Kenya's Corporate Governance Practices Code, 2015

Kamami Christine Michira Mweti, partner and head of the Banking and Finance Practice in Bowman Gilfillan Africa Group's Coulson Harney office, Nairobi, Kenya

The Kenyan Capital Markets Authority (the Authority) has issued a code of corporate governance known as the Code of Corporate Governance Practices for the Issuers of Securities to the Public 2015 (the 2015 Code). The 2015 Code has replaced the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002 (the "2002 Guidelines"). It applies to all companies that issue both debt and equity securities to the public regardless of whether or not they are listed ("Issuers").

Through the 2015 Code, the Authority advocates the adoption of standards of governance that go beyond the minimum standards set in legislation, including in the new Companies Act 2015. Boards of Issuers are required to formulate additional internal policies and strategies that not only enable their companies to grow but that also protect the interests of shareholders, stakeholders and the community at large.

The 2015 Code came into force on 4 March 2016. Issuers are required to implement the 2015 Code within a year of its publication or disclose the reasons for their non-compliance as well as the strategy they intend to implement to come into compliance.

Good governance remains paramount for the sustainable success and progress of a company. The 2015 Code will undoubtedly move corporate governance standards in Kenya one step closer to international standards.

The 2015 Code has significantly enhanced the 2002 Guidelines and addresses some of the shortcomings of the previous Guidelines. For example, undefined terms such as conflict of interest and stakeholders are now clearly defined. It also provides for previously unmentioned but important issues such as stakeholder engagement and governance, legal compliance and ethical compliance audits to supplement financial audits.

It more thoroughly provides for conflict of interest arising at all management levels and the roles and duties of directors. It also requires more disclosure by Issuers improving transparency. It is more comprehensive in the issue of efficiency and effectiveness of

Boards as it introduces mandatory professional training and development for directors and mandates frequent evaluation of the Board across various areas.

However, there are some issues that the Authority needs to address. Enforceability will remain a challenge because some of the provisions of the 2015 Code do not, by their very nature, lend themselves to enforcement. For example, Boards are required to be of a “sufficient size”. What constitutes a “sufficient size” cannot be prescribed as it will vary from Issuer to Issuer depending on several considerations such as the size of the Issuer and the nature of the Issuer’s business.

There is also need for clarification on some of the provisions of the 2015 Code. It is would be useful for the Authority to provide templates or further guidelines for board policies such as the evaluation toolkit and annual work plan must adhere to. The Authority will also need to specify the institutions from which it shall recognise Board training programmes. The Authority shall need to clarify the consequences of noncompliance and the instances in which an explanation by an Issuer for non-compliance shall be sufficient. There is need to harmonise the various corporate governance guidelines being issued by the various authorities because the codes have conflicting provisions. For example, the Central bank of Kenya Prudential Guidelines for Institutions Licensed under the Banking Act, 2013 prohibits directors of such institutions from holding more than two (2) concurrent directorships while the 2015 Code allows them to hold three (3) concurrent directorships.

In conclusion, good governance is to key to exemplary and sustainable performance of a company. The 2015 Code has moved corporate governance standards in Kenya one step closer to international corporate standards. Issuers need to understand the 2015 Code to enable them to implement the necessary processes and policies so as to improve their performance and ensure the sustainability of this performance. This is ultimately in the interest of both the company and the stakeholders.