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

Key Concerns in the NCCG 2018: Use of Languages that are Alien to Corporate Governance Literature

According to Brown (2006), "The only way a board can responsibly do its job without meddling is by monitoring very well" (p. 88). A balanced board is categorised by an appropriate number of directors, the right mix of affiliated or inside (EDs and NEDs) and non-affiliated or outside (independent) directors, low familiarity quotient and diversity in skills, experience, gender, age, amongst other things (India Board Effectiveness Report, 2013 – 14).

The choice of language used in drafting a corporate governance code would more often give away, rightly or wrongly, the intentions, motives and sincerity of the drafters and their sponsors. From the author's review of over 200 corporate governance codes released by both established and emerging markets over the last 17 years, one thing has been consistent – the right choice of language. However, upon a review of the NCCG 2018, some of the languages used in the Code were not only strange and ambiguous, but also alien to corporate governance lexicon. This section of the paper will be used to highlight some of the ambiguous and strange languages used in the NCCG 2018 that should worry corporate Nigeria and those who mean well for Nigeria.

Where so required. Under Paragraph C (Code Philosophy) of the NCCG 2018, the phrase "Where so required" was used in the sentence that reads "Where so required, companies should adopt the "Apply and Explain" approach in reporting on compliance with this Code" (NCCG, 2018, p. v). The choice of language used here presupposes that it is only when it is so required that companies should adopt the "Apply and Explain" approach. In other words, the sentence was phrased as if there are other options envisaged by the Code that are preferred alternatives for which companies should give preference, but could adopt the "Apply and Explain" approach only where it is so required. This is like calling a spade a farm implement, rather than a spade. If the Code is adopting an "Apply and Explain" approach, then, let it be explicitly and expressly stated, without any ambiguity. In fact, it was shocking to see the insertion of this sentence in Paragraph C of the Code because the draft NCCG released in 2018 captured it much better as "The implementation of the Code is based on the

'Apply and Explain' principle, which assumes application of all principles, and require entities to explain how the principles are applied" (draft NCCG, 2018, p. v). In contrast to how the requirement for the "Apply and Explain" approach was phrased in the NCCG 2018, King IV "Under Distinguishing Features of King IV" states that "To reinforce this qualitative application of its principles and practices, King IV proposes an "apply and explain" regime, in contrast to "apply or explain" in King III (King IV, 2016, p. 27). Similarly, under the "Forward" to King IV, Professor Mervyn E. King states that "King IV has moved from "apply or explain" to "apply and explain" (King IV, 2016, p. 7). Based on a philosophy of application couple with disclosure, the Mauritius NCCG 2016 employs an 'apply-and-explain' methodology (Mauritius NCCG, 2016, p. 7). The "effective application of the Principles should be supported by high-quality reporting on the Provisions," "thus, these "operate on a 'comply or explain' basis and companies should avoid a 'tick-box approach'" (UK CG Code, 2018, p. 2.). According to the Egyptian Code (2016), … "a company should typically seek to apply all the relevant principles outlined in this Code. If it fails to do so, for whatever reason, the company must provide an objective and justifiable explanation, in application of the 'comply or explain' principle" (Para. 1.6).

As may be required. Under Paragraph D (Monitoring the Implementation of the Code) of the NCCG 2018, the phrase "As may be required" was used in the sentence that reads "In consonance with the relevant regulatory agencies of the Federal Government of Nigeria, the Council will subsequently issue corporate governance guidelines to assist implementation as may be required to respond to prudential considerations in different sectors of the economy" (NCCG, 2018, p. v). In modern corporate governance codes, and in particular, "apply and explain" codes with detailed disclosure requirements, the issuance of guidelines or guidance to operators and users of the code is sine qua non to the effective implementation of the code. In addition, an omnibus code such as the NCCG 2018 (i.e. applicable to companies of varying sizes and complexities) cannot afford not to automatically have guidance notes or guidelines. Thus, it is not a matter of "if required" or "when required." For example, King IV and Mauritius National Code of Corporate Governance (NCCG 2016), both adopted "apply and explain" principles, incorporated specific guidance on applying the Principles in their respective codes, which was meant to address the various categories of entities the codes are applicable to in terms of sizes, types and complexities. Indeed, this feature in both codes made them truly harmonised and unified and fit-for-purpose. In addition to the Guidance, King IV provides examples to provide clarity on areas that might provide challenges during implementation. From the UK perspective, the UK FRC released a complementary "Guidance on Board Effectiveness" to the UK Corporate

Governance Code 2018 (UK CG Code 2018) same day the main Code was unveiled. The Guidance document was 50 pages in length whereas the 2018 Code itself was a 20-page document. There are many areas in the NCCG 2018 that require guidance for effective implementation, including, but not limited to, succession planning, annual board performance evaluation, annual assessment to ascertain the continued independence of INEDs, directors' membership in concurrent boards and conflicts of interest declaration.

Serves as a guide. Under Paragraph 12 (Appointment to the Board) and Principle of the NCCG 2018, the phrase "serves as a guide" was used in the sentence that reads "A written, clearly defined, rigorous, formal and transparent procedure serves as a guide for the selection of Directors to ensure the appointment of high quality individuals to the Board" (NCCG, 2018, p. 18). Appointing new members to the board is one of the most crucial roles of the board and using a passive voice for such a crucial task in the NCCG 2018 helps to diminish its importance. In contrast, the UK Code 2018 as well as its predecessors have been known to use active voice in regard to the principle on board appointments and consistent in stating that "Appointment to the board should be subject to a formal, rigorous and transparent procedure, and an effective succession plan should be maintained for board and senior management" (UK CG Code 2018, p. 8). Similarly, Mauritius NCCG 2016 states under Principle 3 (Director Appointment Procedures) that "There should be formal, rigorous and transparent process for the appointment, election, induction and re-election of directors" (pp. 9 & 20). In reviewing two of the existing sectoral corporate governance codes in Nigeria, the following were observed: Paragraph 2.4.1 of the CBN Code of 2014 states that "Procedure for appointment to the Board shall be formal, transparent and documented" (p. 7); and Paragraph 13.1 of the SEC Code of 2011 states that "The Board should develop a written, clearly defined, formal and transparent procedure for appointment to the Board of directors" (p. 23).

It is desirable. Under Paragraph 2.3b (Board Structure and Composition) of the NCCG 2018, the phrase "it is desirable" was used in the sentence that reads "appropriate mix of Executive, Non-Executive and Independent Non-Executive members such that majority of the Board are Non-Executive Directors. It is desirable that most of the Non-Executive Directors are independent" (p. 2). This is not a matter of desire or something that is desirable, the Code just has to be clear about what it is trying to convey. This statement has always been a categorical statement in all corporate governance codes globally, but the NCCG 2018 makes it look as if it is difficult to convey what is actually intended. For example, Paragraph 3.1 of the ICGN Code states that "The board should comprise a majority of non-executive directors, the majority of whom are independent" (p. 11). Under Recommended

Practice 8 Principle 7, King IV posits that "The governing body should comprise a majority of non-executive members, most of whom should be independent" (p. 50). Similarly, Paragraph 4.1 of the Malaysian Code on Corporate Governance 2017 states that "At least half of the board comprises independent directors. For Large Companies, the board comprises a majority independent directors" (p. 22). In the same vein, the UK CG Code 2018 states under Paragraph 11 that "At least half the board, excluding the chair, should be non-executive directors whom the board considers to be independent" (p. 7).

In addition, under Paragraph 11.3.3 (Committee responsible for Remuneration) of the NCCG 2018, the phrase "It is desirable" was used in the sentence that states "It is desirable that the chairman of the committee be an INED" (p. 13). In contrast, Paragraph 67 of King IV states that "The committee for remuneration should be chaired by an independent non-executive member" (p. 57). From the perspective of the UK CG Code 2018, Paragraph 32 posits that "The board should establish a remuneration committee of independent non-executive directors, with a minimum membership of three, or in the case of smaller companies, two" (p. 13).

Is not desirable. Under Paragraph 7.5 (Independent Non-Executive Directors) of the NCCG 2018, the phrase "is not desirable" was used in the sentence that reads "Reclassification of an existing NED into an INED on the same Board is not desirable" (p. 8). This phrase is strange and unknown to corporate governance lexicon. Reclassification of existing NEDs to INEDs should either be permissible or not permissible, allowed or not allowed. The statement on reclassification would only be relevant in this context if it was made as a categorical statement (not permissible or not allowed) to deter companies that might want to be smart by half, from trying to create independent directors from existing NEDs. Thus, the manner in which it was used in the NCCG 2018 was unnecessary because it creates an impression that it may be permissible. While it is an acceptable practice for INEDs to be reclassified to NEDs, the reverse is not the case. Such a phrase would most likely not be found in leading practice codes across the world because it would never have been contemplated that a NED can be reclassified to an INEDs.

Only directors may be members of Board committees. Under Paragraph 11.1.2 (Board Committees) of the NCCG 2018, the sentence "Only Directors may be members of Board committees, while members of senior management may be required to attend committee meetings" was captured (p. 10). While "may" is relevant to senior management being required to attend committee meetings, the same cannot be said of the usage of the word "may" regarding directors. In Nigeria, it is only directors that are members of board committees. The SAC that comprises board members and shareholder representatives is not a board committee; it is a statutory audit committee. Thus, the usage of the word "may" in the statement "Only directors may be members of Board committees is wrong because it presupposes that there are acceptable circumstances where non-directors will be members of board committees. Rather, the statement ought to have read "Only directors should be members of Board committees." In the Mauritius NCCG 2016, a similar statement reads "Board committees should comprise only members of the Board" (p. 19).

Where possible. Under Paragraph 11.2.2 (Committee responsible for Nomination and Governance) of the NCCG 2018, the phrase "where possible" was used in the sentence that reads "Members of the committee responsible for nomination and governance should be NEDs, and a majority of them should be INEDs where possible. If the drafters of the NCCG 2018 were fully committed to the provisions contained in Paragraph 2.3b that majority of board members are NEDs and most of the NEDs are INEDs, then, it would have been irrelevant to insert the phrase "where possible" because there would be enough INEDs to be appointed into the Nomination and Governance Committee. So, when phrases like "It is desirable" is used under Paragraph 2.3b of the NCCG 2018, then, it would beget phrases such as "where possible" under Paragraph 11.2.2 of the NCCG 2018. It would have been better if the statement was left as "Members of the committee responsible for nomination and governance should be NEDs, and a majority of them should be INEDs," and a minimum of one or two INEDs should have been prescribed for smaller companies, depending on board size.

The ambiguous statement of "where possible" was also used under Paragraph 11.3.2 (Committee responsible for Remuneration) and Paragraph 11.4.3 (Committee responsible for Audit) of the NCCG 2018. Paragraph 11.3.2 states that "Members of the committee responsible for remuneration should be INEDs, and a majority of them should be INEDs where possible" (p. 13) and Paragraph 11.4.3 states that "For private companies, members of the committee responsible for audit should be NEDs, and a majority of them should be INEDs where possible. Similar to the author's comment in the above Paragraph, the "where possible" in both sentences are not required. Such phrases help to weaken corporate governance, rather than enhance it. Such phrases also help to provide an easy excuse for operators to say it is not possible. A code should be written in a manner to engender action, not to create opportunities for inactions and excuses. For example, Paragraph 56 of King IV states that "All members of the audit committee should be independent non-executive members of the governing body" (p. 56). Similarly, Paragraph 61 of King IV states that "All members of the committee for nominations should be non-executive members of the governing body, and the majority should be independent" (p. 57). In the same vein, Paragraph 66 of King IV states that "All members of the committee for remuneration should be non-executive members of the governing body, with the majority being independent non-executive members of the governing body" (p. 57). In the same light, Paragraph 6.2 of the Malaysian Code of 2017 states that the Remuneration Committee "should only consist of non-executive directors and a majority of them must be Independent Directors" (p. 31). In light of the above, "where possible" as used in the NCCG 2018, has no place in the 21st century corporate governance lexicon.

Reasonable period. Under Paragraph 12.8 (Appointment to the Board) of the NCCG 2018, the phrase "reasonable period" was used in the sentence that reads "NEDs should serve for a reasonable period on the Board" (p. 19). This is the most deplorable and retrogressive phrase in the NCCG 2018. With this statement alone, the NCCG 2018 is worse than the SEC Code of Corporate Governance in Nigeria 2003, even with all the shortcomings of the 2003 Code. If the SEC Code of 2003 (one-half decades earlier) could state under Paragraph 5v that "Non-executive directors should be appointed for a specified period" and "Re-appointments should be dependent on performance" (p. 7), then the motivation of the drafters of the NCCG 2018 would have to be examined or investigated. Even Paragraph 5ii of the SEC Code of 2003 states that "Directors' service contracts should not exceed three years without shareholders' approval" (p. 7).

If leading practice corporate governance codes are now requiring a maximum of three terms of three years for NEDs and INEDs and some are even requiring all directors to be subject to annual re-election by shareholders, then, why should the drafters of the Nigerian Code of Corporate Governance 2018 be using this self-perpetuating and self-serving phrase "reasonable period" in the year 2019. No member of any board should ever be appointed for a "reasonable period" (without a defined tenure) and it should never be acceptable in any part of the world for any director to be appointed for a reasonable period. What is a reasonable period and who determines it? With such a phrase, corporate Nigeria will be moving back to the era of sit-tight directors, which was one of the weaknesses in corporate governance in Nigeria identified under Paragraph 2.11 of the CBN Code of Corporate Governance in Nigeria Post Consolidation 2006. Similarly, like the sit-tight syndrome of African Presidents and Heads of States that is ravaging the continent of Africa, the "reasonable period" phrase in the NCCG 2018 is an open invitation for sit-tight syndrome to sweep through corporate boards in Nigeria anew. In contrast to this self-perpetuating and self-serving provision in the NCCG 2018, all existing sectoral codes either have tenure for NEDs or require directors to be re-elected at regular intervals of at least once every three years. So, why did the drafters of the NCCG 2018 select Paragraph 19.2 of the SEC Code of 2011 which requires NEDs to "serve for a reasonable period" but left out Paragraph 19.1 that requires all directors to be "submitted for re-election at regular intervals of at least once every three (3) years" (p. 29). Why did the drafters of the NCCG prefer the self-perpetuating provision (Para. 19.2) of the SEC Code of 2011 to the tenured provision (Para. 2.4.3) of the CBN Code of 2014? Paragraph 2.4.3 of the CBN Code of 2014 states that "To ensure continuity and injection of fresh ideas, Non-Executive Directors of banks shall serve for a maximum of three (3) terms of four (4) years each" (p. 7). To make matter worse, there is no provision in the NCCG 2018 requiring directors to submit themselves to shareholders annually or at specific intervals for re-election and no requirement on rotation plan (board rotation).

In summary, some of the languages and the context in which they were used in the NCCG 2018 such as "where so required," "as may be required," "serves as a guide," "it is desirable," "is not desirable," "where possible" and "reasonable period" are strange and unknown to global corporate governance lexicon. For the provision requiring NEDs to stay on the board for a reasonable period without providing additional safeguards to subject NEDs to re-election at pre-specified intervals by shareholders is a recipe for directors to perpetuate themselves on the board. With such a provision, directors will use the NCCG 2018 as a shield to pursue their sit-tight agenda on the board. The languages analysed above made it seem as if the NCCG 2018 was drafted with guns held to the head of the drafters by certain interested parties who want to perpetuate themselves on their boards. It seems those interested parties have succeeded in inserting languages that create a weak code for Nigeria, which make Nigeria the ultimate loser for failing to develop a code that can stand shoulder to shoulder with those of its peers in sub-Saharan Africa, including King IV of South Africa. It is indeed a missed opportunity.

Key Concerns in the NCCG 2018: General

Few months ago, a man was asked to define corporate governance...but the man asked the journalist, if he meant Nigeria type of corporate governance or the original corporate governance. In Nigeria, everything has its own different definition and meaning from what is obtained in other climes. Apart from the concerns regarding the languages used in the NCCG 2018, there are quite a handful of other concerns that require attention. Some of these concerns include:

- It was very difficult to differentiate between when the word "NEDs" was referring to the class of directors who are strictly NEDs and when it was used to refer to both NEDs and INEDs. Once directors are categorised into EDs, NEDs and INEDs in any code, then, care must be taken to ensure that subsequent references to any of the categories must be clear as to the specific category that is being referred to. Consequently, provisions targeted at INEDs alone must be categorical and unambiguous and provisions targeted at both NEDs and INEDs must ensure that both are specifically mentioned within the sentence or Paragraph. To do otherwise, is

- a recipe for misinterpretation and confusion. Once this is unclear in any code, it creates a fundamental governance problem. Specifically, it was not clear whether the provisions of Paragraphs 3.2 and 3.6 of the NCCG 2018 were referring to both NEDs and INEDs or strictly NEDs. The question would then be, if Paragraph 3.2 was referring strictly to NEDs, what was the intention of the drafters of the Code and what were they trying to achieve? Were the drafters of the Code using the provision to weaken corporate governance or enhance it? Paragraph 3.6 of the NCCG 2018 states that "The Chairman may interact with NEDs periodically" (p. 4). NEDs as used here, does it include INEDs? Paragraph 3.2 of the NCCG 2018 states that "The Chairman of the Board should be a NED and not be involved in the day-to-day operations of the Company" (p. 4). The current leading practice globally is to require chairmen of boards to meet the same independent requirements as INEDs. Paragraph 31 under Principle 7 of King IV states that "The governing body should elect an independent non-executive member as chair to lead the governing body in the objective and effective discharge of its governance role and responsibilities" (p. 53). This requirement was also the same under Paragraph 2.16.2 of King III of 2009 (p. 24). Similarly, Paragraph 2.2 of the ICGN 2014 states that "The chair should be independent on the date of appointment" (p. 9). In the same vein, Paragraph 9 of the UK CG Code of 2018 states that "The chair should be independent on appointment" (p. 6). So, if all the leading practice codes in unitary board environments are gravitating toward independent chairmanship of corporate boards, then why will Nigeria develop a code in 2018 and do not even make it an option under Paragraph 3.2 of the NCCG 2018 for companies to appoint INEDs as board chairmen?
- Paragraph 2.8 of the NCCG 2018 permits concurrent directorships. However, a particular type of concurrent directorship that is generally frowned at in corporate governance, cross-directorship, was not mentioned. A cross-directorship occurs when two or more directors sit on the boards of the other. It represents a threat to efficient working of the board and, in practice, it has the potential to compromise the independence of the directors involved in the cross-directorship;
- The provision of Paragraph 3.3 of the NCCG 2018 which requires a three years cool-off period for the transition of a MD/CEO or an ED to the chairmanship of the same company is insufficient. First, the leading practice requirement is for chairmen to be appointed from INEDs or the individual being appointed should meet the independent criteria on appointment. Second, additional safeguards should be put in place to ensure that shareholders have a say on potential transition from CEO or ED to chairman. For example, Paragraph 9 of the UK CG Code 2018 states that "A

chief executive should not become chair of the same company. If, exceptionally, this is proposed by the board, major shareholders should be consulted ahead of appointment. The board should set out its reasons to all shareholders at the time of the appointment and also publish these on the company website" (p. 6);

- Paragraph 11.2.3 of the NCCG 2018 states that "The Chairman of the committee responsible for 'Nomination and Governance' should be a NED" (p. 12). This being a categorical statement portends danger to what effective corporate governance stands for. If the roles and responsibilities that the Nomination and Governance committee is expected to perform is critically analysed, which includes conducting annual assessment of the independent status of each INED (Para. 11.2.5.6), dealing with all matters pertaining to executive management selection and performance (Para. 11.2.5.8, including an annual evaluation of the performance of the MD/CEO and executive management), establishing a formal and transparent process for board appointments (Para. 11.2.5.2), identifying individuals suitably qualified to become board members (Para. 11.2.5.3), recommending criteria for appointing directors to the board for approval (Para. 12.1), recommending directors for consideration for directorship positions (Para. 12.2) and upholding the principle of director independence by assessing conflicts of interest among directors (ICGN, 2014, Para. 3.8c), it would be inappropriate for a NED to chair it. Rather, this should be one of the committees that should be chaired by an INED. The recommendation under Paragraph 11.2.3 causes more bewilderment when the committee already has more INEDs than NEDs based on the composition recommended under Paragraph 11.2.2 which states that "Members of the committee responsible for nomination and governance should be NEDs, and a majority of them should be INEDs, where possible. There is no consistency with this provision and does not align with what is obtained in leading practice jurisdictions. For example, the U.S. and UK have already given independent status to the three traditional oversight committees of Audit, Remuneration and Nomination/Governance. In other words, they are to be composed solely of independent directors. If the intention is to strengthen the independence of the oversight committees of the board, why should any code with a unitary board structure ever recommend a NED to chair an oversight (monitoring) committee consisting of three directors of which two are INEDs? It should not have been contemplated and should not be allowed to stand. In contrast to the aforementioned provision of the NCCG 2018, Paragraph 4.7 of the Malaysian Code states that "The Nominating Committee is chaired by an

Independent Director or the Senior Independent Director" (p. 24). Similarly, to enhance the role of the Nomination Committee, the Hong Kong Consultation Conclusions on Review of the Corporate Governance Code of 2011 recommends that the committee should comprise a majority of INEDs and chaired by an INED (Para. 127i and 127ii, p. 30);

- It is important to state that it seems the reckless adoption of the format of King IV by the drafters of the NCCG 2018 also caused some of the problems associated with the NCCG 2018. For instance, the NCCG 2018 adopts a similar language used in categorising committees as committee responsible for "risk," "audit," "remuneration" and "nomination" without taking into consideration why King IV adopted that format in the first place. King IV adopted that format because King IV applies to all types of entities, including not-for-profit, public sector and private sector. Thus, it was appropriate to refer to the names of such committees in that manner so as to provide opportunity for the public sector, private sector and not-for-profit to customise as appropriate. However, because the NCCG 2018 is only applicable to the private sector, it was inappropriate to use the term "committee responsible for." The implication of this choice will be known in a matter of time as it may change the already consistent naming convention for corporate board committees in Nigeria. Since the naming convention for board committees is well-established in Nigeria, it would have been better to preserve same to ensure consistency. For example, is it well known that BRMC is Board Risk Management Committee and BAC is Board Audit Committee. There is a well-known committee naming challenge in Nigeria today, which is the naming of the board risk management committee as the "Enterprise Risk Management Committee" (ERMC) by the NAICOM Code of 2009 (Para. 6.0, p. 13). Practitioners, consultants and trainers sometimes mistaken the ERMC for a management committee instead of the board committee due to the "Management" attached to "Enterprise Risk Management Committee." It makes it look as if it is a management committee. So, it would have been better if the drafters of the NCCG 2018 had inserted provisions that promote consistency rather than inconsistency. Another area where the adoption of the King IV format has misled the drafters of the NCCG 2018 is in the use of the word "non-executive" members" (King IV, Paragraphs 64 and 66). While non-executive members as used by King IV can apply to both NEDs and INEDs, the same cannot be said of the use of non-executive directors (NEDs) in the NCCG 2018. Since the NCCG 2018 has categorised its directors into EDs, NEDs and INEDs, then the Code must be clear and unambiguous when referencing any, two or three of the director types;

- The provision of Paragraph 11.2.4 of the NCCG 2018 which requires the Nomination and Governance Committee to "meet at least twice a year" is insufficient. If the board is expected to work and monitor through committees and Paragraph 10.1 of the NCCG 2018 requires the board to meet at least once every quarter (minimum of 4 times in a year), then, why should any of the oversight committees meet for less than once every quarter? Rather, the minimum acceptable practice, which would allow the oversight committees to effectively perform their oversight functions, would be to align the number of oversight committee meetings to that of the board, which is at least once every quarter (minimum of 4 times in a year). This concern is also applicable to Paragraphs 11.3.4 and 11.55 of the NCCG 2018 which requires the Remuneration Committee to meet at least once a year and the risk management committee to meet at least twice every financial year respectively. The recommendation for alignment between the number of oversight committee meetings and the number of board meetings suffices here. Thus, all committees should meet at least once every quarter. This should be the very minimum;
- Paragraph 11.5.2 of the NCCG 2018 states that "Members of the committee responsible for risk management should include EDs and NEDs, a majority of whom should be NEDs" (p. 16). Furthermore, Paragraph 11.5.4 of the NCCG 2018 states that "The chairman of the risk management committee should be a NED" (p. 16). This is a recipe for disaster. The drafters of the NCCG 2018 are not children of history, and certainly not children of history in Nigeria. If they are, and they understood the causes of insider-related loans and non-performing loans in banks in Nigeria and the concomitant failures experienced by banks in Nigeria within the last two decades due to such practices, then, such composition would not have been recommended for the risk management committee. Paragraph 2 of the CBN Code of Corporate Governance Post Consolidation of 2006 listed weaknesses in corporate governance of banks in Nigeria to include insider-related loans, non-performing loans and abuses in lending. The risk management committee as constituted by the NCCG 2018 is a committee of the affiliated (insider) directors, by the affiliated (insider) directors and for the affiliated (insider) directors and those they represent on the board. Thus, what is prescribed in the NCCG 2018 is a case where Nigeria, with a concentrated ownership environment, decides to create an insider dominated board and insider dominated committees with no safeguard and no independent voice. In contrast, the UK, even though it has a dispersed ownership environment, with the market (through the dispersed shareholders) being the ultimate disciplinary mechanism, recommends

under Paragraph 25 of the UK CG Code of 2018 for the board risk management committee to be composed of solely independent directors. The question that the drafters of the NCCG 2018 need to answer is, which of the environments, concentrated ownership or dispersed ownership, should seek for more independent directors on boards and board committees, as well as pursue stricter corporate governance requirements?

- While the drafters of the NCCG 2018 opted for a strict leading practice requirement regarding the tenure of INEDs (Para. 12.10), they however, opted for the most lax and obsolete requirement for NEDs (Para. 12.8). This is one area of the NCCG 2018 that makes corporate governance scholars to wonder if the drafters of the Code were acting a pre-defined script. Paragraph 12.10 of the NCCG states that "The tenure for INEDs should not exceed three terms of three years each," whereas Paragraph 12.8 states that "NEDs should serve for a reasonable period on the Board" (p. 19). What is a reasonable period and who determines it? With this provision, NEDs are free to perpetuate themselves in the boardroom like many African political leaders who overstay their relevance and tenure in offices they occupy. No tenure limit was recommended for CEOs and EDs in general, not even CEOs of listed companies (Para. 12.9). However, as far back as 2002, Section 2.1.7 of the Kenya Gazetted Corporate Governance Guidelines states that: (a) "All directors except the managing director should be required to submit themselves for re-election at regular intervals or at least every three years, and (b) "Executive directors should have a fixed service contract not exceeding five years with a provision to renew subject to: (i) Regular performance appraisal, and (ii) Shareholders' approval" (pp. 477-478). Thus, with such composition prescribed in the NCCG 2018, affiliated directors (EDs and NEDs) have been given the leeway to become Dukes, Kings, Duchess and Queens in the boardroom and to reign over the helpless INEDs, who have been castrated, stripped and deprived of all the protections and status usually accorded them in leading practice codes globally. Once again, these provisions of the NCCG 2018 help to corroborate the concerns of genuine corporate governance scholars that the NCCG 2018 was designed to create insider-dominated boards in corporate Nigeria. All the organs and mechanisms that forward-thinking Nations adopt in their codes to strengthen the independence of the board have been bluntly rejected in the NCCG 2018. What a missed opportunity; what a wasted opportunity. With the inconsistent provisions of the NCCG 2018 highlighted in this bullet point, the probability of corporate failures in Nigeria in no distant time has been significantly enhanced;
- With the kind of composition prescribed by the NCCG 2018 and the total rejection of

the position of the Senior or Lead INED, who is responsible performing significant roles on the board, including facilitating the performance appraisal and providing feedback to the board chairman, the hope of entrenching sound corporate governance in Nigeria is bleak. If the mechanism of Lead or Senior INED created to deal with the performance appraisal of the board chairman is rejected by the drafters of the NCCG 2018, what is the alternative measure(s) recommended to address this lacuna under Paragraph 14.4 of the NCCG 2018? Maybe, the board chairman is an emperor whose performance cannot be evaluated and cannot be questioned;

- Although Paragraph 16.8 of the NCCG 2018 states that "The Company's Remuneration Policy as well as remuneration of all Directors should be disclosed in the Company's annual report" (p. 22), the NCCG 2018 failed to require shareholders to vote on the company's remuneration policy. The Paragraph also talks about the remuneration of all directors and not the remuneration of each director. If Paragraph 16.5 can require board to fix the remuneration of NEDs and approved by shareholders in the General Meeting, why was the drafters of the NCCG 2018 not willing to subject the company's remuneration policy to shareholders' approval. These provisions are opaque and not in tandem with the principle of accountability, openness, transparency and does not give any say to shareholders on executive compensation. In contrast, Paragraph 29c of King IV requires shareholders to vote on the remuneration policy. Paragraph 30 of King IV went further to prescribe the basic elements that should be contained in the remuneration policy, Paragraph 31 requires the board to monitor the implementation of the remuneration policy to achieve its objectives and Paragraph 32 prescribes the robustness of the remuneration disclosures and the remuneration report. Similarly, to encourage transparency, the NCCG of Mauritius 2016 requires under Principle 4 that "In addition, all Boards should consider disclosing details of the remuneration paid to each individual director in the annual report" … and "Executive director remuneration should be clearly differentiated from non-executive director remuneration" (p. 26). The disclosure was for each director as against the requirement in the NCCG 2018, which requires disclosure for all directors;
- Paragraph 17.7 of the NCCG 2018 requires the board to "ensure that the Company's risk management framework is disclosed in the annual report" (p. 23). It is not the risk management framework that should be disclosed in the annual report, rather the effectiveness of the risk management system (based on monitoring and review conducted by the board and its committees) that should be disclosed in the annual report. The framework itself should be disclosed or hoisted in the company's

website; and

- The NCCG 2018 focused mostly on "What" the board or a director should and should not do, but less about the "How" and "Why."

Conclusion

There are three basic objectives, amongst other objectives, that a modern corporate governance code must seek to achieve regarding corporate boards. The first is, are boards more independent; the second is, are boards more financially savvy; and the third is, is there more diversity in boards? Consequently, the question that needs to be asked of the NCCG 2018 and its drafters is, has the NCCG 2018 been deliberately designed to create more independent and financially savvy boards, as well as more diversity in boards?

Based on the review of the Nigerian Code of Corporate Governance (NCCG) 2018, taking into consideration the importance of sound corporate governance, key issues addressed by the NCCG 2018 (positives), key issues the NCCG 2018 failed to address (negatives), key concerns in the NCCG 2018 and the questions posed above regarding the three basic objectives that a modern corporate governance code must seek to achieve, the following conclusions have been reached:

- The NCCG 2018, as written, is sound in principle (the 28 principles) and the disclosures recommended under Paragraph 28, but lacking and highly deficient in many other aspects;
- While the NCCG 2018 will be profoundly useful to smaller companies and companies not currently under any corporate governance regulatory regime in Nigeria, it is far from adequate (and far from suitable) for listed and bigger companies;
- The Code has created insider dominated boards. This is at variance with global corporate governance literature which recommends independent (outsider and non-affiliated) dominated boards for a concentrated ownership environment such as obtained in Nigeria. Therefore, a concentrated ownership environment cannot have and should not be allowed to have insider (affiliated) dominated boards;
- The NCCG 2018 has helped to create non-financially savvy audit committee and board committees dominated by affiliated directors. The NCCG 2018 only requires one financial expert on the audit committee, while other members need just be financially literate (Para. 11.4.2). The NCCG 2018 went further to recommend that for the statutory audit committee (SAC), the chairman should have financial literacy (11.4.4). What does being financially literate mean? There was also no attempt made by the NCCG 2018 to

create independent oversight committees. With the language used in the NCCG 2018, the three traditional oversight committees (Audit, Remuneration and Nomination) and the Risk Management Committee will be dominated not by independent directors, but by NEDs (affiliated directors). Furthermore, there was no innovation introduced into the NCCG 2018 to encourage more diversity on corporate boards in Nigeria;

- The NCCG 2018 has the capacity to engineer more corporate failures in no distant future, primarily as a result of the weak composition and insider dominated arrangement recommended for boards of companies in Nigeria;
- Nigeria, being a country with weak legal, regulatory and judicial frameworks, deserves a corporate governance code that seeks to strengthen rather than weaken independent organs and structures of corporate boards. In addition, Nigeria deserves a corporate governance code that contains inbuilt dissuasive requirements that will act as ultimate disciplinary mechanism since the Nigerian market, being a concentrated ownership environment, cannot act as the ultimate disciplinary mechanism;
- The "Recommended Practices" in the NCCG 2018 are not far-reaching enough, and in most instances, leaves much to be desired. The "Recommended Practices" should rather be benchmarked with leading practices and consideration given to smaller companies, not the listed and bigger companies, to implement reduced measures;
- The relationship between the FRCN's NCCG 2018 and existing sectoral codes was not addressed;
- The effective date of the NCCG 2018 was not mentioned, neither was early adoption recommended;
- The FRCN abdicated its responsibilities as enshrined under Sections 11c and 50 of the FRCN Act of 2011 regarding its responsibilities to "promote the highest standards of corporate governance" (Section 50b, p. A78) and "act as the national coordinating body responsible for all matters pertaining to corporate governance" in Nigeria (Section 50d, p. A78). It is not clear in the NCCG 2018 how the FRCN will act as the national coordinator regarding the implementation of the NCCG 2018. The provisions of Paragraph D of the NCCG 2018 is short of the powers granted the FRCN and the responsibility enshrined under Section 50d of the FRCN Act. To make matter worse, even the provisions relating to the relationship between the NCCG 2018 and existing sectoral codes in Nigeria, which was contained in the draft NCCG 2018 was conspicuously

missing in the unveiled NCCG 2018;

- The NCCG 2018 has no capacity to boost foreign investors' (direct and portfolio) confidence in the corporate and board governance structure in Nigeria. The structure prescribed in the NCCG 2018 does not enhance the independence of boards, rather, it weakens the independence of boards in Nigeria through the strengthening of affiliated and insider dominated boards;
- The governance practices that are the foundation of effective corporate and board governance in the 21st century, such as appropriate board composition (with majority independent directors), extensive disclosures on company's websites, minority shareholders' protection, say-on-pay (binding or non-binding), are conspicuously missing in the NCCG 2018;
- There was no attempt to harmonise existing sectoral corporate governance codes in the NCCG 2018, even though it was the primary remit of the Steering Committee on National Code of Corporate Governance constituted in January 2013, the predecessor committee to the Technical Committee that birthed the NCCG 2018. The most embarrassing aspect of the NCCG 2018 is that even though the remit of the Technical Committee was to review the suspended NCCG 2016 (for private sector) with a view to recommending amendments and/or improvements, the Technical Committee embarked on a new mission, to write a totally new code, not minding the fact that the predecessor committee (i.e. the Steering Committee) spent almost four years (between January 2013 and October 2016) and tax payers' monies to engage various stakeholders in arriving at the suspended NCCG 2016. Unlike the precedence in corporate governance literature such as the review of the Cadbury (1992) and Greenbury (1995) Reports by the Hampel Committee in 1999, as well as the review of Smith's Report of 2003 by Higgs' Committee of 2003 in the UK, the Technical Committee failed to tell Nigerians which of the provisions of the NCCG 2016 they agreed with and adopted and those they disagreed with and fail to adopt. The Technical Committee failed to even reference, acknowledge or cite either the draft NCCG 2016 (private sector) or the suspended NCCG 2016 (private sector). From a scholarly perspective, the Technical Committee can be sued for plagiarising the NCCG 2016 without giving credit to the Steering Committee that produced it. In contrast to the practice observed in the case between the work of the Technical Committee and the Steering Committee on the Nigerian Code of Corporate Governance, the first

Combined Code in the UK, which was the Hampel Report of 1998, informed the people of the United Kingdom and indeed the world the areas of agreement with both the Cadbury Committee (and the Cadbury Report of 1992), as well as the Greenbury Committee (and the Greenbury Report of 1995). In the same vein, this same practice was adopted by the Higgs' Committee Report of 2003, which formed the core of the Combined Code of Corporate Governance 2003 in the UK, in informing the people of UK and indeed the world of the areas of agreement with the Smith's Committee (and the Smith's Report of 2003). The Higgs' Committee Report of 2003 specified provisions of the Smith's Report that were adopted and those not adopted. Similarly, the Hampel's Committee Report of 1998 specified provisions of both the Cadbury Committee Report of 1992 and the Greenbury Committee Report of 1995 that were adopted and those not adopted. From a scholarly perspective, this is the right thing to do;

- The NCCG 2018 has done a great disservice and injustice to researchers, consultants (responsible for governance advisory), scholars and academics in corporate governance as they will continue to read and reference multiple sectoral codes in Nigeria since the sectoral codes were not harmonised and would most likely continue to exist side-by-side the NCCG 2018;
- The drafters of the NCCG 2018 seems not to have taken into consideration many of the failures that occurred in the Aviation, Banking and other industries in Nigeria, the lessons learnt and the reforms embarked upon by some of the regulators to forestall future occurrences;
- The author might not have agreed with all the provisions of the suspended NCCG 2016, but that code was a masterpiece. It was a code that had the full capacity to compete favourably with any code from any part of the world and was capable of causing significant change in corporate Nigeria. As a scholar, the author could see that so much rigour was applied in drafting the suspended NCCG 2016. Unfortunately, the same cannot be said of the NCCG 2018. The non-implementation of the NCCG 2016 was a missed opportunity for Nigeria and a costly one for that matter. Few weeks ago, a gentleman said to the author of this paper upon the released of the NCCG 2018, "There is no vibes from the release of the NCCG 2018." Unfortunately, this seems to be the prevailing feeling over the NCCG 2018. The author's areas of disagreement with the suspended NCCG 2016, which were quite a few, are in the public domain and can be obtained through a Google search. In

fact, the author disagreed more with the contributions from PWC and KPMG than with the provisions of the NCCG 2016. The author's "Point of Order" letters on PWC and KPMG's comments on the draft NCCG 2015/16 are also in the public domain;

- The NCCG 2018 falls short in many aspects when compared with existing sectoral codes;
- The NCCG 2018 as written, does not have the capacity to cause the kind of change required and needed in corporate Nigeria. However, like the popular adage "half bread is better than no bread," companies that are currently not under any corporate governance regulatory regime in Nigeria should adopt the NCCG 2018 as a matter of urgency. For such companies, the NCCG 2018 is a fair document to start with;
- The NCCG of 2018 is not what Nigerians should be excited about as its provisions are far less aligned to leading practice requirements when compared with those of South Africa and Mauritius corporate governance codes; and
- This is not the National Code of Corporate Governance Nigeria and Nigerians deserve at this time and surely not the code Nigerians have been yearning, longing and waiting for.

Recommendations

Upon a review of the Nigerian Code of Corporate Governance (NCCG) 2018 and the conclusion reached by the author, the following recommendations are made:

- The implication of the deficient NCCG 2018 will be far-reaching on key stakeholders. First, most, if not all, of the sectoral corporate governance codes in Nigeria require reviews to strengthen corporate governance as the sectoral regulators cannot and should not rely on the newly released NCCG 2018 based on the avalanche of deficiencies in the NCCG 2018 as highlighted in this paper. Corporate governance codes in Nigeria take too long before they are reviewed and updated. The NAICOM Code was issued in 2009, PenCom's Code in 2008, SEC's Code in 2011 (with minor amendments in 2014), CBN's Code and NCC's Code in 2014. Some of the provisions in the existing sectoral codes are too lax and need to be updated. The world is moving and Nigeria needs to keep pace with the rest of the world. Thus, there is need for changes to be made to the existing codes. Second, the NCCG 2018 becomes an addition to the already existing sectoral codes and the consequences of this on some companies would be huge. For example, a bank that is listed on the Nigerian Stock Exchange would have to comply with three corporate governance codes: The CBN Code, the SEC Code and the FRCN NCCG 2018. Thus, additional burden, financial and otherwise, may likely be experienced, particularly as externally facilitated governance reviews and board evaluations would take into consideration the new addition (i.e. the NCCG 2018);

- For companies and industries not currently under any sectoral corporate governance regulatory regimes in Nigeria, such as Aviation, Power, Energy, Utility, Oil and Gas and the International Oil Companies (IOCs), the NCCG 2018 should be quickly adopted by such companies and their regulators. Such regulators may also engage experts to help draft additional corporate governance requirements or even a code to meet the specific challenges pertaining to each industry;
- Higher standards of corporate and board governance ought to have been implemented for listed companies by the NCCG 2018. This should be given due consideration in the next update to the NCCG 2018; and
- Nigeria is the most populous black nation in the world and cannot continue playing the Ostrich. Nigeria must lead Africa from the front, and not behind and she must set the pace for other African countries to follow. Thus, a more independent, more financially savvy and a more diversity friendly board is needed in Nigeria, and only a code that supports these objectives shall be good enough for Nigeria. Only when these objectives are achieved, and until then, will the world in general and foreign investors (Direct and Portfolio) in particular take Nigeria and the Nigerian market seriously.

The Way Forward

The way forward and the next step is for Nigeria and the FRCN in particular to, as a matter of urgency, set up a new committee of experts to draft a truly national and befitting code of corporate governance for Nigeria. In the new arrangement, Recommended Practices, should be positioned at the level of leading practices. However, companies, particularly, smaller companies, could be advised or encouraged to implement the new corporate governance code to be drafted by experts on a proportional basis so that the Recommended Practices can be scaled in accordance with other predefined variables such as size, complexities and resources.

References

Brown, J. (2006). The imperfect board member: Discovering the seven disciplines of governance excellence. San Fran cisco, CA: Jossey-Bass.