



## THE CODE OF CORPORATE GOVERNANCE 2018 – A NEW DAWN FOR CORPORATE GOVERNANCE IN NIGERIA?



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## INTRODUCTION

The Nigerian Code of Corporate Governance (the “**Code**”) was issued in 2018 by the Financial Reporting Council of Nigeria (the “**FRCN**”) pursuant to Sections 11(c) and 41(c) of the Financial Reporting Council of Nigeria Act, 2011.<sup>1</sup> The issuance of the Code stemmed from the suspension of the National Code of Corporate Governance 2016 (the “**2016 Code**”) by the Federal Government of Nigeria.

The Code, which is aimed at companies of varying sizes across different industries, seeks to institutionalise corporate governance best practices and promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment.

The FRCN, through sectoral regulators and registered exchanges, will monitor the implementation of the Code and may, in this regard, conduct periodic reviews on the implementation of the corporate governance principles that are frequently deviated from by companies.

## **KEY HIGHLIGHTS OF THE CODE**

1. **Code Philosophy** – Companies are required to adopt the ‘**Apply and Explain**’ approach in implementing and monitoring compliance with the Code.<sup>2</sup> This is different from the 2016 Code which utilised the more forceful ‘**Comply or Else**’ approach.

The Apply and Explain approach assumes that all principles have been applied and, therefore, requires companies to demonstrate how the specific activities they have undertaken best achieve the outcomes intended by the corporate governance principles specified in the Code.

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<sup>1</sup> Chapter F42, Laws of the Federation of Nigeria, 2004.

<sup>2</sup> See paragraph C of the introduction section in the Code.

2. **Board Structure and Composition** – The Code enjoins the Board to assume responsibility for its composition “*by setting the direction and approving the processes for it to attain the appropriate balance of knowledge, skills, experience, diversity and independence to objectively and effectively discharge its governance role and responsibilities.*”<sup>3</sup>

Principle 2.3 of the Code also requires the Board, in determining its number, to consider certain factors such as the appropriate mix of knowledge, skills and experience. There should also be an appropriate mix of Executive, Non-Executive and Independent Non-Executive members such that majority of the Board are Non-Executive Directors. The Code further provides that there should be sufficient number of members that qualify to serve on the committees of the Board and secure quorum at meetings as well as diversity.

The Code appears to provide the Board with the flexibility to make decisions regarding its membership and composition. This is a change from the 2016 Code which expressly provided that Board members must not be less than 8 and prohibited the sitting of more than 2 members of the same or extended family on the Board of a company at the same time<sup>4</sup>. It, therefore, appears that these restrictions contained in the 2016 Code are no longer applicable.

3. **Chairman** – By virtue of Principle 3.3 of the Code, a person who is appointed as a Managing Director (MD), Chief Executive Officer (CEO) or Executive Director (ED) of a company is prohibited from also being appointed as the Chairman of that company unless there has been a cool-off period.<sup>5</sup> The cool-off period which was 7 years under the 2016 Code<sup>6</sup> has now been reduced to 3 years.

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<sup>3</sup> Principle 2.2 of the Code.

<sup>4</sup> See Principles 5.4 and 5.12 of the 2016 Code.

<sup>5</sup> This is the period of time which must elapse before an MD, CEO or ED of a company can be appointed as Chairman as well.

<sup>6</sup> See Principle of 6.1.4 of the 2016 Code.

The Code is however silent regarding whether the Chairman may sit on a Board committee - a prohibition that was strongly emphasised in Principle 6.1.9 of the 2016 Code. It may therefore be assumed from this omission that the Chairman of a company may now be appointed to sit on Board committees.

4. **Managing Directors** - Under Principle 4.8 of the Code, it is permissible for the MD of a company to be appointed as a Non-Executive Director (NED) on the Board of another company, provided the said position is not detrimental to the company where he/she is MD or against company policy. Also, the MD/CEO is not to be appointed as a member of the committees responsible for remuneration, audit, nomination and governance.<sup>7</sup>
5. **Non-Executive Directors** - Regarding the roles and responsibilities of NEDs, the Code stays within the ambit of the 2016 Code in providing that NEDs should be chosen on the basis of their wide experience, knowledge and personal qualities and not be involved in the day-to-day operations of the Company, which should be the primary responsibility of the MD/CEO and the management team. However, it excludes the provision contained in the latter on the responsibility of NEDs to evaluate the performance of the Chairman taking into consideration the views of the EDs.<sup>8</sup>
6. **Meetings of the Board** - The Code retains the requirement contained in the 2016 Code on the holding of Board meetings at least once every quarter. However, the Code omits the requirement for directors to attend at least two-third of all Board meetings and simply provides that every director shall endeavour to attend all Board meetings.<sup>9</sup>

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<sup>7</sup> See Principle 4.7 of the Code.

<sup>8</sup> See generally Principles 6 and 6.6 of the Code and the 2016 Code respectively.

<sup>9</sup> See Principle 10.2 of the Code.

In addition, under Principle 10.3 of the Code, it is recommended that minutes of meetings of the Board and its committees be prepared and sent to directors on a timely basis and be formally reviewed and approved by the members of the Board or relevant Board committee at its next meeting.

**7. Committee responsible for Risk Management** - The Code provides that the Risk Management Committee shall meet at least twice every financial year and unlike the 2016 Code, delves deeper into the extent of its functions as regard information technology. In this regard, the committee is required to review and recommend for approval of the Board, at least annually, the company's information technology (IT) data governance framework which may include the following:

- a. development of IT strategy and policy;
- b. proactive monitoring and management of cyber threats and attacks as well as adverse social media incidents;
- c. management of risks relating to third-party and outsourced IT service providers;
- d. assessment of value delivered to the company through investments in IT; and
- e. periodic independent assurance on the effectiveness of the company's IT arrangements.<sup>10</sup>

The Board is also recommended to establish a sound framework for managing risks and ensuring effective internal control<sup>11</sup>. The risk management framework is to be formally approved by the Board, communicated in simple and clear language to all employees and integrated into the day-to-day operations of the business.

**8. Evaluation of the Board** - The Code recommends that the Board establish a system to undertake a formal and rigorous annual evaluation of its own performance, that of its committees, the Chairman and individual Directors. The

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<sup>10</sup> See Principle 11.5.6.6 of the Code.

<sup>11</sup> Principle 17 of the Code

process is to be facilitated by an independent external consultant at least once in three years.

The result of the Board performance evaluation is to be communicated to the Board and discussed by it as a whole, while those of individual directors are to be communicated to and discussed with them individually by the Chairman. Where the performance of a director is considered unsatisfactory, the Board is to provide appropriate training to address the identified gaps.<sup>12</sup>

9. **Corporate Governance Evaluation** - The Code recommends that the Board ensures that an annual corporate governance evaluation, including the extent of application of the Code, is carried out by an independent external consultant at least once in three years. The summary of the report of the evaluation is to be included in the company's annual report and on the investors' portal of the company, if applicable.<sup>13</sup>
10. **Remuneration Governance** - The Code recommends that the remuneration for NEDs be fixed by the Board and approved by shareholders in a general meeting. It also recommends that companies implement a clawback 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.<sup>14</sup>
11. **Internal Audit Function** - The Code recommends that companies set up an internal audit function to be headed by a member of senior management who is a professional with relevant qualifications, competence, objectivity and experience and is registered with a recognised professional body. The Code also recommends that there should be an external assessment of the effectiveness of the internal

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<sup>12</sup> See Principle 14 of the Code.

<sup>13</sup> See Principle 15 of the Code.

<sup>14</sup> See Principle 16 of the Code.



audit function at least once every three years by a qualified independent reviewer to be appointed by the Board.<sup>15</sup>

- 12. Whistle-blowing** - Worthy of mention is the provision for whistle-blowing which seems to be a lot less comprehensive than the 2016 Code. While the 2016 Code expressly provides a procedure for whistle-blowing, the Code merely states that there should be an effective whistle-blowing mechanism in place.<sup>16</sup>

Other matters covered in the 2016 Code, but omitted in the Code, include the specific functions to be carried out by the head of the internal audit committee as regards whistle blowing, matters which are considered appropriate to be reported and sanctions for violating the whistle-blowing provisions, among others.

Perhaps, it may be argued that by not providing a comprehensive procedure for whistle- blowing, the intent of the 2018 Code is to give companies more room to construct their whistle blowing policies as they see fit.

- 13. External Auditors** - Whilst the provisions of the Code relating to external auditors are similar to the 2016 Code, the Code does not list specific matters on which external auditors cannot provide services to companies contained in the latter.<sup>17</sup> In this regard, the Code merely states that an external auditor may provide to the company only such other services as are approved by the Board on the recommendation of the committee responsible for audit and such as does not create a self-review threat in line with the provisions of international auditing standards.<sup>18</sup>

The Code also recommends that external audit firms be retained for no longer than ten years continuously and may not be considered for reappointment until seven

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<sup>15</sup> See Principle 18 of the Code.

<sup>16</sup> See Principle 18 of the 2016 Code.

<sup>17</sup> See Principle 19.4 of the 2016 Code.

<sup>18</sup> See generally Principle 20 of the Code.

years after their disengagement. It also recommends that there should be a rotation of the audit engagement partner every five years.

**14. General Meetings** - The Code recommends that the chairmen of all Board committees and of the statutory audit committee, be present at general meetings to respond to shareholders' inquiries.<sup>19</sup>

**15. Protection of Shareholders rights** - On the protection of shareholders, the Code emphasises that the duty of the company is to ensure that shareholders understand the ownership structure of the company. It also requires the directors to act honestly at all times in their management of the company.<sup>20</sup>

## **CONCLUSION**

The Nigerian Code of Corporate Governance 2018 appears to take a softer approach with respect to corporate governance and gives companies room to establish corporate governance policies which are suitable for their operations taking into cognisance the various recommendations in the Code. In this regard, it is stated expressly in the Code that “flexibility – the ability to apply the Code in a wide range of circumstances, and scalability – the ability to apply to companies of differing sizes, are of utmost importance for successful implementation”.

It is our opinion that whatever changes have been made in the 2018 Code are minor at best and whether or not they will have a major effect on companies remains to be seen. We, however, believe that there may be some benefit to affording companies the opportunity to tailor the Code's Principles to fit the peculiarities of their businesses as it could reduce the incidences of non-implementation of and non-compliance with the Code.

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<sup>19</sup> See Principle 21 of the Code.

<sup>20</sup> See Principle 23 of the Code.



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