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Corporate Governance

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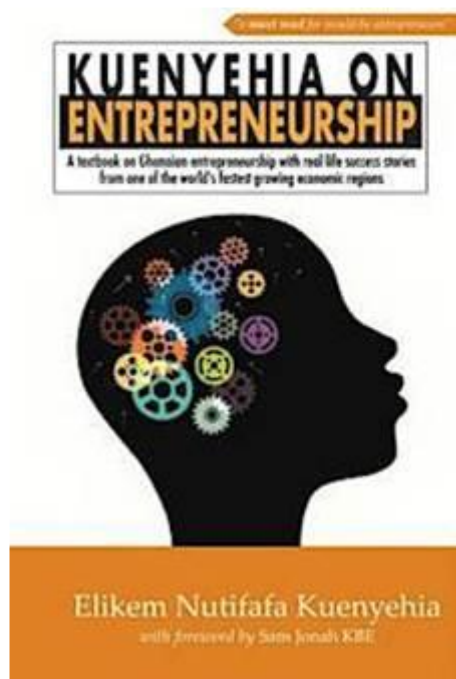


Table of Contents

How to Understand Corporate Governance ……………………………………………………….….. 3
Shareholders……………………………………………………………………………………………….. 4
Directors…………………………………………………………………………………………………….. 6
Auditors……………………………………………………………………………………………………… 9
Key Principles of Corporate Governance………………………………………………………………. 10

Introduction

Corporate Governance is central to the direction of any successful business. Elikem Nutifafa Kuenyehia, a Ghanaian Lawyer by profession, has outlined the importance of finding the right people to direct and support your company and how the legal steps to making such appointments.

How to Guide: Corporate Governance

Corporate governance has been described as the relationship among various participants in determining the direction and performance of corporations[1]. Corporate governance also considers and balances the interests of all the stakeholders in the enterprise to ensure a win-win situation as much as possible. Thus, if for instance directors run a company in a manner which does not consider the interests of shareholders, good corporate governance is not being practiced. Similarly, if the enterprise focuses on only maximising the profits of shareholders without taking the welfare of employees into consideration, that is not good corporate governance.

> ***"The main actors responsible for corporate governance are shareholders, board of directors, and the management team led by a Chief Executive or Managing Director."***

[1] Kueneyhia, Kuenyehia on Entrepreneurship, Flipped Eye Publishing (2012), p. 459

Shareholders

A shareholder or a member of a company is a person who agrees with the company to become a member of the company and whose name is recorded in the register of members as a member of the company. They have a duty to acquire at least one share in the company and to pay for the cost of the shares they hold whenever the company requires them to do so. In simple terms, the shareholder owns the company. However, the shareholder does not have total control over the business as he may have over his personal property. Thus, the shareholder cannot, for instance, treat the business like a personal bank and take its resources without properly accounting for it. The shareholder cannot change directors at will without following the procedures laid down by the Companies Act and other laws. The shareholder also cannot reduce the stated capital of the company, or order directors to declare dividends[2].

The rights and responsibilities of shareholders as set out in the Companies Act include, without limitation,

1. The right to attend general meetings of the company, and to speak and vote on a resolution passed as the general meeting.

2. A right to have the shareholder's name in the company's register of members.

3. A right to inspect the register of members during normal business hours, and to apply to court to have the register of members rectified if the shareholder's name is omitted from the register, or a mistake is made while entering the shareholder's name in the register.

4. A right to request for a meeting of the company and to table a resolution at such meeting.

5. A right to appoint and remove directors, subject to due procedure.

6. A right to be paid a dividend when the company declares dividends.

[2] Dupaul Wood Treatment & Duffuor v Asare [2005-2006] SCGLR 667

7. A right to institute legal proceedings in the name of, and on behalf of the company if the directors refuse or neglect to do so.

8. A right to institute legal proceedings against a director who is in breach of directors' duties.

9. A right to institute court proceedings against the company where the shareholder suffers oppressive conduct in the capacity of shareholder.

10. A right to act on a matter if the directors are in a deadlock or are disqualified from acting on that matter.

11. A right to make recommendations to the board of directors in connection with an action to be taken by the board.

From the above, it is clear that shareholders are to stay away from the day-to-day running of the company if they are not executive directors or employees of the company. They have a duty to appoint competent directors to manage the affairs of the company, and when they have made such appointments, they need to give those directors the freedom to steer the company in the right direction. However, they must always keep an eye out for malfeasance, and must attend general meetings of the company to make their grievances and suggestions, if any, heard.

Directors

A director is a person appointed by the shareholders to direct and administer the business of the company. It does not matter what name that person is given, and they may include, director, governor, or executive. Such a person must give written consent to the appointment as a director of the company, and the Registrar must be given notice of that appointment by the filing of a Form 17 at the Companies Registry. Where the company holds a person out as a director but the person has not been duly appointed as a director, the law may consider such a person as a de facto director and shall subject that person to the same duties and liabilities (but not rights or benefits) of a duly appointed director. Also, if a person who is not a director usually instructs the appointed directors and they usually follow those instructions, that person may be treated as a shadow director and will also be held to the same duties and liabilities as a duly appointed director.

The board of directors (BOD) has primary responsibility for ensuring the prevalence of good corporate governance practices in the enterprise. This is because, although a company is a separate legal entity, it does not have eyes and hands of its own to direct its affairs. The directors are therefore the hands, eyes, and directing minds of the company. They as such have a lot of responsibility in ensuring that the best interest of the company is served at all times. Their duties include, without limitation, the following:

1. Managing the business of the company and providing overall leadership for the enterprise.

2. Observing the utmost good faith towards the company in any transaction on its behalf and acting in the best interest of the company.

3. Acting within their power and not exceeding the powers conferred on them by the company's Regulations, except with approval of the shareholders.
4. Not engaging in any transaction that may lead to conflict of interest, except with the consent of the company.

5. Managing the interest of company, shareholders, employees, and all other stakeholders effectively.

6. Protecting the company's assets and not misapplying company property.

7. Appointment of management and other key employees.

8. A prohibition from making unauthorized profit from the position of director. Any profit must be accounted for.

9. Institute and defend court proceedings for and on behalf of the company, and in the name of the company.

10. Making the books of the company available to auditors, and providing explanations to the books when so sought.

11. Preparation and circulation of annual financial statements among shareholders and debenture holders.

12. Following all the duties prescribed in the company's Regulations.

Effective corporate governance can affect an enterprise's bottom line because it guarantees that an enterprise is directed in a responsible, professional and transparent manner towards safeguarding its long-term success. Enterprises with good corporate governance are able to command a higher valuation and generally have higher returns on capital employed. This is supported in a study commissioned by McKinsey where over 80% of investors agreed that they would pay a premium for the shares of a better-governed company than for those of a poorly governed company with comparable financial performance.

Since the board of directors, as the main organ for providing leadership for the business, has primary responsibility for driving good corporate governance, it is imperative that shareholders give a lot of thought to the persons they put on their boards. They may consider the following in selecting a board:

1. People who are reasonably accessible and available to contribute to the development of the business.

2. Interest and passion for the industry.

3. Possession of significant knowledge and competence in relation to the industry so that the company can benefit from the person's experience. Where the director does not have industry experience, the director must at least be open-minded and willing to learn.

4. Ability to make sensible business decisions concerning the enterprise.

5. A flair for strategic planning to enable the board make informed decisions about the future direction of the business.

6. Analytical and critical thinking skills to help resolve problems and to prioritise business opportunities.

7. Ability to relate easily with persons so that the company can benefit from the social networks the director belongs to.

8. Integrity and ethical standing to ensure that the board acts in good conscience and in the best interest of the company.

9. Ability to make objective decisions without bias.

10. Communication skills to enable the director articulate a point of view during deliberations of the board, and also the ability to listen impartially.

Auditors

It is also very important for an enterprise to have auditors. In fact, the Companies Act requires every company to have an auditor. If there is no auditor, the company will not be registered by the Registrar General. Auditors may be internal or external. An internal auditor is usually from the accounts department of the enterprise and is an employee of the enterprise, while an external auditor is an independent professional appointed by the company by an ordinary resolution.

> ***"The role of the external auditor is to certify that the financial records of the enterprise represent a true and fair view of the financial affairs of the business venture."***

Key Principles of Corporate Governance

From the above, it is clear that corporate governance is essential to the growth of any enterprise. In practicing good corporate governance therefore, all stakeholders must be guided by the following eight (8)[3] key principles:

1. Compliance

All enterprises must comply with the laws and regulations governing corporate governance. This includes without limitation to the Companies Act, tax laws, and sector specific laws such Banking Act, National Petroleum Authority Act, and the Ghana Stock Exchange Listing Rules.

Ghana's Companies Act, 1963 (Act 179) prescribes that a company must have at least two (2) directors at all times. Thus, if a company is operating with only one director or no directors, that company is in breach of this rule and is liable to sanctions by the Registrar of Companies. Similarly, a company is required to file its monthly tax returns by the fifteenth day of the following month. Failure to do this will lead to negative consequences for the enterprise. There are several rules in the laws of Ghana that direct enterprises on what to do in order to be compliant with the laws governing those enterprises' industries or sectors. Additionally, the enterprise must adhere to accepted standard practices prescribed by professional bodies, industries and trade bodies.

2. Participation

In order for corporate governance to be effective, it requires the full and active involvement of all stakeholders including shareholders, management, and the board of directors or advisers. Each stakeholder must do its part in ensuring that the enterprise stays on course to deliver on its objectives.

3. Accountability

It is very important that stakeholders account for all transactions that they engage in on behalf of the enterprise. To this end, there must be some

[3] Kuenyehia, Kuenyehia on Entrepreneurship, Flipped Eye Publishing (2012), p. 463.

form of structure where everyone is answerable to someone. Typically, management of the enterprise answer to the BOD, and the BOD answers to shareholders.

4. Transparency

Good corporate governance requires transparency on the part of all stakeholders. They must display a high degree of honesty, probity and integrity in their management and operations. Transparency ensures that the vision of the enterprise is kept in sight at all times. It also ensures that the opportunities as well as the challenges the business face are highlighted.

5. Responsiveness

One of the best ways to measure good corporate governance is in how responsive the enterprise is to its stakeholders. A properly structured system of feedback is essential to realizing the responsiveness principle in corporate governance. Thus, your corporate structure should be one which takes this into account. At any point in time, everyone must be clear on who to go to with what, and how that should be handled.

6. Fairness

Stakeholders in the enterprise must be made to feel that they truly have a stake in it. They should as such not be excluded from the activities of the enterprise. Their opinions must be sought on issues concerning the enterprise, particularly on those issues that directly affect them. If there is a procedure to be followed in order to achieve a purpose, everyone should be subjected to it. There must be no favouritism and one stakeholder must not benefit to the exclusion of another. Similarly, some stakeholders' interests should not be sacrificed for the interest of others'.

7. Focus on consensus

As a corollary of the above, good corporate governance requires mediation of different interests in order to reach consensus that is in the best interest of the enterprise. As such, the majority view would usually prevail. However, it is important to consider minority views and interests in

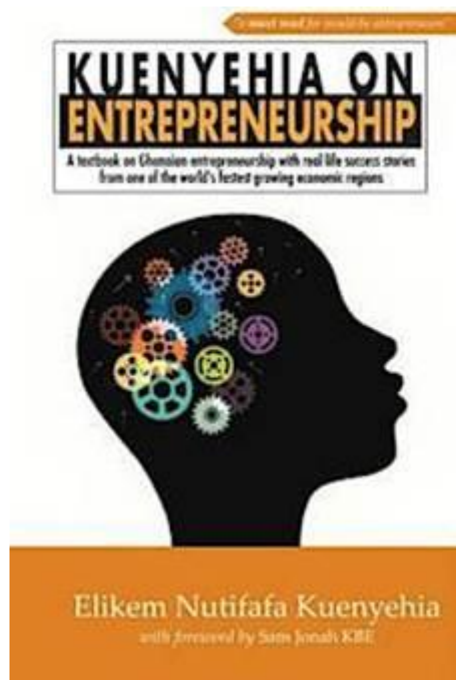
order not to act in a manner oppressive to the minority. It is important that everyone be made to feel that they have won.

8. Effectiveness and Efficiency

Your business must have systems and processes that produce results that meet set objectives of the enterprise. In this regard, resources of the enterprise must be used in the best manner possible. It is unacceptable for shareholders or owners of enterprises to take resources that belong to the enterprise for themselves without accounting for them. If there is a procedure for hiring new people, that procedure must be followed, and must not be waived just because the applicant is the owner's wife's pastor's nephew. Therefore, if you do not have a system or structures to ensure effectiveness and efficiency, put some in place. Even more important, ensure that they are followed by all involved.

Thank you for reading!

Please find more information on how to grow and strengthen your business in Ghana via Elikem Kuenyehia's book on Entrepreneurship.



Readers of this guide also found the following IIA report useful:

- Embedding strong governance structures
- Meeting tax and accounting regulations

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