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Department:  
Public Service and Administration  
REPUBLIC OF SOUTH AFRICA

# **Handbook for the appointment of persons to boards of state and state controlled institutions**

Approved by Cabinet on 17 September 2008

**January 2009**



We belong



We care



We serve

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## DEFINITIONS

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In this Handbook, unless the context otherwise indicates –

**“board”** means –

- (a) the governing authority of a state controlled institution;
- (b) the advisory board, without executive functions, of a government component listed in Schedule 3 of the Public Service Act, as amended by Act 30 of 2007; and
- (c) a statutory council that does not have powers and duties associated with a governing or accounting authority;

**“Cabinet”** also means the Executive Council of a province;

**“Executive Authority”** means the Cabinet member or member of the Executive Council of a province in whose portfolio a government component, statutory council, public entity or government enterprise falls;

**“MEC”** means a member of a provincial Executive Council;

**“parent department”** means a national or provincial department designated by an Executive Authority as the department responsible for the institutions falling under the portfolio of the Executive Authority. A parent department normally supports the Executive Authority in overseeing associated institutions;

**“Parliament”** also means a provincial legislature;

**“PFMA”** means the Public Finance Management Act, 1999;

**“PSA”** means the Public Service Act, 1994, as amended by Act 30 of 2007;

**“state institution”** means a national or provincial –

- (a) government component listed in Schedule 3 of the PSA; or
- (b) a statutory council established by legislation;

**“state controlled institution”** means a national or provincial public entity or government enterprise (government business enterprise and major public entity) listed in Schedules 2, 3A, 3B, 3C and 3D of the PFMA.

## CHAPTER ONE – INTRODUCTION

### Background

1. This Handbook has been developed in response to the Cabinet's expectations that clear guidelines be developed for appointing persons to boards, including an explanation as to how Executive Authorities can deal with such appointments as well as a specification of the approval processes to be followed.
2. When government requests experts from the public or private sector or a particular community of interest to serve on a board, it does so with the expectation that they will use their expertise and knowledge in a manner that will improve access to services and service delivery to citizens and also advance the interests of South Africa.
3. Executive Authorities are responsible for making appointments to a wide range of institutions. It is essential that proper systems and processes be in place to ensure that the interests of government and the public in these entities are managed effectively. Appointing the right people to the board is a crucial step in ensuring that an entity has the capability to perform effectively.

### Purpose of the Handbook

4. The purpose of the Handbook is to provide best practice guidelines to promote uniformity in the appointment of persons to boards of state and state controlled institutions. It supports government initiatives to promote transparency, accountability, sound administration and good governance practices in all organs of state. It should be understood that the Handbook builds on the good governance principles and practices provided for in the PFMA. The Handbook represents a stand-alone practical document which is not in any way prescribed in terms of any formal framework, regulation or legislation. However, the Handbook also makes reference to various policies and legislative frameworks and departments should ensure compliance with these policies and frameworks.
5. The Handbook promotes a set of principles and best practices rather than following a prescriptive or regulatory approach towards the appointment of members. This approach provides for an enabling environment in which Executive Authorities and departments may carry out administrative actions concerning appointment matters by using their discretion that best takes into consideration local circumstances.
6. The Handbook is not intended to be used as an instrument to promote governance at board level. Although the Handbook is not a governance instrument, it does support the primary pillars of fairness, accountability, responsibility and transparency, which are fundamental to all international guidelines of corporate governance.
7. The Handbook also supports the basic values and principles governing public administration set out in Chapter 10 of the Constitution. Section 195 of the Constitution provides that public administration in all organs of state and public enterprises must be governed by the democratic values and principles enshrined in the Constitution.

**The following Constitutional principles are particularly relevant for the Handbook:**

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Services must be provided impartially, fairly, equitably and without bias.
- (c) Public administration must be accountable.
- (d) Transparency must be fostered.

8. The specific objectives of the Handbook are to:
- (a) Provide guiding principles for appointing persons to boards and explain the fiduciary duties of board members
  - (b) Provide qualifying principles for appointing office bearers to boards and limit multiple memberships of boards
  - (c) Specify the roles and responsibilities of role players involved in the appointment process
  - (d) Integrate the disclosure of interests of board members into the appointment process to ensure that possible conflict of interest is identified upfront before board members are appointed
  - (e) Specify pre-appointment information systems to guide the appointment process and to develop succession management plans
  - (f) Provide guidance on each step of the appointment process to assist those running the appointment process. The appointment process can be customised to accommodate the unique circumstances in ministries or departments. Various check lists are provided as an easy reference. Departments are encouraged to include the check lists in work documents.
  - (g) Provide guidance on which appointments Executive Authorities can deal with and which should be submitted to Cabinet for consideration
  - (h) Provide the basis for aligning legislation to the principles and best practices set out in the Handbook. The enabling Act of a state or state controlled institution provides the legal basis in terms of which board members are appointed and not the Handbook. The Handbook takes no precedence over enabling Acts or any other legislation.

## Applicability of the Handbook

9. The Handbook is applicable to the appointment of persons to the board of –
- (a) a national or provincial state institution (government component or statutory council);
  - (b) a national or provincial state controlled institution (public entity or government enterprise); and
  - (c) public interest institutions, when the enabling Act for the institution provides for the *ex officio* appointment of public service officials to the board of that institution.
10. Although the Handbook is not applicable to public interest institutions, constitutional institutions and commissions of inquiry, these institutions are encouraged to adopt the principles and best practices set out in this Handbook. For purposes of the Handbook, state institutions, state controlled institutions and public interest institutions are defined as listed below.

## State institutions

11. In this Handbook the category, **state institutions**, includes national and provincial government components and statutory councils.
- 11.1 A **government component** is a separate institution within the public service and is listed in Schedule 3 of the PSA. This organisational form intends to enable service delivery through a focused and fully ring-fenced entity, but under the direct control of an Executive Authority, with accountability and responsibility vested in the functionaries directly involved in the performance of the functions in question. A government component will be a separate institution in the public service and its head will be the accounting officer in terms of the PFMA. Such a component may have original statutory powers or assigned or delegated statutory powers and duties. A government component is linked to a parent department responsible for the relevant policy/functional area in order to assist the Executive Authority in overseeing the component as

regards policy implementation, performance, integrated planning, budgeting and service delivery. A government component may have an advisory board without executive functions.

- 11.2 A **statutory council** is established in terms of legislation to perform functions that typically involve the rendering of advice on policy matters or policy implementation, or to consider and adjudicate appeals as an independent tribunal. Secretarial and professional support services are normally rendered and funded by the parent department. A statutory council normally does not have the powers and duties associated with a governing or accounting authority, or is listed either as a state controlled institution in the schedules of the PFMA, or as a public interest institution. An example of a statutory council would be a consultative or advisory body that the Minister for the Public Service and Administration may establish in terms of the PSA. Another example would be the independent tribunal that the Minister of Social Development may establish in terms of the Social Assistance Act, 2004.

### State controlled institutions

12. In this Handbook the category, **state controlled institutions**, includes national and provincial public entities and government enterprises.

- 12.1 A **public entity** is an institution –

- (a) established in terms of legislation as a separate juristic person;
- (b) which in the ordinary course of performing its functions is fully, or at least to a substantial extent, funded from –
  - (i) the National or Provincial Revenue Fund;
  - (ii) the proceeds of a tax, levy or other compulsory charge imposed in terms of legislation; or
  - (iii) fees charged by it for the performance of its functions; and
- (c) for whose performance an Executive Authority is accountable to the relevant legislature; or
- (d) which is a subsidiary of a public entity, excluding a subsidiary which is a government enterprise.

- 12.2 A **government enterprise** is an institution –

- (a) established in terms of legislation as a separate juristic person, including a public or private company over which the national government or a national executive organ of state has effective control;
- (b) which performs a public function in accordance with ordinary business principles or conducts as its main function business, commercial or industrial activities for the state;
- (c) which is not in the ordinary course of its business funded or intended to be funded from –
  - (i) the National or Provincial Revenue Fund; or
  - (ii) the proceeds of a tax, levy or other compulsory charge imposed in terms of legislation; and
- (d) for whose performance an Executive Authority is accountable to the relevant legislature;
- (e) which is a subsidiary of a listed or unlisted government enterprise;
- (f) which is a subsidiary of a listed or unlisted public entity and which –
  - (i) performs a public function in accordance with ordinary business principles or conducts as its main function business, commercial or industrial activities for that entity; and

- (iii) is not in the ordinary course of its business funded from –
  - (aa) the National or Provincial Revenue Fund; or
  - (bb) the proceeds of a tax, levy or other compulsory charge imposed in terms of legislation.

### Public interest institutions

13. In this Handbook the category, **public interest institutions**, refers to institutions that perform functions serving the interest of the public and in which government has an interest to promote certain minimum norms and standards regarding sound governance, financial management and reporting arrangements. Public interest institutions have any one or more of the following characteristics:
- (a) They may be established as separate juristic entities in terms of specific enabling legislation to regulate a specific sector, for example the education sector, or a specific function, for example the provision of welfare services.
  - (b) Governance, financial management and reporting arrangements are set out in their enabling legislation.
  - (c) They are not regarded or listed as state or state controlled institutions by the PSA or PFMA.
  - (d) They may receive payments from contributing membership fees, payments of financial support, funding for projects or subsidies from government, yet they are not subject to the normal processes of financial oversight as set out in the PFMA.
  - (e) They may be governed by a board of trustees with trustees equally represented by elected members and members appointed by an employer(s) to protect the interests of all stakeholders/members.
14. In this Handbook, **public interest institution** includes –
- (a) institutions responsible for overseeing, developing, licensing or regulating a particular industry or profession (for example the South African Association for Consulting Engineers);
  - (b) private organisations designated as welfare organisations in terms of welfare legislation. These organisations often receive government subsidies or grants;
  - (c) sporting and recreational federations that receive government grants and private institutions or committees responsible for arranging sporting events of national importance (for example 2010 FIFA Soccer World Cup and the Olympic games) where government plays an important role in terms of financing, planning and providing certain guarantees;
  - (d) higher education institutions as defined in the Higher Education Act, 1997 (Act No 101 of 1997);
  - (e) public schools as defined in the South African Schools Act, 1996 (Act No 84 of 1996);
  - (f) further education and training institutions as defined in the Further Education and Training Act, 1998 (Act No 98 of 1998);
  - (g) adult basic education and training centres established in terms of the Adult Basic Education and Training Act, 2000 (Act No 52 of 2000);
  - (h) the Government Employees Medical Scheme (GEMS) established and listed in terms of the Medical Schemes Act, 131 of 1998 as a restricted membership medical scheme; and
  - (i) the Government Employees Pension Fund (GEPF) established in terms of the Government Employees Pension (GEP) Law, Proclamation 21 of 1996.



## CHAPTER TWO – FIDUCIARY DUTIES/EXECUTIVE OWNERSHIP AND CONTROL

1. To ensure that the Handbook is comprehensive, this section explains the fiduciary duties of board members and the role of Executive Authorities as the owners or shareholders of state controlled institutions. The nature of fiduciary duties set out in the PFMA, common law and the Companies Act, 1973, are highlighted.

### Ownership and control by Executive Authorities

2. The PFMA provides that the Executive Authority responsible for a public entity under the ownership control of the national or a provincial Executive (ie Cabinet or a provincial Executive Council) must exercise that Executive's ownership control powers to ensure that the public entity complies with the PFMA.<sup>1</sup>
3. Ownership control means exercising the following powers:<sup>2</sup>
  - (a) Appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body
  - (b) Cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body
  - (c) Control all, or the majority of, the voting rights at a general meeting of that entity
4. The shareholder's liability is limited to his/her investment. The shareholder has the right to vote on a resolution submitted at an annual general meeting or general meeting "in any way he pleases and with regard, not to the company's interest, but to what he considers to be in his own interests".<sup>3</sup>
5. Executive Authorities also exercise ownership and control over state controlled institutions by utilising the following instruments:
  - (a) Public entities are required to –
    - (i) have enabling legislation that specifies amongst others the fiduciary duties, corporate governance structures and public purpose mandate(s); and
    - (ii) adopt a code of ethical conduct.
  - (b) Government enterprises are required to comply with –
    - (i) fiduciary duties specified in the Companies Act, 1973;
    - (ii) principles of corporate governance contained in the King Code and the Protocol on Corporate Governance; and
    - (iii) a shareholders compact that will further specify the public purpose mandate and corporate plan.
  - (c) Appointment and termination of board members in terms of enabling Acts
  - (d) Issuing of policy or regulations in terms of legislation. In the event that the Executive Authority responsible for a particular policy area is not the owner/shareholder, close co-operation between the Executive Authorities is required when shareholder compacts are finalised.

**A *shareholders compact* is an agreement between the Executive Authority and the accounting authority. It describes the relationship between the signatories and identifies the behaviour on both sides to support effective management and performance of the enterprise.**

**A *corporate plan* is a framework containing information regarding the enterprise's strategic thinking, direction and action leading to the achievement of planned results.**

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<sup>1</sup> Section 63(2).

<sup>2</sup> Section 1.

<sup>3</sup> *Coronation Syndicate Ltd v Lillienfeld* 1903 TS 489.

## Fiduciary duties

6. The most important duties of board members are that they must –
  - (a) act independently at all times with unfettered discretion;
  - (b) exercise independent judgement; and
  - (c) take decisions according to the best interest of the institution.

## Public Finance Management Act

7. The PFMA expressly describes the fiduciary duties of boards as accounting authorities for public entities. It provides that the board must<sup>4</sup> –
  - (a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;
  - (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;
  - (c) on request, disclose to the Executive Authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the Executive Authority or that legislature; and
  - (d) seek, within the sphere of influence of that board, to prevent any prejudice to the financial interests of the state.
8. A member of a board may not<sup>5</sup> –
  - (a) act in a way that is inconsistent with the responsibilities assigned to a board in terms of the PFMA; or
  - (b) use the position or privileges of, or confidential information obtained as, a member of the board, for personal gain or to improperly benefit another person.

## Common law

9. A fiduciary is a person in a special position of trust. A fiduciary duty of directors originates from common law, in other words the law or corresponding legal system developed through decisions of court rather than through legislation. South African common law in respect of companies is predominantly the English law. Our courts created the law on companies by looking at previous cases dealing with the same issue; this approach is known as creating law by precedent. This body of precedent forms common law and is referred to in making future decisions and will bind future decisions.
10. In terms of common law a director owes a fiduciary duty and a duty of skill and care to the company:
  - (a) Fiduciary duties mean that directors must –
    - (i) be loyal to the company and should avoid inappropriate self-dealing;
    - (ii) not use their position of trust and confidence to further their private interests;
    - (iii) act in good faith in their dealings with or on behalf of the company;
    - (iv) carry out the duties of their position honestly and in the best interest of the company; and
    - (v) ensure that there is no conflict of interest between their duties towards the company and their personal interests.

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<sup>4</sup> Section 50(1).

<sup>5</sup> Section 50(2).

- (b) Duty to display reasonable skill and care means that a director must exercise the level of skill required of a person in his/her position or reasonably expected of someone carrying out the function of a director within a company and must devote his/her full attention to the business of the company.

### **Duty to act in the best interest of the institution**

11. The duty of board members to discharge their fiduciary duties in the best interest of the institution (and not vote in the interest of the shareholder) is also confirmed in the *Fisheries* case.<sup>6</sup> The court held that “the director’s duty is to observe utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgement and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person nominating him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company.”

### **Duty to act independently**

12. A board member has the duty to exercise independent and unfettered discretion. Although issues will often arise for decisions in which a board member will necessarily have to rely on the knowledge and experience of others, a board member must exercise independent discretion in the sense that, having listened to what his/her colleagues have to say, the member must bring his/her own mind to bear on the issue, using such skill and judgement as he/she may possess.

13. Although a board member may lawfully be elected by an Executive Authority to represent that Executive Authority’s interests, and may even be a servant or agent of that Executive Authority, the member must exercise independent discretion when engaging in board affairs. The board member should not remain inactive when the interests of the institution conflict with the interests of that Executive Authority. A board member must at all times exercise independent judgement and act positively to protect the interests of the institution.

The King II Report also describes independence as one of the key characteristics of good corporate governance: “Independence is the extent to which mechanisms have been put in place to minimise or avoid potential conflicts of interests that may exist, such as dominance by a strong chief executive or large shareholder. These mechanisms range from the composition of the board, to appointments in committees of the board, and of external parties such as the auditors. The decisions made, and internal processes established, should be objective and not allow for undue influences.”

14. The independence of board members is similar to that of external auditors. Board members do not owe a fiduciary duty towards individual Executive Authorities/shareholders. In addition, termination of board membership does not necessarily immediately or automatically release a board member from all such fiduciary duties, nor can a board member avoid personal liability or accountability by resigning from the board.

### **Companies Act, 1973**

15. In the case of government enterprises that are established as companies, the Companies Act specifies the fiduciary relationship of board members vis-a-vis the company.<sup>7</sup> From the time of his/her appointment, the board member (director) stands individually in a fiduciary relationship with the company. This fiduciary relationship arises from the purpose for which a member is entrusted with his/her office and for which he/she and co-members are entrusted with their powers to manage the affairs of the company. It seeks to ensure that office is used and those

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<sup>6</sup> *Fisheries Development Corp of SA v AWJ Investments Pty Ltd* 1980 (4) SA 156 (W).

<sup>7</sup> LAWSA, Vol 4, Par 116 at 178.

powers are exercised for, and only for, the benefit of the company as a whole, and never for personal advantage; and that members act honestly in their dealings with fellow members and with shareholders. There are four fundamental fiduciary duties, namely board members may not –

- (a) exceed their powers provided for in law, in legislation or by the articles of association if the public institution is a company;
- (b) exercise their powers for improper or collateral purposes (determined objectively);
- (c) fetter their discretion; or
- (d) place themselves in a position of conflict as regards their duties to the company. This last duty includes the duties not to –
  - (i) act for the company in a matter in which they or any other person or institution significantly associated with the board members has an interest;
  - (ii) deal with the company otherwise than openly and in good faith; and
  - (iii) abuse confidential information.

16. The Companies Act codified the common law position concerning the following duties of directors:

- (a) Directors have a duty to disclose any interest in contracts and must declare such interest to the company.<sup>8</sup> This promotes the fiduciary duty of directors to act in the best interest of the company and not to appropriate business opportunities of the company to further their private interest. Directors must refrain from doing anything that would harm the company and must display unselfish loyalty to the company.
- (b) Directors may be disqualified from serving as directors or in the management or any other position of trust due to theft, fraud, forgery, uttering a forged document, corruption, whether in terms of common law or not or due to any other act involving dishonesty. The director will be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.<sup>9</sup> If the director makes a statement which is false in any material respect, knowing it to be false, he/she will also be guilty of an offence, namely falsification of books and records in person.<sup>10</sup>
- (c) In addition, directors have the duty not to use the controlling power of the holding company to destroy the subsidiary's ability to act in its own best interest.

### **Implications for office bearers**

17. Board members' liability is unlimited and they are jointly and severally liable, both in terms of the PFMA and the Companies Act.

18. The legal consequences of a breach of a fiduciary duty may include –

- (a) that the decision is void or voidable;
- (b) personal liability for damages; or
- (c) personal criminal liability.

19. The Companies Act states that the fiduciary duties of a director may not be limited or excluded in the articles, by contract or in any other way. Any provision which indemnifies a board member or exempts him/her from liability for breach of a fiduciary duty will be void.<sup>11</sup>

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<sup>8</sup> Section 234.

<sup>9</sup> Section 249.

<sup>10</sup> Section 250.

<sup>11</sup> Section 247(1).

20. The risk posed to an Executive Authority/shareholder, should the lines of independence between the Executive Authority/shareholder and the board be compromised, is considerable. The shareholder may no longer have a limited liability (equal to his/her investment), but may become severally and jointly liable, the same as the board members. In practice, this means where a board member takes a decision under the influence or on instruction of someone else (eg Cabinet or an Executive Authority), that body (Cabinet as represented by the President or the Executive Authority) could be held to be a “deemed” or “shadow” board member<sup>12</sup> and may be held accountable and liable – jointly, separately and in his/her official and personal capacity.<sup>13</sup>
21. It is a challenge for public service officials appointed as board members to remain independent in view of their official duties to their employers and Executive Authorities. Although these officials have been appointed *ex officio*, they are still fully liable as board members.
22. Another challenge to manage carefully is that the other board members (non-public service officials) would probably seek “guidance” from the Executive Authority’s representative or nominee, potentially compromising the independence of that board. In this regard, the Protocol states that the board should monitor and manage potential conflicts of interests of management, board members and the shareholder.<sup>14</sup>

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<sup>12</sup> A “shadow” board member means the manipulative or controlling hand behind board members.

<sup>13</sup> See *S v Shaban* 1965 (4) SA 646 (W); *S v De Jager* 1965 (2) SA 616 (A).

<sup>14</sup> See paragraph 5.1.1.7 of the Protocol.

## CHAPTER THREE – QUALIFYING PRINCIPLES

1. This section specifies principles in terms of which office bearers qualify to serve on the board of a state or state controlled institution.

### Members of the National Assembly and members of a provincial legislature

**2. A member of the National Assembly or a member of a provincial legislature may not serve on the board of any state or state controlled institution (government component, statutory council, public entity or government enterprise).**

**3. A member of the National Assembly or a member of a provincial legislature, who is not a member of the Cabinet, a deputy minister or a member of a provincial Executive Council, is eligible to serve on the board of a public interest institution provided that –**

- (a) the enabling Act of the institution or any other Act does not expressly disqualify the member; and**
- (b) the appointment of the member to the board does not create a conflict of interest in fulfilling the National Assembly or provincial legislature's role of overseeing the institution and/or the powers and functions set out in the Constitution.**

4. Parliament ultimately oversees organs of state, and the appointment of members of Parliament to boards could create a conflict of interest when members are fulfilling their oversight role (individually and collectively). Board members, on the other hand, have a duty to participate in and take decisions in the best interest of the institution. Boards are also accountable to the responsible Executive Authority and ultimately Parliament as regards the execution of their mandate and performance.

### Members of the Cabinet, deputy ministers and members of provincial Executive Councils

**5. A member of the Cabinet or a member of a provincial Executive Council may not serve on the board of any state or state controlled institution (government component, statutory council, public entity or government enterprise) or public interest institution.**

**6. A deputy minister is eligible to serve on the board of a state or state controlled institution or public interest institution provided that –**

- (a) the enabling Act of the institution or any other Act expressly provides for the appointment of the deputy minister; and**
- (b) the appointment of the deputy minister to the board does not create a conflict of interest in fulfilling the National Assembly's role of overseeing the institution, and/or powers and functions set out in the Constitution.**

7. The Constitution<sup>15</sup> also prohibits members of Cabinet, deputy ministers and members of the Executive Council (MECs) of a province from –
  - (a) undertaking any other paid work; and
  - (b) acting in a way that is inconsistent with their office (eg Cabinet's decisions), or expose them to any situation involving the risk of a conflict between their official responsibilities and private interests.
8. Although deputy ministers are not members of the Cabinet, the rules and principles applicable to Executive Authorities who are members of Parliament also apply to them.<sup>16</sup>
9. Members of Cabinet and MECs of a province are accountable collectively and individually to the relevant legislature for the exercise of their powers and the performance of their functions.<sup>17</sup> Individual accountability entails a duty to –
  - (a) explain to the relevant legislature how the powers and duties under his/her control have been exercised and performed. The Constitution requires that members of Cabinet and MECs provide the relevant legislature with full and regular reports concerning matters under their control;<sup>18</sup>
  - (b) acknowledge that a mistake has been made and to promise to rectify the matter; and
  - (c) resign if personal responsibility has been accepted.
10. Collective accountability means that members of the Cabinet and MECs act in unison as far as the outside world is concerned and carry joint responsibility before the relevant legislature for the way in which each member exercises and performs his/her powers and duties. This implies that individual members of Cabinet or individual MECs who disagree with a particular decision must either support it or resign.<sup>19</sup> Therefore, although the Cabinet member or MEC is individually responsible for overseeing a state or state controlled institution, the other members of Cabinet or of the Executive Council, as the case may be, are collectively responsible for the way in which the said Cabinet member or MEC exercised and performed his/her powers and duties in respect of the state or state controlled institution. If an Executive Authority serves on a board, the Executive Authority would also face conflicting interests, as decisions taken at board level may have to be ratified by Cabinet.
11. In view of the above discussion and the fiduciary and other duties of board members of state or state controlled institutions discussed in chapter 2, it is advised that the serving of –
  - (a) an Executive Authority on a board for which he/she is the Executive Authority appears untenable, not only in view of his/her membership of Cabinet but also because of his/her functions as Executive Authority in terms of the PFMA;
  - (b) an Executive Authority on a board for which he/she is not the Executive Authority appears untenable because of his/her membership of Cabinet; and
  - (c) a deputy minister on a board also appears untenable because of his/her membership of the Executive and his/her being bound as such by Cabinet's decisions unless the enabling Act for the institution or any other Act expressly provides for the appointment of the Deputy Minister.

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<sup>15</sup> Section 96(2).

<sup>16</sup> Executive Members' Ethics Act, 1998 (Act 82 of 1998).

<sup>17</sup> Sections 92(2) and 133(2) of the Constitution.

<sup>18</sup> Sections 92(3)(b) and 133(3)(b) of the Constitution.

<sup>19</sup> Rautenbach & Malherbe *Constitutional Law* 3<sup>rd</sup> ed p 201-2.

## Members of municipal councils

**12. A member of a municipal council is eligible to serve on the board of a national and provincial state or state controlled institution provided that –**

- (a) the enabling Act of the institution or any other Act does not expressly disqualify the member;**
- (b) the appointment to the board does not create conflict between the official responsibilities as a councillor and the board's interest;**
- (c) the municipal council concurs with the appointment of the member as a board member.**

13. The Local Government Municipal Systems Act specifies in Schedule 1, Code of Conduct for Councillors,<sup>20</sup> that a full-time councillor may not undertake any other paid work, except with the consent of the municipal council, which consent may not be unreasonably withheld.

14. The Municipal Systems Amendment Act, 2003, disqualifies a person from being a director of a municipal entity if he/she holds office as a councillor of any municipality.<sup>21</sup>

15. Apart from the requirement for a municipal council to consent to other paid work by councillors and the disqualification of councillors in some instances as set out in the enabling Acts of state and state controlled institutions, there are no other legislative provisions that preclude councillors from serving on the board of a provincial or national state or state controlled institution.

## Special advisers

**16. A special adviser to an Executive Authority may not serve on the board of any state or state controlled institution.**

**17. Deviation. A deviation from the principle in paragraph 16 may be granted provided that –**

- (a) the Executive Authority responsible for the institution submits a fully substantiated request for a deviation to the Minister for the Public Service and Administration;**
- (b) the Executive Authorities mentioned in (a) after consultation recommend the appointment to Cabinet; and**
- (c) Cabinet approves the appointment to the board.<sup>22</sup>**

18. The PSA provides that special advisers may be appointed to –

- (a) advise an Executive Authority on the exercise or performance of the Executive Authority's powers and duties;
- (b) advise an Executive Authority on the development of policy that will promote the department's objectives; or
- (c) perform such other tasks as may be appropriate in respect of the exercise or performance of the Executive Authority's powers and duties.<sup>23</sup>

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<sup>20</sup> Section 8 of Schedule 1.

<sup>21</sup> Section 93F.

<sup>22</sup> See paragraph 9 of the Dispensation for the Appointment and Remuneration of Persons (Special Advisers) appointed to Executive Authorities on Ground of Policy Considerations.

<sup>23</sup> Section 12A(1).



19. Since a special adviser would act in one of the ways in 18.(a) to (c) above, there is no relationship of authority between the special adviser and the head of a department. A special adviser must direct his/her inputs to the Executive Authority and refrain from interfering in the administration and management of the department, which in law is the function and responsibility of the head of the department. Therefore, a special adviser may not be tasked to perform any executive function which vests by law in the head of the department. As regards the responsibility of the head of the department to assist the Executive Authority in exercising his/her oversight responsibility over state or state controlled institutions associated with the Executive Authority's portfolio, a potential conflict of interest may arise if the special adviser is a member of a board of such an institution.
20. Special advisers must be impartial and perform their duties objectively without fear, favour or prejudice. When a member of Cabinet is to participate in decisions of Cabinet regarding a state or state controlled institution, advice from his/her special adviser who serves on the board of that institution will raise questions about the objectivity of the advice and/or a possible conflict of interest.
21. The serving of special advisers on statutory boards or councils (or similar bodies) for which the Executive Authority is individually or collectively accountable would be inappropriate since it could give rise to a direct or indirect conflict of interest or advice which could be biased or perceived to be biased. Therefore, if a person who is to be appointed as a special adviser serves on a statutory board or council (or similar body) for which the relevant Executive Authority is individually or collectively accountable, his/her appointment to such board or council must be terminated with effect from his/her date of appointment as special adviser to the relevant Executive Authority.
22. A request for deviating from the principle set out in paragraph 17 must be fully substantiated and should include the nature and period of appointment, the person's competencies (skills, expertise, experience, and knowledge), and the benefits and risks (eg potential conflict of interest) of making such an appointment.

### Heads of departments

**23. A head of department may not serve on the board of a state or state controlled institution for which his/her department is the parent department and in respect of which his/her Executive Authority has an oversight responsibility.**

**24. Deviation. A deviation from the principle in paragraph 23 may be granted provided that –**

- (a) the head of department is appointed in exceptional cases for a specific period, preferably not more than one year, to promote a government objective, for example to normalise the governance of a dysfunctional institution and/or to advise on the management of complex and diverse interests of role players;**
- (b) the head of department is preferably not the chairperson, in order to provide for objective decision-making;**
- (c) the Executive Authority responsible for the institution recommends the appointment; and**
- (d) Cabinet approves the appointment to the board.**

**25. A head of a department is eligible to serve on the board of a state or state controlled institution, except a government enterprise, falling under another department or Ministry, provided that –**

- (a) the special circumstances set out in paragraph 38 are fully substantiated and demonstrate that the appointment is justified;**
- (b) the Executive Authority to whom the head of department reports and the Executive Authority responsible for the institution concur with the appointment; and**
- (c) Cabinet approves the appointment.**

26. A head of a department is not eligible to be a board member of a state or state controlled institution –

- (a) for which his/her department is the parent department; and
- (b) if the same Executive Authority is both the responsible Executive Authority for the department and the institution.

27. A potential conflict of interest may occur due to the supporting role of a head of a department towards his/her Executive Authority in overseeing a state or state controlled institution. In this regard, decisions taken at board level may have to be ratified by the Executive Authority or Cabinet.

28. A head of a department as the accounting officer of a department is also responsible for ensuring compliance with any prescribed conditions if the department gives financial assistance to any entity (departments make transfer payments to state controlled institutions).<sup>24</sup> A head of a department cannot be accountable for ensuring the effective and efficient utilisation of transferred funds or financial assistance rendered to a state controlled institution and also be accountable in terms of his/her membership of the board of the same institution. It would be inappropriate for a head of a department to be both referee and player.

29. A request for deviating from the principle set out in paragraph 24 must be fully substantiated and include the nature and period of appointment and indicate the person's competencies (skills, expertise, experience, and knowledge), and the benefits and risks (eg potential conflicts of interest) of making such an appointment.

## **Public service officials**

### **Government enterprises**

**30. A public service official, including a head of a department, may not serve on the board of a government enterprise.**

**31. Deviation. A deviation from the principle in paragraph 30 may be granted provided that –**

- (a) the special circumstances set out in paragraph 38 are fully substantiated and demonstrate that the appointment is justified;**
- (b) the Executive Authority responsible for the institution recommends the appointment; and**
- (c) Cabinet approves the appointment to the board.**

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<sup>24</sup> Sections 38(1)(b), (d), (i) to (l) of the PFMA.

**32. As an alternative to serving on the board of a government enterprise, public service officials may participate in key committees (eg the audit committee) of a government enterprise by agreement between the Executive Authority responsible for the relevant enterprise and the board of that enterprise.**

#### State and state controlled institutions

**33. A public service official is eligible to serve on a board of a state or state controlled institution, except a government enterprise, provided that –**

- (a) the special circumstances set out in paragraph 38 are fully substantiated and demonstrate that the appointment is justified; and**
- (b) the official does not perform dual responsibilities by assisting the Executive Authority in overseeing that institution.**

#### Public interest institutions

**34. A public service official is eligible to serve on a board of a public interest institution, provided that the enabling Act of the institution or any other Act expressly provides for the ex officio appointment of the official.**

#### Disclosing interests

**35. A public service official appointed as a board member must declare to the state or state controlled institution his/her financial interests in terms of the Framework for disclosing interests set out in Annexure 3.**

36. Public service officials are discouraged from serving on the boards of government enterprises in view of the personal risks to the officials in exercising their fiduciary duties as set out in chapter 2.

37. An official's first duty as an employee is towards the Executive Authority and towards the current government through the head of the department. The principal duty of a board member of a state or state controlled institution, on the other hand, is to work towards achieving the statutory interests of the institution. There is a potential conflict of interest when an official serves as a board member.

#### Special circumstances

38. Appointing an official to the board of a state or state controlled institution must only be allowed where special circumstances justify the appointment. The special circumstances are as follows:

- (a) *Improving board performance*** – There are circumstances where appointing a particular official to a board may be critical for board performance. These circumstances could be described as ones where there is a potential risk of not achieving the board's goals or properly carrying out the board's basic functions without direct input from a particular official. This might be where:
  - (i) There is a confluence of person and role
  - (ii) An Executive Authority needs a specific task completed
  - (iii) A particular official has experience in completing these tasks in a public sector environment

(b) **Capacity building** – Building the capacity of boards through the participation of historically disadvantaged individuals (HDI) and achieving broad representation of the South African people according to race, gender, and disability. If it can be shown that the public official, in addition to being an HDI, is also appointed based on any one of the other criteria (improving board performance, *ex officio* appointment, or to capitalise on experience), then the person may be a fully functioning board member. However, if the sole reason for appointment is the fact that the official is an HDI, he/she should be appointed only as an observer.

**Note this**

In accordance with the policy on affirmative action in 1998, the Minister for the Public Service and Administration has set the following public service-wide targets:

- (a) 75% representation of Black people (Africans, Coloureds and Indians) in management
- (b) 50% women in management
- (c) 2% disabled people in the public service

(c) **Serve in private capacity** – Officials may serve on boards in their private capacity, provided the Executive Authority responsible for the institution grants permission in terms of section 30 of the PSA if remunerated work is involved. Such official has the same responsibilities and duties as any other board member and does not represent the views of his/her department or of the current government. These officials are on the board for their competencies (skills, expertise, experience, and knowledge) and contribute as private individuals.

(d) **Ex officio appointment**

An official is appointed in an *ex officio* capacity by virtue of his/her position/office, provided that –

- (i) the enabling legislation for the institution expressly requires the *ex officio* appointment of a public service official to the board of the institution;
- (ii) officials that are *ex officio* members of boards may not be appointed as chairpersons.

(e) **Capitalising on experience** – As senior officials head towards the end of their public service careers, they may be considered for appointment to boards.

(f) **Observers** – Officials may be appointed as observers to boards. Although they have no official status (eg voting rights) at board meetings, they can explain matters such as government or departmental policy and direction.

It is best practice that departments report in their annual reports on the appointment of officials to the boards of state or state controlled institutions.

### Managing a public official appointment

39. The special circumstances set out in paragraph 38 must be outlined in a submission to the Executive Authority responsible for the institution, indicating the official's competencies (skills, expertise, experience, and knowledge), nature of appointment, and the benefits and risks of making such an appointment.

40. Officials are subject to the same rules as any other person nominated for membership of a board. The appointment should be appropriate to the role and should follow the appointment process set out in this Handbook.

### Relocation or secondment to another department

41. **When a public service official who serves on a board of a state or state controlled institution is transferred/promoted/seconded to another department, the Executive Authority responsible for the relevant institution may:**

- (a) **Appoint another official to the board to replace the official**
- (b) **After consultation with the Executive Authority of the recipient department and the official retain the services of the official on the board of the relevant institution.**

## Limiting multiple memberships of boards

42. The ability of candidates to serve on a number of boards depends on the circumstances and competencies of the candidate. The reason for limiting multiple membership is to ensure that members are able to pay proper attention to the affairs of the institutions on whose boards they serve, to broaden participation in public sector governance, to avoid tokenism, to minimise opportunities for corruption and to minimise conflicts of interest.

**43. The following principles are provided to limit multiple memberships of boards:**

- (a) An individual may not serve on more than three boards, whether private or public.**
- (b) An individual may not be chairperson of more than one board at any time.**
- (c) An individual serving on the board of a regulatory entity may not simultaneously serve on the board of a government enterprise that is regulated by the particular regulatory entity.**
- (d) Retirees may not serve on more than five boards.**

**44. A selection committee must determine the capacity, availability and competencies of candidates to meaningfully contribute their time to the affairs of the board, particularly where candidates serve on a number of boards.**

**45. Deviation. The Executive Authority responsible for the institution may approve a deviation from the principles set out in paragraph 43 provided that, on the recommendation of the selection committee, there are justifiable reasons for exceeding the limit for multiple memberships. The selection committee must record the reasons for its recommendation.**

## Remuneration and reimbursement for expenditure

### Public service officials

**46. A public service official may not receive any remuneration for ex officio board activities pertaining to the preparation for board meetings, travelling time to and from board meetings, and participation in board meetings, whether inside or outside normal working hours.**

**47. The ex officio board activities that a public service official performs to prepare for board meetings, travelling time to and from board meetings, and participating in board meetings, whether inside or outside normal working hours –**

- (a) are regarded as official duty; and**
- (b) do not require the official to take leave to attend to such duties.**

48. The PSA stipulates that –

- (a) every officer and employee must place all his/her time at the disposal of the State;
- (b) no officer or employee may perform remunerative work beyond his/her employment in the public service without permission granted by the Executive Authority responsible for the institution; and

- (c) no officer or employee may claim any additional remuneration in respect of any official duty or work which he/she performs voluntarily or is required by a competent authority to perform.<sup>25</sup>
49. Officials appointed to boards normally belong to the senior management of the public service. No provision is made in the PSA or Public Service Regulations for overtime for this category of officials.
50. However, in those cases where officials who do not belong to the senior management are appointed to boards, the Executive Authority may remunerate such officials for overtime work with due consideration of the Public Service Regulations, collective agreements and conditions of employment legislation.<sup>26</sup>

**51. Any direct cost, such as travel, accommodation and meals, should be recovered from the state or state controlled institution of which a public service official serves as a board member.**

52. Departments must ensure that –
- (a) such claims are submitted to the board under cover of a certificate by the official, clearly stating that no other claim for that expenditure or part thereof will be claimed or paid by another person or institution; and
  - (b) boards submit a regular (monthly or quarterly) statement to the department that clearly stipulates what payments were made in respect of board member activities by public service officials.

### **State and state controlled institutions**

53. The relevant Executive Authority determines, after consultation with the Minister for the Public Service and Administration, the remuneration of advisory boards of government components listed in Schedule 3 of the PSA.
54. The relevant Executive Authority determines the remuneration of members of statutory councils in terms of the enabling Acts of these institutions. This could involve consultation with the Minister of Finance or the Minister for the Public Service if provision is made in the enabling Act for such consultation.
55. The National Treasury is the custodian of the system of Service Benefit Packages for Office-Bearers of Certain Statutory and Other Institutions. An interdepartmental evaluation committee, representing the National Treasury and the Department of Public Service and Administration, makes recommendations to the Minister of Finance and the relevant Executive Authority on the remuneration of board members for newly established non-business public entities listed in Schedule 3A of the PFMA. Further information on the Service Benefit Packages for Office-Bearers may be obtained from the Public Entities Governance Unit in the National Treasury.
56. Government enterprises conduct business activities and they are expected to compete with the private sector for market share and scarce competencies (skills, expertise, experience, and knowledge). The Department of Public Enterprises provides remuneration guidelines for government enterprises.

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<sup>25</sup> Section 30.

<sup>26</sup> See Part V of Chapter 1, regulation D.2 of the Public Service Regulations; Public Service Coordinating Bargaining Council Resolution 3 of 1999; and Basic Conditions of Employment Act, 1997.

## Municipal councils

57. The Local Government Municipal Systems Act, 2000 stipulates in Schedule 1, Code of Conduct for Councillors,<sup>27</sup> that full-time councillors may not undertake any other paid work, except with the consent of the municipal council, which may not be unreasonably withheld.
58. The Public Office-Bearers Act, 1998 provides that a member of a municipal council is, in addition to his/her salary as a member of the municipal council to which he/she has been directly elected, entitled to an allowance in respect of his/her membership of any other municipal council. Such allowance must be determined by the other municipal council by resolution, with a supporting vote of the majority of its members, in consultation with the member of the Executive Council responsible for local government in the province concerned.<sup>28</sup>
59. The Public Office-Bearers Act also provides that the salary and allowances of a member of a municipal council are determined by that municipal council by resolution, with a supporting vote of a majority of its members, in consultation with the member of the Executive Council responsible for local government in the province concerned. For this purpose,<sup>29</sup> the upper limit of salaries and allowances of the different members of municipal councils as determined from time to time should be taken into account.
60. The principle of payment for other paid work undertaken by councillors is recognised in legislation. Municipal councillors are not precluded from receiving remuneration for serving on the board of a provincial or national state or state controlled institution, provided that the municipal council consents that the relevant councillor undertakes other paid work.

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<sup>27</sup> Section 8 of Schedule 1.

<sup>28</sup> Section 7(2).

<sup>29</sup> Section 7(3).

## CHAPTER FOUR – ROLES AND RESPONSIBILITIES

1. Every role player who is involved in an appointment process should have a clear understanding of the extent of his/her roles and responsibilities. A brief description of the role players and their responsibilities follows.

### Parliament

**2. *Parliament or committees of Parliament nominate, recommend, approve, or appoint board members in terms of applicable legislation.***

**3. *An Executive Authority may request Parliament to make recommendations on the suitability of candidates to serve on a board. The Executive Authority must refer the recommended candidates to Cabinet for approval.***

4. Parliamentary structures and processes in some instances provide for the appointment of persons to boards of state or state controlled institutions and constitutional institutions (eg Public Protector and Public Service Commission). Such appointments normally provide for –
  - (a) nomination by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly (a panel sometimes submits a list of recommended candidates to the committee); and
  - (b) recommendation or approval by the Assembly by a resolution adopted by a majority of its members.
5. Apart from the qualifying principles set out in chapter 3, this Handbook does not further elucidate Parliamentary structures or processes regarding the appointment of persons to boards. However, departments should consider the principles and best practices in the Handbook when they draft legislation that requires the appointment of board members through Parliamentary structures and processes.

### Executive acts of the President

**6. *The President, as Head of State or as Head of the National Executive, approves the appointment of persons to boards of state or state controlled institutions in terms of applicable legislation.***

7. Chapter 2 of the Handbook on Executive Acts of the President of the Republic of South Africa, published by the Office of the President, specifies the powers and functions of the President to make appointments that the Constitution or legislation requires the President to make as Head of State or as Head of the National Executive. Therefore, the President acts in the following manner:
  - (a) As Head of State, the President acts outside the normal executive function as a symbol of the state. The President is not required to consult with or act together with his/her Cabinet. This does not mean that the President acts freely in each case, and the President may choose to act on the advice of an Executive Authority, Cabinet or of Parliament.
  - (b) As Head of the National Executive, the President exercises executive authority over the Republic “together with” the other members of the Cabinet.



## Cabinet approval/consultation

- 8. The Executive Authority responsible for the state or state controlled institution must recommend the following appointments to Cabinet for approval/consultation:**
- (a) Special advisers**
  - (b) Heads of departments and deputy directors-general**
  - (c) Public service officials, including heads of departments serving on the board of a government enterprise**
  - (d) If the appointment of persons (officials and private persons) will be so significant that the collective accountability of the Executive Authority, in terms of the Constitution, requires some form of approval of or consultation with the Cabinet**

### Criteria to decide on the significance of appointments

9. The collective interests of government are best served if the whole Cabinet participates in the making of key appointments of a significant nature. The following criteria specify significant appointments:
- (a) Institutions for which the Constitution expressly requires the approval of or consultation with Cabinet when board members are appointed
  - (b) Large institutions with more than 500 employees and/or operational budgets of more than R200 million
  - (c) Institutions with responsibilities of a transversal nature in which several departments, ministries or Cabinet clusters may have an interest (eg State Information Technology Agency)
  - (d) Government enterprises with an asset base of more than R1 billion (eg Airports Company)
  - (e) Institutions that predominantly perform functions of a regulatory or tribunal nature
  - (f) Institutions that, at the discretion of the Executive Authority responsible for the institution, perform functions of a strategic nature, for example prominent or high-impact government programmes
10. The Cabinet memoranda must outline the candidate's competencies (skills, expertise, experience, and knowledge), nature of the appointment, and the benefits and risks of making such an appointment.
11. In addition, the Guide for the Drafting of Cabinet Memoranda<sup>30</sup> under the heading "Memoranda dealing with the appointment of Members of Boards" requires the following:
- When submitting names for consideration for appointment to boards, councils or other relevant institutions the race and gender of proposed appointees must be indicated and the curricula vitae must be annexed to the memorandum. The memorandum should also indicate all other boards, councils or similar institutions the candidates are currently serving on. In the event they are not serving on any, it must also be indicated.

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<sup>30</sup> See paragraph 4.20.1 of the Guide for the Drafting of Cabinet Memoranda published by the Cabinet Secretariat, September 2007.

## The Executive Authority

- 12. The Executive Authority responsible for the state or state controlled institution may, on recommendation of the head of the department, approve the appointment of –**
- (a) a public service official (who is not the head of a department or a deputy director-general) to a board, except a government enterprise, provided that any special circumstances set out in paragraph 38 of chapter 3 are fully substantiated and demonstrate that the appointment is justified;**
  - (b) private persons if the appointment is not of a significant nature as set out in paragraph 9, chapter 4; and**
  - (c) persons whom the enabling Act of the institution requires the Executive Authority to appoint.**

- 13. The Executive Authority responsible for the state or state controlled institution may approve a deviation to exceed the limit for multiple memberships of boards on the recommendation of the selection committee if there are justifiable reasons for exceeding the limit set out in paragraph 43, chapter 3.**

- 14. The Executive Authority formally appoints board members.**

15. It has become common practice to refer all appointments of persons to boards to the Cabinet. This places an unnecessary administrative burden on Cabinet, particularly in those cases where legislation specifically provides that the responsible Executive Authority may appoint board members (that is, without the approval of Cabinet).
16. The Executive Authority is ultimately responsible for every appointment, including the extent to which he/she wishes to be involved. In practice, the Executive Authority delegates the appointment process to the department. In making the decision, the Executive Authority may depend on advice and information provided by others, including Cabinet decisions/recommendations, Executive Authorities, the chairperson of the board, staff, departmental officials, community organisations and other outside sources. The formal appointment process is set out in chapter 5.

## The parent department

- 17. For those state or state controlled institutions falling under the portfolio of the Executive Authority, the parent department is required to –**
- (a) maintain a consolidated succession management plan for board members;**
  - (b) ensure that the chairperson of the board implements a succession management plan for board members;**
  - (c) ensure that the chairperson of the board implements an approved induction and training programme for board members;**
  - (d) maintain a database (Excel spreadsheet) of board member information in the format provided in Annexure 1;**
  - (e) provide the dpsa with updated board member information on an annual basis by 1 April of each year;**
  - (f) implement the Framework for disclosing interests for existing and newly appointed board and council members of state and state controlled institutions as set out in Annexure 3;**
  - (g) subject all short-listed candidates to pre-appointment suitability checks and/or security clearance, as the case may be;**

- (h) report on the appointment of officials to the boards of state or state controlled institutions in the annual report of the parent department; and**
- (i) manage the appointment process.**

18. **Departments must manage the appointment process.** A parent department is responsible for managing the appointment process on behalf of its Executive Authority. This should ensure that the appointment practices in this Handbook are appropriately internalised and provide for continuity and transparency.
19. **Departments may use the services of outside companies (selection consultants).** A parent department may, in accordance with the procedures set out in this Handbook and the relevant procurement policies, make use of an outside company or selection consultant to assist with part or all of the nomination and selection processes. Expenditure incurred would be for the account of the relevant department.
20. Regardless of whether officials of the parent department or an outside company arranges an appointment, the same standards of information gathering and scrutiny are required before an Executive Authority makes a decision on the appointment. All appointments must be made with due consideration of the appointment principles set out in paragraph 1, chapter 5.
21. **Departments must be clear about the extent of their role.** All those involved in a particular appointment process must be absolutely clear about which parts of the process they are responsible for and who has overall responsibility for the process. They must also be clear about the extent to which the Executive Authority wishes to be personally informed and involved.

### The chairperson of the board

- 22. An Executive Authority or the parent department may consult the chairperson of a board on the nomination and selection of board members.**

23. An Executive Authority or the parent department may consult with the chairperson of a board regarding the nomination and selection of board members and for purposes of succession management. This role of the chairperson will be influenced by matters such as requirements specified in the enabling legislation, size and/or particular circumstances of the institution.

**Note the following best practice**

1. The chairperson of a board must actively participate in the nomination and selection of board members.<sup>31</sup>
2. The chairperson's responsibilities should be separate from those of the chief executive officer.
3. Where this separation of roles proves to be impracticable, the board must appoint an independent, non-executive director as a deputy chairperson to ensure that no individual has unfettered decision-making powers.<sup>32</sup>

- 24. The chairperson or company secretary oversees a formal succession plan for board members.**

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<sup>31</sup> See King Code; Section 1; Chapter 2 – Role and functions of the chairperson.

<sup>32</sup> See paragraph 5.1.2.1 of the Protocol – Role of the chairperson.

25. The chairperson of a board or the company secretary (if one has been appointed) must oversee a formal succession plan for the board<sup>33</sup> and ensure that the succession plan is included in the overall succession plan for which the parent department is responsible. The chairperson should be assisted with this task by the company secretary, if one has been appointed, or the chief executive officer.

**26. *The chairperson arranges for new members to be properly inducted.***

27. The chairperson of a board must arrange for new board members to be properly inducted and orientated.<sup>34</sup> The chairperson should be assisted with this task by the company secretary, if one has been appointed, or the chief executive officer.<sup>35</sup>

### **The candidate**

**28. *Candidates applying for a position on a board must provide personal information and disclose their interests.***

29. The candidate has the task of providing those involved in the appointment process with all relevant personal information – competencies (skills, expertise, experience, and knowledge), qualifications, availability, possible conflicts of interest, *et cetera*. In addition, the candidate should be provided with information about the organisation, including its functions and areas of operation, well before the appointment is finalised.
30. Appointees should be fully aware of the expectations of them before accepting the position. The appointee must accept the appointment on the basis of an informed appreciation of the competencies (skills, expertise, experience, and knowledge) and commitment required to be effective.

### **The Department of Public Enterprises**

**31. *The Department of Public Enterprises maintains a Directors' Database for State Owned Enterprises reporting to the department.***

32. Board member information should be integrated but managed on a decentralised basis. The integrated database will be decentralised to provide that –
- (a) the dpe maintains a consolidated Directors' Database in respect of state owned enterprises reporting to it;
  - (b) the dpsa maintains a consolidated database of board member information in respect of all state and state controlled institutions, excluding state owned enterprises;
33. These information systems will be made available to all role players to assist them with effective succession management of board members.

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<sup>33</sup> See King Code; Section 1; Chapter 2 – Role and functions of the chairperson.

<sup>34</sup> See King Code; Section 1; Chapter 2 – Role and functions of the chairperson.

<sup>35</sup> See King Code; Section 1; Chapter 5 – Director selection and development.

## **The Department of Public Service and Administration**

**34. *The Department of Public Service and Administration must –***

- (a) *maintain a consolidated database of board member information in respect of all state and state controlled institutions, excluding state owned enterprises; and***
- (b) *advise the Minister for the Public Service and Administration on the overall administration and implementation of the Handbook to promote uniformity in the appointment of board members.***

## CHAPTER FIVE – APPOINTMENT PROCESS

### Appointment principles

1. **The following principles must be applied when appointing persons to boards:**
  - (a) **Merit based** – Appointments are governed by the overriding principle of selection based on merit, in other words an objective assessment of the fit between the competencies (skills, expertise, experience, and knowledge) and qualifications of the prospective candidate and the needs of the institution.
  - (b) **Transparent** – The appointment process and phases are standardised, objective, clear, understandable, and transparent.
  - (c) **Representative** – Appointed board members should broadly reflect the demographics of South Africa. The appointment process should take into consideration employment equity legislation and policies to achieve broad representation of the South African population according to race, gender, and disability.
  - (d) **Consistent** – The appointment process should be applied consistently in all cases.
  - (e) **Probity** – Board members must be committed to the values and principles governing public administration and perform their duties with integrity.<sup>36</sup>

### Pre-appointment systems

2. Before a specific vacancy arises, it would be sensible to be aware of the various facets of an appointment process. Practices such as advertising for candidates (in what circumstances, in which publications, how much lead time is needed), interviewing (determining the composition of the interview panel, how to short-list), consultation (with whom, what are the protocols, who should do it) and complying with legislative requirements (both general and institution specific) can all be daunting when one is faced with the reality of running a board appointment process. The broad process for appointing persons to boards of state or state controlled institutions is set out in Annexure 2.

### Departmental databases and succession management

3. **Departments are required to:**
  - (a) ***Maintain a database (Excel spreadsheet) of board member information for all appointments to boards of state or state controlled institutions falling under the portfolio of their Executive Authorities in the format set out in Annexure 1 of the Handbook***
  - (b) ***Provide the dpsa with updated board member information on an annual basis by 1 April of each year***

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<sup>36</sup> The basic values and principles governing public administration are set out in section 195(1), Chapter 10 of the Constitution, 1996.

4. The dpsa will consolidate the information for all state and state controlled institutions in order to share information with all departments making board appointments. The member information will provide Executive Authorities and departments with a good base for an effective succession management plan – for example, who is up for reappointment to or retirement from the board and when. The department should use the database information to flag impending appointments, allowing it time to activate the appointment process.

<u>Check list</u>	
✓	Is there a database of board member information that can be consulted?
✓	Is there a process in place to alert the department to upcoming board vacancies three to six months before they are due to arise and nine to 12 months for board chairs?
✓	Is there awareness of the relevant legislation applicable to appointments?
✓	Is there a succession management plan in place?
✓	Are those responsible for running the appointment process familiar with the various ways of locating candidates, including public service databases of potential board members and making use of outside companies (selection consultants)?

5. For board member appointments, **at least three to six months' leeway is recommended between initiating the appointment process and the expected date of appointment**, depending on consultation and interviewing. Nine to 12 months is desirable for a board chair. These are suggested minimum times and may vary from case to case. Succession management, particularly for the positions of chair and deputy chair, is crucial to the continuing effective functioning of the board.

### Generic role descriptions and board profile

6. Information contained on the department's database can also be used to produce a generic role description for board members and a board profile. This information is useful in a number of respects:
- (a) It allows candidates to have a greater understanding of what the job requires before considering whether to apply for or accept a position.
  - (b) It provides a benchmark against which the attributes of the candidates can be assessed.
  - (c) It allows stakeholders to nominate candidates who are well matched to the description.
  - (d) It assists in reinforcing the principle of appointment on merit.

### Role description

7. The role description contains information of an individual nature, such as competencies (skills, expertise, experience, and knowledge), qualifications and expectations related to the position (eg minimum meeting attendance). The competencies that all board members require include organisational leadership and an understanding of effective governance and strategy. The role description should also detail the importance of personal integrity and the interest and enthusiasm needed to contribute effectively to the institution's performance. The role of chairperson of the board would have a separate and more elaborate description to reflect the nature of the position.

8. When designing the role description, allow scope for tailoring the document each time a vacancy arises. Each vacancy or policy change that necessitates the realignment of functions creates the opportunity to reassess the needs of the board and the type of person best suited to becoming a board member.

<u>Check list</u>	
✓	Is there a standard role description for the jobs of board members and board chair?
✓	Is there a board profile that includes a description of the role of the board and the board's legislative framework?
✓	What are the requirements in terms of enabling legislation, shareholder agreements and/or articles of association?

9. The department should ensure that its Executive Authority approves the role description for each appointment after it has been tailored to the vacancy. Developing a tailored role description is discussed on

page 27, chapter 5 of the Handbook.

### Board profile

10. Those responsible for conducting the appointment process must be familiar with the statutory requirements that govern appointments to boards.
11. The board profile would contain information such as the legislative framework in terms of which the board and the institution operate, the role of the board,<sup>37</sup> role of the chairperson, role of executive and non-executive directors, committees of the board, relationship with the Executive Authority and the parent department, other stakeholders and the unique nature of working in the public sector.

### Appointment process

**12. Departments should customise the appointment processes to suit their specific functional areas.**

#### Identifying a vacancy

13. If there is an active succession management system in place, then identifying an impending vacancy will be a matter of course. It is crucial that the board is at 'full strength' and is not left without sufficient members for a quorum. Departments are required to –
  - (a) notify the Executive Authority of the vacancy in writing;
  - (b) suggest a recommended appointment process;
  - (c) provide a generic role description; and
  - (d) advise on the basic legislative requirements associated with the appointment and the process the department will follow unless explicitly directed otherwise by the Executive Authority.
14. It may be prudent to give the Executive Authority preliminary advice on the nature of the candidate required.

#### Check list

- ✓ Has the Executive Authority been notified in writing of the impending vacancy?
- ✓ Has the department recommended on the appointment process, including legislative and administrative requirements, and the nature of the role description?
- ✓ Have the respective roles of Executive Authorities, departmental officials and the Executive Authority's office staff been clarified?
- ✓ Has the Executive Authority's office been briefed on the legal and administrative requirements?
- ✓ At what stage(s) in the process does the Executive Authority need to be involved?
- ✓ What are the requirements in terms of enabling legislation, shareholder agreements and/or articles of association?

#### Developing a time line of the agreed procedure

15. After the Executive Authority has been consulted on the process for the appointment, a time line should be developed that reflects events during the appointment process. Sufficient time should be allowed for all aspects of the process. This is particularly important if seeking expressions of interest or using outside companies (selection consultants).
16. A sensible way of producing the time line is to work backward from the time the appointee is to take up office. Project management practices should be followed that allow for possible contingencies (time).

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<sup>37</sup> See paragraph 5.1 of the Protocol – Board of Directors.



17. The time line should also provide for the Executive Authority's input. The time needed for consultation with role players and colleagues also needs to be taken into account.
18. Consider and record the following milestones when drawing up a time line:
- (a) When the appointee is to take up the position
  - (b) When the incumbent is due to step down from the position
  - (c) When the appointment particulars must be submitted to the relevant Cabinet Committee, the Cabinet or the President, if necessary
  - (d) The date by which the Executive Authority wishes to have a preferred candidate identified
  - (e) The closing date for applications
  - (f) The requirements in terms of enabling legislation, shareholder agreements and/or articles of association

**Check list**

- ✓ Has a time line for the appointment process been produced?
- ✓ Does the time line include a closing date for applications, selection date, date for submission to various role players and appointment commencement date (including the potential for overlap)?
- ✓ Does the time line allow sufficient time for consultation with caucus and coalition partners?

**Developing a tailored role description**

19. Where a generic role description already exists, it simply needs to be tailored to the specific requirements of the vacancy.

**Legislative requirements**

20. Check any legislative requirements for the composition of the board – has the vacancy made the board deficient in its legal composition? For most boards, their enabling legislation stipulates certain types of competencies, or a particular mix of people. If the vacancy creates a missing set of competencies (skills, expertise, experience, and knowledge) or form of representation, the role description must be drafted to reflect that gap so that the vacancy can be filled as required by legislation and the board does not act outside its powers.
21. The role description will typically include, but is not limited to:
- (a) A description of the roles in terms of the task requirements and the responsibilities
  - (b) The competencies the person will need to demonstrate for the successful performance of the role
  - (c) Educational requirements (qualifications)
  - (d) Membership of professional bodies
  - (e) Level of competencies
  - (f) Reporting relationship
  - (g) Remuneration

**Consultation on the role description**

22. The Executive Authority may wish to bring in certain competencies (skills, expertise, experience, and knowledge) or a new approach, and this should be reflected in the role description. Whether the Executive Authority wishes to be consulted on the role description should have been determined at the start of the process. It is desirable for the Executive Authority to have the opportunity to discuss and endorse the role description.
23. It is good practice to consult the chairperson of the board on the role description. This could provide a unique perspective on the functioning and competencies of the current board and

possible areas of strengthening that could be achieved by the new appointment. The chair is responsible for the performance of the board as a unit and will have a view on the type of person required to fill the vacancy.

24. Where appropriate, other stakeholders, such as participants in a particular Cabinet cluster, industry groups, and voluntary organisations, may be able to offer their perspectives on what may be missing from the board.
25. In some cases, legislation requires consultation with external stakeholders, although such consultation usually deals with the person appointed rather than the role description.

### Board composition

26. When considering the role description, take into account the current composition of the board, the principle of appointing on merit and the need for an appropriately balanced board. What is the balance of competencies (skills, expertise, experience, and knowledge)? How appropriate is the balance of gender, representivity, disabled and community/industry representation?
27. The role description for board members should reflect the following preferences as set out in the King Code and the Protocol, unless enabling Acts state otherwise:

- (a) The chairperson should preferably be an independent, non-executive member.<sup>38</sup>
- (b) The board could comprise a mix of executive, non-executive and independent directors. Definitions of these portfolios are provided in the King Code and the Protocol.<sup>39</sup>
- (c) The board should comprise a majority of non-executive directors. Confusing the roles and responsibilities of board members and senior management can be avoided if executive directors are not appointed.
- (d) Member appointments should be in writing and limited to a maximum of three to five years.

<b>Check list</b>	
✓	Does the tailored position description take into account legislative requirements for the composition of the board?
✓	Was the Executive Authority consulted on the role description?
✓	Was the board chair consulted to determine the board's perspective?
✓	Were other stakeholders consulted as and where appropriate?
✓	Did the Executive Authority sign off the role description?
✓	Does the role description take into consideration the guiding principles set out in section 3, the need for a balance of gender, ethnicity, and community representation, while appointing on merit?
✓	Was the correct preliminary remuneration level set?
✓	What are the requirements in terms of enabling legislation, shareholder agreements and/or articles of association?

28. Obtain the approval of the Executive Authority to formalise the role description.

### Preliminary remuneration

29. The preliminary remuneration to which the board member will be entitled should be determined at this stage – see chapter 3.

### Identifying candidates

30. There are a number of ways to source candidates. They range from consulting departmental databases (discussed earlier), advertising in the media and head-hunting, to using referrals and

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<sup>38</sup> See paragraph 5.1.2.1 of the Protocol – Role of the Chairperson.

<sup>39</sup> See paragraph 5.1.5 of the Protocol – Role of Executive and Non-executive Directors.

recruitment agencies. A preliminary selection of methods should be made when the time line for the appointment process is being developed. When developing the time line, seek clarification from the Executive Authority about when the Executive Authority wishes the candidate to be contacted. It is possible that the Executive Authority may wish to consider the candidate before he/she is contacted about the position.

31. Sources of identifying candidates include –
- (a) seeking declarations of interest via public advertising;
  - (b) using nominations provided by the public;
  - (c) consulting with the Directors-General Cluster, the Executive Authority and his/her Cabinet colleagues;
  - (d) consulting with the board, in particular with the chair;
  - (e) consulting with interested parties, sectoral groups and other stakeholders;
  - (f) consulting with the parent department;
  - (g) using outside companies or selection consultants;
  - (h) using departmental databases, the Directors' Database of the Department of Public Enterprises and the Department of Public Service and Administration as discussed earlier;
  - (i) using a nomination committee as discussed later in the section dealing with "Short-listing candidates"; and
  - (j) using a nomination committee that was established as a committee of a board.

32. An appointment process that seeks candidates from a number of different sources can identify candidates who might not have otherwise been considered. A selective approach to each vacancy would be best – no vacancy will require all of the methods suggested. An appointment to the chair of a significant or large institution may require an entirely different process from an appointment to the board of a significantly smaller organisation. The Executive Authority will have outlined his/her preferences at the beginning of the process. Board profiles and tailored role descriptions should be used to identify and provide information to candidates.

<b>Check list</b>	
✓	Have all sources of identifying candidates been explored?
✓	Have applications been sought by using available databases, advertising for expressions of interest, consulting with Executive Authorities, consulting with the board and board chair, consulting with sectoral groups, consulting within the parent department, consulting with the nomination committee or using outside companies and selection consultants?
✓	Have the board profile and tailored role descriptions been used to provide information to prospective candidates and in advertisements for potential candidates?

33. Those who conduct the appointment process need to be aware of the legal requirements governing personal information set out in the Access to Information Act (Act No 2 of 2000) with respect to obtaining, holding and protecting the privacy of such information.

### Framework for disclosing interests

34. Along with information on competencies (skills, expertise, experience, and knowledge) and qualifications, candidates should be asked to consider whether there is any impediment that may preclude them from office.
35. Those conducting the appointment process must elicit all relevant information from candidates regarding any interests or potential conflicts of interest. To assess conflicts effectively, those involved must understand both the organisation's functions and the statutory framework in terms of which it operates.
36. Candidates must consider whether there is anything in their personal histories that may make their candidacy for the board inappropriate. This could be described to candidates as a test of

probity, and is necessary to save the government and the board potential future embarrassment.

37. In view of the rights to privacy set out in the Constitution, the *Framework for disclosing interests* of serving board members and candidates can only be applied if members voluntarily declare their interests. There is currently no legislation in terms of which the framework can be regulated for private persons as is required in terms of section 36 of the Bill of Rights. This framework is based on the system that is prescribed for officials in the senior management service of the public service to disclose their interests.

- 38. *Executive Authorities and their departments are encouraged to implement the Framework for disclosing interests for existing and newly appointed board and council members of state and state controlled institutions as set out in Annexure 3 by –***
- (a) *encouraging serving members to voluntarily declare their interests, annually before the start of the financial year of the institution to which the member is appointed as a board or council member; and***
  - (b) *considering including the disclosure of interests by members as a condition of appointment in the case of new appointments or when appointments are renewed to ensure that possible conflict of interest is identified upfront before members are appointed.***

- 39. *Public service officials serving on boards and councils of state and state controlled institutions must declare their interests by completing the Register of interest information sheet provided in Annexure 3, Appendix A.***

40. The disclosure of interests by public service officials provided for in this Handbook does not substitute the financial disclosure by members of the senior management service as prescribed in the Public Service Regulations.

41. Serving board members and candidates are encouraged to indicate whether they have any financial, professional or personal interests that might create a conflict if they are appointed to the board. The framework set out in Annexure 3 makes specific reference to the following types of interest:

- (a) Shares and other financial interests
- (b) Directorships and partnerships
- (c) All remunerated work and employment
- (d) Consultancies and retainerships
- (e) Sponsorships and assistance
- (d) Gifts and hospitality
- (g) Land and property

**Best practice**

**It is best practice for governing authorities to adopt a standing item on the agenda of every board meeting for the disclosure of interests of members.**

42. The following practical advice is also provided:

- (a) Consider critically the information provided by the candidate, and seek further information from the candidate where information is incomplete or further questions arise.
- (b) Ask the candidate to immediately advise of any change to his/her interest that occurs in the course of the appointment process.
- (c) Seek advice from a departmental legal adviser if there is any doubt about whether an interest creates a conflict.
- (d) If a conflict of interest is identified, consider whether it is so fundamental (see Annexure 4) that the candidate is unsuitable for appointment, or whether the conflict can be managed with appropriate systems (seek legal advice where appropriate).
- (e) Discuss systems for managing the conflict with the candidate and obtain the candidate's agreement to a proposal for managing the conflict, if possible.
- (f) Provide the Executive Authority with comprehensive information about any conflicts of interest, including details of any proposal for managing the conflict, an indication of the candidate's position in respect of the conflict, details of any legal advice obtained in relation to the conflict, and free and frank advice in respect of the adequacy of any management arrangements proposed.

**Check list**

- ✓ Has the candidate been provided with information about the organisation?
- ✓ Has the candidate been asked for specific information about any financial, professional or personal interests that might create a conflict?
- ✓ Has the matter been followed up where information is incomplete?
- ✓ Has the candidate been asked to advise of any changes in their interests which might create a conflict?
- ✓ If a conflict has been identified, has its seriousness been fully assessed?
- ✓ If a conflict appears manageable, have management mechanisms been proposed?
- ✓ Have any management systems been discussed and agreed with the candidate?
- ✓ Has legal advice been sought where appropriate?
- ✓ Has the Executive Authority been provided with comprehensive information about conflicts of interest and what was the response?
- ✓ Does the documentation for disclosure of interests include all information relating to conflicts of interest?

**Dealing with conflict of interest**

- 43. Whenever an appointment is made, the Executive Authority (Cabinet and the President, where appropriate) should be confident that every actual or potential conflict of interest that can reasonably be identified has been identified. Where a conflict of interest has been identified, the relevant authority should be confident that an acceptable system has been proposed or established to manage the conflict appropriately.
- 44. Further information on what constitutes a conflict of interest, how to assess the seriousness of a conflict of interest, and how to avoid or minimise the risk of conflicts of interest is contained in Annexure 4. This annexure includes hypothetical examples and suggested mechanisms for managing conflicts.

**Short-listing candidates**

**Nomination committee**

45. **An Executive Authority:**
- (a) **Must appoint a nomination committee**
  - (b) **Must nominate suitable persons to the nomination committee**
  - (c) **Is not obliged to appoint a candidate proposed by the nomination committee**
  - (d) **May delegate the setting up and administration of the nomination committee to his/her department**

46. Consideration should be given to inviting individuals with specialist cluster/functional/sector knowledge to participate in the nomination committee.
47. The role of the nomination committee is to ensure that the people best qualified for each institution's board positions are recommended to the Executive Authority. The committee must provide the Executive Authority with a list of candidates suitable for board membership. The committee must determine nomination criteria.
48. In looking at the competency mix for a board, there are three dimensions of board effectiveness requiring consideration. These are:
  - (a) The knowledge or information required to fill a significant gap on the board
  - (b) The capacity of an individual to influence preferred outcomes (internally and externally) through his/her involvement on the board
  - (c) The extent to which an individual has the opportunity or availability to meaningfully contribute their time and abilities to the affairs of the board<sup>40</sup>
49. A parent department may, in accordance with the relevant procurement policies, make use of an outside company or selection consultant to assist with part of or the entire nomination and selection process, provided that the advertising and selection procedures comply with the requirements set out in this Handbook. Expenditure incurred would be for the account of the relevant department.
50. Where an outside company or selection consultant has identified a candidate, it is desirable to confirm whether the candidate is interested in the position (although it may not always be possible or appropriate to confirm this with the candidate at this stage). This is also a good time to provide the candidate with some basic information about the nature of the position, if this was not done during the disclosure and conflict of interest checks. In some cases, it may be appropriate for contact to be initiated by the Executive Authority. As the situation arises, confirm this with the Executive Authority.
51. When short-listing candidates, benchmark their CVs against the role description created earlier in the process. This is also the time to analyse the information provided regarding potential conflicts of interest. Depending on the nature of the position, suitability and/or credit checks may also be a useful part of the process.
52. The nomination committee established by an Executive Authority is not the same as the nomination committee (board committee) that state and state controlled institutions may establish.
53. The Executive Authority may seek guidance from the nomination committee established by state controlled institutions when making appointments.

#### **Outcome of board and member evaluation**

<p><b>54. <i>The Executive Authority may consider the outcome of a board and/or board member evaluation when making reappointments.</i></b></p>
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55. Chapter 6 of the King Report, 2002, states that the board, through the nomination committee or a similar committee, should regularly review its required mix of skills and experience and other qualities, such as demographics and diversity, in order to assess the effectiveness of the board. This should be done by means of a self-evaluation of the board as a whole, its committees and

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<sup>40</sup> See Chapter 5, Director selection and development of the King Code.

the contribution of each individual member. A typical board self-evaluation is set out in Appendix IV of the King Report.

### Suitability checks

**56. All short-listed candidates must be subjected to suitability checks and/or security clearance, as the case may be.**

57. The National Intelligence Agency is implementing a vetting strategy that provides for the decentralisation of security vetting to departments and the creation of vetting officers on the post establishment of departments.

### Interviewing and selection

#### Selection committee

**58. An Executive Authority:**

- (a) Must appoint a selection committee separate from the nomination committee to make recommendations on the suitability of candidates**
- (b) Must nominate suitable persons to the nomination committee**
- (c) May for practical reasons nominate members of the nomination committee to serve on the selection committee**
- (d) Should serve as chairperson of the selection committee in cases where chairpersons of boards are considered. For other board members, the Executive Authority may nominate the chairperson.**
- (e) Is not obliged to appoint a candidate recommended by the selection committee**
- (f) Selects the candidate and determines who will be appointed**

59. Consideration should be given to inviting individuals with specialist cluster/functional/sector knowledge to participate in the selection committee. The selection committee must determine selection criteria with due consideration of the enabling legislation of the institution.

60. After suitable candidates have been identified, interviews must be held. Interviews are an effective way of sharing information on the particular complexities of working in the wider public sector and to gauge the depth of the candidate's understanding of the role of the board in ensuring sound governance of the institution's interests. In the interests of natural justice, any concerns around conflicts of interest or issues arising from security checks could be put to candidates for response in interviews.

61. During the selection process, care should be taken that all candidates are provided equal opportunities. This implies that they must be evaluated against the same requirements and criteria.

62. The selection committee must make a recommendation on the suitability of a candidate after considering –

- (a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination (eg using a scoring grid which provides space to rate each individual according to the weighted inherent requirements of the position);
- (b) balancing the training, competencies and knowledge necessary to meet the inherent requirements of the position with the need to redress the imbalances of the past to achieve a representative board; and

- (c) the extent to which an individual has the opportunity or is available to meaningfully contribute his/her time and abilities to the affairs of the board, particularly where candidates serve on a number of boards.

63. Multiple membership of boards is limited as set out in paragraphs 42 to 45 of chapter 3. The ability of candidates to serve on a number of boards depends on the circumstances and competencies of the candidate. The selection committee must determine the capacity, availability and competencies of candidates to meaningfully contribute their time to the affairs of the board, particularly where candidates serve on a number of boards. Where there are justifiable reasons for exceeding the limit on multiple memberships, the selection committee must record the reasons for its recommendation. The Executive Authority may approve deviations recommended by the selection committee.

64. The selection committee must record the reasons for its recommendation.

65. The Executive Authority is not obliged to appoint a candidate recommended by the selection committee. The Executive Authority may request the selection committee to recommend another suitable candidate. The Executive Authority selects the candidate and determines who will be appointed. The Executive Authority will have outlined his/her preference for either a single candidate or a short list at the start of the appointment process. The department should provide information that will help the Executive Authority to make a selection.

66. Unsuccessful candidates should be asked if they are willing to be included on a database of potential board members.

### Consultation

67. Once a prospective appointee has been identified, the Executive Authority may proceed to make the appointment, but in most cases would wish to discuss it with his/her colleagues first. This reflects Cabinet's expectation that the relevant Cabinet Committee and Cabinet will consider appointments of a significant nature. The proposed remuneration for the appointee should be resolved with the Executive Authority at this point, if it has not been resolved earlier. If the Executive Authority proposes a remuneration rate which is outside the remuneration framework, consultation with the Minister of Finance and the Minister for the Public Service and Administration is required before the appointment is finalised.

68. On occasion, a candidate's name may be submitted to Cabinet without the candidate's knowledge. Any decision made in these circumstances should be considered provisional until after the candidate has been informed, his/her availability determined, and examining (for conflicts of interest, issues of probity, etc) has been completed. The Executive Authority must report back to Cabinet on the outcome of these enquiries, either confirming that the appointment has proceeded or, if necessary, referring any outstanding issues back to his/her colleagues for further discussion. In addition to consulting with their Cabinet colleagues on an appointment, Executive Authorities may undertake consultation with their caucus or other parties or members of Parliament.

#### Check list

- ✓ Has the candidate been provided with information about the organisation?
- ✓ Have security checks been carried out on short-listed candidates?
- ✓ Are there protocols for the holding of personal information?
- ✓ Has the Executive Authority been provided with adequate background information on the candidate(s)?
- ✓ Has the Executive Authority determined the remuneration for the appointment in accordance with the *National Treasury System for the Administration of the Service Benefit Packages for Office-Bearers of Certain Statutory and other Institutions* or the relevant legislation? If the proposed remuneration is outside the remuneration framework, has the Minister of Finance been consulted?
- ✓ Has the Executive Authority been provided with a comprehensive briefing note on the proposed appointee (covering issues such as conflict of interest), together with a draft letter of appointment?
- ✓ Has the Executive Authority been provided with the recommendations of the nomination and selection committees?
- ✓ If the appointment is provisional, has the availability of the candidate been confirmed? Are there any outstanding issues (such as conflicts of interest) that may require a report-back to Cabinet?



## Appointment

### Formal action

69. Once all necessary consultation has taken place (eg with Cabinet Committees and Cabinet) and all outstanding issues have been resolved, the appointment can be made. Those managing the appointment process are responsible for preparing letters of appointment and formal appointment documents, and arranging for signatures.
70. Although the Executive Authority decides who will be appointed, the formal appointment action must be executed by the person authorised to do so in terms of the entity’s legislation or constitution. The formal action required to effect the appointment could vary in each case between an Executive Authority and the President. **The Executive Authority (or the President where appropriate) should sign the appointment letter** after the required consultation (with caucus, etc) has been completed and all outstanding matters have been resolved.
71. The Executive Authority must send a letter of appointment to the appointee. A draft letter should have been provided to the Executive Authority during the selection process. The letter of appointment should include the following:
- (a) An indication of the provision of the Act according to which the appointment is made
  - (b) The term of contract and all-inclusive package or remuneration in the case of non-executive members
  - (c) That the appointee is required to sign an employment contract and enter into a performance agreement
  - (d) Date of assumption of duty (the date of appointment will be a date as agreed to by the Executive Authority responsible for the institution and the appointee)
  - (e) Requirement to annually disclose any interests
  - (f) Relevant information material
  - (g) Confidentiality agreements

#### Checklist

- ✓ Is the legally appropriate person making the appointment?
- ✓ Has the formal act of appointment been carried out correctly (e.g., Gazette notices)?
- ✓ Has a letter of appointment been sent to the appointee?

## Induction

72. Induction is a vital step in the appointment process and is fundamental to a board member becoming fully effective as quickly as possible. Induction is often overlooked by those running the appointment process, who may assume that the board will carry out all necessary induction.
73. Induction material should be supplied at the time of appointment. This material should be a varied package of information. It could include supplementary documentation beyond that supplied with the letter of appointment, an offer of a briefing by the department, suggested training (eg courses offered by the Institute of Directors) and information on the role of the board and the board’s operating environment. Executive Authorities should convey government’s expectations to board members as part of the induction process.
74. The induction package should be compiled in

#### Check list

- ✓ Has an induction programme been compiled in conjunction with the board chair?
- ✓ Does induction material emphasise the role of the board – devising strategy, appointing and monitoring the chief executive and monitoring organisational performance – compliance with the law and the duty to act in the best interests of the entity?
- ✓ Does the supplementary information include offers of training and briefings by the department?
- ✓ If the new appointee is the chairperson of the board, is there a six months’ overlap between the incumbent and the new appointee, if possible?

consultation with the board chair to eliminate potential overlap with the induction training that the board will provide. New board members should be familiarised with:

- (a) The institution's operations, senior management and business environment
- (b) Fiduciary duties and responsibilities
- (c) Expectations of the Executive Authority, chairperson and the board
- (d) The role of the board and its committees, for example devising strategy, appointing the chief executive and monitoring the performance of the chief executive and the organisation

## Reappointment

75. Appointees or incumbents should not expect that they will be automatically reappointed. In terms of the Protocol, the board should comprise a majority of non-executive members and each member's appointment should be limited to a maximum period of three to five years.<sup>41</sup> If a member's performance and competencies (skills, expertise, experience, and knowledge) remain relevant to the organisation, he/she may be reappointed for a second term.<sup>42</sup> Board members are expected to serve not more than two terms of appointment. Enabling legislation should specify the period of appointment and the number of terms that board members could serve, if required.

### Check list

If the process is a reappointment, have you considered –

- ✓ altering the role description to take into account changed environment, changed board composition, changed board needs, changed Executive Authority requirements?
- ✓ reassessing the remuneration?
- ✓ seeking a performance assessment of the board member from the board chair?

## Disqualification

76. The enabling Acts of state and state controlled institutions make provision for the disqualification or removal of board members. The enabling Act normally provides that a member must cease to be a board member for the reasons mentioned below. Executive Authorities should select the most appropriate disqualification criteria for inclusion in the enabling Acts of institutions:
- (a) The member resigns by written notice to the Executive Authority.
  - (b) The member becomes an unrehabilitated insolvent.
  - (c) A competent court has declared the member to be mentally ill.
  - (d) The member has been convicted of an offence in the Republic, other than an offence committed prior to 27 April 1994 associated with a political objective.
  - (e) The member has been convicted in the Republic or elsewhere of fraud, theft, forgery, bribery, corruption or any other offence involving dishonesty, and was sentenced to imprisonment without the option of a fine.
  - (f) The member is absent from two or more meetings in one calendar year without the leave of the board (or chairperson).
  - (g) The member is elected as a member of Parliament, a provincial legislature or any municipal council.
  - (h) The member ceases to be a citizen of, or to have the right of permanent residence in, the Republic.
  - (i) The member has, as a result of improper conduct, been removed from a position of trust by a competent court of law.
  - (j) The member has failed to disclose interests.
  - (k) The member is disqualified in terms of the Companies Act. Any individual who is disqualified from being a director cannot hold (or continue to hold) the office of director. Any contravention of this principle may attract criminal liability for the

---

<sup>41</sup> See paragraph 5.1.6.2 of the Protocol.

<sup>42</sup> See paragraph 5.1.8.1 of the Protocol.

individual in question and any other director who knows or should have known that the said individual is or was so disqualified).<sup>43</sup>

The Executive Authority may remove a member of the Board from office –

- (a) on the grounds of misconduct, incapacity or incompetence; or
- (b) for any other sound and compelling reason as referred to in paragraph 76(a) to (k) above.

A decision to remove a member of the board from office must be based on the recommendation of an independent panel appointed by the Executive Authority.

The Executive Authority may dissolve the Board on reasonable grounds.

77. The enabling Acts for state and state controlled institutions could provide for further disqualification criteria.

78. The following persons may not be appointed or act as a director of a company:<sup>44</sup>

- (a) A minor or any other person under legal disability
- (b) Any person who is subject to any order under the Companies Act No 61 of 1973 or the repealed Act, disqualifying him/her from being a director
- (c) An unrehabilitated insolvent
- (d) A person issued by the Registrar with a sequestration order
- (e) A person convicted of an offence
- (f) A person removed from an office of trust on account of misconduct
- (g) A person who has been convicted at any time (whether in the Republic or elsewhere) of –
  - (i) theft, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act No 6 of 1958), the Corruption Act, 1992 (Act No 94 of 1992); or
  - (ii) an offence involving dishonesty or in connection with the promotion, formation or management of a company, and who has been sentenced to imprisonment without the option of a fine or to a fine exceeding R100
- (i) A person who has, in terms of an Act of Parliament, been removed from office due to the fact that he/she is not a fit and proper person to serve as a director or in the management or any other position of trust of the body in question due to theft, fraud, forgery, uttering a forged document, corruption, whether in terms of the common law or not, or any other act involving dishonesty

79. Nothing prevents a company from providing in its articles for any further disqualifications.

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<sup>43</sup> Paragraph 5.1.10.2 of the Protocol.

<sup>44</sup> Section 218 of the Companies Act.

## CHAPTER SIX – IMPLEMENTATION AND CONCLUSION

### Implementation

1. To facilitate implementation of the Handbook it is suggested that –
  - (a) all proposed new legislation that provides for the appointment of persons to boards of state or state controlled institutions be aligned to the Handbook;
  - (b) existing legislation that is under review for amendment incorporate a revision of the provisions of every board created by the legislation in order to align it to the Handbook;
  - (c) provincial premiers be requested to adopt the Handbook; and
  - (d) the overall administration of the Handbook be assigned to the Minister for Public Service and Administration to promote uniformity in the appointment of board members.
  
2. The dpsa will monitor implementation of and compliance with the Handbook by –
  - (a) providing comments on Cabinet memorandums and concomitant legislation dealing with the appointment of board members;
  - (b) analysing and reporting on the database of board member information that departments submit to the dpsa; and
  - (c) aligning the Handbook with the governance practices set out in the PFMA.

### Conclusion

3. This Handbook is intended to be a living document, which should be updated with the best practice experiences of departments and be shared by all. The Handbook will be accessible online at <http://www.dpsa.gov.za>. Departments are invited to share their best practice experiences with us and are welcome to contact us for further information. Contact particulars are as follows:

The Chief Directorate: Human Resource Planning  
Department of Public Service and Administration  
Private Bag X916  
PRETORIA  
0001

Telephone number: (012) 336 1177 or (012) 336 1159  
Fax number: 086 618 8628  
Email: [etienne@dpsa.gov.za](mailto:etienne@dpsa.gov.za) or [vanessan@dpsa.gov.za](mailto:vanessan@dpsa.gov.za)

## ANNEXURES

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Attached are Annexures 1-4.



## Instructions for completing the board member information sheet

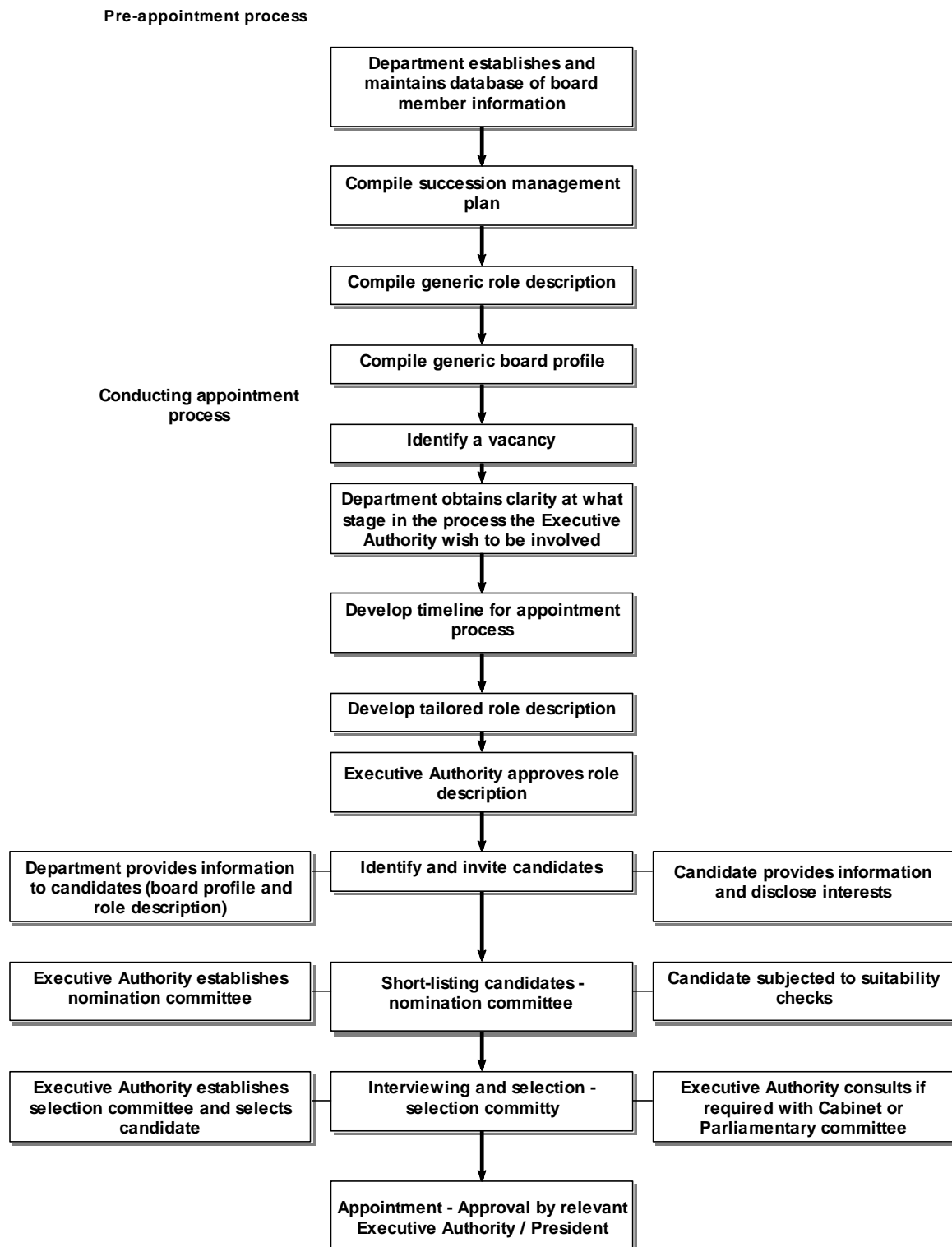
Column descriptions are as follows:

1. Full first name(s) and surname of member
2. Identity number of member
3. Telephone number and postal address of member
4. Full name of entity on which member serves
5. Classification of entity in terms of listing in appropriate schedule of the PMFA. Choose one of the following categories:
  - 5.1 Schedule 3A – National public entity
  - 5.2 Schedule 3B – Provincial public entity
    - 5.2.1 Eastern Cape (EC)
    - 5.2.2 Free State (FS)
    - 5.2.3 Gauteng (GP)
    - 5.2.4 KwaZulu-Natal (KZN)
    - 5.2.5 Limpopo (LP)
    - 5.2.6 Mpumalanga (MP)
    - 5.2.7 Northern Cape (NC)
    - 5.2.8 North West (NW)
    - 5.2.9 Western Cape (WC)
  - 5.3 Schedule 4A – National government enterprise
  - 5.4 Schedule 4B – Provincial government enterprise
    - 5.4.1 Eastern Cape (EC)
    - 5.4.2 Free State (FS)
    - 5.4.3 Gauteng (GP)
    - 5.4.4 KwaZulu-Natal (KZN)
    - 5.4.5 Limpopo (LP)
    - 5.4.6 Mpumalanga (MP)
    - 5.4.7 Northern Cape (NC)
    - 5.4.8 North West (NW)
    - 5.4.9 Western Cape (WC)
6. Name of parent department – National departments (National Treasury, Transport, etc) and provincial departments. For provincial departments add the abbreviation for the province (listed in 5.2.1 to 5.2.9) before the name of the parent department (eg EC Economic Affairs).
7. Gender – Choose one of the following:
  - 7.1 Male
  - 7.2 Female
8. Race – Choose one of the following:
  - 8.1 African
  - 8.2 Coloured
  - 8.3 Indian
  - 8.4 White
9. Employed in terms of the Public Service Act – Choose between the options of yes or no. This is relevant to persons who are board members and are still employed in a government department.
10. Speciality profile:
  - 10.1 Field of speciality – Provide for a choice of one or more than one of the following categories:
    - 10.1.1 Financial management
    - 10.1.2 Human resource management

- 10.1.3 Economics
- 10.1.4 Legal
- 10.1.5 Risk
- 10.1.6 Corporate governance
- 10.1.7 Audit
- 10.1.8 Procurement
- 10.1.9 Social sciences (welfare/education/health)
- 10.1.10 Engineering
- 10.1.11 Information technology and communication
- 10.1.12 Stewardship (arts, culture, sport, museums)
- 10.1.13 List others
- 10.2. Speciality profile: Number of years' experience in field of speciality – Choose one of the following:
  - 10.2.1 Less than 5 years
  - 10.2.2 Between 5 and 10 years
  - 10.2.3 Between 10 and 15 years
  - 10.2.4 More than 15 years
- 10.3 Speciality profile: Qualifications – List qualifications (eg B Admin Unisa)
- 10.4 Speciality profile: Membership of professional bodies – Indicate full name of professional body.
- 10.5 Speciality profile: Committee participation – Indicate the full name of committees on which member currently serves.
- 10.6 Speciality profile: Capacity on board:
  - 10.6.1 Position – Choose one of the following:
    - 10.6.1.1 Chairperson
    - 10.6.1.2 Deputy chairperson (if this is a position specifically provided for)
    - 10.6.1.3 Member
  - 10.6.2 Standing – Choose one of the following:
    - 10.6.2.1 Executive member
    - 10.6.2.2 Non-executive member
- 11. Appointment time line:
  - 11.1 Term of appointment – Choose one of the following:
    - 11.1.1 3 years
    - 11.1.2 5 years
    - 11.1.3 Other
  - 11.2 Indicate date of appointment to the governing body
  - 11.3 Expiry date – Date on which current appointment expires. This date is calculated by the system.

End of instruction

## Annexure 2: Broad process for appointing persons to boards





### **Annexure 3: Framework for disclosing interest of board members**

1. ***Executive Authorities and their departments are encouraged to implement the Framework for disclosing interests for existing and newly appointed board and council members of state and state controlled institutions by –***
  - (a) ***encouraging serving members to voluntarily declare their interests, annually before the start of the financial year of the institution to which the member is appointed as a board or council member; and***
  - (b) ***considering including the disclosure of interests by members as a condition of appointment in the case of new appointments or when appointments are renewed to ensure that possible conflict of interest is identified upfront before members are appointed.***

2. ***Public service officials serving on boards and councils of state and state controlled institutions must declare their interests by completing the Register of interest information sheet provided in Appendix A.***

3. The disclosure of interest by board members is integrated into the appointment process to ensure that possible conflict of interest is identified upfront before members are appointed.
4. The disclosure of interests by public service officials provided for in this Handbook does not substitute the financial disclosure by members of the senior management service as prescribed in the Public Service Regulations.
5. In view of the rights to privacy set out in the Constitution, the framework for serving board members and candidates can only be applied if members voluntarily declare their interests. There is currently no legislation in terms of which the framework can be regulated as is required in terms of section 36 of the Bill of Rights.

#### **Intention of the disclosure framework**

6. To support the values and principles governing public administration as set out in Chapter 10 of the Constitution, 1996 and in the interest of good governance, members appointed to boards of public sector institutions must maintain the highest standards of professional ethics. The framework should be seen as a valuable instrument for Ministers to ensure that the integrity of board members and that of the institutions they serve are beyond question.

#### **Applicability**

7. Candidates nominated or members serving on the boards of government components, public entities, and government enterprises must make full disclosure of their interests.

#### **Confidentiality**

8. The *Register of interests information sheet* (see Appendix A of this Framework) must be kept in strict confidence. A register detailing directorships and partnerships (non-confidential information) may be published annually.

**Members provide information**

9. The *Register of interests information sheet* (see Appendix A) must be completed in duplicate in respect of:
  - New board members who are appointed
  - Serving members, annually before the start of the financial year of the institution to which the member is appointed as a board member
10. All candidates (officials and private persons) nominated or selected for appointment, particularly those short-listed, should be encouraged to voluntarily disclose their interest.

**Non-disclosure of interests**

10. Failure to disclose interests may make a person liable to disqualification as a board member in terms of the provisions of enabling legislation.

**Responsibility of Executive Authorities**

11. Executive Authorities must ensure that all items on the forms are completed/signed.

## **Instructions for completing the *Register of interest information sheet for persons serving on boards***

### General instructions

The information sheet must be completed in duplicate in the person's own handwriting and certified by a Commissioner of Oaths/Justice of the Peace. By completing the information sheets, public service officials are not exempted from –

- obtaining approval for performing remunerated work outside the public service in terms of section 30 of the Public Service Act, 1994; or
- also disclosing their interests in terms of the approved Financial Disclosure Framework for persons in the Senior Management Service. The systems for disclosing interests of board members and officials in the senior management service are not interchangeable.

Where insufficient space is provided on the information sheet, the required information should be provided on a separate sheet.

### Notes to the Register of interest information sheet

The following notes provide guidance for completing the relevant parts of the information sheet in Annexure A.

#### **Note 1 – Shares and other financial interests**

Disclose shares and other financial interests held in any private or public company or any other corporate body recognised by law.

- A share is any investment that provides a dividend, including unit trusts, equities and government bonds.
- Nature refers to whether the shares are ordinary or preferential shares.
- Nominal value refers to the current rand value of the shares.

#### **Note 2 – Directorships and partnerships**

Disclose all remunerated and non-remunerated directorships and partnerships.

- Remuneration means the receipt of benefits in cash or in kind.
- Directorship includes any position occupying the office of director, alternate director, independent director, and member of a board (executive or non-executive) or by whatever name the position is designated.
- Partnership is a legal relationship arising out of a contract between two or more persons with the object of making and sharing profits of benefits.

#### **Note 3 – Remunerated work**

Disclose all remunerated work and employment.

- Remuneration means the receipt of benefits in cash or in kind.
- Work means rendering a service for which the person receives remuneration.
- A public service official must obtain the approval of his/her Minister for performing remunerated work outside the public service.

#### **Note 4 – Consultancies and retainerships**

Disclose any interests in any consulting firm or company that provides advice or professional services.

- Name of client and nature of consultancy or retainership
- Type of business activity
- Value of benefits derived may refer to benefits in cash or in kind.

**Note 5 – Sponsorships and assistance**

A sponsorship is received when another person or organisation assumes the financial responsibility or provides assistance, for example scholarships for a member's child.

**Note 6 – Gifts and hospitality (from a source other than a family member)**

Disclose gifts and hospitality.

- Specify all gifts from any source with a value in excess of R350 received in the past calendar year.
- Any hospitality intended as a gift must be disclosed.
- Personal gifts within the family and hospitality of a traditional or cultural nature need not be disclosed.
- Include a description and value of gifts from a single source which exceeds the value of R350 in the relevant 12-month period.

**Note 7 – Land and property**

Disclose all land and property (residential or otherwise) both inside and outside the Republic.

**REGISTER OF INTEREST INFORMATION SHEET – BOARDS AND COUNCILS**

I, the undersigned (surname and full names) \_\_\_\_\_

\_\_\_\_\_

Postal address \_\_\_\_\_

\_\_\_\_\_

Residential address \_\_\_\_\_

\_\_\_\_\_

Name of employer \_\_\_\_\_

Position held \_\_\_\_\_

Tel No \_\_\_\_\_ Cell No \_\_\_\_\_ Fax No \_\_\_\_\_

Email \_\_\_\_\_

Hereby certify that the following information is complete and correct to the best of my knowledge:

\_\_\_\_\_

**Signature of member/applicant**

**Date:** \_\_\_\_\_

**Place:** \_\_\_\_\_

**1. Shares and other financial interests**

(See note 1)

Number of shares/ Extent of financial interests	Nature	Nominal value R	Name of company/entity

**2. Directorships and partnerships**

(See note 2)

List directorships and partnerships in any corporate body	Type of business activity	Rand amount of remuneration or benefits in kind

**3. Remunerated work**

(See note 3)

Name of employer	Type of work/business	Rand amount of remuneration

**4. Consultancies and retainerships**

(See note 4)

Name of client	Nature	Type of business activity	Rand value of any benefits received in cash or in kind

**5. Sponsorships and assistance**

(See note 5)

Source of sponsorships or assistance	Description of sponsorship or assistance	Rand value of sponsorship or assistance

**6. Gifts and hospitality (from a source other than a family member)**

(See note 6)

Source	Description of gift or hospitality	Rand value of gift or hospitality

**7. Land and property**

(See note 7)

Description of land and property	Extent	Area	Rand value

8. Have you been convicted of an offence involving fraud?

\_\_\_\_\_

**OATH/AFFIRMATION**

1. I certify that before administering the oath/affirmation I asked the deponent the following questions and wrote down his/her answers in his/her presence:

(a) Do you know and understand the contents of the declaration?

Answer \_\_\_\_\_

(b) Do you have any objection to taking the prescribed oath or affirmation?

Answer \_\_\_\_\_

(c) Do you consider the prescribed oath or affirmation to be binding on your conscience?

Answer \_\_\_\_\_

2. I certify that the deponent has acknowledged that he/she knows and understands the contents of this declaration. The deponent uttered the following words: "I swear that the contents of this declaration are true, so help me God."/"I truly affirm that the contents of the declaration are true."  
The signature/mark of the deponent was affixed to the declaration in my presence.

\_\_\_\_\_(Signature)

Commissioner of Oaths/Justice of the Peace

**PARTICULARS OF COMMISSIONER OF OATHS/JUSTICE OF THE PEACE**

Full first names and surname: \_\_\_\_\_

\_\_\_\_\_ (block letters)

Designation (rank) \_\_\_\_\_ *ex officio* Republic of South Africa

Street address of institution \_\_\_\_\_

Date \_\_\_\_\_ Place \_\_\_\_\_

**CONTENTS NOTED BY RESPONSIBLE MINISTER**

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Surname and initials of member/applicant: \_\_\_\_\_

## **Annexure 4: Identifying and dealing with conflicts of interest**

### **General background**

South Africa is a relatively small country, where only a limited number of individuals may possess critical competencies (skills, expertise, experience, and knowledge) and therefore are sought for serving on a number of (potentially conflicting) boards. As a consequence, the potential for conflicts of interest may be unavoidable in a reasonable number of appointments – this is often the price of appointing people with knowledge of and expertise in specialised areas.

A conflict of interest will not necessarily bar an appointment, although a serious conflict may mean a candidate is not suitable for an appointment, or should resign if the conflict arises during the course of the appointment. Systems should be put in place to ensure that potential conflicts of interest are identified and managed in order to protect the decision-making integrity of boards and public confidence in them.

The key points in respect of conflicts of interest are identification and management. Whenever an appointment is made, the Executive Authority should be confident that –

- every actual or potential conflict of interest that can reasonably be identified has been identified; and
- where a conflict of interest has been identified, an acceptable mechanism or system has been proposed or established to deal with the conflict appropriately.

### **What is a conflict of interest?**

#### Ethical context

Conflicts of interest should be viewed within an ethical context of good faith, honesty, impartiality and constitutional principles.

- **Good faith:** members of boards have an obligation at all times to act in good faith and in the best interests of the body to which they have been appointed.
- **Honesty:** members of boards have an obligation to act honestly at all times in relation to all matters concerning the body to which they have been appointed.
- **Impartiality:** members of boards must observe the principles of fairness and impartiality in all official dealings. No individual or organisation with which board members or officers are involved may be given improper preferential treatment – whether by access to goods and services or access to information, or anything similar.
- **Values:** members of boards should adhere to the values and principles governing public administration as set out in Chapter 10 of the Constitution, 1996.

#### Definition

A conflict of interest arises where a prospective or existing board member has an interest which conflicts (or might conflict, or might be perceived to conflict) with the interests of the governing body itself. The key question to ask when considering whether an interest might create a conflict is: does the interest create an incentive for the appointee to act in a way which may not be in the best interests of the governing body? If the answer is 'yes', a conflict of interest exists. The existence of the incentive is sufficient to create a conflict. Whether or not the appointee would actually act on the incentive is irrelevant.



## Types of conflicts of interest

A conflict of interest may take a number of forms. It may be financial or non-financial. It may be direct or indirect. It may be professional or family related. A conflict of interest may arise from:

- Directorships or other employment
- Interests in business enterprises or professional practices
- Share ownership
- Beneficial interests in trusts
- Existing professional or personal associations with the governance body concerned
- Professional associations or relationships with other organisations
- Personal associations with other groups or organisations
- Family relationships

A conflict of interest may be more perceived than actual. Perception is a very important factor in the public sector; the processes of government (including institutions in the wider public sector) must be fair and ethical, and must be very clearly seen to be so.

In identifying conflicts of interest, those involved should focus on interests that are specific to the appointee, rather than generic in nature. Generic interests are those held in common with the general public or a significant sector of the general public (eg where the appointment relates to a component in the transport sector and the appointee has a car, or the appointment relates to a component in the education sector and the appointee has children of school-going age). Interests that are solely generic are not relevant and should be disregarded.

## Examples

Some hypothetical examples of conflicts of interest follow. This is not an exhaustive list of every possible conflict of interest – conflicts are many and varied and some may be very subtle.

Example 1: An appointee to the board of a trading state or state controlled institution holds shares in a company that is in direct competition with the institution.

*Comment:* The appointee has a direct financial interest in the competing company. Poor performance on the part of the public institution may translate into greater profits for the competing company and its investors (including the appointee). The appointee therefore has an incentive to put his/her own financial interest ahead of the interests of the board.

Example 2: An appointee to the board of a state or state controlled institution is a partner in an accountancy firm, which regularly undertakes consultancy work for the entity.

*Comment:* The appointee has a direct conflict of interest. Persuading the board to give more consultancy work to his/her firm is likely to result in financial gain for the appointee. The member therefore, has an incentive to place the interests of the consulting firm ahead of the board's interest in finding the best value consultants. Other board members may find it difficult to criticise the performance of the accountancy firm in light of the appointee's presence on the board. Additionally, the appointee may be tempted to pass confidential information relating to the board's activities to the firm, providing it with inside information, which will give it an advantage over their competitors.

Example 3: An appointee is considered for appointment to the board of a state or state controlled institution that has a regulatory function in respect of a particular industry. The appointee is the director and major shareholder in a company that operates in that industry.

*Comment:* There is often value in including industry representation on the board of a regulatory body. Sometimes it is a statutory requirement. However, there may also be risks. In this case, the appointee has a strong financial incentive to influence board decisions in favour of his/her company or the

industry as a whole. The appointee may also be tempted to disclose confidential board information to colleagues or other industry participants for improper purposes.

**Example 4:** An appointee to a board of a state or state controlled institution is the wife of the body's chief executive.

*Comment:* The board must be able to appraise critically the performance of the chief executive and other employees of the institution. A close family relationship between a board member and the chief executive is very likely to inhibit or prevent that critical appraisal.

**Example 5:** An appointee to a board of a state or state controlled institution was previously employed by a lobby group in the same industry as the public institution, although the association has now ceased.

*Comment:* The candidate no longer has any personal or financial interest in the lobby group, so there is no actual conflict in this case. However, the past association may mean that there is a public perception of a conflict of interest.

These are just some hypothetical examples of the types of conflicts of interest that may arise. There will be many variations on these themes. Legal advice should be sought where there is any doubt.

### **Assessing conflicts of interest**

Having established the existence of a conflict of interest, the next consideration is the seriousness of the conflict. Conflicts can be divided into two categories:

- (a) Unmanageable conflicts of interest: where a conflict of interest is –
- unavoidable (ie the appointee cannot or will not divest him or herself of the conflicting interest);
  - serious (in terms of the significance and/or value of the interest, and the appointee's circumstances);
  - pervasive (ie would affect so many of the board's decisions that management mechanisms are not practical); and
  - likely to render the appointee ineligible for the position.
- (b) Manageable conflicts of interest: where a conflict of interest has been identified, but –
- the appointee is prepared to divest him or herself of the interest or sever the connection that is causing the conflict;
  - the conflict of interest is so minor (taking into account the circumstances of the appointee) or so remote that it provides no real incentive to the appointee to act against the best interests of the board;
  - there is little risk of a negative public perception;
  - the conflict of interest affects a confined area of the board's operations; or
  - the conflict of interest can probably be avoided, or alternatively managed, through some appropriate mechanism.

### **Mechanisms for avoiding or managing the risk of conflicts of interest**

Many conflicts of interest fall into the "manageable" category. If a candidate is otherwise suitable, there will often be mechanisms available to avoid or minimise any risk to the decision-making integrity of the board. The main methods of dealing with a conflict of interest are:

- **Divestment:** the appointee agrees to divest him or herself of the interest that is creating the conflict (eg to sell shares).

- Establishing a trust: under this arrangement, the appointee transfers assets (such as shares) to a trust. A trustee manages the trust and the investment of its assets with almost complete autonomy. After transfer, the appointee retains very little knowledge or control of the transferred assets.
- Severing connections: the appointee agrees to leave an employment position or an organisation which gives rise to the conflict.
- Confidentiality agreements: the appointee agrees not to pass confidential information relating to the state or state controlled institution or the board to professional or personal associates outside the ambit of board business. Confidentiality agreements will often help to minimise the risk of conflicts of interest.
- Declarations of interest: the appointee retains the interest, but agrees to declare it when related issues arise for discussion and/or decision at board meetings. The process for recording declarations of interest may vary, depending on the nature of the body. For some bodies, the rules and procedures relating to declarations of interest are provided by statute (either the legislation establishing the component, or general legislation such as the Companies Act, 1973). In the absence of specific legislative provisions, boards should establish appropriate systems for recording declarations of interest. A declaration of interest should be noted on each occasion in the board minutes.
- Abstaining from voting: in addition to declaring the interest, the appointee agrees that he/she will not participate in any vote on related issues. The abstention should be noted on each occasion in the minutes.
- Withdrawing from discussion: in addition to declaring the interest and abstaining from voting when related issues arise for discussion and/or decision at board meetings, the appointee agrees that he/she will withdraw from the meeting for the duration of the item. The withdrawal should be noted on each occasion in the minutes.
- Non-receipt of relevant information: in addition to declaring an interest and withdrawing from the discussion and the vote, the appointee agrees that he/she should not be given any information (ie board papers, written or oral briefings) relating to the interest by the board or the body.
- Agreement not to act: the appointee agrees not to participate in any other board action concerning the interest (eg signing documents that relate to the interest on behalf of the board).

These methods of managing a conflict of interest may be used singly or in combination, depending on the nature and extent of the conflict of interest that is being considered. If the board is governed by statute, there may be relevant statutory provisions that provide appropriate rules and procedures.

## Examples

The various mechanisms for avoiding or managing conflicts of interest can be considered in relation to the factual examples above, as follows:

Example 1: An appointee to the board of a trading state or state controlled institution holds shares in a company which is in direct competition with the public institution.

*Comment:* The appropriate action will depend on the value of the shares held and, possibly, on the appointee's own circumstances (ie the relative importance of the shares to the appointee's financial situation). If the value of shares is very small and there is no risk of a negative public perception, the conflict may be immaterial. If the value of the shares to the appointee is more significant, it would probably be necessary to require that they be sold or placed in a blind trust. Declarations of interest would not be suitable, because the conflict of interest concerns the performance and success of the institution as a whole, rather than one specific area of its operation.

Example 2: An appointee to the board of a state or state controlled institution is a partner in an accountancy firm which regularly undertakes consultancy work for the body.

*Comment:* This conflict of interest is unlikely to be manageable, because it is ongoing and serious. Even if the appointee were to sign a confidentiality agreement and to agree to remove him or herself from discussions on specific items relating to the firm, the appointee's relationship with the other

board members might affect their decision making on those items. In addition, the public perception of the arrangement would be likely to be very negative.

Example 3: An appointee is considered for appointment to the board of a state or state controlled institution that has a regulatory function in respect of a particular industry. The candidate is the director and major shareholder in a company that operates in that industry.

*Comment:* Declaring an interest (and possible absencing him/herself from board discussions and votes) will be suitable only if regulating the industry in which the appointee's company operates is just one of the board's activities. If regulation of that industry is the board's main activity, the conflict of interest may be too serious to allow the appointee to be confirmed, unless the appointee severs the relationship with the company and divests him/herself of shareholding in the company. Decisions on whether this type of conflict can be managed may depend on statutory provisions. A number of institution-specific statutes provide for some type of industry representation, but explicitly rule out candidates who are intimately or financially connected to the industry concerned. Where there is any doubt, legal advice should be sought to determine whether the conflict means that the appointment is untenable.

Example 4: The appointee to a board of a state or state controlled institution is the wife of the component's chief executive.

*Comment:* The closeness of the family relationship, combined with the ongoing and pervasive nature of the conflict, means that the appointee is probably unsuitable for appointment, or if the situation arises mid-term, should resign.

Example 5: An appointee to a board of a state or state controlled institution was in the past employed by a lobby group in the same industry as the institution, although the association has now ceased.

*Comment:* Whether the perception of a conflict is manageable or not will depend on a number of factors: the significance of the institution, the political sensitivity of the appointment, the passage of time between the appointee's involvement with the lobby group and the date of the appointment, the public profile of the appointee and/or the body, the likelihood of the appointee resuming contact with the lobby group after expiry of his/her term on the board, *et cetera*. Even though the conflict of interest may be more perceived than real, the appointment may not be tenable if it would seriously compromise the integrity and standing of the board according to public opinion.

Not all conflicts of interest will be clear-cut in terms of how serious they are and how (or if) they can be managed. In considering these issues, those involved should take into account:

- The nature of the body's functions
- The values and broad criteria applicable to the appointment
- The qualifications and expertise required for the appointment and the size of the available pool of candidates
- The significance of the appointment
- The political sensitivity of the appointment
- The nature of the conflict
- The extent of the conflict
- Any relevant legislative provisions
- The candidate's own circumstances

It is sensible to err on the side of caution. In many cases it will be desirable to obtain legal advice.

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