

Oslo, 17 March 2021

Proposal for changes to the Norwegian Code of Practice for Corporate Governance

The Norwegian Corporate Governance Board (NCGB) is pleased to circulate for consultation proposed changes to the Norwegian Code of Practice for Corporate Governance (hereinafter the "Code"). The current Code can be downloaded [here](#).

All interested parties are invited to provide any comments they have on the proposals or on any other aspect of the Code by 25 May 2021. NCGB requests that all comments are sent to info@nues.no.

The proposed changes stem from legislative and regulatory changes, international developments, and issues that have arisen through use of the Code. NCGB has also reviewed the responses to the consultation it carried out in 2018. Some of the proposals below are the result of this feedback.

The most significant changes being proposed are as follows:

- Replacing the recommendation in Section 2 that the company should have clear guidelines for how it integrates considerations related to its stakeholders into its value creation with a new recommendation that it should take sustainability into account in its value creation.
- Replacing the recommendations in Section 4 regarding transactions with close associates with a new recommendation that the instructions the board of directors issues for its work should set out how the board and executive management should handle agreements with related parties.
- Changing Section 7 in order to propose that no member of the company's board of directors should be able to be a member of its nomination committee.
- Removing a significant proportion of the recommendations in Section 12 relating to the remuneration of executive personnel as a result of new statutory rules.

This consultation paper does not include specific proposals for changes to the *commentaries* that accompany the Code's recommendations. NCGB's analysis of the changes will be reflected in the commentaries where appropriate. Consultation parties are welcome to provide their thoughts on what the commentaries should contain.

Best regards

The Norwegian Corporate Governance Board

Christina Stray
Chair

Stine Winger Minde
Secretariat

1. Business (Section 2 of the Code)

Background and current recommendations

Section 2 of the Code relates to the business that the company shall operate.

One of the objectives for the revisions made to the Code in 2018 was to highlight what is expected of the board of directors in terms of its work on the company's objectives, strategies and risk profile. As part of this, NCGB added a recommendation that companies should have guidelines for how they integrate considerations related to stakeholders into their value creation. The commentary also makes reference to Section 3-3c of the Norwegian Accounting Act, which concerns the reporting of corporate social responsibility. The Code was also changed to highlight that creating value for shareholders is the principal objective of companies' business activities.

NCGB's analysis

Companies are now increasingly expected to include sustainability in their corporate governance. This is reflected inter alia in a range of new EU initiatives, including in EU legislation that is expected to be transposed into Norwegian law. See for example the [proposed new Norwegian act relating to sustainability data](#), which is to implement [Regulation \(EU\) 2019/20188 on sustainability-related disclosures in the financial services sector \(the Disclosure Regulation\)](#) and [Regulation \(EU\) 2020/852 on the establishment of a framework to facilitate sustainable investment \(the Taxonomy Regulation\)](#). The EU is also reviewing its [Directive 2014/95/EU on Non-Financial Reporting \(NFRD\)](#) and working on [a regulatory initiative on sustainable corporate governance](#). NCGB is of the view that one of its objectives for the Code is to ensure it does not include recommendations that are already addressed by acts of law and official regulations. It is therefore important that any recommendation in the Code relating to sustainability is sufficiently general and capable of enduring over time.

NCGB therefore proposes that the Code should contain a new recommendation that a company link its responsibility for sustainability with its value creation. The proposed recommendation emphasises that sustainability should be an integral part of a company's objectives, strategy and risk profile. Creating value in a sustainable manner refers to creating value with regard for economic, social and environmental considerations. NCGB is of the view that the term 'sustainable' would be assumed to address all matters described in the Norwegian Accounting Act at Section 3-3c, i.e. human rights, labour rights and social considerations, the external environment, anti-corruption, the working environment, equality, discrimination and environmental impact.¹ The term 'climate/climate risk' does not feature in the Norwegian Accounting Act, but such considerations are deemed to be encompassed by the terms 'external environment/environmental impact'.

The proposal entails that Section 2 of the Code should no longer include reference to guidelines or the provisions of Section 3-3c of the Norwegian Accounting Act.

NCGB also proposes removing the recommendation in Section 10 that a company's internal control and systems for risk management should encompass its guidelines etc. for how it integrates

¹ The list is somewhat different in the proposed new Norwegian Accounting Act at Section 3-3c, cf. Proposition 66 LS (2020-2021).

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considerations related to stakeholders into its creation of value. This is a consequence of the proposed new recommendation in Section 2 relating to sustainability. NCGB is of the view that it would not make sense for Section 10 to continue to mention considerations related to stakeholders since there will no longer be a recommendation that the company should have guidelines on the integration of such considerations.

NCGB's proposal

NCGB proposes that Section 2 of the Code should read as follows:

2. Business

The company's articles of association should clearly describe the business that the company shall operate.

The board of directors should define clear objectives, strategies and risk profiles for the company's business activities such that the company creates value for shareholders in a sustainable manner. When carrying out this work, the board of directors should therefore take into account financial, social and environmental considerations.

~~The company should have guidelines for how it integrates considerations related to its stakeholders into its value creation.~~

The board of directors should evaluate these objectives, strategies and risk profiles at least yearly.

NCGB proposes that Section 10 of the Code should read as follows:

10. Risk management and internal control

The board of directors must ensure that the company has sound internal control and systems for risk management that are appropriate in relation to the extent and nature of the company's activities. ~~Internal control and the systems should also encompass the company's guidelines etc. for how it integrates considerations related to stakeholders into its creation of value.~~

The board of directors should carry out an annual review of the company's most important areas of exposure to risk and its internal control arrangements.

2. Transactions with related parties (Section 4 of the Code)

Background and current recommendations

With effect from 1 January 2020, material agreements between listed companies and related parties are subject to new rules contained in the Norwegian Public Limited Liability Companies Act at Chapter 3, sub-chapter V. The new rules represent a tightening of the case management rules for such agreements. However, fewer agreements than previously will fall under the scope of the rules as the threshold value is considered to have increased for the majority of companies. Furthermore, there are exemptions for a number of types of agreement, cf. the Public Limited Liability Companies Act, Section 3-16. Previous experience indicates that there are grounds to think that there are relatively few instances in which the case management rules for agreements with related parties in the Limited Liability Companies Act will apply.

As a result of the legislative changes, changes need to be made to the recommendations in Section 4 of the Code on transactions with close associates. The phrase 'not immaterial transactions' that is used in the Code is not consistent with the new statutory rules.

NCGB's analysis

NCGB is of the view that companies should have a considered approach to how they enter into agreements with related parties. This also needs to be seen in light of the fact that there are grounds to think that there are relatively few agreements with related parties that have to be handled in accordance with the case management rules contained in Chapter 3, sub-chapter V, of the Norwegian Limited Liability Companies Act, either because they do not meet the threshold value or because they are a type of agreement covered by one of the exemptions in Section 3-16 of the Act. NCGB considers that there is therefore still a need for the Code to contain a recommendation regarding transactions with related parties. However, NCGB proposes that the Code should be relaxed and simplified on this point.

The objective of the Code in relation to transactions with related parties should be to ensure that companies are made aware of possible conflicts of interests and that they handle affected agreements in a sufficiently thorough manner, with the aim of preventing value from being transferred to any related party.

It is therefore proposed that the current recommendations should be removed and replaced with a new recommendation that the instructions for the board of directors should set out how the board and executive management should handle agreements with related parties. It is proposed that the term 'related party' should be understood in the same way as in the Norwegian Limited Liability Companies Act at Section 3-12.

The proposed recommendation means that the board of directors should establish instructions setting out how such agreements are to be handled. This means that the board of directors must ensure that appropriate measures are implemented to protect the interests of the company and its shareholders. The board's instructions should also set out inter alia whether an independent valuation has to be obtained, as well as whether such agreements should be presented in the annual report.

The proposed recommendation accordingly goes further than the rules in the Public Limited Liability Companies Act, as it will apply to all agreements with related parties. NCGB is proposing that there should not be any exemptions equivalent to those in Section 3-16 of the Public Limited Liability Companies Act. However, the board of directors would be able to set exemptions and/or to differentiate between how different types of agreement with related parties are handled. Companies would be able to decide whether to exempt agreements that are already regulated by special case management rules, cf. for example the Norwegian Limited Liability Companies Act, Section 3-16, items 3-7 and 10. NCGB notes, however, that “normal business agreements” that are entered into with related parties should be regulated by the company’s instructions for its board of directors.

Swedish and Danish company law stipulates that the board of directors must have routines/internal procedures for assessing whether an agreement with a related party is a normal business agreement, cf. the Swedish Companies Act, Chapter 16, Section 6, second paragraph, and the Danish Companies Act, Section 139d, subsection 4. There is no equivalent regulation in Norwegian law.

The proposed recommendation also goes further than the rules of the Norwegian Limited Liability Company Act as it applies to how not only the board of directors but also the company’s executive management should handle agreements with related parties.

As the proposed recommendation on agreements with related parties targets the work of boards of directors, NCGB proposes that it should be moved to section 9 of the Code.

NCGB’s proposal

NCGB proposes that Section 4 of the Code should read as follows:

4. Equal treatment of shareholders ~~and transactions with close associates~~

Any decision to waive the pre-emption rights of existing shareholders to subscribe for shares in the event of an increase in share capital should be justified. Where the board of directors resolves to carry out an increase in share capital and waive the pre-emption rights of existing shareholders on the basis of a mandate granted to the board, the justification should be publicly disclosed in a stock exchange announcement issued in connection with the increase in share capital.

Any transactions the company carries out in its own shares should be carried out either through the stock exchange or at prevailing stock exchange prices if carried out in any other way. If there is limited liquidity in the company’s shares, the company should consider other ways to ensure equal treatment of all shareholders.

~~In the event of any not immaterial transactions between the company and shareholders, a shareholder’s parent company, members of the board of directors, executive personnel or close associates of any such parties, the board should arrange for a valuation to be obtained from an independent third party. This will not apply if the transaction requires the approval of the general meeting pursuant to the requirements of the Public Companies Act. Independent valuations should also be arranged in respect of transactions between companies in the same group where any of the companies involved have minority shareholders.~~

NCGB proposes that Section 9 of the Code should read as follows:

9. The work of the board of directors

The board of directors should issue instructions for its own work as well as for the executive management with particular emphasis on clear internal allocation of responsibilities and duties.

These instructions should state how the board of directors and executive management should handle agreements with related parties.

The board of directors should ensure that members of the board of directors and executive personnel make the company aware of any material interests that they may have in items to be considered by the board of directors.

...

3. Nomination committee (Section 7 of the Code)

Background and current recommendations

The objective of the recommendations regarding nomination committees is inter alia to ensure that the best possible preparations are made for the general meeting's election of board members. The recommendations on the composition of the nomination committee are intended to balance the need for those who prepare the election to be independent of candidates with the need for knowledge regarding how the board functions. The recommendations also relate to the nomination committee's way of working etc.

When the Code was revised in 2018, some changes were made to this section of the Code. The changes were intended inter alia to strengthen the quality of nomination committees' justifications for the candidates they propose. In the 2018 consultation paper, NCGB proposed that up to one member of the nomination committee could be a member of the board of directors. However, this proposal met with some resistance and many respondents indicated that nomination committees should not have any members who were also members of the board of directors. On this basis NCGB chose not to adopt the proposal contained in its consultation paper.

NCGB's analysis

NCGB is of the view that respondents to its 2018 consultation submitted sound reasons for the view that no member of a company's board of directors should be a member of its nomination committee. The respondents to the consultation also expressed the view that even a member of a company's board of directors not standing for re-election should not be on its nomination committee.

NCGB is therefore now proposing changes to the Code to bring it into line with the views expressed by respondents to its 2018 consultation. The respondents based their proposals inter alia on the fact that having a nomination committee that is entirely independent of the board prevents the interests and viewpoints of a single board member from influencing the nomination committee's proposals regarding the re-election of candidates and the selection of new candidates. Having an entirely independent nomination committee was also considered to strengthen the level of confidence in its work. A board member on a nomination committee may contribute useful insight on how the board members function and contribute to the board. At the same time, the insight of a single board member can be but the subjective perception of that individual. Discussions with the chair of the board of directors and other board members can enable a nomination committee to obtain the more impartial information it requires on the board's members and work. NCGB also estimates that there are few board members on nomination committees. The current recommendation is, furthermore, not particularly practical as decisions regarding whether to leave a board of directors are often taken after the company's annual general meeting and the appointment of the nomination committee.

In connection with the 2018 consultation, a proposal was also received that suggested that it should be specified that the nomination committee should hold individual discussions with each of the board's members. The rationale for this proposal was that this would provide the nomination committee with the best possible basis for its deliberations. NCGB is of the view that this is an appropriate proposal, and NCGB wishes to incorporate such a specification in the commentary to this section.

NCGB's proposal

NCGB proposes that Section 7 of the Code should read as follows:

7. Nomination committee

The company should have a nomination committee, and the nomination committee should be laid down in the company's articles of association. The general meeting should stipulate guidelines for the duties of the nomination committee, elect the chairperson and members of the nomination committee, and determine the committee's remuneration.

The nomination committee should have contact with shareholders, the board of directors and the company's executive personnel as part of its work on proposing candidates for election to the board.

The members of the nomination committee should be selected to take into account the interests of shareholders in general. The majority of the committee should be independent of the board of directors and the executive personnel. ~~No more than one member of the nomination committee should be a member of the board of directors, and any such member should not offer himself for re-election to the board.~~ The nomination committee should not include any ~~the company's chief executive or other~~ executive or other executive personnel at the company or any member of its board of directors.

The nomination committee's duties should be to propose candidates for election to the board of directors and nomination committee (and corporate assembly where appropriate) and to propose the fees to be paid to members of these bodies.

The nomination committee should justify why it is proposing each candidate separately.

The company should provide information on the membership of the committee and any deadlines for proposing candidates.

4. Remuneration of executive personnel (Section 12 of the Code)

Background and current recommendations

With effect from 1 January 2021 the determination of the salary and other remuneration paid to executive personnel at listed companies and the reporting of such information are subject to new rules contained in the Norwegian Public Limited Liability Companies Act at Sections 6-16a and 6-16b respectively, together with the associated official regulations. As a result of these legislative changes, changes have also been made to Section 5-6 of the Norwegian Public Limited Liability Companies Act, which concerns ordinary general meetings, and to Section 7-31b of the Norwegian Accounting Act, which concerns the information included in notes on the remuneration of executive personnel etc. at large companies. The new rules are far more detailed than before, meaning large portions of Section 12 of the Code are now superfluous.

NCGB's analysis

NCGB is of the view that one of its objectives for the Code is to ensure it does not have content that is substantially already addressed by acts of law and official regulations. NCGB therefore proposes that those parts of Section 12 that are superfluous should be removed. This would mean that only the recommendation regarding performance-related remuneration would remain.

NCGB is of the view that there should still be a recommendation that there should be an absolute limit on performance-related remuneration. This is an important element in ensuring that performance-related remuneration is predictable and does not become disproportionately large in situations in which a company's earnings or share price are strongly affected by external matters. Furthermore, it can prevent disproportionate value from being transferred from shareholders to management.

As a result of the fact that Section 12 of the Code would only contain a single recommendation if the superfluous recommendations are removed, NCGB has considered amalgamating Section 11 on the remuneration of the board of directors and Section 12 on the remuneration of executive personnel. NCGB has not reached a conclusion on this matter and welcomes respondents' views on this.

In preparing this revision to the Code, NCGB did not consider whether new recommendations on the remuneration of executive personnel should be included in light of the new rules. NCGB is of the view that the new rules should be given time to take effect so that experience of how they are practiced can inform what any such recommendations should address.

NCGB's proposal

12. Remuneration of executive personnel

~~Performance-related remuneration of the executive personnel in the form of share options, bonus programmes or the like should be linked to value creation for shareholders or the company's earnings performance over time. Such arrangements, including share option arrangements, should incentivise performance and be based on quantifiable factors over which the employee in question can have influence. Performance-related remuneration should be subject to an absolute limit.~~

5. Other changes

In connection with the 2018 revision of the Code, NCGB received feedback to the effect that it was in places unclear for whom the Code was intended. One change NCGB approved was in Section 15, which concerns the auditor. This change consisted of making it clear for whom the Section was intended. In connection with this, NCGB proposes that a clarification should be introduced under the sub-title 'Target group' (page 6 of the printer-friendly version):

"The Code of Practice is principally intended for the boards of directors of companies that are required by the Norwegian Accounting Act to provide a report on their policies and practices for corporate governance".

NCGB has not identified a need for further changes of this type to be made. However, NCGB would welcome specific feedback on which sections of the Code are unclear if respondents are of a different opinion.