

## **The Unveiled Nigerian Code of Corporate Governance (NCCG) 2018: Progress or Setback for Corporate Governance, Corporate Nigeria and Sectoral Regulators? – Part Four**

### **Key Issues the NCCG Failed to Address: Negatives**

We live in an imperfect world, or “at least in a world made imperfect by some of its inhabitants” (Bain & Barker, 2010, p.105). Following the corporate governance scandals of the early 2000s, the effectiveness of board monitoring came into question. With the eventual fall of Enron, WorldCom, Tyco, Global Crossing and Arthur Andersen in the early 2000s, came the genuine need to take a critical look at what actually went wrong in corporate America with a view to re-evaluating some of the corporate governance practices common at that time and to cause changes to be made to those practices, where necessary.

In Enron’s case, it was observed that Arthur Andersen acted as both auditor and consultant to Enron. Investigation also revealed that Arthur Andersen earned large fees from its audit work, but earned much larger amounts of fees from Enron for consulting and other non-audit services. One of the conclusions reached on the investigation into the Enron’s case was that Arthur Andersen lost its ability to provide effective, independent oversight of Enron’s accounting practices because of its dependency

on Enron for large non-audit fees. At the time Arthur Andersen was engaged by Enron, neither auditing standards nor securities laws specifically limits an external auditor from performing non-audit services for its auditing clients. The U.S. SEC adopted new rules in November 2000, which placed limits on the type of consulting services an external auditor may provide to its audit clients, however, because of the transition provisions, Enron and Arthur Andersen were not affected by these new rules until the third quarter of 2001. The new rules also included a provision requiring disclosure of audit and non-audit fees. During the Enron’s scandal, regulators and other critics of Arthur Andersen kept asking the question “could consulting fees impair the auditor’s judgment?”

As part of the reforms to restore investors’ confidence, bring sanity to the external auditor-client relationship, increase monitoring and improve corporate governance, the Sarbanes-Oxley Act (“Sarbox” or “SOX”) was signed into law by President George W. Bush in July 2002. The Act imposes significant additional restrictions on external auditors, including the types of consulting services that an external

auditor may perform for its audit clients. Specifically, Section 201 of SOX prohibited external auditors from carrying out the following non-audit services:

- a. bookkeeping or other services related to the accounting records or financial statements of the audit client;
- b. financial information systems design and implementation;
- c. appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
- d. actuarial services;
- e. internal audit outsourcing services;
- f. management functions or human resources;
- g. broker or dealer, investment adviser, or investment banking services;
- h. legal services and expert services unrelated to the audit; and
- i. any other service that the Board determines to be impermissible.

Sections 201 and 202 also state that external audit firms may engage in any non-audit service that is not described in any of bullet points (a) through (i) above, only if the activity is approved in advance by the audit committee of the company. In addition to the aforementioned requirements, Section 203 of SOX made it mandatory for audit partner rotation every five years. Sections 301 of SOX further mandated the existence of the audit committee, which had to be comprised solely of independent directors. Although SOX did not expressly address board composition, increasing the independence of public companies' boards was a primary objective of the Act. Listing requirements

established by the New York Stock Exchange (NYSE) and the National Association of Securities Dealers Automated Quotations (NASDAQ) and approved by the U.S. Securities and Exchange Commission (SEC) in November 2003 required that independent directors make up a majority of a listed company's board of directors. This would allow listed companies to have a majority of outside (non-affiliated), independent directors to provide a counterbalance to the power of affiliated directors (EDs and NEDs) on the board. In addition to the majority of independent directors' requirement on boards of listed companies, the SEC-approved listing requirements (relating to corporate governance) specified the following, amongst others:

- a more tightened definition of independent director;
- proposed that non-affiliated ("outside directors" or "independent directors") of listed companies to have regularly scheduled meetings or sessions without affiliated directors (EDs and NEDs) present;
- nomination/corporate governance committee to be composed solely of independent directors;
- compensation/remuneration committee to comprised entirely of independent directors; and
- audit committee of listed companies to have a minimum of three members composed entirely of independent directors.

Thus, the three committees generally referred to as the traditional oversight committees, audit, nomination/governance and compensation/remuneration, were given independent status. In other words, they are referred to as independent committees.

From the UK perspective, several corporate failures and challenges necessitated corporate governance reforms. The Cadbury Committee, which produced the widely celebrated Cadbury Report of 1992, was constituted as a result of the unexpected failures of major companies in the UK in the early 1990s. Paragraph 4.11 of the Cadbury Report requires boards of all companies to have a minimum of three NEDs, inclusive of the Chairman and two of the three NEDs should be independent (i.e. two-third). Paragraph 4.12 of the Cadbury Report further recommends that majority of the NEDs on a board should be independent of the company (i.e. they should be INEDs). Paragraph 3.9 of the Hampel Committee Report of 1998 (the first Combined Code in the UK) supports the Cadbury Report's position that a majority of non-executive directors should be independent. With the collapse of Enron in the U.S., the UK responded by constituting two committees, one on the review of the role and effectiveness of non-executive directors (the Higgs Committee) and the other on Audit Committees (Smith's Committee). The reports of both committees were issued in 2003. Paragraph 3.1 of Smith's committee Report of 2003 recommends that audit committees should include at least three

members, who should all be independent non-executive directors. Paragraph 3.2 of the Report further stresses that the chairman of the company should not be an audit committee member. Similarly, Paragraph 9.5 of the Higgs Committee Report of 2003 recommends that at least half the members of the board, excluding the chairman, should be INEDs. The Higgs' Committee Report introduces the concept of Senior Independent Director into the UK corporate governance Code for the very first time. The role of the Senior Independent Director is to provide a sounding board for the chairman and to serve as an intermediary for the other directors when necessary as well as be available to shareholders if they have concerns when contact through the normal channels of chairman, CEO or other EDs has failed to resolve or for which such contact is inappropriate (Paragraphs 7.5, 15.15, 15.16 and A1.5). In addition, the role of the Senior Independent Director is crucial as he or she leads the other INEDs and NEDs in the meeting held at least once every year without the chairman being present to conduct the performance evaluation of the chairman (Para. 7.5). This is a means devised by most jurisdictions to ensure that, the chairman, being a member of the board, does not lead the board without his or her own performance being appraised at least annually. Higgs Committee's Report also requires, amongst others, the following:

- a NED should normally be expected to serve two three- year terms, although a longer term will exceptionally be appropriate (Para. 12.5);
- on appointment, NEDs should undertake that they will have sufficient time to meet what is expected of them, taking into account their other commitments (Para. 12.13);
- if a NED is offered appointments elsewhere, the chairman should be informed before any new appointment is accepted (Para. 12.14);
- the nomination committee should annually review the time required of NEDs. The performance evaluation should assess whether NEDs are devoting enough time to fulfil their duties (Para. 12.14);
- a full time executive director should not take on more than one non-executive directorship, nor become chairman, of a major company. No individual should chair the board of more than one major company (Para. 12.19);
- where a NED has concerns about the way in which a company is being run or about a course of action proposed by the board, these should be raised with the chairman and their fellow directors. Non- executive directors should ensure their concerns are recorded in the minutes of the board meetings if they cannot be resolved (Para. 12.31);
- on resignation, a NED should inform the chairman in writing, for circulation to the board, of the reasons for resignation (Para. 12.32);
- Smith Committee's recommendations on audit committees, including the requirement that audit committees should include at least three members, who should all be INEDs was adopted by Higgs' Committee (Para. 13.7); and
- the remuneration committee should comprise at least three members, all of whom should be INEDs (Para. 13.11).

From Cadbury, Greenbury, Hampel, Turnbull, Smith, Higgs to the Combined Code of 2003 and from the Combined Code of 2006 to that of 2008, as well as the UK Codes of Corporate Governance from 2010 to 2018, it is evident that incremental progress has been achieved. There has also been a conscious and serious effort to keep the UK Code of Corporate Governance up to date, hence, its biennial updates since 2006.

From the European Union ("EU") context, there has been much activity to strengthen corporate governance and company law standards over the years. Although many corporate governance reforms occurred in the European Union prior to the global financial crisis of 2008, the focus of this paper will be on the European Commission's ("EC") Statutory Audit Reform which commenced in October

2010 with the launched of a broad consultation on the role of statutory audit, as well the wider environment within which audits are conducted. A Green Paper titled, “Audit Policy: Lessons from the Crisis” was also issued by the EC. As part of the launch, the EC posits that:

In the wake of the financial crisis, we need to ask the question whether the role of auditors can be enhanced to mitigate any new financial risk in the future. The crisis also highlighted certain weaknesses in the audit sector which need to be explored further. This work on audit is part of our effort to learn the lessons from the crisis and reform the financial sector. In particular, the Commission is keen to discuss whether audits provide the right information to all financial actors, whether there are issues around the independence of audit firms, whether there are risks linked to a concentrated market, whether supervision at a European level might be useful and how best the specific needs of small and medium sized businesses may be met. (European Union, 2010)

In the aftermath of the launch of the broad consultation on the role of statutory audit, extensive engagements were held with key stakeholders in the EU Member States which culminated in the presentation of two EC’s proposals in November 2011. On April 14, 2014, the Council of Ministers of the EC

adopted two audit reform legislations (a Directive and a Regulation) that had been under debate since November 2011. The Directive and Regulation came into force in July 2014 with a transitional period of at least two years. Thus, the majority of the provisions of both the Regulation and the Directive came into effect in June 2016. Key provisions of the Regulation (which are key elements of the reform) are:

- mandatory audit firm rotation. The Regulation introduces mandatory firm rotation for the statutory auditor of a Public Interest Entity (PIE) after a maximum initial engagement period of 10 years, although EU Member States can require an initial engagement period that is shorter than 10 years (provided it is more than one year). Member States may also allow a PIE to extend the initial engagement period by a further 10 years where an audit tender has taken place or 14 years where there is a joint audit. The EU permitted these variations so that Member States like Italy and the Netherlands could maintain their existing mandatory audit rotation requirements of nine years and eight years respectively, and France could keep its joint audit regime;
- expanded audit tendering requirements. The introduction of mandatory firm rotation is accompanied by more prescriptive tendering process rules to be followed by the audit committee. For example, the Regulation includes a requirement for the audit committee to recommend to the board at least two

choices of statutory auditor, together with a justified preference for one of them;

- significant restrictions on non-audit services. The Regulation introduces significant new restrictions on the non-audit services a PIE can obtain from its statutory auditor, including:
  - ❖ specific tax, consultancy and advisory services;
  - ❖ services that involve playing any part in the management or decision-making of the PIE; and
  - ❖ services linked to the financing, capital structure and allocation, and investment strategy of the PIE.
- a cap on permitted non-audit services. The Regulation imposes a cap on fees for permitted non-audit services at 70% of the statutory audit fee. The cap will be calculated as 70% of the average statutory audit fees for the previous three years. The cap will be calculated not only for the audited entity but at the group level where the audited entity is part of a group of companies. Audit committees are also required to approve all permissible non-audit services;
- strengthened audit committees. The Regulation codified a number of existing audit committee best practices, including requirements for:
  - ❖ a majority of audit committee members to be independent;
  - ❖ at least one member to have competence in auditing and/or accounting; and

- ❖ the audit committee as a whole to have competence relevant to the sector in which the company operates.

- removing barriers for smaller audit firms. In addition to the tendering requirements, the Regulation includes several measures to remove barriers to audit firm growth, including prohibiting so-called “Big 4 only” contractual clauses entered into between a PIE and a third party (e.g. a bank or insurance company) that restrict the PIE’s choice of auditor. Experience in Italy has shown that mandatory firm rotation tends to increase concentration in the audit market, so the inclusion of mandatory firm rotation in the new legislation may in fact ultimately undermine the EU’s apparent intent to support the growth of smaller firms if provisions are not introduced to remove barriers with negative effects on smaller audit firms;
- strengthened two-way dialogue between auditors and prudential supervisors. The Regulation recognises the value of a two-way dialogue between auditors and prudential supervisors and formalises the communication already taking place, by requiring supervisors and auditors of financial institutions to establish an effective dialogue and share responsibility for this;
- an additional report from the auditor to the audit committee. The Regulation also introduces a new report from the auditor to

the audit committee. This will cover a variety of information, including:

- ❖ a declaration of the auditor's independence; The names of all key audit partners;
  - ❖ a description of the scope and timing of the audit work;
  - ❖ the overall approach to the audit and any substantial variations as compared to the prior year;
  - ❖ a disclosure of materiality, explaining judgments about events or conditions that may cast significant doubt on the entity's ability to continue as a going concern, and whether they constitute a material uncertainty; and
  - ❖ addressing significant deficiencies in internal financial controls and matters related to actual or suspected noncompliance with laws and regulations.
- Improving coordination of audit oversight. Oversight of the audit profession in the EU will continue to be carried out at the Member State level. The Regulation requires each Member State to designate a single competent authority to bear ultimate responsibility for the audit public oversight system, where they have not already done so.

During the period of the debates on the statutory audit reform, which was between 2010 and 2014, so many proposals were considered, some of which never made the final legislation

(the Directive and the Regulation), including the proposal for “audit-only firms.” According to the EU, the above listed provisions of the Regulation on statutory audit became necessary to address a number of shortcomings observed on the audit market, including the following:

- an excessive familiarity between the management of a company and its external audit firm, risks of conflicts of interest, and threats to the independence of statutory auditors can challenge the ability of external auditors to exert thorough professional scepticism;
- a lack of choice of audit firms emanating from high concentration levels in the top-end of the audit market;
- a systemic risk as the audit market is effectively dominated at the top end by four networks;
- deficiencies, and in some instances misstatements, have been observed in audit reports by Member States' competent authorities; and
- doubts have emerged amongst investors on the credibility and reliability of the audited financial statements of banks, other financial institutions and listed companies, as highlighted by the economic and financial crisis. This has seriously dented the confidence of investors in the reports of statutory auditors

From the perspective of international and independent corporate governance standard setting bodies, the International Corporate

Governance Network (ICGN) and the Organisation for Economic Development and Cooperation (OECD) are at the forefront of inspiring and promoting effective standards of corporate governance to advance efficient markets and economies world-wide. The ICGN and OECD have established globally respected principles of corporate governance. According to the OECD Principles of Corporate Governance (2015), good corporate governance is not an end in itself, but, a means to create market confidence and business integrity, which in turn is essential for companies that need access to capital for long term investment. Some of the key provisions of the ICGN's Global Governance Principles (2014), which it recommends to well governed companies globally include:

- the chairman of the board should be independent on the date of appointment. If the chairman is not independent, the company should adopt an appropriate structure to mitigate any potential challenges arising from this, such as the appointment of a lead independent director. A lead independent director also provides shareholders and directors with a valuable channel of communication should they wish to discuss concerns relating to the chairman (Para. 2.2);
- the board should allocate adequate time to board meeting preparation and attendance (Para. 1.4);
- the Chairman should regularly hold meetings with the NEDs and INEDs without EDs present. In addition, the NEDs and the INEDs, led by the lead independent director, should meet as appropriate, and at least annually, without the chairman present (Para. 2.6);
- the board should comprise a majority of NEDs, the majority of whom are independent, noting that practice may legitimately vary from this standard in controlled companies where a critical mass of the board is preferred to be independent industry experience and diversity of perspectives to generate. There should be a sufficient mix of individuals with relevant knowledge, independence, competence, industry experience and diversity of perspectives to generate effective challenge, discussion and objective decision-making (Para. 3.1);
- the board should ensure that shareholders are able to nominate candidates for board appointment (Para. 3.5);
- board members should be conscious of their accountability to shareholders. Accountability mechanisms may require directors to stand for election on an annual basis or to stand for election at least once every three years. Shareholders should have a separate vote on the election of each director, with each candidate approved by a simple majority of shares voted (Para. 3.6);

- shareholders should have an opportunity to vote on the remuneration policies, particularly where significant change to remuneration structures is proposed or where significant numbers of shareholders have opposed a remuneration resolution. In particular, share-based remuneration plans should be subject to shareholder approval before being implemented (Para. 6.5);
- the board should present a balanced and understandable assessment of the company's position and prospects in the annual report and accounts in order for shareholders to be able to assess the company's performance, business model, strategy and long-term prospects (Para. 7.1);
- the board should affirm that the company's annual report and accounts present a true and fair view of the company's position and prospects (Para. 7.3); and
- the audit committee should, as far as practicable, approve any non-audit services provided by the external auditor and related fees to ensure that they do not compromise audit independence. The non-audit fees should be disclosed in the annual report with explanations where appropriate. Non-audit fees should normally be less than the audit fee and, if not, there should be a clear explanation as to why it was necessary for the auditor to provide these services and how the independence and objectivity of the audit was assured.

From an African perspective, South Africa has been at the forefront of driving corporate governance best practices. King III (2009) and its successor King IV (2016) have very laudable provisions that continue to set the pace for other African countries to follow. King IV adopts the “apply and explain” approach as the NCCG 2018. Some of the leading practice provisions contained in King IV include:

- the board should comprise a majority of NEDs, most of whom should be independent (p. 50);
- as a minimum, the CEO and at least one other executive should be appointed to the board to ensure that it has more than one point of direct interaction with management (p. 50);
- the board should establish arrangements for periodic, staggered rotation of its members so as to invigorate its capabilities by introducing members with new expertise and perspectives while retaining valuable knowledge, skills and experience and maintaining continuity (p. 50);
- a candidate for election as a non-executive member (NED or INED) of the board should be requested to provide the board with details of professional commitments and a statement that confirms that the candidate has sufficient time available to fulfil the responsibilities as a member of the board (p. 51);

- the board should elect an INED as chairman to lead the board (p.53);
- the board should appoint an INED as the lead independent director to fulfil the following functions (p. 53):
  - ❖ to lead in the absence of the chairman;
  - ❖ to serve as a sounding board to the chairman;
  - ❖ to act as an intermediary between the chairman and other members of the board, if necessary;
  - ❖ to deal with shareholders' concerns where contact through the normal channels has failed to resolve concerns, or where such contact is inappropriate;
  - ❖ to strengthen independence on the board if the chairman is not an INED;
  - ❖ to chair discussions and decision-making by the board on matters where the chairman has a conflict of interest; and
  - ❖ to lead the performance appraisal of the chairman.
- the members of the audit committee should, as a whole, have the necessary financial literacy, skills and experience to execute their duties effectively (p. 56);
- all members of the audit committee should be INEDs and chaired by an INED (p.56);
- all members of the nomination committee should be NEDs, and the majority should be independent (p. 57)
- all members of the remuneration committee should be NEDs, with majority being

INEDs (p. 57);

- The board should appoint an INED to lead the evaluation of the chairman's performance if a lead independent director is not in place (p. 58); and
- The board should satisfy itself that a combined assurance model is applied which incorporates and optimise the various assurance services and functions so that, taken as a whole, these support the objectives for assurance (p. 68).

From the Nigerian context, many failures have occurred, from the banking failures of the late 1980s and late 2000s (that led to the eventual removal of CEOs of five banks and the bailout/takeover of the five banks by the CBN), the failures experienced in the aviation industry that led to the change of management, dissolution of boards and eventual takeover of those companies by government and now under the quasi-supervision of AMCON and the persistent fight for survival of a major telecommunications company in Nigeria. In the late 1980s, the failure of many banks was attributed to high rate of insider loans, insider abuses and lack of sound corporate governance. According to the Central Bank of Nigeria (CBN) in 2009, the major findings on the five banks whose CEOs were removed (and the banks taken over by the CBN) include: excessive high level non-performing loans attributable to poor corporate governance practices, lax credit administration processes

and the absence or non-adherence to the banks' credit risk management practices, amongst others. Some of these corporate failures in Nigeria have resulted in corporate governance reforms, while others are yet to get the attention of the appropriate authorities. On October 9, 2018, there was an article on Vanguard Newspaper which reads, "AMCON boss seeks adoption of corporate governance code for aviation industry." In the article, it was reported that Mr Ahmed Kuru, the managing director of Asset Management Corporation of Nigeria (AMCON) called for the adoption of a sound code of corporate governance for the aviation industry. Mr Ahmed Kuru further states that lack of regulations and good corporate governance were the main factors responsible for the failure of about 160 Nigeria airlines, including the defunct Nigeria Airways. He concludes by stating that there are two major problems with airlines in Nigeria; one being lack of an effective Board of Directors, thereby affecting internal policies and disciplines, the other has to do with regulation. Specifically, he explained both problems further by stating that:

- given the ownership structure of most airlines in Nigeria, the board's veritable checks on management and excesses of airline owners who show very little patience for orderly and planned conduct of business, is practically absent;
- a functional board is necessary for the effective operations of airlines with long-term success, in terms of profitability and

survival;

- individuals with independence, experience and expertise from relevant sectors of the economy are not identified and engaged; and
- regulations were either weak and lack the courage to enforce compliance based on current standards or need more fine-tuning to ensure effectiveness of the airline.

Mr Ahmed Kuru then urged the Nigerian Civil Aviation Authority (NCAA) to enforce sound corporate governance systems on Nigerian carriers to ensure their sustainability. The comment from Mr Ahmed Kuru is a brilliant summary of what is happening not only in the aviation industry, but in many other industries and companies in Nigeria. Worst still, there are many industries and big multinationals, including the International Oil Companies (IOCs) that do not currently operate under any corporate governance regime in Nigeria.

In addition, under Paragraph 2 of the CBN Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006, weaknesses in corporate governance of banks in Nigeria were attributed to, amongst others, the following:

- ineffective board oversight functions;
- fraudulent and self-serving practices among members of the board, management and staff;
- overbearing influence of chairman or

MD/CEO;

- weak internal controls;
- passive shareholders;
- abuse in lending, including lending in excess of single obligor limit;
- sit-tight directors, even where such directors fail to make meaningful contributions to the growth and development of the bank;
- poor risk management practices resulting in large quantum of non-performing credits, including insider-related credits;
- technical incompetence, poor leadership and administrative ability; and
- succumbing to pressure from other stakeholders (e.g. shareholders' appetite for high dividend and depositors' quest for high interest on deposits).

Similarly, the "Introduction" to the SEC Code of Corporate Governance for Public Companies in Nigeria 2011 (p.4) states that:

It is generally agreed that weak corporate governance has been responsible for some recent corporate failures in Nigeria. In order to improve corporate, the Securities and Exchange Commission ("SEC"), in September 2008, inaugurated a National Committee chaired by Mr. M. B. Mahmoud for the review of the 2003 Code of Corporate Governance for Public Companies in Nigeria to address its weaknesses and to improve the

mechanism for its enforceability. In particular, the Committee was given the mandate to identify weaknesses in, and constraints to, good corporate governance, and to examine and recommend ways of affecting greater compliance and to advise on other issues that are relevant to promoting good corporate governance practices by public companies in Nigeria, and for aligning the Code with international best practices.

With all these hard evidence of corporate failures, resulting from poor corporate governance in Nigeria and the undying need for a more robust and leading practice national or unified code of corporate governance, it is surprising that Nigeria is still not ready in 2019 to select the appropriate and well-established standards from the leading practice corporate governance tool-box. While it is obvious that there is a great appreciation for the need to entrench sound corporate governance in Nigeria, the actual requirements of most of the Codes developed in Nigeria have fallen short of the "leading practices" or "best practices" that is so much promised by the initiators and drafters of these Codes, to say the least. The readers of this paper would have to make their own judgment whether the provisions of existing corporate governance codes in Nigeria, including the newly released NCCG 2018 Code can favourably be compared with the

provisions of the aforementioned painstaking corporate governance reforms documented for the U.S., UK and the EU, as well as the robustness of the provisions prescribed in the South African Code.

In light of the foregoing analysis on corporate governance practices in Nigeria, leading practices and recommended best practices, as well as essential features of corporate governance codes, the author submits that the NCCG 2018 fails to address the following:

- The date of commencement in terms of the first reporting year of the Code was not stated in the Code. It was also not stated whether early adoption was envisaged;
- The transitional arrangements, if any, between the NCCG 2018 and the sectoral codes were not stated in the NCCG 2018. Thus, it is not clear whether the NCCG 2018 and the sectoral codes will run concurrently or existing sectoral codes will be withdrawn and replaced with supplemental guidelines by sectoral regulators;
- There was no requirement for companies reporting in respect of the first reporting year for which this Code applies (first applicable reporting period not stated in the Code) to state in their report and accounts whether they comply with the Code. Being the first national code, this requirement would have been very essential, particularly for companies listed in recognised exchanges in Nigeria;
- With the manner in which Paragraph D of the NCCG 2018 was drafted, it is not clear which regulator has the ultimate disciplinary mechanism over the NCCG 2018 in terms of its infractions or violations. For industries with established corporate governance regimes in Nigeria, such as Banking, Insurance, Pensions, Capital Markets and Telecommunications, monitoring of the NCCG 2018 or any other code might not pose a difficult challenge. However, if the FRCN will monitor the NCCG 2018 through the sectoral regulators that currently does not have any tangible corporate governance monitoring structure, such as the Department of Petroleum Resources (DPR – for the Oil and Gas Industry), the Nigerian Civil Aviation Authority (NCAA – for the Aviation Industry), then Nigeria might be far from enjoying corporate governance dividends from these industries. It would also be important for the FRCN to review the capacity of other regulators and quasi-regulatory bodies such as the Nigerian Electricity Regulatory Commission (NERC) to provide effective monitoring of the NCCG 2018 and impose appropriate sanctions. In addition, for other industries such as Agriculture, Healthcare, Construction, Real Estate, Information Technology (IT), Mining, amongst others, with no clear sectoral regulators, the Code did not specify how monitoring would be done or the arrangements put in place by FRCN to ensure effective monitoring of the

NCCG 2018;

- No paragraph in the NCCG 2018 treated Financial Reporting and no reporting format was adopted (e.g. integrated reporting). Although Paragraph 28 discusses Reporting, but laid emphasis on corporate governance report, which is a non-financial report. Financial reporting is a common provision in most, if not all, corporate governance codes. The importance of financial reporting cannot be over-emphasised and it is almost impossible to find a code that does not dedicate at least a major paragraph to it. For example, Part G and Paragraphs 10.0, 4.3.6, 5.0 and 12.0 for the SEC, NAICOM, PenCom, CBN and NCC Codes respectively, prescribed requirements for financial reporting. Similarly, Principle 5 of King IV provides detailed requirements for both financial and non-financial reporting, as well as the requirement for the board to oversee that the company issues an integrated report at least annually;
- No provision for the re-election and the intervals for re-election of directors by shareholders. Paragraph 12.3 of the NCCG 2018 only states that “Shareholders should be provided with biographical information of proposed Directors to guide the decision,” however, the decision being referred to was not specified. From a review of other corporate governance codes, it seems that the provision requiring directors to submit themselves for re-election at regular or specified intervals to

shareholders at the AGM ought to have preceded Paragraph 12.3. This error was in the draft Code released in 2018 and appeared in two comments submitted to the FRCN that I am aware of, but, like the reaction of the FRCN to most of the other comments submitted, it was ignored;

- No recommendation was made to the National Assembly regarding critical corporate governance matters that require amendments, updates and/or deletion from extant laws, particular the Companies and Allied Matters Act (CAMA) LFN 2004. When the issue associated with Agency, Stewardship and Stakeholder theories of corporate governance are well analysed, particularly, the need to separate ownership and management and to determine where ultimately accountability lies, Nigeria would have to critically review the continued relevance of the provisions of Section 359 of CAMA regarding the composition and inclusion of shareholder representatives on the Statutory Audit Committee (“SAC”). A cue can be taken from the Mauritius Code of 2016 where the drafters recommended certain amendments to the National Assembly in Mauritius;
- The role of the board chairman in fostering board behavioural dynamics such as shaping the culture in the boardroom, encouraging all board members to speak up in meetings and on matters relating to the board, fostering relationships based on trust, mutual respect and open communication (both in and outside the

boardroom) and encouraging a productive working relationship amongst directors and between directors and senior management, was not captured in the Code. This essential ingredient has long been missing in Codes in Nigeria and continued to be missing;

- A list of non-audit services that cannot be provided by the external auditor to the audited company was not established in the Code. This is a practice that has gained support in the EU and the U.S. and has been adopted by the CBN's Code (2006 – Para. 8.24, 2014 – Para. 5.2.11). In fact, this was a core element of the EU Statutory Audit Reform and a key provision that came into force in June 2016 as part of the EU Regulation on Statutory Audit;
- No limitation was set on the fees charged for the permissible non-audit services (approval of non-audit services under this Code is under the discretion of the Audit Committee). This is normally set as a percentage of the audit fee;
- No requirement for the disclosure of non-audit fees earned by external auditors for non-audit services provided to their audit clients;
- No provisions regarding joint audit or requirements/incentives to encourage joint audit. The EU statutory audit reform, though did not prescribe joint audit, created an incentive for companies with joint auditors by allowing such companies to rotate their auditors up to a 24-year cycle, instead of the normal 10-year cycle;
- No provision requiring the board to appoint

a Lead or Senior INED. Like the supervisory board under a two-tier board system (as practised by Germany, Austria and Netherlands) that provides proper oversight over the management board, the concept of having a sizeable number of INEDs on the board and appointing a senior or lead INED is to have individuals with no affiliation with owners and management to provide proper oversight over management in a unitary board system. Independent directors as the conscience of the board and primary custodian of probity cannot and should not be relegated to the background. In fact, the seriousness that is attached to this group of directors and the empowerment that they have in the boardroom will determine the attention the country will get, in terms of foreign investments. So, like the popular saying “Show me your friend, and I will tell you who you are,” investors are saying “Show me your board composition, and I will tell you if you can have my money;”

- No requirement for corporate boards to appoint independent chairmen. Thus, it can be concluded that Nigeria does not want independent chairmen, and also does not want another generally accepted corporate governance safeguard recommended to help cushion the effect of affiliated chairmen, which is the appointment of lead/senior INED. While other jurisdictions are strengthening the status of INEDs and the requirements for more INEDs (up to half of board members) on the board, it

seems Nigeria is more interested in prescribing provisions that are meant to weaken independent directors' status vis-à-vis their NEDs and EDs counterparts. There is nowhere this is more evident than the newly released NCCG 2018. Sometimes, it seems that INEDs are people that either cannot be found in Nigeria or they can only be sourced at a high cost. But, in actual fact, INEDs are all around corporate Nigeria and the pool of INEDs is huge in Nigeria. For example, the University community has a huge pool of INED materials in Nigeria. Secondly, retired directors, deputy directors and assistant directors of regulatory bodies in Nigeria and retired board members and senior staff of companies in Nigeria, including banks and other financial institutions is another pool of INED materials in Nigeria. Thirdly, former and retired partners and directors of practising firms, including the "Big 4"

firms, is another pool of INED materials in Nigeria. So, sourcing INEDs should not be that difficult in Nigeria.

Finally, the next few paragraphs will be used to discuss concerns regarding specific provisions and languages used in the NCCG 2018. The intention would be to reflect on those provisions and languages used in drafting the NCCG 2018 with a view to highlighting their deviations from well-established corporate governance standards, practices and norms, if any.

#### References

Bain, N., & Barker, R. (2010). The effective board: Building individual and board success. London, England: Kogan Page.

**Part Five (Final) to be released on Wednesday**

**McLeish U. Otuedon, PhD, DBA, MSc, BSc, FCA, FCTI, MNIM, CIRM, CAMS**