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THE NIGERIAN CODE OF CORPORATE GOVERNANCE 2018: A SYNOPSIS

Introduction

In January 2019, the Federal Government of Nigeria unveiled the Nigerian Code of Corporate Governance 2018 (the “Code” or the “NCCG 2018”). The Code was published in 2018 by the Financial Reporting Council (“FRC”) pursuant to its powers under Sections 11(c) and 51(c) of the Financial Reporting Council of Nigeria Act 2011 (the “Act”) and launched in January 2019. The NCCG 2018 consolidates the private and public companies’ codes of corporate governance and replaces the National Code of Corporate Governance 2016 which was suspended due to its contentious provisions on not-for-profit organizations¹.

Objectives and Philosophy of the Code

The objective of the Code is two pronged: to institutionalize corporate governance best practices in Nigerian companies and to promote the awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment. Undoubtedly, the achievement of these objectives will rebuild public trust and confidence in the Nigerian economy and facilitate increased trade and foreign investment.

The Code adopts the “*Apply and Explain*” approach for reporting compliance. This means that companies are required to explain how the principles of the Code have been applied, bearing in mind their specific industry, size and growth phase.

Application and Implementation of the Code

The Regulation on the Adoption and Compliance with the NCCG 2018² provides that the Code applies to: (a) all public companies (whether listed or not); (b) all private companies that are holding companies of public companies or other regulated entities; (c) concessioned or privatised companies³; and (d) regulated private companies⁴. The implementation of the Code will be monitored by the FRC through sectoral regulators⁵ and registered exchanges which are empowered to impose sanctions on defaulting companies based on nonconformity with the provisions of the Code. In conjunction with relevant regulatory agencies of the Federal Government of Nigeria, the FRC will also issue corporate governance guidelines to assist with the implementation of the Code.

¹ The provision precluding the founder or leader of any not for profit organization from taking on too many responsibilities in the organization or having an indefinite term in the running of the organization. Also, the provision requiring a founder or leader who occupies any of the three governance positions of Chairmanship of the Board of Trustees, the Governing Board or Council, and the Headship of the Executive Management (or their governance equivalents), to occupy only one of the three positions.

² Issued by Dr. Okechukwu Enyinnaya Enelamah, Federal Minister for Industry, Trade and Investment on 15 January 2019.

³ Companies hitherto owned or operated by a government (federal or state) and ceded or sold to private investors.

⁴ Private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission.

⁵ Including but not limited to the Securities and Exchange Commission Nigeria, the Central Bank of Nigeria, the National Insurance Commission, the Nigerian Communications Commission, the Nigerian Electricity Regulatory Commission and the Department of Petroleum Resources.

Reporting Date & Structure of the Code

Companies governed by the Code will be required to begin reporting on their application of the Code in their annual reports/audited accounts for the financial year ending after 1st January 2020. Companies are therefore required to map out and institutionalize the corporate governance structures best suited to their business. The Code consists of seven (7) parts and twenty-eight (28) principles, together with practices recommended by the Code for the implementation of each principle.

Key Highlights of The Code

Board of Directors and Officers of the Board

Board Charter - In light of the strategic role of the Board, the Code requires every Board to have a charter setting out its responsibilities to ensure clarity of roles and to specify other functions to be undertaken by the Board. The Code highlights sixteen recommended practices such as strategic direction, oversight of risk management and internal control, succession planning and information technology governance amongst others, to be included in the Board charter. Also, to encourage diversity and better decision-making, the Board is required to consider factors like knowledge, skills, experience, age, culture and gender in determining persons to be appointed to the Board. A policy to govern this process and establish measurable objectives for achieving gender diversity and other selection criteria is required to be formulated.

Committee Composition - Another salient provision is that only Non-Executive Directors (“**NEDs**”) can serve as chairmen of Board committees. The Chairman of the Board, the Managing Director/Chief Executive Officer (“**MD/CEO**”) and other Executive Directors (“**ED**”) are not eligible for appointment as committee chairmen. In addition, the Chairman cannot serve as a member of any Board committee.⁶ The Code recommends that Boards should comprise of a good mix of EDs, NEDs and Independent Non-Executive Directors (“**INED**”) with NEDs being the majority and preferably, majority of the NEDs should be independent.⁷

Disclosure of Conflict of Interest - The Code aligns with the provisions of section 280 of the Companies and Allied Matters Act (“**CAMA**”)⁸ by requiring that all directors inclusive of the MD/CEO and EDs disclose any conflict of interest, not only when they are appointed, but annually.⁹ Where any director becomes aware of a potential conflict of interest, he is required to disclose this to the Board at the first possible opportunity. Any actions arising from the disclosure will be subject to the company’s conflict of interest policy. The purpose of the requirement for directors to disclose conflict of interest is to encourage greater accountability from the Board, particularly Boards of private companies where the disclosures are often made only at the directors’ appointment. The disclosure by a director of a conflict of interest or a decision by the Board as to the existence of a conflict of interest should be recorded in the minutes of the meeting.¹⁰ This implies that conflict disclosures can only be made at Board meetings. However, it may not be feasible to wait until Board meetings are held where the potential conflict may be detrimental to the company’s business. Companies should therefore consider implementing other efficient means of bringing conflict disclosures to the Board’s attention or at least to the Chairman or Company Secretary’s attention where there is no immediate upcoming Board meeting.

The Code also requires directors to establish policies and mechanisms to monitor insider trading, related party transactions and conflict of interest.¹¹

Directors’ Remuneration - Regarding directors’ remuneration, the Code requires that a remuneration committee, preferably headed by an INED should be constituted to recommend a remuneration policy

⁶ Principle 2.9 of the Code

⁷ Principle 2.3 (b) of the Code

⁸ Cap C20 Laws of the Federation of Nigeria 2004

⁹ Principle 25.2.7 of the Code

¹⁰ Principle 25.2.6 of the Code

¹¹ Principle 25.1.1 of the Code

and structure for directors, amongst other matters.¹² Members of the remuneration committee should be NEDs, and a majority of them should be INEDs where possible.¹³ The Code also provides that the remuneration for NEDs should be determined by the Board and approved by the shareholders at a general meeting. This provision is a modification of the CAMA provision which gives the shareholders in general meeting the power to determine the remuneration of directors.¹⁴

The Chairman

The Code adopts the position of most sectoral corporate governance codes in Nigeria regarding the separation of the positions of the Chairman and the MD/CEO.¹⁵ This is based on the principle that one of the main duties of the Chairman is to provide guidance to the MD/CEO and be available to him for regular communication and guidance. Appointing the same individual as Chairman and MD/CEO therefore defeats the intention of this principle and raises questions of independence and the risk of overbearing influence, particularly where the Chairman/MD/CEO is a substantial shareholder. Also, the Code precludes the MD/CEO or an ED from transitioning to the role of Chairman.¹⁶ Where in exceptional cases, the Board decides that a former MD/CEO or an ED should become Chairman, a “cool-off” period of three years should be adopted.¹⁷ The Code is however silent on the meaning of exceptional circumstances and therefore leaves the decision of determining an exceptional circumstance to the discretion of the Board. It is noteworthy that it is gradually becoming popular to appoint an INED as Chairman.

The Independent Non-Executive Director

To encourage neutrality and independence of opinion on the Board, the Code requires companies to appoint INEDs who will serve for a maximum of three terms not exceeding 9 years.¹⁸ The criteria for establishing an INED’s independence includes that he/she must not - (i) hold shares in excess of 0.01% of the paid up capital of the company; (ii) be a representative of a shareholder that has the ability to control or significantly influence management; (iii) be a person who has served as an employee of the company or group within five years preceding his appointment (iv) have served at directorate level or above with the company’s regulator within the three years before his appointment.¹⁹ The Code clarifies that these criteria are not exhaustive and gives the Board the power to ascertain the continued independence of each INED of the company annually. A reclassification of an existing NED as an INED on the same Board is prohibited under the Code.²⁰

Board Meetings

The Code recognizes that meetings are the principal vehicle for conducting the business of the Board and successfully fulfilling the strategic objectives of a company. The Code thus recommends that to effectively perform its oversight function and monitor management’s performance, the Board should meet at least once every quarter.²¹ Every director should endeavour to attend all Board meetings. The attendance record of each Director is among the criteria for the re-election of such Director.²²

Induction and Continuing Education

The Code requires newly appointed directors of a company to undergo a formal induction programme which should take place soon after their appointment to familiarize them with the company’s strategic plans, operations, business, senior management and their fiduciary responsibilities.²³ The Code vests the

¹² Principle 11.3.1 of the Code

¹³ Principle 11.3.2 of the Code

¹⁴ Section 267(1) of the CAMA

¹⁵ Principle 2.7 of the Code

¹⁶ Principle 3.3 of the Code

¹⁷ Principle 3.3 of the Code

¹⁸ Principle 12.10 of the Code

¹⁹ Principles 7.2.1, 7.22., 7.23, and 7.26 of the Code

²⁰ Principle 7.5 of the Code

²¹ Principle 10.1 of the Code

²² Principle 10.2 of the Code

²³ Principle 13.1 of the Code

responsibility for coordinating the induction and training of new directors solely with the Company Secretary.²⁴ In addition to an induction programme, all directors are required to undergo periodic, relevant, continuing education programmes to update their knowledge and skills and keep them informed of new developments in the company's business and operating environment.²⁵ While the Code is silent on whether this is also the responsibility of the Company Secretary, it is not out of place for the Company Secretary to identify beneficial trainings and recommend the same to the Board.

Board Evaluation and Corporate Governance Evaluation

The Code requires the Board to undertake an annual evaluation of its own performance and of its committees, the Chairman and individual directors.²⁶ The evaluation process should be facilitated by an independent external consultant at least once in three years.²⁷ Based on this recommendation, while the Company Secretary may coordinate annual Board evaluation, an independent evaluator will be required to conduct the performance evaluation of the Board at least once in three years. Additionally, a corporate governance evaluation to confirm the extent of the application of the Code should be conducted annually.²⁸ The evaluation should also be conducted by an independent consultant at least once in three years.²⁹ The summary of the evaluation report should be included in the company's annual report and on the investor's portal of the company's website.³⁰

Board Committees

To ensure efficiency and effectiveness, the Board may delegate some of its functions, duties and responsibilities to its committees. The Board is responsible for determining the number and composition of its committees as well as ensuring that each committee is comprised of directors with relevant skills and competencies.³¹ Only directors may be appointed as members of Board committees. Senior management may be invited to attend specific committee meetings.

Whistleblowing

To minimize the exposure and liability of a company, the Code requires the Board to establish a whistleblowing framework to enable stakeholders to anonymously report unethical conduct and violations of laws and regulations to an internal and/or external authority in order that appropriate action may be taken. All employees and stakeholders are required to be informed about the existence of the whistleblowing framework.³²

External Auditors

The Code requires external audit firms of companies to be changed after every ten years of continuous service with a "cool-off" period of seven years after disengagement. Where the cumulative tenure of an external auditor has already exceeded ten years at the date of the commencement of the Code, such an auditor should cease to hold office at the annual general meeting to be held immediately after the effective date for compliance with the Code. The audit engagement partners are to be rotated every five years in order to preserve independence. Also, a "cool-off" period of three years is required for a retiring partner to be qualified for appointment to the Board of an external audit client.

²⁴ Principle 8.62 of the Code

²⁵ Principle 13.2. of the Code

²⁶ Principle 14.1 of the Code

²⁷ Principle 14.1. of the Code

²⁸ Principle 15.1. of the Code

²⁹ Principle 15.1 of the Code

³⁰ Principle 15.2 of the Code

³¹ Principle 11.1.1 of the Code

³² Principle 19.1 of the Code

Shareholder Engagement Policy

A shareholder engagement policy should be developed and hosted on the company's website.³³ The Board is mandated to encourage institutional investors to monitor compliance with the provisions of the Code and raise concerns as appropriate.

Business Conduct & Ethical Culture

The Board should formulate and periodically review the Company's code of business conduct and ethics and be responsible for monitoring adherence to the same.³⁴ This responsibility may be delegated to the Board nomination and governance committee and directors and all employees are obligated to comply with the code of business conduct and ethics at all times.

Sustainability & Transparency

The Code recommends that the Board should establish and monitor policies and practices regarding its social, ethical, safety, working conditions, health and environmental responsibilities as well as policies addressing corruption and related issues.³⁵ The Board is required to monitor these policies and to report to all stakeholders on their implementation.³⁶ The NCCG also prescribes that Boards should adopt and implement a stakeholder management and communication policy.³⁷ All communication to stakeholders should be clear and should be posted on the company's website.³⁸ An investor's portal should also be established on the company's website where the communication policy as well as the company's annual reports for a minimum of five years preceding the date of the publication and other relevant information about the company should be published and made accessible to the public in downloadable format.³⁹

Conclusion

A unified code of corporate governance that applies to both private and public companies in Nigeria is long overdue. The FRC's efforts in this regard are commendable and it is hoped that the Code will play a major role in enthrone the highest standards of ethical practice that will boost investor confidence in the Nigerian economy. That said, non-regulated private companies may use the absence of sanctions as a reason to avoid compliance. We are of the opinion that any company wishing to build a sustainable business and an enduring legacy of good governance, will take immediate steps to ensure compliance with the Code.

Qualifications

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*Adepetun Caxton-Martins Agbor & Segun by telephone (+234 1 462 2094), fax (+234 01 461 3140)
Adcax Nominees Limited by telephone (+234 1460 5271-2), (+234 1 279 7035), fax (+234 01 461 3140)*



³³ Principle 22.1 of the Code

³⁴ Principle 24.2. of the Code

³⁵ Principle 26.1. of the Code

³⁶ Principle 26.3. of the Code

³⁷ Principle 27.1. of the Code

³⁸ Principle 27.2. of the Code

³⁹ Principle 27.4 of the Code