



NATIONAL CODE OF CORPORATE GOVERNANCE 2018: LEARNING FROM THE 2016 CONTROVERSIES

On the 14th of June 2018, the Financial Reporting Council of Nigeria (FRC) unveiled the draft of the Nigerian Code of Corporate Governance (NCCG) 2018. The NCCG, which comes about two years after the suspension of the earlier 2016 draft, is made pursuant to the powers of the FRC under Section 11(c) and Section 51(c) of the Financial Reporting Council of Nigeria Act, 2011 in line with international best practices on corporate governance.

The main objectives of the NCCG are to institutionalize the highest standards of corporate governance best practices in Nigerian companies (particularly those not already covered by sectoral regulations), promoting public awareness of essential corporate values and ethical practices to enhance market integrity, and rebuilding public confidence in the Nigerian economy. The NCCG also seeks to facilitate trade and contribute to the ease of doing business in Nigeria.

APPLICABILITY

Unlike its suspended 2016 counter-part, the NCCG is not applicable to Not profit entities and private companies generally¹. Rather, the NCCG is applicable and required to be implemented by the following entities:

- i. All public companies (whether listed or not);
- ii. All private companies which are holding companies of public companies or other regulated entities;
- iii. Concession and/or privatized companies and;
- iv. Regulated Private Companies² (RPCs).

¹ An earlier attempt by the FRC to include a Private Sector Code (PSC) in its National Corporate Governance Code was challenged and defeated in court. In the case of Eko Hotels Limited V. Financial Reporting Council of Nigeria (Unreported: Suit No. FHC/L/CS/1430/2012 delivered on 21/03/2014), Justice O.E. Abang held that the FRCN's power, as stated in its enabling Act, covers only public interest entities

COMPLIANCE

Entities covered by the NCCG are required to include a report of their application of the code in their annual reports, starting from financial years ending on or before January 1, 2020.

Notwithstanding the length of the period given for compliance, the NCCG encourages earlier reporting³.

STRUCTURE OF THE CODE

The NCCG has seven (7) parts and twenty-eight (28) principles, sixteen (16) of which relate to the Board of Directors, four (4) to Assurance, three (3) to Relationship with Shareholders, two (2) to Business Conduct with Ethics, one (1) to Sustainability, and two (2) to Transparency.

The application of the NCCG, is expected to be more practical because of the requirement for companies to “apply and explain”, that is, companies are required to give a report of how they have implemented the code in their affairs, and also explain the impacts of such implementation⁴.

DOES THE CODE REPLACE SECTORAL CODES?

The NCCG recognizes the existence of sectoral codes, particularly the following:

- i. Code of Corporate Governance for the Telecommunication Industry 2016, issued by the Nigerian Communications Commission (replaced 2014 NCC Code);
- ii. Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014 issued by the Central Bank of Nigeria (replaced 2006 CBN Code);
- iii. Code of Corporate Governance for Public Companies in Nigeria 2011 issued by the Securities and Exchange Commission (replaced 2003 SEC Code);

² Regulated Private Companies are private companies that file returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission-Section 24.1.21 of the Code.

³ This is in order to ensure that companies have ample time to create the framework for implementation of the NCCG which is best suited for their businesses.

⁴ Section C of the NCCG states that-The ‘Apply and Explain’ philosophy requires companies to take responsibility for demonstrating how the specific activities they have undertaken best achieve the intended outcomes of the corporate governance specifications in the Principles. This will assist in preventing a ‘box ticking’ exercise while ensuring companies deliberately consider how they have (or have not) achieved the intended outcomes.

- iv. Code of Good Corporate Governance for Insurance Industry in Nigeria 2009 issued by the National Insurance Commission; and
- v. Code of Corporate Governance for Licensed Pension Fund Operators 2008 issued by the National Pension Commission.

These sectoral Codes covering aspects not provided for under the NCCG, shall continue to apply to the concerned entities.

In effect, the NCCG recognizes the continued applicability of sectoral codes and seeks only to make provisions for the areas where no sectoral codes exist⁵.

NON-COMPLIANCE AND SANCTIONS

The FRC is saddled with the responsibility of monitoring implementation of the NCCG through the Nigerian Stock Exchange, Sectoral Regulators and other Trade Associations. These bodies are empowered to impose appropriate sanctions based on the specific deviation noted and the company in question.

The power of the FRC under the NCCG is therefore limited to monitoring compliance only, the FRC does not stipulate sanctions for non-compliance with the NCCG⁶.

CONCLUSION

There is no doubt that the 2018 draft NCCG has been revised to accommodate the controversies experienced by the suspended 2016 draft. While this draft is also not full-proof, it forms a veritable working document as we move towards establishing a solid National Code of Corporate Governance in Nigeria.

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⁵ The NCCG notes that "The Nigerian Code of Corporate Governance 2018 seeks to institutionalize the highest standards of corporate governance best practices in Nigerian companies, particularly those who are not already covered by sectoral regulation"

⁶ Section 64 of the FRC Act 2011 only empowers the FRC to sanction public interest entities. However, the 2018 Code applies to some private companies. Hence, it would be over reaching for the FRC to assume the powers to sanction under the NCCG which it does not have under its establishing Act. However, it may recommend sanctions to other regulatory agencies empowered to sanction erring entities.