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CORPORATE AND COMMERCIAL ALERT

IN THIS ISSUE

A PREVIEW OF KING IV

Recently a draft of the latest instalment of the King Reports on Corporate Governance, namely King IV, was released by the Institute of Directors in Southern Africa (IoDSA) and the King Committee for public comment.
Comments are to be submitted by 15 May 2016.

CLIFFE DEKKER HOFMEYR

A PREVIEW OF KING IV

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King IV addresses and bolsters numerous general principles pertaining to good corporate citizenship and the 'RAFT' governance ideals that have always been at the core of the King Reports – responsibility, accountability, fairness and transparency.

Currently the King Report on Governance for South Africa, 2009 (King III) and the accompanying King Code together constitute the premier corporate governance code in South Africa. King III is not legally binding. However, for entities with a primary listing on the JSE Limited securities exchange certain aspects of King III are binding by virtue of the listings requirements imposing obligations on issuers to comply therewith. In respect of those matters in King III which the JSE does not consider mandatory, an issuer is nevertheless required to describe the extent of its compliance, and explain any non-compliance, in its annual report to shareholders. This is in accordance with the overall 'apply and explain' philosophy of King III. There have also been cases where the high court has considered the principles expounded by King to be binding on state-owned entities (*SABC v Mpofu* 2009), and where it has referred to those principles as a yardstick against which the conduct of directors should be measured in the context of their fiduciary duties (*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* 2006).

The draft of King IV retains the 'apply and explain' philosophy currently found in King III. It addresses and bolsters numerous general principles pertaining to good corporate citizenship and the 'RAFT' governance ideals that have always been at the core of the King Reports – responsibility, accountability, fairness and transparency. This note addresses some of the material and more 'concrete' new principles contained in the draft of King IV, as these give us a sense of what may be expected in the final version (subject of course to any changes that may be made pursuant to comments received).

Notably the test for the independence of directors is expanded. Currently King III lists the following criteria in order to be classified as an 'independent' non-executive director:

It is a director who:

(i) is not a representative of a shareholder who has the ability to control or significantly influence management or the board;

(ii) does not have a direct or indirect interest in the company (including any parent or subsidiary in a consolidated group with the company) which exceeds 5% of the group's total number of shares in issue;

(iii) does not have a direct or indirect interest in the company which is less than 5% of the group's total number of shares in issue, but is material to his personal wealth;

(iv) has not been employed by the company or the group of which it currently forms part in any executive capacity, or appointed as the designated auditor or partner in the group's external audit firm, or senior legal adviser for the preceding three financial years;

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The role of the social and ethics committee is expanded beyond that which is envisaged in the Companies Act, 2008.

(v) is not a member of the immediate family of an individual who is, or has during the preceding three financial years, been employed by the company or the group in an executive capacity;

(vi) is not a professional adviser to the company or the group, other than as a director;

(vii) is free from any business or other relationship (contractual or statutory) which could be seen by an objective outsider to interfere materially with the individual's capacity to act in an independent manner, such as being a director of a material customer of or supplier to the company; and

(viii) does not receive remuneration contingent upon the performance of the company.

In King IV it will be clearly stated that this is not an exhaustive list, and that other factors may still affect a director's independence despite him fulfilling the 'bright-line' criteria. Further, the 'material supplier or customer' criterion is refined: The question will be whether one is *a member of the governing body or an executive of* such supplier or customer.

The role of the social and ethics committee is expanded beyond that which is envisaged in the Companies Act, 2008 (more specifically regulation 43 of the Companies Regulations, 2011). King IV envisages this expansion to be in the context of the committee's direction and oversight of the management of ethics, as well as the socially responsible aspects of the remuneration policy.

Currently King III recommends that the company's remuneration policy be submitted to shareholders for their approval in terms of a non-binding, advisory vote at every annual general meeting (AGM). This has found its way into numerous listed companies' AGM notices as a regular item for shareholders to consider and vote on. At present this entails an ordinary majority (a 50% + 1 vote); King IV envisages increasing this to a special resolution (75%). Of course this is aside from the normal Companies Act requirement to have directors' remuneration approved in advance by a shareholder special resolution (s66(8) and (9)), but that is concerned only with remuneration *qua* director (ie director fees, typically payable only to non-executive directors) and not with remuneration to executives in their capacities as such.

King IV will include sector supplements that provide specific guidance to the following categories of organisations and sectors, in addition to the traditional audience of listed, public and large private companies:

- SMEs
- Non-profit organisations
- Public sector organisations and entities
- Municipalities
- Pension funds

King IV is also more prescriptive with regard to:

- the content of the terms of reference/ charters of board and audit committees. These must set out the composition and rotation of membership, the overall role and associated responsibilities of the committee, the delegated authorities (including the extent of the committee's decision-making powers), tenure, resources and access to information and meeting procedures;

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A PREVIEW OF KING IV

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Ultimately the general theme of King IV is an expansion and heightening of the RAFT principles.

- the group governance framework. These should include the delineation of the rights and role of the holding company, the extent of delegation by a subsidiary of certain functions to a holding company's committee (King IV reiterates the age-old adage that delegation cannot be abdication), the extent of adoption of governance and operational policies across the group, engagement by the holding company with subsidiary boards before directors are elected to the subsidiary boards, and structures and procedures with regard to information-sharing amongst group entities.

This will undoubtedly require companies, at the appropriate stage in the future, to review their charters and framework documents to ensure compliance with King IV's recommendations.

Ultimately the general theme of King IV is an expansion and heightening of the RAFT principles. It remains to be seen to what extent the commentary phase moulds the draft. It will also be important to look out for movements from regulators such as the JSE with regard to the implementation of King IV, importantly, for instance, how long entities will be given to ensure and procure full compliance with the new code once the final version is published.

Yaniv Kleitman

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We've recently published a new edition of the Cliffe Dekker Hofmeyr (CDH) Corporate Governance Guide – A Guide for Directors. The publication explains all you need to know about being a director and deals with the duties, responsibilities and personal liability of directors, prescribed officers and committee members under the Companies Act, 2008. Kindly contact your legal partner at CDH should you wish to receive a copy.

CDH

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