



REVIEW OF THE EXPOSURE DRAFT OF THE NIGERIAN CODE OF CORPORATE GOVERNANCE

In line with its primary mandate of ensuring good corporate governance practices in the public and private sectors of the Nigerian economy, the Financial Reporting Council of Nigeria (FRCN) recently exposed the draft Nigerian Code of Corporate Governance 2018 (the Code

The Draft Code was issued pursuant to conferred on the FRCN in Sections 11(c) and 51(c) of the Financial Reporting Council of Nigeria (FRC) Act, 2011 (the Act) and specifically applies to the following PIEs:

- All public companies (whether listed or not);
- All private companies that are holding companies of public companies
- Concessioned and/or Privatized companies; and
- Regulated Private Companies as defined Section 24.1.21 of the Code.

Although the Code specifically seeks to regulate the above genre of companies in principle, the application of the Code is expected to cover a wide range of Companies of “varying sizes and complexities, who operate in diverse industries including financial services, energy and natural resources, consumer and industrial markets and technology, media and telecommunication.”

The Code adopts a principle-based philosophy rather than a rigid rule-based approach. The principles are set as minimum standards which companies are encouraged to comply with and indeed surpass. The implementation philosophy is “Apply and Explain”. The recommended principles and practices are scalable and adaptable as the

The implementation philosophy is **“Apply and Explain”**. The recommended principles and practices are scalable and adaptable as the size and complexity of a company would permit. The Code is expected to apply alongside the various sectoral codes - **where there is a conflict the stricter provisions shall apply.**

The Code consists of seven (7) parts and twenty-eight (28) principles, each with practices recommended by the Code for their implementation. The highlights of the twenty-eight (28) principles which form the key provisions of the Code are as follows:

THE BOARD CHARTER

The Code recognizes the oversight responsibility of the Board over Management in the realization of stakeholder interest and enjoins every Board to have a Charter setting out its responsibilities including the following:

- ensuring compliance with the laws of the Federal Republic of Nigeria and other applicable regulations.
- considering and approving short and long-term strategies for the business of the Company and monitoring implementation by management;
- ensuring the establishment and implementation of a succession plan, appointment process, training mechanism and remuneration structure for both the Board and senior management;
- establishing and maintaining the Company's values and standards (including an ethical culture) as well as demonstrating the right tone at the top;
- overseeing the internal audit function, approving the internal audit plan, and appointing and removing the head of the internal audit function on the recommendation of the committee responsible for audit;
- establishing the Company's risk management framework and monitoring its effectiveness, setting the Company's risk appetite and receiving and reviewing risk reports;
- providing oversight over Information Technology governance;

Quote

"Governance and leadership are the yin and the yang of successful organisations. If you have leadership without governance you risk tyranny, fraud and personal fiefdoms. If you have governance without leadership you risk atrophy, bureaucracy and indifference."

- Mark Coyder

- defining a formal schedule of matters specifically reserved for Board decision and matters delegated to Board committees and management;
- overseeing the effectiveness and adequacy of the internal control system;
- overseeing the Company's communication and information dissemination policy;
- performing the appraisal of Board members and senior executives; ensuring the integrity of annual reports and accounts and all material information provided to regulators and other stakeholders;
- ensuring that management systems are in place to identify and manage environmental and social risks and their impact.

BOARD COMPOSITION

Unlike the Sectoral Codes of Corporate Governance, the Code does not set the minimum or maximum composition of the Board of Directors. The Board has the discretion to determine its size, taking into consideration the need for an appropriate balance of skills, appropriate mix of Executive, Non-Executive Directors and Independent Directors, Diversity across a variety of attributes, amongst others. **It is advisable that most of the NEDs are independent.**

MEMBERSHIP OF BOARDS OF COMPETING COMPANIES

Article 2.8.3 of the Code requires that directors should not be members of Boards of competing Companies to avoid conflict of interest, breach of confidentiality, diversion of corporate opportunity and divulgence of corporate information.

PERIODIC REINVIGORATION OF THE BOARD

Article 2.5 of the Code requires that the Board should periodically invigorate its capabilities by ensuring the appointment of new members with relevant skills and fresh perspectives, while retaining valuable knowledge, skills, experience and diversity; and maintaining continuity. Periodic injection of the Board with fresh persons with different ideas and capabilities is specifically recommended.

Similarly, Article 6.1.4 requires that the Board Committees should be reviewed and refreshed periodically.

TRANSITING FROM THE MANAGING DIRECTOR TO THE CHAIRMAN

The transition of the Managing Director to the Chairman of the Company shall only happen in exceptional circumstances where the Board so decides and only after a cool-off period of three years.

CONFLICT OF INTEREST

Article 20.2.5 requires that directors who are aware of a real, potential or perceived conflict of interest on the part of a fellow Director, have a responsibility to raise the issue promptly for clarification, either with the Director concerned, the Chairman of the Board or the Chairman of the Committee responsible for Nomination and Governance. Any disclosure of conflict of interest should be recorded in the minutes of the Board meeting to which it relates. Furthermore, Article 3.2.6 requires the MD/CEO to declare any conflict of interest on appointment and annually thereafter.

REGULATOR AS A DIRECTOR

Article 20.2.8 of the Code requires that no member of executive management (director level and above) leaving the services of a relevant regulatory institution, for any reason, should be appointed as a Director or top management staff of an institution that has been directly supervised or regulated by the said regulatory institution until after three years of the disengagement of such executive or senior management staff from that regulatory institution.

SEPARATE MEETING OF THE BOARD CHAIRMAN AND THE NON-EXECUTIVE DIRECTORS

Article 3.1.6 of the Code requires the Chairman to meet with NEDs without the Executive Directors present, at least, annually. This will strengthen the oversight of the Executive Directors and their independent assessment and monitoring by the NEDs. In this regard, the NEDs should have unfettered access to the EDs, Company Secretary and the Internal Auditor, while access to other senior management should be through the MD/CEO.

STRICTER REQUIREMENTS FOR APPOINTMENT OF INDEPENDENT DIRECTORS

Article 3.5.2.4 provides that the Independent Director (ID) should not be a close family member of any of the Company's advisers, Directors, senior employees, consultants, auditors, creditors, suppliers, customers or substantial shareholders. The ID should not have and should not have had within the last five years, a material business relationship with the Company either directly, or as a partner, shareholder, Director or senior employee of a body that has, or has had, such a relationship with the Company.

FUNCTIONAL AND ADMINISTRATIVE RESPONSIBILITIES OF THE COMPANY SECRETARY

Article 3.6.2 of the Code provides that the Company Secretary shall have both functional and administrative responsibilities. The functional responsibility is to the Board through the Chairman, while administratively, he/she reports to the MD/CEO. However, there is no clear distinction between these roles in the Code. Also, an external Company Secretary may not be able to perform administrative responsibilities not being an employee of the Company.

BOARD COMMITTEES

Article 6 of the Code requires that the following Board Committees should be constituted:

- Committee responsible for Nomination & Governance;
- Committee responsible for Remuneration;
- Committee responsible for Audit;
- Committee responsible for Risk Management;

MEMBERSHIP OF BOARD COMMITTEES

The Code requires that each Committee is comprised of Directors with relevant skills and competencies and that each Committee should be composed of at least three members with a majority of Independent Non-Executive Directors (INEDs) where possible. Only Directors may be members of Board Committees, while members of senior management may be required to attend committee meetings. Executive Directors are not permitted under Article 3.3.5 to sit on the committees responsible for remuneration, audit, or nomination and governance.

Quote

"Good corporate governance is about 'intellectual honesty' and not just sticking to rules and regulations, capital flowed towards companies that practiced this type of good governance."

- Mervyn King

MANDATORY AUDIT COMMITTEE

Article 6.4.1 of the Code requires companies to which it applies to establish an Audit Committee. For private companies, the Code requires that members of the committee responsible for audit should be NEDs, and a majority of them should be INEDs where possible. The Audit Committee should exercise oversight over Management's processes to ascertain the integrity of the Company's financial statements, compliance with all applicable legal and other regulatory requirements as well as assess the qualification and independence of the external auditors, and the performance of the Company's internal audit function as well as that of the external.

The Audit Committee should review the independence of the external auditors in line with the company's policy on non-audit services prior to their appointment to perform non-audit services to ensure that where approved non-audit services are provided by the external auditors, there is no real or perceived conflict of interest, or other legal or ethical impediment. The Committee should preserve auditor independence, by setting clear hiring policies for employees or former employees of external auditors

CROSS-MEMBERSHIP OF AUDIT AND RISK MANAGEMENT COMMITTEES

Article 6.5.3 provides that where the committees responsible for audit and risk management are separate, the Board should consider for one or more members to have joint membership of both committees for more effective functioning as this will enhance the discussions at meetings of both committees. This will also provide an avenue for extensive discussion of the risk implication of audit matters, whilst knowledge of findings from the Company's internal audit activities will bring a unique perspective to the discussion of risk issues.

APPOINTMENT TO THE BOARD AND TENURE OF MEMBERS

Article 7.1 requires that the Board has in place a formal process for the appointment of Board members. By Article 7.6 the process used for the appointment of Directors should be stated in the Annual Report. Whilst Non-Executive Directors are required to serve for a reasonable period on the Board, the tenure of the MD/CEO should be determined by the Board taking into cognizance his/her performance. The Code provides that the tenure of Independent Non-Executive Directors should not exceed three terms of three years each.

INDUCTION AND CONTINUING EDUCATION FOR DIRECTORS

Article 8.1 of the Code requires the Board to establish a formal induction program for new Directors to familiarize them with the Company's operations, strategic plan, senior management, its business environment and their fiduciary responsibility. All Directors should also participate in periodic, relevant continuing education program/ training. The outcome of the performance evaluation of individual directors should be taken into account in developing the Board training programme.

BOARD PERFORMANCE EVALUATION

The Code recommends that the Board undertakes the assessment of its performance annually. The Annual Board evaluation would assess how each Director, the Committees of the Board and the Board are committed to their roles, work together and continue to contribute effectively to the achievement of the Company's objectives. The process should be externally facilitated by an independent external consultant at least once every three years.

CORPORATE GOVERNANCE EVALUATION

In addition to the Board Evaluation, Article 10 of the Code requires every Board to conduct an annual corporate governance evaluation, and that the evaluation should be externally facilitated by an independent external consultant at least once every three years.

CLAW-BACK POLICY

Article 11.9 provides that companies should implement a claw-back policy to recover excess or undeserved reward, such as bonuses, incentives, share of profits, stock options, or any performance-based reward, from Directors and senior employees.

Such Claw-back can be triggered if the accounts or financial performance on which the reward was based is later found to be materially false, misstated, misleading, erroneous, etc. or in instances of misdeemeanour, fraud, material violation of Company policy or material regulatory infractions. It remains to see how the implementation of this provision will not violate known constitutional provisions on powers of the court and presumption of innocence.

INTERNAL AUDIT FUNCTION

The Board Audit Committee is required to ensure the internal audit function is sufficiently skilled and resourced to address the complexities and volume of risks faced by the organization. Also, Article 13.7 provides that the evaluation of the head of the internal audit function should be performed by the Committee responsible for audit, and he may only be removed by the Board on the recommendation of the committee responsible for audit.

MAXIMUM PROTECTION OF A WHISTLE-BLOWER

Article 14.2 requires the Board to put in place a Whistle blowing framework and a mechanism that is reliable, accessible and guarantees the anonymity of the Whistleblower. Article 14.6 mandates that the Board should ensure a whistleblower who has suffered any detriment by reason of disclosure may be entitled to compensation and or reinstatement as may be appropriate.

TENURE OF EXTERNAL AUDIT FIRMS AND AUDIT ENGAGEMENT PARTNERS

Article 15.2 provides that External audit firms may be retained for no longer than ten years continuously. External audit firms disengaged after ten years continuous service may not be considered for reappointment until seven years after their disengagement. Where an external auditor's aggregate or cumulative tenure has already exceeded ten years at the date of commencement of this Code, such auditor should cease to hold office as an auditor of the Company at the Annual General Meeting to be held immediately after this Code comes into effect. In order to preserve independence, there should be a rotation of the audit engagement partner every five years.

REPORTING OFFENCES

Article 15.8 provides that where external auditors discover or acquire information during an audit that leads them to believe that the Company or anyone associated with it has committed an indictable offence under any law, they should report this to the Regulator, whether or not such matter is or will be included in the Management Letter issued to the Committee responsible for audit and/or the Board.

COMPULSORY ATTENDANCE OF GENERAL MEETINGS BY BOARD AND STATUTORY COMMITTEE CHAIRMEN

Article 16.2 requires that the Chairmen of all Board Committees and of the Statutory Audit Committee should be present at General Meetings of the Company to respond to shareholders' queries and questions. The Code also requires that all decisions reached at the AGM should be fully implemented by Management as governance directives.

BUSINESS CONDUCT AND ETHICS

Article 19 requires the Board to set a clear tone at the top, formulate and review the Code of Business Conduct and Ethics.

STAKEHOLDERS' PORTAL

The Code requires that the Board should establish an investors' portal on the Company's website, where the communication policy as well as the Company's annual reports for a minimum of five immediately preceding years and other relevant information about the Company should be published and made accessible in downloadable format to the public-Article 22.4

GOING CONCERN DISCLOSURE

Article 23.4 provides that the Board should use its best judgment to disclose any material matter even though not specifically required by this Code to be disclosed if in the opinion of the Board such matter is capable of affecting the present or anticipated financial condition of the Company or its status as a going concern. The onus of proof of such possible negative effect is on the Board.

Witty Corner

“ Reaching the end of a job interview, the Human Resources Officer asks a young engineer fresh out of the Massachusetts Institute of Technology, "And what starting salary are you looking for?" The engineer replies, "In the region of \$125,000 a year, depending on the benefits package." The interviewer inquires, "Well, what would you say to a package of five weeks' vacation, 14 paid holidays, full medical and dental, company matching retirement fund to 50% of salary, and a company car leased every two years, say, a red Corvette?" The engineer sits up straight and says, "Wow! Are you kidding?" The interviewer replies, "Yeah, but you started it. ”

REPORT ON COMPLIANCE WITH THE CODE

The Code requires disclosure of the extent of compliance with the provisions of the Code in the Company's Annual Report. Article 23.6 further provides that where the Board has engaged independent experts in evaluating and reporting on the extent of application of the Code, the identity of the Consultant and the summary of the Consultant's report should be included in the Company's annual report.

The Nigerian Code of Corporate Governance 2018 seeks to institutionalize the highest standards of corporate governance best practices in Nigeria. The Code also aims at promoting corporate governance principles and ethical practices that will enhance the integrity of the market. The philosophy of "apply and explain" is intended to have Boards apply the principles and explain how and to what extent the application has impacted on the Company. Laudable as the provisions of the Code and the philosophy for its implementation are, the Sectoral Codes will continue to apply and indeed override the provisions of the Code where these Codes have "stricter" requirements. The expectation in many circles had been that the NCCG 2018 will harmonize existing Codes to ensure a uniform application across sectors.

Companies are expected to start reporting on the application of the Code in their annual reports for the period ending on or before **January 1, 2020** whilst earlier reporting is encouraged.



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