THE FINANCIAL REPORTING COUNCIL
OF NIGERIA'S NATIONAL CODE OF CORPORATE
GOVERNANCE 2016 FOR THE PRIVATE SECTOR:

KEY HIGHLIGHTS

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The Financial Reporting Of Council of Nigeria's National Code of Corporate Governance 2016 For The Private Sector: Key Highlights

Introduction

The Financial Reporting Council of Nigeria (**FRCN**) released its National Code of Corporate Governance 2016 for the Private Sector (the **Code**) on 17 October 2016. The Code is applicable to (x) public companies (both listed and not listed); (y) private companies that are holding companies or subsidiaries of public companies; and (z) regulated private companies.[1]

Since it's unveiling, the Code has generated lots of interest to professionals and stakeholders across various sectors. This, amongst other reasons, is due to the fact that the Code by its provisions: (x) seeks to supersede other corporate governance codes which regulate other sectors; (y) provides a "one-size-fits all" code; and (z) is mandatory in its application.

Further, some of the provisions of the Code, whilst being unusual, are clearly inconsistent and seek to amend the provisions of the Companies and Allied Matters Act (**CAMA**) and other statutory legislations. In the paragraphs below, we seek to analyze the legality of the FRCN issuing the Code and highlight certain key provisions of the Code.

Legality of the FRCN Issuing The Code

From a read of section 7 and 8 of the Financial Reporting Council of Nigeria Act (**FRCN Act**) which provides for the powers and functions of the FRCN, it is clear that the intendment of the draftsman was to regulate and enforce accounting, auditing, and financial reporting standards in Nigeria. With this in mind, a further read of section 51(c) of the FRCN Act shows that the Act provides for the powers of the Directorate/Committee on Corporate Governance to issue codes of corporate governance and guidelines.[2] The foregoing reveals an internal disharmony and inconsistencies within the FRCN Act, and more importantly, the FRCN overreached its powers in section 51(c) and 77 of the FRCN Act by issuing a Code which seeks to cover the entire spectrum of corporate governance in Nigeria without limiting itself to regulating the accounting and financial reporting standards of companies.

It is unequivocal that as a subsidiary legislation, the Code cannot by its provisions overreach, override, amend or repeal other existing statutes which have been made by legislative enactment, neither can it amend other subsidiary legislation issued pursuant to already existing Acts of the

[1] Regulated private companies as defined under the Code means those private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC)

[2] Section 77 of the FRCN Act defines corporate governance to refer to the roles of persons entrusted with the supervision, control and direction of an entity.

National Assembly. Such a subsidiary legislation stands the risk of being declared *ultra vires* the FRCN and being declared null and void, to the extent of its inconsistencies with existing statutes of the National Assembly.

Moreso, as it is trite law that where there are two legislations, the legislation which is sector specific would override the more general legislation.[3]

Mandatory Nature of the Code

Section 2.3 of the Code provides that the Code is mandatory and this is reinforced by Section 37.1 of the Code which provides that violations of its provisions will occasion personal sanctions and sanctions against the company or firm involved in such violations.

Number of Directors

The minimum number of members of the board of directors is eight (8) directors in a public or private company. However, a regulated private company must have not less than five (5) directors. This is a direct contrast to CAMA which provides that all companies must have at least two (2) directors.[4]

The effect of this is that companies to which the Code applies will have to take measures to adjust their board structure and composition.

Family Members

Closely tied to the above, is the issue of family members on the board. According to the Code, not more than two members of the same or extended family can be on the board of one company at the same time. The Code defines an extended family member to mean those persons who may be reasonably expected to influence, or be influenced by, that person in his dealing with a company.

In this instance, companies' especially private companies which hitherto did not have this sort of restriction would need to adjust their board composition in compliance with the Code.

Voting powers

In relation to the voting powers of directors, the Code[5] provides that where a majority of independent directors do not agree with a decision of the board of directors, such a decision would only stand if it was supported by at least 75 percent of the entire board. The effect of this provision is that it elevates the independent directors above the majority of the board of directors and seems to create an illusion of a two-tier board system in which the executive directors report to the independent (non-executive) directors.

3 *See Aden Refinery Co Ltd v Ugland Management Co (1986) 3 All ER 737, @ P 739*
4 *Section 246(1) of CAMA.*
5 *Section 7.3 of the Code.*

It also contravenes the provisions of CAMA[6] which provide that decisions of the board of directors are arrived at by a majority of votes, and to this end, every director on the board of directors is entitled to one vote.

Board Appointment

The board has the power to develop a written, formal and transparent procedure for board appointment. This document will provide for the criteria for board appointment with emphasis on the strengths and weaknesses of the existing board, required skills and experience, gender and age diversity.

The Code also provides that appointments shall be a matter for the board as a whole. This is in direct conflict with the provisions of CAMA which provides that members at an annual general meeting (**AGM**) have the powers to appoint directors. The only power directors have to appoint other directors is to fill a casual vacancy caused by retirement, death, resignation or removal. Such an appointment stands subject to the approval of members at the next AGM.

Performance Evaluation

The board has a duty to create an evaluation system which shall include the criteria and key performance indicators and targets for the board, its committees, the chairman and individual committee directors. The board may engage the services of external consultants to facilitate the performance evaluation at least once every three years.

The result of the performance evaluation of each director shall be disclosed in the annual report on a named basis as well as the name of the external consultant facilitating the performance evaluation.

Corporate Governance Evaluation

Every company is mandated to undertake an annual corporate governance evaluation which should be facilitated by an independent consultant. The independent consultant must be registered by the regulator for such purpose.

Managing Director/Chief Executive Officer

Under the Code, the Managing Director/Chief Executive Officer (MD/CEO) cannot go on to become the chairman of the same company. However, should the Board decide that a former MD/CEO should become chairman of the company; there must be a seven (7) year cooling period. Furthermore, the board must (x) consult with majority and minority shareholders in advance; (y) inform the regulators disclosing reasons for such appointment; and (z) disclose the reason in the next annual report.

[6] *Section 263(2) & (9) of CAMA.*

MINORITY INTEREST EXPROPRIATION

To protect minority shareholders and other external stakeholders, the Code precludes insiders from engaging in transfers of assets and profits out of company for their personal benefits or for the benefit of those who directly or indirectly control the company.

Minority shareholders who individually or as a group hold not less than one percent of the share capital in a company are also entitled to submit items for inclusion in the agenda of the AGM of the company. This is cumbersome and would create a number of administrative hurdles for the company.

Most importantly, controlling shareholders have fiduciary duties to minority shareholders and must call a general meeting to discuss major or extraordinary transactions that may materially impact on the business of the company.[7]

CONCLUSION

The above are a few of the key highlights of the Code. There are other key areas which we would be discussing in subsequent newsletters.

These are early days and we envisage that diverse issues would be thrown up in the course of implementation.

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7 *Some of these businesses include acquisitions or divestitures, capital restructuring, change of business model, venture partnerships or similar activities.*