

Knowledge Exchange

OALP Client Update

Olaniwun Ajayi LP

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The Code of Corporate Governance for Public Companies in Nigeria 2011: A Primer

Corporate Governance connotes a set of processes and policies that control the administration of a corporate entity and are aimed at promoting accountability. In reality, Corporate Governance is about serving the holistic purpose of safeguarding the interests of a company's stakeholders which include its employees, creditors, customers, management, government, community and suppliers.

In Nigeria, the first attempt to provide a code of corporate governance for public companies was via the Code of Corporate Governance for Public Companies 2003 (the 2003 Code), to supplement the existing legal framework of corporate governance principles, particularly the Companies and Allied Matters Act (CAMA) and the Investment and Securities Act (ISA). However, the inadequacies that became apparent in the implementation of the 2003 Code and the rampant incidence of insider trading in the Nigerian banking sector, led to the new code which was brought into force on 01 April, 2011.

Applicability of the Code

The Code of Corporate Governance for Public Companies in Nigeria 2011 (the Code) is intended to guide and enhance sound corporate practices and behaviour in Public Companies in Nigeria and is applicable to all public companies, particularly, public companies whose securities are listed on a recognised securities exchange and all companies seeking to raise funds from the capital market through the issuance of securities or seeking listing by introduction (together "Companies").

Conflict Provisions

Where there appears to be a conflict between the provisions of the Code and any other code in force in relation to the Companies, the Code provides that the "code with a stricter provision shall apply". For instance, as of date hereof, Nigerian Banks, which are all public companies with their securities listed on the Securities Exchange, are required to comply with the provisions of the Code of Corporate Governance for Banks in Nigeria, Post Consolidation (2006), which is expressly stated to be mandatory rules and standards of behaviour. As such, where there appears to be a conflict in the provisions of these two codes, Code of Corporate Governance for Banks in Nigeria, Post Consolidation (2006) would prevail, being the stricter Code.

Composition and Responsibilities of the Board of Directors

The Board is entrusted with the responsibility of effective management of the Company in compliance with good corporate governance and board practices so as to ensure due protection

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In event of a conflict between the provisions of the Code and any other code in force in relation to the Companies, the "code with a stricter provision shall apply".

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and enhancement of shareholder value. The Board of Directors of the Company is to have a minimum of (5) five members comprising of both executive and non-executive directors with at least one independent director. The Code defines the term “independent director” as one who is not a substantial shareholder of the Company; whose shareholding whether directly or indirectly does not exceed 0.1% of the Company’s paid up capital. In practical terms however, 0.1% shareholding may still constitute a material influence in companies whose shares are widely held. The Board of Directors of the Company is to be headed by a Chairman who is to be a non- Executive director of the Company and is to have no executive functions in the Company.

The Code states that all public companies with listed securities must have separate roles for the Chief Executive Officer (who is the head of the management team and is involved in the day to day management of company) and the Chairman of the Board and that those offices must be held by different individuals. This provision seems to be mandatory on public companies with listed securities unlike the persuasive provisions of the 2003 Code.

The Code provides that not more than two members of the same family should sit on the Board of a public company at the same time. The Code however fails to define “family”; thus, making unclear, the categories of precluded persons.

To effectively perform its oversight function and monitor the performance of management, the Board of the Company is required to meet at least quarterly and every director is required to attend at least two-thirds of all Board meetings; this is a criterion for re-nomination.

The Directors are required to be presented for re-election at regular intervals of at least three years and non-executive directors of public Companies are to serve for a reasonable period on the Board.

Insider trading

The Code provides that Directors of Public Companies, their immediate families (including spouse, son, daughter, father, mother) and other insiders defined in section 315 of the Investment and Securities Act 2007 and Rule 110(3) of the SEC Rules and Regulations, in possession of price sensitive information or other confidential information shall not deal with the securities of the Company where such would amount to insider trading as defined under the ISA. The provision on Insider trading is an effort to address the reoccurrence of insider dealing on the Nigerian Stock Exchange (NSE) and as such a mandatory provision for public companies.

Shareholder Protection

The Code provides that general meetings of the Company should be conducted in an open manner allowing for free discussions on all issues on the Agenda, with sufficient time allotted, to enable the shareholders participate efficiently. Specific provisions are also made with respect to proceedings at meetings. For example, institutional shareholders and shareholders with large holdings of the Company are encouraged to seek to positively influence corporate governance in the Company and to seek an explanation where there has been non-compliance with provisions of the Code. The Code also suggests that the Company should stipulate that shareholders holding more than a specified ratio of the total issued capital of the Company should have a representative on the Board unless this is impracticable.

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The Code also suggests that the Company should stipulate that shareholders holding more than a specified ratio of the total issued capital of the Company should have a representative in the Board unless this is impracticable.

Public companies are by the Code required to state in their Annual Report their level of compliance with the provisions of the Code.

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Risk Management and Audit

The Code provides that the Board is responsible for the process of risk management and forming an opinion on the effectiveness of the process. In accordance with the provisions of CAMA, the Code, like the 2003 Code, provides for the establishment of the Audit Committee amongst several committees of the Board. At least one of the members of the Committee is required to have basic financial literacy and the Committee is responsible for assessing and managing significant risks that may affect the business of the Company, amongst other duties stated in the Code.

Companies are required to have an effective risk-based internal audit function and in the absence thereof, sufficient reason disclosed in the Company's Annual Report with an explanation as to how an effective internal processes and systems such as risk management and internal control will be obtained.

The Board is also responsible for establishing a whistle-blowing mechanism for reporting any illegal or substantial unethical behavior, which policy should be known to stakeholders, so as to ensure its effectiveness.

Compliance with the Code

The Board of directors in the first instance are entrusted with the responsibility of ensuring compliance with the provisions of the Code. Shareholders are however also encouraged to ensure compliance.

Whilst the intent of the Code is to be directory, it is pertinent to note that public companies are, by the Code, required to state in their Annual Report their level of compliance with the provisions of the Code.

Where a company is in breach of any provisions of the Code, the Securities and Exchange Commission (SEC) shall notify the Company of such non-compliance and the specific actions needed to remedy the breach as such, there are no stipulated penalties for non-compliance with any of the provisions of the Code.

CONCLUSION

The Code, unlike the 2003 Code, is set out to ensure the highest standard of transparency, accountability and corporate governance, without unduly inhibiting enterprise and innovation. Whilst the provisions of the Code are laudable, it remains indubitable that enforcement mechanisms, rather than elaborateness of the provisions of a code, remain key to good Corporate Governance both in Nigeria and in all parts of the developed and developing world. If enforcement mechanisms remain weak or virtually non-existent, codes will come and go with very little impact on stakeholder interests. Good Corporate Governance is also germane to securing Investor Confidence in any Corporation. Thus, the importance of stakeholder vigilance and commitment to ensuring compliance with the Code cannot be over-emphasized.

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