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**THE NIGERIAN CODE  
OF CORPORATE  
GOVERNANCE:  
A CALL FOR  
APPROPRIATE  
ENFORCEMENT  
MECHANISMS**



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# THE NIGERIAN CODE OF CORPORATE GOVERNANCE: A CALL FOR APPROPRIATE ENFORCEMENT MECHANISMS

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## ABSTRACT

The utility of sound corporate governance principles can never be overemphasised within the corporate sphere as these principles set out standard parameters evincing transparency, fairness and accountability in the administration of organisations. These standard practices have become imperative and almost an inevitable recipe for corporate successes and sustainable development in national and global economies. Indeed, the benefits of adopting strong corporate governance ethics remain alluring. Like other nations, Nigeria has over the years made assiduous efforts to develop and strengthen her corporate governance structures and practices with the formulation of a myriad of sector-specific and general regulations geared towards this purpose. The Nigerian Code of Corporate Governance (the "Code") issued in 2018 demonstrates Nigeria's latest attempt to institutionalise corporate governance best practices in Nigerian companies.

The Code premised on the realisation that good corporate governance is a crucial driver in the establishment of sustainable enterprise advocates for stronger governance practices within companies and accountability to shareholders amidst other ingenious provisions. Despite these remarkable provisions in the Code, it presents itself as being predominantly a voluntary and administrative guideline. The absence of ideal implementation and enforcement strategies, as well as sanctions for non-compliance with its provisions, leaves more to be desired.

This article seeks to analyse the key highlights of the Nigerian Code of Corporate Governance 2018 with specific emphasis on the dire need for the development of adequate implementation and enforcement strategies. It also recommends the formulation of proper enforcement strategies in a bid to unleash the desired holistic intendment of the Code.

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## INTRODUCTION

The financial crisis around the world and the consequent collapse of major corporate institutions in both developed and developing economies has brought to the fore the issue of corporate governance.<sup>1</sup> Consequently, corporate governance has received more considerable attention as a result of the increasing recognition that a company's corporate governance affects both its economic performance and its ability to access long-term, low-cost investment capital.<sup>2</sup> Recent cases of corporate governance failure in large companies have focused the minds of investors, boards, companies, regulators and indeed governments on the threat posed to the integrity of financial markets.<sup>3</sup>

Recent definitions of corporate governance have provided a very holistic interpretation of its nature. Pat Barrett, the Auditor General of Australia, stated:

*“Corporate governance is largely about organizational and management performance. Simply put, corporate governance is about how an organisation is managed, its corporate and other structures, its culture, its policies and the ways in which it deals with its various stakeholders. It is concerned with structures and processes for decision-making and with the control and behaviour that support effective accountability for performance outcomes/results.”*<sup>4</sup>

The corporate governance structure spells out the rules and procedures for making decisions on corporate affairs. It provides the structure through which the company objectives are set, as well as the means of attaining and monitoring the performance of those objectives. It also defines the accountability of those saddled with the responsibility of steering the company's affairs.<sup>5</sup> The adoption and effective implementation of corporate governance principles by corporate organisations have apparent benefits. Effective implementation of these principles contributes to the creation of a credible policy

environment thereby boosting the investment confidence of domestic and international investors in the overall interest of the economy. They also contribute significantly to macroeconomic stability thereby strengthening a nation's absorptive capacity to attract and mobilise development assistance flows.

## HISTORY OF THE CODE OF CORPORATE GOVERNANCE IN NIGERIA

The first corporate governance codes emerged in December 1992 in response to corporate failures in the United Kingdom.<sup>6</sup> A committee headed by Sir Adrian Cadbury produced a report, known as the Financial Aspects of Corporate Governance. The Report, now referred to as the Cadbury Report has predominantly influenced corporate governance thinking around the world.<sup>7</sup>

By the turn of the 21st century, the corporate challenges experienced by the world ushered in need of a more radical review of corporate governance practices. One of the remarkable outcomes of these efforts was the United States' Sarbanes-Oxley Act of 2002, also known colloquially as SOX.<sup>8</sup> The Act amongst other provisions made comprehensive provisions on certification of internal auditing, increased financial disclosure. The Act also birthed the imposition of criminal penalties on directors for non-compliance.

Nigeria has also had its fair share of corporate governance history. Before the 1990s, the principal company law in Nigeria was the Companies Act 1968, which was modelled after the Companies Act 1948 of the United Kingdom. The Law was repealed and replaced by the then Companies and Allied Matters Decree No. 1 of 1990.<sup>9</sup> This legislation had evolved over the years into the present-day Companies and Allied Matters Act Cap. C20, 2004. The current statute was the product of a rigorous process led by the Nigerian Law Reform Commission. The pioneer corporate governance code in Nigeria was the Code of Corporate Governance for Banks and Other

1 E.Y. Akinoye and O.O. Olasanmi “Corporate governance practice and level of compliance among firms in Nigeria: Industry Analysis” Journal of Business and Retail Management Research (JBRMR) Vol. 9 Issue 1 October 2014 p. 13.

2 F.I Ajogwu *Corporate Governance in Nigeria: Law and Practice*. Centre for Commercial Law Development, Lagos, Nigeria 2007 at page 1.

3 *ibid*

4 Pat Barret ‘Managing Risk as Part of Good Management - An ANAO Perspective’. Available at [https://www.anao.gov.au/sites/g/files/net4981f/Barrett\\_managing\\_risk\\_as\\_part\\_of\\_good\\_management\\_1996.pdf](https://www.anao.gov.au/sites/g/files/net4981f/Barrett_managing_risk_as_part_of_good_management_1996.pdf) last assessed 26 November 2019

5 Note 2

6 Olajide Olutuyi “How corporate governance can affect Nigeria's development” available at <http://www.financialnigeria.com/how-corporate-governance-can-affect-nigeria-s-development-blog-273.html> last accessed October 14, 2019.

7 Other countries followed suit, France (Vienot Report, 1995); South Africa (King Report, 1994); Canada (Toronto Stock Exchange recommendations on Canadian board practices, 1995); The Netherlands Report (1995); and Hong Kong (a report on corporate governance from the Hong Kong Society of Accountants, 1996).

8 *ibid*

9 Note 6.

Financial Institutions in Nigeria, issued by the Bankers Committee in August 2003.

In October 2003, SEC's 17-member committee, headed by Atedo Peterside, issued the Code of Best Practices on Corporate Governance in Nigeria. The SEC code primarily laid emphasis on the role of the board of directors and management; shareholder rights and privileges; and the audit committee. Not only was the code influential, it was also the first to be issued by any regulator in the country. Although the SEC code contained remarkable reforms, it soon became inadequate in addressing new emerging challenges. This inadequacy led to the formulation of sector-specific regulations tailored to address the respective sector-specific challenges. In 2006, the Central Bank of Nigeria (CBN) issued its Code of Corporate Governance for Banks in Nigeria Post Consolidation. The code was introduced to ensure accountability and transparency on the part of bank CEOs. The Code contained provisions which specified fines and penalties, including jail terms for erring CEOs. The National Pension Commission (PENCOM) issued its Code in 2008, known as the 2008 PENCOM Code. The National Insurance Commission (NAICOM) also issued its Code of Corporate Governance for the Insurance Industry in 2009. Subsequently, the Corporate Governance for the Telecommunication Industry 2016, was issued by the Nigerian Communications Commission.<sup>10</sup> These industry-specific codes were meant to address the issues that were not reflected under the SEC legislation. However, in 2011, SEC released the Code of Corporate Governance for Public Companies in Nigeria, which replaced its former 2003 SEC Code. This latest law was adjudged at the time as the most comprehensive corporate governance code in Nigeria. The Code is anchored on five main principles, which include: leadership, effectiveness, accountability, remuneration and relations with shareholders.

Following the establishment of the Financial Reporting Council of Nigeria (FRCN) in 2011, the FRCN through its Directorate of Corporate Governance assumed the responsibility to develop principles and practices of corporate governance. The FRCN demonstrated its first official duty in this regard with the formulation of the National Code of Corporate Governance 2016

(NCCG), released in October 2016. The NCCG made provisions for corporate governance legislation for private and public sectors as well as not-for-profit organizations. It was however suspended by the federal government in November 2016 following stiff opposition from various stakeholders.

## ANALYSIS OF THE NIGERIAN CODE OF CORPORATE GOVERNANCE 2018

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.<sup>11</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.<sup>12</sup> The Code highlights key principles that seeks to institutionalise corporate governance best practices in Nigerian companies. The Code seeks to promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment and ultimately rebuild public trust and confidence in the Nigerian economy.

The Code is divided into 7 (seven) parts comprising of 28 (twenty-eight) principles which evinces the minimum standard corporate practices to be adopted by corporate organisations in a bid to foster corporate accountability and business prosperity. One of the key highlights of the Code is its underlying "Apply and Explain" approach adopted in implementing and monitoring compliance with the Code.<sup>13</sup> This presupposes the application of all principles under the Code and requires companies to explain how the principles have been applied to suit their unique organisational context while still achieving the intended outcome of the principles.<sup>14</sup>

Principle 2 of the Code empowers its users to determine the size and composition of their boards taking into account the scale and complexity of their operations; the need for sufficient members to serve on its committees; the need to secure quorum at meetings; as well as ensuring diversity. Companies are now allowed the discretion to determine the size and composition of their Boards, within the confines of the requirements set out by their

<sup>10</sup> This replaced the replaced 2014 NCC Code

<sup>11</sup> Financial Reporting Council of Nigeria Act No. 6 of 2011

<sup>12</sup> Kanyinsola Ojeshina and Akorede Adelupe "The Code of Corporate Governance 2018 – A New Dawn for Corporate Governance in Nigeria? Available at <http://www.mondaq.com/Nigeria/x/779394/Corporate+Governance/The+Code+Of+Corporate+Governance+2018+A+New+Dawn+For+Corporate+Governance+In+Nigeria> Last accessed October 14, 2019

<sup>13</sup> This is different from the 2016 Code which utilised the more forceful 'Comply or Else' approach.

<sup>14</sup> KPMG "The Nigerian Code of Corporate Governance 2018: Board Advisory Services -Highlights and Implications" published January 2019. Available at <https://assets.kpmg/content/dam/kpmg/ng/pdf/advisory/2018-Nigerian-Code-of-Corporate-Governance.pdf> Last accessed October 14, 2019.

sectoral regulators. This flexibility affords companies significant control over their cost of governance.<sup>15</sup> The Code also discourages the transition of MD/CEOs or EDs to the role of Chairman and mandates a three-year cooling-off period where this is the case.<sup>16</sup> This requirement implies that retiring or retired MD/CEOs or EDs who aspire to the chairmanship in the same company would need to wait for the required three-year cooling-period before they can be considered. This will aid in curbing potential conflicts of interests.

The Code notably applies more stringent principles in relation to Independent Non- Executive Directors (INED). Principle 7 of the Code sets expectations for increased level of independence from INEDs. The benchmarks although not exhaustive aims at strengthening the independence on the board to ensure that directors who are classified as INEDs are “independent – both in character and in judgement”. Specifically, independent directors cannot have a shareholding in excess of 0.01% of the company’s paid-up capital.<sup>17</sup> An INED under the code must not have served as an employee for the company or any of its related companies within the preceding five years.<sup>18</sup>

The Code also buttresses the importance of an effective internal control system under principle 11. The code introduces additional responsibilities to the audit committee charging it to ensure the development of a comprehensive internal control framework and obtain annual assurance (internal and/ or external) and report annually in the audited financials on the design and operating effectiveness of the company’s internal controls over financial reporting. The Nigerian Code further recommends a maximum tenure of three terms of three years each for INEDs while recommending periodic refreshing of the NEDs on a Board.<sup>19</sup> Additionally, the Code recommends that the Boards of companies ensure 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.<sup>20</sup>

## THE NEED TO EFFECTUATE THE FULL INTENDMENT OF THE NIGERIAN CODE OF CORPORATE GOVERNANCE.

It is not in doubt that the Nigerian Code of Corporate Governance 2018 consists of remarkable principles which if meticulously adopted will significantly lead the target corporate sector to an unprecedented trajectory. The Code rejigs the existing governance principles while also introducing ingenious principles in a bid to bring the Nigerian corporate sector in line with international standards of governance which is desired for the accelerated and greater development of the corporate sector and the economy at large.

The flexibility and scalability mechanism adopted by the Code in achieving implementation is laudable. From the underlying philosophy of the Code, it is intended to apply in a wide range of circumstances<sup>21</sup> to companies of differing sizes.<sup>22</sup> Similarly, the Apply and Explain approach adopted by the Code which assumes application of all principles and requires entities to explain how the principles are applied is also a giant stride in ensuring that companies become more intentional with compliance to the Code as opposed to a “box-ticking” exercise previously obtainable. The continued recognition of the need for the creation of an effective whistle-blowing framework for reporting any illegal or unethical behaviour within a company<sup>23</sup> is a bold step intended to reduce corporate unethical and fraudulent conducts to the barest minimum hence re-projecting the Nigerian corporate sector as an alluring and safe harbour for business.

Despite the excellent and bold approaches intended by the code to bring about the anticipated change in the corporate sector much is still left to be desired. The Code lacks adequate specificity in certain salient areas of importance. The Code does not expressly prescribe its scope of application. It thus raises the ready assumption that the absence of a definitive scope suggests that it is intended to apply to all companies in Nigeria owing to its underlying scalability approach. The Minister of Trade and Investment,

15 ibid

16 Principle 3.3 of the Code

17 This is at variance with 0.1% shareholding requirement set out in the SEC Code. The 2009 NAICOM Code of corporate governance does not permit an INED to have any shareholding in the company.

18 This is at variance with the requirement of the SEC Code which prescribes 3 years

19 Principle 12.10 of the Code.

20 Principle 15 of the code.

21 The Flexibility of the Code

22 The Scalability of the Code.

23 Principle 19 of the code

perhaps with a view to clarifying the position, on 18th February 2019 issued a regulation (effective 15th January 2019)<sup>24</sup> expressly setting out the scope of application of the Code and directing that it shall also apply to “all regulated private companies being companies that file returns to any regulatory authority other than the Federal Inland Revenue Service (FIRS) and the Corporate Affairs Commission (CAC)”. Notwithstanding the scope of application of the Code as clarified in the aforesaid regulation, its applicability to private companies is still debatable in light of the Federal High Court of Nigeria’s decision in **Eko Hotels Limited v. Financial Reporting Council of Nigeria**<sup>25</sup> to the effect that “the jurisdictional scope of the Act is limited to public companies and other public entities and does not include private companies”<sup>26</sup>

Another issue that has been on the front burner for discussion is the totally voluntary compliance platform the Code presents to the applicable companies. The absence of specific and concrete implementation and enforcement strategies is an issue. It is intended that the implementation of this Code will be monitored by the FRC through the “*sectoral regulators and registered exchanges*”<sup>27</sup> who are empowered to impose appropriate sanctions based on the specific deviation noted and the company in question.<sup>28</sup> Additionally, the FRC may conduct reviews on the implementation of the Code where deviations from the Code recur. Other monitoring mechanisms adopted by the FRC will be based on its review of the level of implementation of the Code.<sup>29</sup> The above provision of implementation and enforcement is grossly weak and inadequate to ensure effective and wholesome compliance from the target companies. In Nigeria, it is not in doubt that there exist notable discrepancies in the strength of sector-specific regulators. While certain sector-specific regulators may strive to ensure standard compliance<sup>30</sup> some other sector regulators may be too complacent to advocate and enforce strict compliance. Based on this there is a greater need for a more concrete implementation approach.

Under the Code, the absence of proper enforcement

mechanisms in the event of a breach of the requirements of the code poses a serious challenge. While the Code presents itself as a mere administrative guide, it is imperative that the ingenious provisions of the code does not stop at mere letters but are implemented to bring about the desired effect of the code. The need for companies to be more intentional about standard compliance with corporate governance principles cannot be overemphasized. There must be an adequate structure in place to address the fate of erring companies. Corporate governance principles are necessary as they not only promote transparency and accountability but also promote increased confidence among shareholders and stakeholders necessary for greater growth. It is thus imperative that some force of all be given to the salient provisions of the code to ensure strict compliance among companies.

By the provisions of the code, the “registered exchanges” are empowered to impose appropriate sanctions based on the specific deviation noted and the company in question.<sup>31</sup> However, the Nigerian Stock Exchange (NSE) which is so empowered neither has any specific and concrete enforcement mechanism to ensure compliance. The NSE merely provides mild provisions urging companies to comply with the code.<sup>32</sup> These provisions although relating to the SEC’s Code of Corporate Governance for public companies, nonetheless go to show the NSE’s approach in ensuring compliance.

To ensure greater compliance with these principles stated in the code, it is imperative to compel greater accountability by having in place some form of legal force to ensure compliance. In curbing this challenge, subsidiary legislation creating legal rights and liabilities in respect of salient provisions of this code should be enacted.<sup>33</sup> By this approach, the Code still retains its “persuasive” outlook whilst its intentment garners legal force hence compelling greater accountability via the instrumentality of a separate channel. In the same vein, other sectoral regulators could significantly compel accountability and compliance from their respective sectoral companies by

24 The Regulation was intended to apply retrospectively.

25 FHC/L/CS/1430/2012.

26 It is however arguable that the court’s decision was made in light of the existing Code of Corporate Governance Rules at the relevant time where the applicability of the code was strictly limited to public companies.

27 The Code does not expressly define “sectoral exchanges” however, it is safe to conclude that the Nigerian Stock Exchange is a perfect demonstration of its intentment.

28 The Implementation section of the Nigerian Code of Corporate Governance 2018

29 *Ibid.*

30 The banking sector is an apt example of this category.

31 *Ibid.* Note 23

32 See Part 1 Rules 9.11 (a) and Part A Rule 1.1 Paragraph D (3) of the Rule Book of the Nigerian Stock Exchange.

33 The Companies Proceeding Rules 2012 is an example of such subsidiary legislation creating binding legal rights and liabilities.

formulating sectorial codes<sup>34</sup> which embody these governance principles. These sectorial codes which invariably have the legal force will certainly compel greater compliance with the governance principles by companies. Furthermore, the NSE's impact could also be significantly felt in ensuring greater compliance with the principles of governance by listed companies. The inclusion of a detailed report adopting the "apply and explain" approach by companies regarding their compliance with these governance principles as a condition precedent for continued listing under the NSE would be of remarkable value in ensuring adherence. This requirement would enable shareholders in knowing where the companies they have invested in stand in relation to the Code, thus strengthening public accountability.

### CONCLUSION

The realization that Corporate Governance is a key driver of corporate accountability and business prosperity have intensified the efforts of nations to continually strengthen their corporate governance legislations. The Nigerian Code of Corporate Governance 2018 is

a remarkable giant stride formulated towards ensuring greater transparency and accountability in the Nigerian corporate sector. Despite this feat, it is imperative for the actual intendment of the code to be realized. The Code which contains ingenious principles lacks the necessary momentum to realise its full intendment owing to the absence of concrete enforcement strategies.

In order to actualize true corporate governance under this refined system, the sector-specific regulators, as well as the Nigerian Stock exchange, must make conscious efforts to help achieve this feat. To ensure greater compliance with these principles stated in the code, it is imperative to compel greater accountability by having in place some form of legal force to ensure compliance. It is firmly believed that where sound ethical and governance values are instilled in any company's corporate structure, the potential for sustained growth is unassailable. Finally, despite its potential pitfalls, we remain optimistic on the likely impact of the Code on the development of Nigerian corporate governance.

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<sup>34</sup> The existing sector specific codes such as the Nigerian Communication Commission Code etc could be rejigged to contain governance principles.

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