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KING V MONITORING AND ENFORCEMENT

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Introduction

The King V Code on Corporate Governance (the Code), like its predecessors, operates on a voluntary, principles-based model characterised by proportionality and flexibility—central features designed to accommodate diverse organisations and contexts.

Unlike laws and regulations, the Code cannot be monitored or enforced as a rules-based framework. This model aligns with international best practice, enabling companies to tailor their governance practices appropriately and ensure they are fit-for-purpose to their specific circumstances.

Due to the inherent flexibility and the "apply and explain" nature of its recommended practices, the Code does not prescribe rigid governance rules that can be audited or assured in the same manner as financial standards. Since the assurance of qualitative matters is not as easily obtainable as quantitative matters, stakeholders inevitably rely significantly on transparency, truthful disclosures and a robust governance culture fostered within organisations.

It is important to recognise that while King V operates primarily as voluntary and principle based, its recommended practices significantly influence what courts view as good governance standards. Voluntary governance codes such as King V inform judicial assessments of appropriate conduct for those charged with governance responsibilities. When recommended practices become widely adopted, courts often regard adherence to these standards as indicative of meeting the required legal standard of care. Consequently, King V principles and practices indirectly become part of South Africa's common law through jurisprudence, reinforcing their legal significance and creating implicit enforceability through potential judicial consequences.

The IoDSA and the King Committee, as entities broadly equivalent or comparable to "standard setters" in relation to the King Codes on Corporate Governance, develop and publish the King Codes and therefore do not simultaneously act as enforcers of these governance "standards". Internationally, standard setters such as the IFRS Foundation and the ISO similarly refrain from enforcement roles, maintaining objectivity and impartiality.

However, the King V Disclosure Framework issued with King V serves as an essential tool to assist stakeholders to hold organisations to account. Organisations wishing to claim application of King V will now be required to make their disclosure framework publicly available. This publicly accessible, standardised disclosure simplifies the identification of governance practices and makes it significantly

easier to hold organisations accountable retrospectively, especially with the introduction of exception reporting. This enhanced transparency benefits shareholders, regulators and the public, facilitating clearer accountability. According to the JSE Issuer Regulation Guide¹ “the governance disclosure afforded through the King Code...are critical for a sound corporate governance culture in the South Africa...”.

Thus, in the instance of corporate governance standards and disclosures, stakeholders should collectively act to promote, monitor and enforce better governance.

Governance accountability role-players

Effective governance accountability relies on clearly defined roles and responsibilities among a range of internal and external stakeholders within the governance ecosystem.

Internal role-players

- **Boards and their subcommittees:** The board is primarily responsible for implementing and overseeing governance implementation and disclosure. Subcommittees, such as nominations, audit, risk, social and ethics as well as remuneration committees, also play critical roles in overseeing specific aspects of governance and ensuring appropriate practices are adopted and reported transparently.
- **Company Secretaries:** The company secretary should guide the board on governance matters, ensuring adherence to best practice principles and relevant practices, facilitating robust governance reporting; and helping maintain accountability and compliance.
- **Specific business functions (e.g. risk, compliance, legal, finance):** These functions help ensure that organisational processes, controls and disclosures align with legal and governance requirements. Their contributions provide additional layers of oversight and assurance.
- **Internal Audit Functions:** Internal audit should independently assess statutory and governance controls and practices; and provide assurance to the board and management on the effectiveness and integrity thereof.

¹ https://www.jse.co.za/sites/default/files/media/documents/2021-02/The%20Issuer%20Regulation%20Guide%20Feb%202021_0.pdf

External role-players

- **Regulators and Oversight Authorities** (e.g. Johannesburg Stock Exchange, Financial Sector Conduct Authority, South African Reserve Bank, Takeover Regulations Panel, Companies and Intellectual Property Commission, Prudential Authority, National Treasury and Department of Public Enterprises): Regulators and oversight authorities may require general King Code application and disclosure; and in addition incorporate certain recommended practices within their regulatory frameworks and oversee compliance. If incorporated, they have the authority to enforce adherence through regulatory sanctions.

The JSE, for example demonstrates how specific King recommendations can be integrated ("hard-coded") into regulatory frameworks, providing explicit enforcement capabilities for these provisions. Furthermore, the JSE requires listed companies to adopt the King Code on an 'apply and explain' basis.

Proactive enforcement or assessment by regulators of “compliance” with a flexible, principles-based governance code is inherently challenging, given that governance practices often involve subjective, context-specific interpretations that cannot always be objectively verified upfront.

Despite this inherent challenge, any regulatory requirement to formally adopt and annually disclose adherence to King V significantly benefits the broader governance ecosystem as follows:

- **Uniform standards and expectations:** Adoption creates clear and consistent expectations across companies, providing a valuable baseline for stakeholders to assess and compare governance practices across organisations.
- **Annual disclosure framework submission:** Regulators can require companies to annually submit their King V Disclosure Frameworks. While this submission does not equate to upfront verification of compliance, it provides a critical mechanism for transparency and stakeholder assessment.
- **Reactive accountability and enforcement:** The King V Disclosure Framework allows regulators and other stakeholders to retrospectively hold organisations accountable if governance failures or discrepancies later surface, especially regarding practices

that were claimed to be implemented. This reactive capability is a crucial enforcement tool and should not be undervalued.

- **Enhanced governance culture and credibility:** Regulatory adoption underscores a commitment to high governance standards, positively influencing corporate culture and promoting ethical conduct.
- **Increased stakeholder trust and market integrity:** Clear regulatory endorsement enhances stakeholder and investor confidence, contributing to healthier markets and a more resilient economic environment.

Regulators in various sectors should thus adopt King V into their regulatory frameworks to leverage these benefits, enhancing overall governance standards and accountability.

- **Shareholders, including institutional investors:** Shareholders play a critical and influential role in ensuring sound governance by actively exercising their voting rights to appoint, evaluate, and, where necessary, remove board directors. Increasingly, shareholders are also proactively engaging in governance oversight through voting on remuneration policies and practices, influencing executive pay decisions to ensure alignment with performance and sustainability objectives. They have the ultimate authority to hold directors accountable for governance shortcomings and should proactively demand transparency, accuracy and improvement in governance practices and disclosures.
- **Public and media scrutiny:** The public and media act as critical watchdogs, highlighting governance failures and holding companies publicly accountable. Their scrutiny can significantly influence corporate reputation, incentivising robust governance practices and transparent disclosure.
- **NGOs and civil society groups:** These groups should advocate for responsible governance, monitor corporate actions and apply pressure where governance lapses are identified. Their involvement helps maintain transparency and ethical corporate conduct.

Potential consequences of inaction

If stakeholders in the governance ecosystem fail to adequately fulfil their monitoring and/or enforcement roles, the governance ecosystem could weaken significantly, eroding the collective ability to effectively hold organisations accountable. The broader implications of such failure could extend well beyond individual entities, potentially affecting the overall economic stability, market trust and the public's confidence in governance frameworks. Significant negative outcomes that may result from poor governance or inaction include:

- **Financial instability and loss of investor confidence:** When governance failures emerge, investors and funders may withdraw support, leading to significant declines in funding and market valuation.
- **Reputational damage:** Public disclosure of governance lapses or unethical practices can severely damage an organisation's reputation, resulting in loss of customer trust, reduced business opportunities and difficulty in attracting talent.
- **Regulatory repercussions:** Failure to proactively manage governance issues can trigger investigations and sanctions from regulatory authorities, potentially resulting in legal liabilities, fines or other penalties.
- **Loss of stakeholder trust:** Persistent governance failures can undermine stakeholder confidence; and weakening relationships with employees, suppliers, customers and the broader community.
- **Market penalties:** Share prices can plummet significantly when governance shortcomings become public, negatively impacting shareholders and overall market perceptions.
- **Operational disruptions:** Governance breakdowns often disrupt operations, cause inefficiencies, and result in higher operational costs, ultimately impairing organisational performance and sustainability.

These consequences underscore the vital importance of collective responsibility and proactive stakeholder engagement in maintaining high governance standards.

Conclusion

The strength of King V lies precisely in its flexibility and proportionality, enabling tailored governance practices.

However, for this governance regime to be genuinely effective, every stakeholder should proactively fulfil their respective roles within the accountability ecosystem to ensure adequate monitoring and enforcement of King V. Boards and subcommittees should rigorously monitor governance practices; regulators should integrate King V into their frameworks and hold companies accountable; shareholders should actively engage and exercise their rights diligently; internal governance functions should provide ongoing assurance; and public, media, NGOs, and civil society groups should remain vigilant and vocal.

It is only through this collective commitment and coordinated effort that King V can achieve its full potential as a critical governance tool, driving sustainable organisational success and strengthening overall market integrity.