing, knowingly and knows and which means if the person either:

(a) had actual knowledge of the matter;
(b) was in a position in which the person reasonably ought to have –
   (i) had actual knowledge;
   (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
   (iii) take other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.

The onus of proof is therefore on the member of the governing body to prove on a balance of probabilities that he/she not only disclosed the necessary investigations in order to identify possible conflicting interests of a related party but also disclosed same as required by law or in terms of the policies of the governing body.

At the end of the day, a member of any governing body is expected to act prudently, reasonably and in good faith when fulfilling his/her fiduciary duties to the entity whose interests he/she is supposed to not only enhance but also protect.

Acknowledgment

This practice note was drafted in conjunction with iThemba Governance and Statutory Solutions (Pty) Ltd.