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## **UNIFYING NIGERIA'S SECTORAL CORPORATE GOVERNANCE REGIMES THROUGH A NATIONAL CODE OF CORPORATE GOVERNANCE FOR THE PRIVATE SECTOR**

Since 2011, the Federal Reporting Council of Nigeria (“**FRCN**”) had been navigating certain legal hurdles in its bid to regulate the operations of companies (public sector, private and Not-For- Profit). However, on 17<sup>th</sup> October, 2016, it finally issued a *three-in-one* National Code of Corporate Governance (“**NCCG**”) aimed at regulating governance issues within organizations in Nigeria.

The newly issued NCCG is divided into three (3) codes, to wit:

- (i) National Code of Corporate Governance for the Private Sector in Nigeria 2016 (“**Private Sector Code**”);
- (ii) Public Sector Governance Code in Nigeria 2016 (“**Public Sector Code**”); and
- (iii) Not-For-Profit Organizations Governance Code 2016 (“**Not-For-Profit Code**”).

Whilst it is expressed that both the Private Sector Code and the Not-For-Profit Code take immediate effect from the date (17<sup>th</sup> of October 2016) of their release, the Public Sector Code is scheduled to take effect after an executive directive from the Federal Government of Nigeria, has been secured.

According to the FRCN, the delay announcing the effective date of the Public Sector Code “*is due to the fact that the enabling laws that set up most government establishments already carry some form of governance structure that will require an umbrella legislation to unify the different provisions of those laws to synchronize with this Code*”.

On a preliminary note, we find this explanation on why the Public Sector Code cannot be effective at this time, rather curious given that the same argument could be made with respect to why the Private Sector Code should not become effective immediately given that different companies within the Private Sector already have different and varying “governance” rules applying to them.

On the back of our preliminary note, we will, in this newsletter, critic in some detail, the provisions of the Private Sector Code which attempts to harmonize and unify all the existing sectoral corporate governance codes in Nigeria whilst granting to the FRCN, superior regulatory powers over all other sector-specific regulators as it pertains to corporate governance issues.

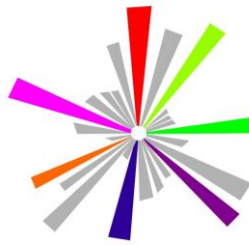
Additionally, this newsletter analyses the new innovations introduced into the corporate governance regime in Nigeria as well as the legal and regulatory implications on doing business in the Nigerian private sector.



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## LEGAL FRAMEWORK

The FRCN, which was established under the Financial Reporting Council of Nigeria Act, 2011 (“**FRCN Act**”), to replace the defunct Nigerian Accounting Standards Board, is charged with the “**responsibility for, among other things, developing and publishing accounting and financial reporting standards to be observed in the preparation of financial statement of public entities in Nigeria; and for related matters**”. Specifically, under section 7 of the FRCN Act, the FRCN is given the powers **to do all things necessary** for or in connection with the performance of these functions.

The FRCN is permitted to issue rules and guidelines for the purpose of:

- implementing auditing and accounting standards;
- **ensuring good corporate governance practices in the public and private sectors of the Nigerian economy;**
- harmonizing activities of relevant professional and regulatory bodies as relating to Corporate Governance and Financial Reporting; and
- establishing a Directorate of Corporate Governance.<sup>1</sup>

Additionally, the Directorate of Corporate Governance, established under Section 23 of the FRCN Act, is mandated among other things to:

- develop principles and practices of corporate governance;
- promote the highest standards of corporate governance;
- promote public awareness about corporate governance principles and practices; and
- on behalf of Council, act as the national coordinating body responsible for all matters pertaining to corporate governance<sup>2</sup>.

In pursuance of the FRCN Act, on the 17<sup>th</sup> of January 2013, the Honourable Minister of Trade and Investment directed the Steering Committee on the National Code of Corporate Governance (“the Steering Committee”) to develop a code for the private and public sectors and subsequently, on the 29<sup>th</sup> of November 2013, a further directive was issued for the scope of the corporate governance code to be extended to the Not-For-Profit sector of the economy.

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<sup>1</sup> Sections 8(2), 11(c), 11(e) and 23 of the FRCN Act

<sup>2</sup> Section 50 of the FRCN Act



Undoubtedly, from the foregoing, it does appear that the FRCN has been imbued with the relevant powers to issue the new NCCG, and the issuance was done in compliance with the directives of the Honourable Minister of Trade and Investment.

## **THE PRIVATE SECTOR CODE**

### **Applicability:**

The Private Sector Code (the “Code”) is a **mandatory**<sup>3</sup> corporate governance framework to which all affected business organisations must comply and it is stated to be the minimum standard for corporate governance in Nigeria<sup>4</sup>.

To this end, the Code is applicable to:

- (i) **All** public companies (*whether listed or not*);
- (ii) **All** private companies that are **holding companies** or **subsidiaries of public companies**; and
- (iii) **Regulated** private companies.

“Regulated Private Companies” are defined in section 40.1.14 of the Code<sup>5</sup> as “**private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission, except such companies with not more than eight (8) employees**”.

### **Harmonisation of Sector-Specific Codes:**

The development of the Code and the issuance of same has introduced for the first time, a harmonised and unified regime of corporate governance in Nigeria. The subsisting sectoral codes of corporate governance that have now been harmonized are:

- Code of Corporate Governance for Banks in Nigeria Post-Consolidation 2006;
- Code of Corporate Governance for Licensed Pensions Operators 2008;
- Code of Corporate Governance for Insurance Industry in Nigeria 2009;
- Securities and Exchange Commission (“SEC”) Code of Corporate Governance in Nigeria 2011;

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<sup>3</sup> Section 2.3 of the Code

<sup>4</sup> Section 2.2 of the Code

<sup>5</sup> Section 2.1 of the Code

and

- Central Bank of Nigeria (“**CBN**”) Code of Corporate Governance for Banks and Discount Houses 2014.

By this harmonization, it would appear that various sector-specific regulators such as the CBN, the National Pension Commission, the National Insurance Commission, the SEC, and other self-regulatory organisations and apex-regulatory bodies shall, henceforth, apply only the Code as their general guidelines for corporate governance. Nonetheless, these regulators are permitted to issue sector specific supplementary guidelines on sector-centric matters relating to corporate governance, to the extent such guidelines **do not conflict** with the provisions of the Code. In cases of conflict between the Code and other sector specific supplementary guidelines, the provisions of the Code shall prevail.

### **Board of Directors**

The Code provides rules and principles on matters such as:

- The Main Purpose of the Board of Directors<sup>6</sup> (the “**Board**”);
- Responsibilities of the Board<sup>7</sup>;
- Board Structure and Composition<sup>8</sup> (including additional disclosure requirements of directors);
- Meetings of the Board<sup>9</sup>;
- Board Committees<sup>10</sup>;
- Appointments to the Board<sup>11</sup>;
- Tenure and Re-election of Directors<sup>12</sup>; and
- Performance Evaluation<sup>13</sup>.

Specifically, the Code provides that the minimum number of directors on a Board shall be eight (8) directors at any given time<sup>14</sup>, with the number of non-executive directors on the board not being less than two-thirds of the total members of the Board; and the number of independent non- executive directors not being less than half of the number of non- executive directors on the Board.

The Code goes further to prescribe that, without prejudice to the minimum number of directors and the ratios of non-executive directors to independent non-executive directors on the Board, the Boards of

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<sup>6</sup> Section 3 of the Code

<sup>7</sup> Section 4 of the Code

<sup>8</sup> Section 5 of the Code

<sup>9</sup> Section 7 of the Code

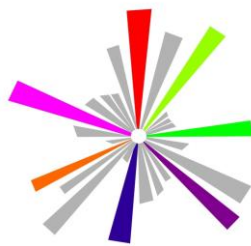
<sup>10</sup> Section 8 of the Code

<sup>11</sup> Section 9 of the Code

<sup>12</sup> Section 14 of the Code

<sup>13</sup> Section 15 of the Code

<sup>14</sup> Section 5.4 of the Code



## BANWO & IGHODALO

“regulated private companies” that **are not** holding companies or subsidiaries of public companies shall be constituted of five (5) or more directors with three (3) of such directors being non-executive directors (of which a majority shall be independent non-executive directors)<sup>15</sup>.

As laudable as this new development may appear, it clearly runs contrary to the provision of Section 246(1) of the Companies and Allied Matters Act (“**CAMA**”) (Cap. C20, Laws of the Federation of Nigeria 2004)<sup>16</sup>, which states **that a minimum of two (2) directors at a time, shall constitute the Board of any private company.**

Other notable provisions in the Code include:

- (1) restriction of:
  - (i) Board membership of family members (including extended family) to not more than two (2) family members<sup>17</sup>;
  - (ii) Managing Directors/Chief Executive Officers (“**MD/CEO**”) of companies assuming office as Chairmen of the same companies where they acted as MD/CEO. Subject to “very exceptional circumstances” a former MD/CEO may assume a Chairman position after a “cool off period” of seven (7) years after holding the position of MD/CEO<sup>18</sup>; and
  - (iii) the Board Chairman from sitting on any Board Committee<sup>19</sup>, (except in the case of regulated private companies having a Board size of five (5), where the Chairman may then be a member of the Nomination and Governance Committee and Remuneration Committee, but shall not chair any of the two (2) committees<sup>20</sup>); and
- (2) the introduction of powers of the Board to appoint and remove the Head of Internal Audit (upon recommendation of the Statutory or Board Audit Committee)<sup>21</sup>.

These are clear departures from what was hitherto permissible for the Board.

Also, the tenure of office of the MD/CEO shall no longer exceed two (2) terms of five (5) years each<sup>22</sup>; while that of other Executive Directors and Non-Executive Directors shall be maximum of three (3) terms of four (4) years each<sup>23</sup>.

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<sup>15</sup> Section 5.7 of the Code

<sup>16</sup> The primary legislation governing company affairs in Nigeria

<sup>17</sup> Section 5.12 of the Code

<sup>18</sup> Section 6.1.4 of the Code

<sup>19</sup> Section 6.1.9 of the Code

<sup>20</sup> Section 8.7 of the Code

<sup>21</sup> Section 4.7 of the Code

<sup>22</sup> Section 14.3 of the Code

<sup>23</sup> Sections 14.4 & 14.6 of the Code

Additionally, the Code appears to make it permissible for the Board to appoint directors of a company, subject to ratification by the relevant industry regulator(s), where applicable<sup>24</sup>. This is contrary to the provisions of CAMA, which mandatorily preserves the powers to appoint directors to members at an Annual General Meeting<sup>25</sup>. Although, in cases of casual vacancies on the Board arising out of death, resignation, retirement or removal, CAMA permits the Board to appoint directors to fill such vacancies, such appointments are still subject to ratification at the next Annual General Meeting<sup>26</sup>.

Also, the Code specifies that remuneration of the MD/CEO shall be **determined** by the Remuneration Committee<sup>27</sup>. This is clearly at variance with the unequivocal provisions of CAMA which prescribes generally, that the remuneration of directors shall from time to time be determined by the company in general meeting<sup>28</sup>; whilst the remuneration, of the Managing Director, shall be as **determined** by the Board<sup>29</sup>. Furthermore, the Code appears to limit the powers of the Remuneration Committee to make “recommendations” to the Board to only instances where compensation payable to executive directors and senior management employees for any loss of office or termination of appointment is being determined. This is to ensure that such compensation is consistent with contractual terms, fair and not excessive<sup>30</sup>.

Clearly, from the foregoing, it would appear that the Code is diluting the powers of the Board (as we know it) in relation to certain matters, and giving such powers to committees of the Board.

The Code makes it mandatory for public companies to have a Board Audit Committee (in addition to the Statutory Audit Committee prescribed by CAMA)<sup>31</sup>, which shall meet at least once every quarter<sup>32</sup>. In addition, every private company to which the Code applies is also expected to have a Board Audit Committee<sup>33</sup>.

Since both the Statutory Audit Committee and Board Audit Committee have certain similar functions and are empowered to make recommendations to the Board:

- either independently or jointly, where they co-exist, on the appointment and re-appointment and removal of external auditors<sup>34</sup>;

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<sup>24</sup> Section 9.4 of the Code specifically provides that “*The nomination Committee shall recommend names of prospective candidates for consideration for directorship positions. The board shall appoint directors subject to ratification by the relevant industry regulator(s), where this is applicable*”.

<sup>25</sup> Section 248 of CAMA

<sup>26</sup> Section 249 of CAMA

<sup>27</sup> Section 6.3.8 of the Code

<sup>28</sup> Section 267(1) of CAMA

<sup>29</sup> Section 268 of CAMA

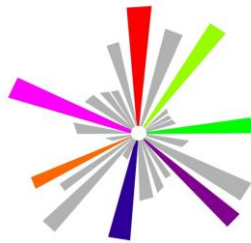
<sup>30</sup> Section 8.13.5 of the Code

<sup>31</sup> Section 8.14.3 of the Code

<sup>32</sup> Section 8.14.6 of the Code

<sup>33</sup> Section 8.14.10 of the Code

<sup>34</sup> Section 19.1 of the Code



## BANWO & IGHODALO

- on the removal of the head of the internal audit where they co-exist<sup>35</sup>;

we hold the considered view that these overlapping dual powers may cause operational conflict between both committees, which ultimately will not be in the best interest of the company.

### **Internal Audit Functions:**

Contrary to other Codes of Corporate Governance that recognize that the Head of Internal Audit of a company needs not be an employee of the company, the Code seeks to review the discretion of companies to outsource its internal audit functions to external auditors<sup>36</sup>. Specifically, the Code provides that the head of the internal audit function shall be a member of senior management<sup>37</sup>.

### **Risk Management and Audit (Whistleblowing):**

The Code prescribes that all private companies shall henceforth **have a whistle-blowing policy**, which shall be known to employees, stakeholders (such as contractors, customers, service providers, creditors, shareholders, job applicants and the general public)<sup>38</sup>. In addition, the Code provides that the establishment and implementation of a whistle blowing policy for reporting any illegal or unethical behavior (with or without the knowledge or involvement of the company's external auditors) **shall now be the responsibility of the Board**; which shall also accord priority to the policy and continually reaffirm its support for, and commitment to, the company's whistle-blower protection mechanism<sup>39</sup>. Furthermore, the Code provides that the responsibility for summarizing, collating and reviewing reported cases, cases investigated, the process of investigation and the results of the investigations, rests with the head of internal audit function, who is obliged to bring it to the notice of the Statutory and/or Board Audit Committees<sup>40</sup>.

Whistle-blowers are now, by the Code enjoined, to disclose any information connected with the activities of companies, which indicate that (i) an offence is about to be, is being or has been committed; (ii) a person has failed to comply with **any laws, internal policies and procedures**, etc; or (iii) someone has concealed any matter falling within (i) or (ii) above.

Any disclosure by a whistle-blower must be (i) in respect of matters which he believes to be true; (ii) reasonable; (iii) made in good faith; and (iv) one that can be investigated<sup>41</sup>. Pursuant to the Code, a

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<sup>35</sup> Section 17.15 of the Code

<sup>36</sup> Section 19.4(b) of the Code

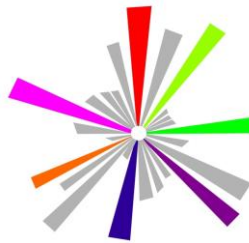
<sup>37</sup> Section 17.15 of the Code

<sup>38</sup> Section 18.3 of the Code

<sup>39</sup> Section 18.4 of the Code

<sup>40</sup> Sections 18.6 and 18.7 of the Code

<sup>41</sup> Section 18.9 of the Code



## BANWO & IGHODALO

cloak of confidentiality is to be deployed when dealing with all disclosures resulting from whistle-blowing and the identity of the whistle-blower<sup>42</sup>.

Lastly, the Code mandates that no company shall subject a whistleblower to any detriment<sup>43</sup> and any employee who has suffered any detriment by reason of disclosure made pursuant to the provisions of this Code shall be entitled to compensation and/or reinstatement provided that in the case of compensation, the employee's entitlement shall be computed as if he had attained the maximum age of retirement or had completed the maximum period of service, in accordance with his condition of service<sup>44</sup>.

### **External Audit:**

The Code introduces **mandatory engagement of Joint External Auditors** by Listed and Significant Public Interest Entities for their statutory audit<sup>45</sup>. This requirement may lead to increased costs of procuring audit services for the relevant companies without guaranteed outcome of improved quality. More importantly, the definition of Public Interest Entities is inconsistent with the definition ascribed to that term in the FRCN Act. Thus, the Code will need to be revised to bring same in conformity with the provisions of the law.

The Code also provides for a maximum period of ten (10) years for retention of services of an external audit firm (with the option of re-appointment after seven (7) years)<sup>46</sup>. Where an external auditor's aggregate or cumulative tenure has already exceeded ten (10) years at the date of commencement of the Code, **such auditor shall cease to hold office as an auditor** of the company at the end of the financial year in 2016<sup>47</sup>. Thus, any audit firm that has worked any company for ten (10) years or more without rancor and/or a dip in the quality of their services, must by this Code, cease to act as the company's external auditors, at the end of year 2016, without more.

Undoubtedly, this provision of the Code on disqualification of auditors is at variance with the provisions of CAMA, which already prescribe circumstances under which persons may be disqualified from being appointed as external auditors. The Code will most definitely, need to be revised in order to align same with the provisions of CAMA.

The Code stipulates that where the Board and/or Statutory Audit Committees make recommendations for the appointment, re-appointment or removal of an external auditor, such recommendation can only be overridden by a seventy-five per cent (75%) vote of the Board's full membership and the fact of and override should be disclosed in the annual report<sup>48</sup>.

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<sup>42</sup> Section 18.10 of the Code

<sup>43</sup> Section 18.11 of the Code

<sup>44</sup> Section 18.13 of the Code

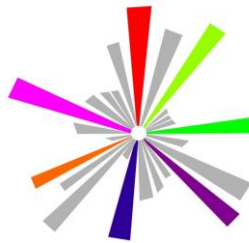
<sup>45</sup> Section 19.2.1 of the Code defines, "Listed and Significant Public Interest Entities" as entities whose market capitalization is not less than ₦1billion and/or whose annual turnover is not less than ₦10billion.

<sup>46</sup> Section 19.3 of the Code

<sup>47</sup> Ibid

<sup>48</sup> Section 19.10 of the Code





## BANWO & IGHODALO

The Code prescribes a mandatory rotation period of five (5) years for audit partners assigned to undertake the external audit of a company<sup>49</sup> and specifies instances where a **retired partner of an audit firm** which provided, or is providing audit services, may be hired<sup>50</sup> as well as instances where a **partner or staff of an audit company (from the level of Audit Manager and above), which has provided audit services to a company, may be employed by such company**<sup>51</sup>.

In addition to the foregoing, the Code provides that where the existing or first statutory auditor is an International Firm<sup>52</sup>, the second auditor, **who must be appointed by a show of hands in an Annual General Meeting, rather than a poll**, shall be a National Firm<sup>53</sup>. The rationale for distinguishing between International and National Firms appears to be unclear and fails to portend on how this distinction will improve corporate governance mechanics in companies.

In relation to the mandatory voting by show of hands instead of by poll for the purposes of appointing a National Firm as an auditor, it is important to highlight that CAMA provides for rights of the chairman of a board as well as specific categories of members at a general meeting to demand a poll when a resolution is put to vote<sup>54</sup>. Indeed, to give credence to how important the right to demand a poll is, Section 225 makes void any provision in a Company's Articles that excludes the right to demand a poll. The only instance where the right to demand a poll is excluded, is with respect to the election of members of the **audit committee as established by a public company** under Section 359 of CAMA.

However, from our reading of certain provisions of the Code, it would appear that these provisions attempt to extinguish the right to demand a poll, by restricting the voting in relation to a resolution for appointment of subsequent auditors (other than the first auditor), **to a show of hands**.

Additionally, the Code also attempts to restrict voting by members in a general meeting **to a show of hands only** in instances, where FRCN, being satisfied that an external auditor of a company has abused his office or acted in a fraudulent manner or colluded in any fraud in the company, directs, by regulatory order, that the company approaches its members to consider and resolve whether on the basis of any facts revealed, the company in general meeting shall change its auditors.

Given the clear departure from an engrained provision of CAMA which preserves the traditional right of a shareholder (which is personal and cannot not be extinguished except with the consent of the relevant shareholder) intrinsically linked to the shares held by the shareholder, the drafters of the Code must cause these offending provisions to be expunged as they conflict rather deeply with the provisions of CAMA and the rights of shareholders.

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<sup>49</sup> Section 19.5 of the Code

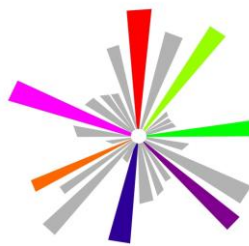
<sup>50</sup> Section 19.6 (a) of the Code

<sup>51</sup> Section 19.6 (b) of the Code

<sup>52</sup> Defined in the Code as an "audit firm that has at least a non-Nigerian partner in the Firm whether incidental or otherwise; whilst a National Firm was defined as an audit firm that has no non-Nigerian in the partnership in the firm whether incidental or otherwise.

<sup>53</sup> Section 19.2.2 of the Code

<sup>54</sup> Section 224 of the CAMA



## BANWO & IGHODALO

On a final note, External Auditors are now mandated to report to FRCN, any information which they discover during an audit that leads them to believe that the company or anyone associated with it has committed an indictable offence under the Companies and Allied Matters Act, Cap C20 Laws of the Federation on Nigeria 2004, any other Statute, or regulation(s).

### **Relationship with Shareholders:**

The Code also makes provisions shaping the relationship of the Board with the shareholders, in addition to those earlier specified in the CAMA. These cover areas such as: Protection of Shareholder Rights<sup>55</sup>; Role of Shareholders' Associations<sup>56</sup>; and Institutional Investors<sup>57</sup>. In addition, the Code makes provision for venue<sup>58</sup> and notice<sup>59</sup> of general meetings.

Specifically, the Code provides that the venue of general meetings shall be accessible to shareholders, so as to ensure such shareholders are not disenfranchised on account of choice of venue. The Code also provides that notices of general meetings shall be at least twenty-one (21) days ***from the date on which the meeting would be held***, which differs from the provisions of CAMA which prescribes twenty-one (21) days' notice ***from date on which the notice was sent out***<sup>60</sup>, and also stipulates that a general meeting of a company shall, notwithstanding that it is called ***by a shorter notice***, (that is, less than twenty-one (21) days), be deemed to have been duly called. To our mind, the fore-going provision of the Code, conflicts with the provision of CAMA relating to shorter notice, since period of notice in the Code was strictly pegged at ***not less than twenty-one days, without the option of convening a meeting at shorter notice***.

### **Minority Shareholder Protection:**

The Code makes prohibitions against such activities that may occasion Minority Interest Expropriation<sup>61</sup>; Insider Trading<sup>62</sup>; Related Party Transactions<sup>63</sup>; and Conflict of Interests<sup>64</sup> in the conduct of the affairs of private companies.

### **Relationship with Other Stakeholders:**

The Code puts "Sustainability Issues"<sup>65</sup> at the core of the relationship of the board of private companies with other stakeholders outside. Pursuant to the provisions of the Code, private companies shall, henceforth, pay adequate attention to the interests of their stakeholders such as employees, creditors, consumers, suppliers, trade unions, host community, government, the general public and future generations<sup>66</sup>.

<sup>55</sup> Section 22 of the Code

<sup>56</sup> Section 26 of the Code

<sup>57</sup> Section 27 of the Code

<sup>58</sup> Section 23 of the Code

<sup>59</sup> Section 24 of the Code

<sup>60</sup> Section 217(1) of CAMA

<sup>61</sup> Section 28 of the Code

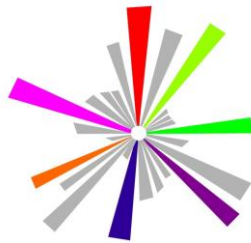
<sup>62</sup> Section 29 of the Code

<sup>63</sup> Section 30 of the Code

<sup>64</sup> Section 31 of the Code

<sup>65</sup> Section 32 of the Code

<sup>66</sup> Section 32.1 of the Code



## BANWO & IGHODALO

Private companies shall also recognize corruption as a major threat to business and to national development and therefore as a sustainability issue for businesses in Nigeria. **Companies, boards and individual directors are mandatorily enjoined to commit themselves to transparent dealings and to the establishment of a culture of integrity and zero tolerance of corruption and corrupt practices**<sup>67</sup>.

### Transparency:

All private companies shall make full **disclosures** of all matters specified in the Code<sup>68</sup>. The Boards of all private companies shall, henceforth, **report annually on the nature and extent of its social, ethical, safety, health and environmental policies and practices**.

Companies shall strive to achieve international best practices and therefore engage in full disclosure of all matters set out in the Code.

Particularly, the Code provides that the Board of every company shall ensure that the **company's annual report includes a corporate governance report** that conveys to stakeholders, clear information on **the strength of the company's governance structures, policies and practices**<sup>69</sup>. The report shall include the company's sustainability policies and programmes covering social issues such as corruption, community service, including environmental protection, HIV/AIDS and matters of general corporate social responsibility<sup>70</sup>.

Every company shall carry out a **Corporate Governance Evaluation annually**, which shall be facilitated by an independent external consultant, who must be registered by the regulator for this purpose<sup>71</sup>. The Corporate Governance Evaluation **shall not** be undertaken by the company's external auditor or a firm related to the external auditor<sup>72</sup>.

Also, **the report of the evaluation shall be presented at the company's annual general meeting and a copy of the report sent to FRCN** and made accessible on the investors' portal of the company<sup>73</sup>.

All private companies shall adopt and implement a **communications policy** that enables the Board and Management to communicate, interact with and disseminate information regarding the operations and management of the company to shareholders, stakeholders and the general public<sup>74</sup>.

In addition, companies shall ensure shareholders have equal access to the company's information and to this end, the Board shall establish **websites and investors' portals**, where the communication policy as well as the company's annual reports **for a minimum of five (5) immediately preceding years**, and other relevant information about the company, **shall be published** and made **accessible in downloadable format** to the public<sup>75</sup>.

<sup>67</sup> Section 32.2 of the Code

<sup>68</sup> Section 33.1 of the Code

<sup>69</sup> Section 33.4 of the Code

<sup>70</sup> Section 33.4 (p) of the Code

<sup>71</sup> Section 34.1 of the Code

<sup>72</sup> Section 34.2 of the Code

<sup>73</sup> Section 34.3 of the Code

<sup>74</sup> Section 35.1 of the Code

<sup>75</sup> Section 35.4 of the Code

### **Enforcement:**

Violation of any provision of the Code by any affected company shall attract **“both personal sanctions against the persons directly involved in the violation, and sanctions against the companies or firms involved in such violation”**<sup>76</sup> and the enforcement of the Code shall be the responsibility of the FRCN and sectoral regulator, where applicable<sup>77</sup>.

A sectoral regulator in exercise of its regulatory functions shall in its guideline, provide for sanction for violation of this code, in respect of the sector it regulates and where sanctions have been so imposed, the person or the firm is precluded from making any reimbursements to the person or firm so sanctioned<sup>78</sup>.

### **Transition**

In accordance with the transitional arrangement provisions of the Code, an entity shall begin the application of the Code **“in its annual reports for the periods beginning on or after 17<sup>th</sup> October 2016”**. However, an entity that applies the Code in its annual report earlier than this time is required to disclose that fact, in the report<sup>79</sup>.

### **CONCLUDING REMARKS**

Although, the objectives of the Code appear laudable and should engender good corporate governance culture across all sectors of the Nigerian economy, if well implemented, we think it noteworthy to point out that the implementation of the Code, (which can, at best, be termed as “guidelines” as they were not birthed by any legislative process in the National Assembly), may be faced with major hurdles, given the inconsistency with quite a few of its provision, with substantive law.

Without more, the Code in its present form, cannot operate to amend or repeal either FRCN Act<sup>80</sup> or any other legislative enactment; and where any provisions of the Code is inconsistent with the FRCN Act and/or any extant Nigerian Law, same stands the risk of being declared null and void, to the extent of their inconsistency, by a law court, at the instance of any interested party.

Thus, certain provisions of the Code, which are inconsistent with extant legislation on relevant issues may be difficult to enforce, or cause further regulatory overlap, which the unification and harmonisation of the existing codes have sought to end.

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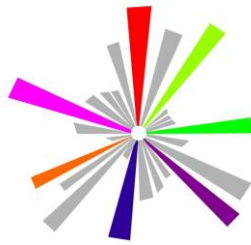
<sup>76</sup> Section 37.1 of the Code

<sup>77</sup> Section 37.2 of the Code

<sup>78</sup> Section 37.3 of the Code

<sup>79</sup> Section 39 of the Code

<sup>80</sup> On the relationship between a principal legislation and a subsidiary legislation, see the Supreme Court in *Adene & Ors v Dantubu* (1994) 2 NWLR [Part 382] at p. 509



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Finally, even though, the drivers for the National Code are commendable, since the Code is expected to help build culture of probity and accountability in the management of business organizations; to prevent organized fraud, corruption of all shades and corporate failures, we hold the considered view that where the Code clearly conflicts with any extant legislation, it (the Code) should be amended so as to forestall widespread disregard of its provisions. We also encourage periodic updates of the provisions of the Code, so as to assure that same conform with relevant statutes and international best practices.

### **BANWO & IGHODALO**

*Banwo & Ighodalo ("B&I") is a full service commercial law firm known for providing innovative, competent, cost-effective and well-timed solutions. B&I is frequently ranked as one of the leading law practices in Nigeria and the Firm has advised, and continues to provide legal advisory support in its chosen areas of practice.*

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