Introduction

The Financial Reporting Council of Nigeria (‘FRCN’) recently issued the draft exposure of the National Code of Corporate Governance 2018 (‘the Code’) pursuant to its powers under the Financial Reporting Council of Nigeria Act, 2011 (the ‘Act’). The FRCN had a couple of years ago issued a two-in-one National Code of Corporate Governance for the Private Sector and Not-for-Profit Organisations the implementation of which was subsequently suspended by the Federal Government. The Code is therefore the outcome of a review of the Code of Corporate Governance for the Private Sector, 2016 (‘2016 Code’). It is essentially a consolidation and refinement of different sectoral codes on corporate governance. However, the FRCN adopted a principles-based approach. This implies that rather than setting rigid rules, the Code specifies minimum standards which companies must adopt and requires companies to adhere to the spirit rather than the letter of the Code. This approach is the ‘Apply and Explain’ approach as against the mandatory application required by the 2016 Code.

With the ‘Apply and Explain’ approach, a company can tailor the principles in the Code to meet its individual needs and choose how best to apply the recommended practices to suit the type, size and growth phase of the company while achieving the outcome envisaged in the principles. The implication is that companies and their respective Boards are responsible for demonstrating how the specific activities they have undertaken best achieves the intended outcome of the Code.
Application

Similar to the 2016 Code, the Code applies to the following Public Interest Entities:

- All public companies (whether listed or not)
- All private companies that are holding companies of public companies and other regulated entities;
- Concessioned and/or privatized companies; and
- Regulated private companies

‘Regulated Private Companies’ are defined in Clause 24.1.20 of the Code to mean any private companies that files returns to any regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission. Thus, any private company that files returns to any regulator is considered by the Code to be ‘regulated private companies’.

“Concessioned” or “Privatized” companies are defined as companies previously owned or operated by a government (Federal or State) and ceded or sold to private investors. Thus, the Code would apply to such privatized or concessioned companies.

From the definition of ‘regulated private companies’, it would seem the Code excludes from the jurisdictional powers of the FRCN, private companies that file returns only with the FIRS and the CAC. All other companies are subject to the provisions of the FRCN Act and consequently, the Code.

The above notwithstanding, the applicability of the Code to ‘private companies’ is still debatable in light of the decision of the Federal High Court’s decision in Eko Hotels Limited v. Financial Reporting Council of Nigeria1 which limits the jurisdictional scope of the Act to public companies and other public entities and not private companies. The decision is presently before the Court of Appeal and the outcome of the appeal should provide some clarity around the issue.

Key Provisions in the Code of Corporate Governance

- Board of Directors

In line with its principle-based approach, the Code recommends that the Board be composed of an ‘appropriate’ mix of executive directors, non-executive directors and independent non-executive directors such that the majority are non-executive directors.

- Directorship

The Code recommends that prospective directors of a company disclose membership of other boards while serving directors should notify the Board of prospective appointments to other boards.

In addition, the Code recommends that the positions of the Chairman of the Board and Chief Executive Officer shall be separate and held by different individuals. The Chairman of the Board is also required to be a non-executive director and should not serve on any Board committee. Moreso, the Code recommends a 3-year cool-off period before the MD/CEO or an Executive Director can become the Chairman of the same company.

- Independent Non-Executive Director

The Code recommends that the Board of every company to which it applies include independent non-executive directors. The

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1 FHC/L/CS/1430/2012
Code also provides a non-exhaustive list of factors to measure the independence of a non-executive Director to wit:

- not be a material shareholder in the Company the value of which shareholding may impair his independence or being a shareholder possessing an excess of 0.01% of the paid up capital of the Company.
- not be a representative of a shareholder that has the ability to control or significantly influence the management of the company:
- not be an employee of the Company or group within the past five (5) years;
- not be a close family member of any of the Company’s advisers, Directors, senior employees, consultants, auditors, creditors, suppliers, customers or substantial shareholders;

**Conflict of Interest**

The Code recommends that any member of executive management of a relevant regulatory institution, who leaves the services of such institution, not be appointed a director or top management staff of a company that has been directly supervised or regulated by the said institution until after three years (or until after five (5) years for Independent non-executive directors) of disengaging from that institution. This provision is aimed at preventing conflict/bias on the part of the member of the executive management in dispensing his duties as a director.

**Tenure of Office of Directors**

The Code recommends that the tenure of office of the Managing Director/Chief Executive Officer and executive directors should be determined by the Board. In determining the tenure of an ED, the Code recommends that the Board take into cognizance his performance, the existing succession planning mechanism, continuity of the Board and the need for continuous serving of the Board. The tenure of non-executive directors should be for a reasonable period on the Board provided that the Board ensures the periodic appointment of new Directors to replace existing Non-Executive Directors. The tenure for INEDs should not exceed three terms of three years each.

**External Auditors**

The Code recommends that the tenure of office of external auditors of a company shall not exceed ten (10) years continuously and such auditors shall only be considered for reappointment seven (7) years after disengagement. Furthermore, where an auditor’s aggregate tenure has already exceeded ten years at the date of commencement of the Code, such auditor shall cease to hold office as an auditor at the other factors include - not have, within the preceding five (5) years, a material business relationship with the company either directly, or as a partner, shareholder, Director or senior employee of a body that has, or has had, such a relationship with the company; not be a senior executive of the company’s regulator within the last five (5) years; not render any professional, consultancy, or other advisory services to the Company or the group, other than in the capacity of a Director; not receive or received additional remuneration from the Company apart from a Director’s fee and allowances, participate in the Company’s share option or a performance-related pay scheme, and is not a member of the Company’s pension scheme; and not served on the Board for more than nine (9) years from the date of first election.
end of the financial year that the Code comes into effect.

- **Internal Audit**

The Code recommends that every company have an Internal Audit function. In the event that a company decides against an internal auditor, the Board must disclose, in the company’s annual reports, sufficient reasons with an explanation as to how the Board has obtained adequate assurance on the effectiveness of the internal processes and systems such as risk management and internal control.

- **Whistle Blowing**

The Code recommends that every company should have a whistle blowing policy which will encourage stakeholders to report unethical conduct and violations of any laws or policies to an internal and/or external authority, so that such conduct/violation can be verified, and appropriate sanctions applied to or remedial action taken to correct any harm done. The Code defines a ‘whistle-blower’ to mean any person(s) including the employee, management, Directors, customers, service providers, creditors and other stakeholder(s) of a Company who reports any form of unethical behavior or violations of laws and regulations to the appropriate internal authority or regulators.

The Code recommends that companies treat all whistleblowing disclosures (including the identity of the whistle blower) as confidential. In addition, the Code affords protection to whistle blowers, by precluding companies from subjecting a whistle blower to any detriment whatsoever on the grounds that he has made a disclosure in accordance with the provisions of the Code.

- **Monitoring**

Unlike the 2016 Code, the provisions of the Code are not mandatory but merely serve as a guide that can be adopted or modified by sectoral regulators in drawing up corporate governance requirements for their respective sectors. The responsibility to enforce the said Guidelines will also rest with the said sectoral regulators who may prescribe sanctions in the said Guidelines.

It is worth mentioning, that several sectoral regulators have already issued Corporate Governance Codes, to wit:

- **SEC- Code of Corporate Governance for Public Companies issued by the SEC**;
- **NCC- Code of Corporate Governance for the Telecommunication Industry 2016**;
- **CBN- Corporate Governance Code for Banks and Discount Houses in Nigeria**;
- **NAICOM- Corporate Governance Code for the Insurance Industry and**
- **PENCOM- Corporate Governance Code for Licensed Pension Fund Operators**.

By retaining the sectoral codes, the Code ensures flexibility (i.e. the ability to apply the Code in a wide range of circumstances) and scalability (i.e. the ability to apply the code to companies of differing sizes) will be achieved). The Code explicitly states that any conflict between the Code and any sectoral code will be resolved in favour of the stricter provision. This is a divergence from the 2016 Code which clearly intended to supersede any other corporate governance code in force in Nigeria, resolving any conflict with sectoral codes in favour of the 2016 Code to the extent of those inconsistencies.
Conclusion

The Code is a welcome development as it seeks to promote the highest ethical standards in corporate governance. Once the transition period stated in the Code is over, the Code comes into effect hopefully bringing with it higher standards of corporate governance. The flexibility and scalability principles in the Code is a welcome development particularly for SMEs and other high-growth companies as this will significantly reduce the cost of corporate governance for them.