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THE NEWW CAMA 2020 CORPORATE GOVERNANCE

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CORPORATE GOVERNANCE IN CAMA 2020.

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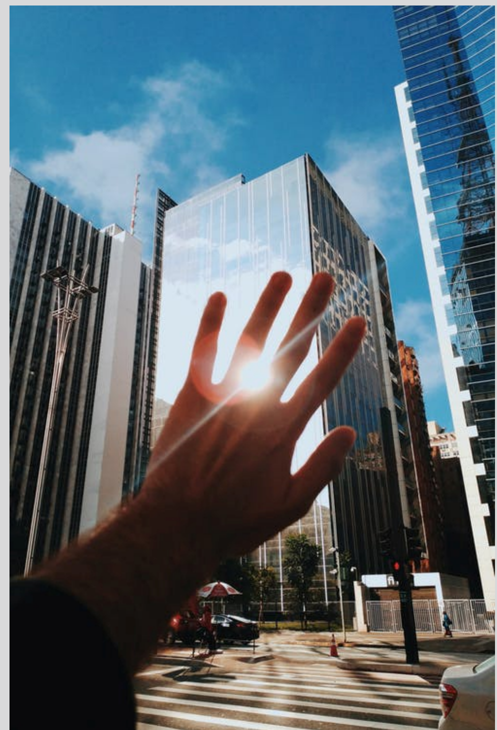
INTRODUCTION

If corporate governance efficiency were measured by legislation, Nigerian Government might be awarded a medal for paying increased attention to the subject of Corporate Governance in the Nigerian Corporate space. In the last decade alone, government institutions have released five different codes of Corporate Governance to regulate specific sectors of the Nigerian Economy. Earlier in the year 2020, the Financial Reporting Council of Nigeria released Guidelines for Reporting on Compliance with the Nigerian Code of Corporate Governance 2018. And of course it is no longer news that the newly enacted Corporate and Allied Matters Act 2020 contains provisions relating to core corporate governance issues. While the intention of the Nigerian government to enhance investments and business might be noble, the approach is potentially confusing and quite disruptive of the existing governance structures. To be clear; disruption is not only a necessity, it is a need in today's technology driven environment. However, corporate governance is less influenced by legislative disruption but more by culture and creativity.



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ESSENCE OF CODES OF CORPORATE GOVERNANCE

With the singular exception of the Code of Corporate Governance for Banks and Discount Houses, the Codes of Corporate Governance are not intended as a mandatory collection of laws or a set of rigid rules but rather a guide. This is succinctly explained in the preamble to the Nigerian Code of Corporate Governance 2018 as follows: ***"although the Code recommends practices to enable companies apply the principles; it recognizes that these practices can be tailored to meet industry or company needs. The Code is thus scalable to suit the type, size and growth phase of each company while still achieving the outcomes envisaged by the principles."*** Similar sentiments are expressed in the other codes.

The new CAMA 2020 is however a Statutory enactment of the National Assembly of Nigeria, duly assented to by the President of the Federal Republic. All of the provisions contained therein are therefore very clearly obligatory and inflexible. There is no latitude for loose interpretation or scalability unlike most of the Codes of Corporate Governance. The obvious implication of this is that in areas of conflict between any of the codes and the newly enacted CAMA, the newly enacted statute will supersede and its provisions will apply. In other words, the corporate governance provisions in the statute are the minimum, non-negotiable standards that concerned companies are subject to.

CORPORATE GOVERNANCE IN CAMA 2020.

The CAMA 2020 contains a number of provisions related to corporate governance, this article will focus on the new provisions that have been introduced and amendment that have been made to the old ones.

Companies prohibited rom having a person act as chairman and MD/CEO simultaneously

By the provision of Section 265(6) of the Act, a person cannot be the Chief Executive Officer (CEO)/Managing Director (MD) of a public company and at the same time act as the Chairman of the Board of Directors. This position has been encouraged in the different codes prior to the enactment of the new Act and is in tandem with international trends of corporate governance.

There are copious arguments in favor of this provision. The CEO/MD is in charge of the day to day running and management of the company while the Board of Directors is responsible for maintaining oversight over the actions of management and implementing the right corporate governance practices. It is therefore not advisable for the MD/CEO to head the body charged with oversight of his activities. Having different persons occupy the two positions enhances risk management, ensures appropriate Executive compensation and provides for the autonomy of the Audit Committee. A strong Chairman can also serve as a counter-weight to the MD/CEO ensuring that the company is not completely subject to the whims and impulses of the MD/CEO.

Notwithstanding the apparent advantages of this provision, it is debatable if making this a statutory obligation for public companies is indeed the best option. The specific circumstances of a company might necessitate a single person combining both roles. A company can also have specific governance arrangements or measures to counteract the possible drawbacks of having a person act as both CEO and Chairman of the Board.

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In the United States, for example, as at 2018, 45.6% of the S&P 500 companies (500 large companies listed on stock exchanges in the United States) have Chief Executives who also serve as the Chairman of their Board of Directors. The CEO of Coca-Cola, one of the most reputable companies in the world also doubles as the Chairman of its Board. Similarly, Jeff Bezos acts as both the CEO and Chairman of Amazon, a leading company in the Technology space with a valuation of about $1.58 trillion. Therefore, this provision in the newly enacted CAMA limits flexibility and would prevent new companies that wish to be listed on the Nigerian Stock Exchange from adapting an arrangement most suited to their circumstances.

It is however noteworthy that even in the United States there is a growing disposition towards having the roles and persons occupying them separated. In 2019, the United States Securities and Exchange Commission compelled the CEO of Tesla, one of the biggest companies in the world, Elon Musk to relinquish his position as Chairman of the Board. Ultimately, therefore, this provision is a commendable one and companies are under a clear obligation to have different persons occupy the two roles.

Independent Directors in Public Companies

In a broad sense an independent director is a non-executive director who does not have any kind of relationship with the company that may affect the independence of his/her judgment. Independent directors act as a guide to the company and its board. Their roles broadly include improving corporate credibility, risk management and governance standards by functioning as a watchdog. Independent directors play vital roles in various committees set up by the company to ensure good governance.

Section 275 of the new Act provides that all Public companies shall have at least three independent directors. This is at variance with the Code of Corporate Governance for Public companies which encourages every public company to have a minimum of one independent director on its Board. The Nigerian Code of Corporate Governance which applies to all kinds of companies, public and private and is also the most recent provides that any Board should possess appropriate mix of Executive, Non-Executive and Independent Non-Executive members such that majority of the Board are Non-Executive Directors. It then goes further to say that it is desirable that most of the Non-Executive Directors are independent.

Under the new statute, the minimum number of independent directors for public companies are required to have is above any threshold provided for by the Codes. Public companies must therefore make the necessary alterations to their Board structure and composition to ensure compliance with this provision. This newly introduced provision aligns with international best practices as boards are increasingly encouraged to have a majority of independent directors. Nestle for example has 15 directors and 14 of them are independent directors.

Beyond the question as to the number of independent directors, Section 275 also defines who an independent director is. According to subsection (3) of that Section,

> *"an independent director means a director of the company who or whose relatives either separately or together with him or each other, during the two years preceding the time in question:*
>
> *(a) was not an employee of the company;*
>
> *(b) did not –*
> *(i) make to or receive from the company payments of more than N20 million or*
> *(ii) own more than a 30% share or other ownership interest, directly or indirectly, in an entity that made to or received from the company payments of more than N20 million or act as a partner, director or officer of a partnership or company that made to or received from the company payments of more than N20 million;*

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c) did not own directly or indirectly more than 30% of the shares of any type or class of the company;

(d) was not engaged directly or indirectly as an auditor for the company"

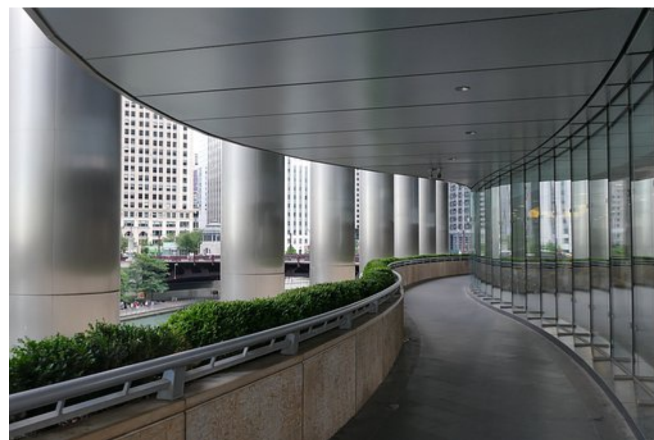
The above definition of an independent director is partly at variance with the definitions contained in the existing codes. While the Act places the maximum shareholding of an independent director at thirty percent (30%), the Code of Corporate Governance for Public Companies places the threshold at 0.1% of the company's paid-up capital. Also, the Nigerian Code of Corporate Governance places the threshold at 0.01%. Therefore, it appears that the shareholding threshold stipulated by the Act effectively makes a mockery of the said independence. Similarly, the prescribed gap of two years between when a person was an employee of the company or had any relationship with the company and when they can be appointed as independent directors is rather small when compared to the five-year prescription by the codes.

In the light of this conflict between CAMA and the Codes, companies have to comply with the provisions of the statute. It is however advised that companies go above the minimum standards of the statute, especially as it relates to the definition of an independent director.

LIMITATION OF MULTIPLE DIRECTORSHIPS.

Under the repealed CAMA 1990, there was no stipulated limit as to the number of multiple directorships a person can hold simultaneously. The Codes also prescribed no limit. They however stipulate that boards and the shareholders should give careful consideration to other obligations and commitments of director nominees in assessing their suitability for appointment into the Board as concurrent service on too many boards may interfere with an individual's ability to discharge his responsibilities. Prospective directors are also required to disclose their other directorships to the company and were discouraged from being members of the boards of multiple companies within the same industry.

However, the new CAMA in Section 307 explicitly provides that a person shall not be a director in more than five (5) public companies. It further provides that any person who is currently a director in more than five (5) public companies shall, within two years from the date of the Act, resign as a director of all but five (5) of the companies.



This new provision is very commendable as it provides some clarity and defines the limitation on the number of directorships a person can hold at the same time. However, there remains the question of exactly what kind of directors this provision applies to. While a limit of five is suitable for Non-Executive Directors who are not employees of the companies and are not involved in the day to day running of the business, for executive directors the limit should be much lower and companies must be careful not to apply the same standard for persons who possess multiple executive directorships.

REQUIREMENT TO DISCLOSE REMUNERATION OF MANAGERS

Under the new Act, companies are now required to disclose the compensation of managers at the Annual General Meeting (AGM). This requirement to disclose the remuneration of managers aligns with the corporate governance principles of disclosure and transparency and shareholder engagement. With this provision, remuneration of managers has been added to ordinary business which must be discussed at every AGM.

Executive compensation is a key governance issue. Companies need to find a balance between offering competitive pay packages to attract the best persons and ensuring that executive compensation does not deprive shareholders of their dividends. Under the Codes, boards of companies are encouraged to delegate the issue of directors' pay or executive compensation to a Remuneration Committee made up entirely of Non-executive directors with a majority of these being independent directors.

ADDITIONAL QUALIFICATIONS FOR AUDITORS.

The relationship between a company and its auditors is a delicate one. Conscious efforts must be made to ensure that the auditors are truly independent and cannot be unduly influenced by the Company or its directors. The Codes prescribe the rotation of audit firms and audit partners to safeguard the integrity of the audit process.

Under the old CAMA, the following people were disqualified from acting as auditors of a company;

(a) *an officer or servant of the company;*

(b) *a partner of or an employee of an officer or of the company;*

(c) *a body corporate;*

(d) *a person disqualified for appointment as auditor of any subsidiary, holding company or subsidiary of a holding company of a body corporate.*

By Section 403 of the New CAMA, the list of persons disqualified from acting as auditors to a company has been expanded to include:

(a) *a debtor to the company or to a company that is deemed to be related to the company by virtue of interest in shares, in an amount exceeding N500,000;*

(b) *a shareholder or spouse of a shareholder of a company whose employee is an officer of the company;*

(c) *a person who is or whose partner, employee or employer is responsible for the keeping of the register of holders of debentures of the company;*

(d) *an employee of or consultant to the company who has been engaged for more than one year in the maintenance of any of the company's financial records or preparation of any of its financial statements.*

EDITORIAL

Is Corporate governance legislative or cultural? The culture of corporate governance in the Nigerian corporate space is deeply deficient. Most companies and managers still believe that financial capacity and pure business acumen are sufficient to lead any company while corporate governance is just a buzzword that regulators and experts love to throw around. The government's approach to solving this conundrum has been to create legislations and supporting regulations to ensure companies embrace corporate governance.

While the efforts of the government in this light are commendable, there are significant impediments to this approach. First is the issue of implemetntation and enforcement. It serves no purpose to enact laws and regulations without enforcing them. The provisons of the

Codes of Corporate Governance mainly only exist in theory and companies still act in blatant disregard of these codes without any oversight by regulatory bodies. Beyond the failure of government agencies to monitor the implementation of these Codes and regulations, it is difficult to accurately measure compliance to corporate governance principles. This is because, as mentioned earlier, corporate governance principles are not a rigid set of rules, they are subject to the peculiar circumstances of individual companies and must be adapted to suit same.

Statutory provisons are therefore an inefficient means of promoting and establishing the right corporate governance structures. Corporate governance is a vast and wide concept with different applications for different companies, and, no Act or Law, no matter how wide can adequately legislate corporate governance. Therefore, rather than rely on the impracticable enforcement of defective stautes or laws, efforts should be directed towards promoting and establishing corporate governance first and foremost as corporate culture in Nigeria.

In the United Kingdom, for example, there is a similar regulatory framework for corporate governance. The key legislation is the Companies Act 2006 along with the Listing Rules and the Disclosure Guidance and Transparency Rules (DTR) by the Financial Conducts Authority. The regulations focused mainly on corporate governance include the United Kindom Corporate Goveernance Code (" the UKCG Code") which applies to companies and the UK Stewardship Code for Institutional Investors. The similarity between the regulatory framework of corporate governance in Nigeria and UK demonstrates that the difference in the disposition towards corporate governance in the UK is not solely as a result of laws and regulation.

A key factor in enhancing corporate governance is the role of institutional investors. An institutional investor is an entity which pools money to purchase securities, real property, and other investment assets or originate loans. Investopedia defines an institutional investor as company or organization that invests money on behalf of clients or members. Examples of institutional investor include banks, credit unions, insurance companies, pensions, hedge funds, REITs, investment advisors, endowments, and mutual funds.

Institutional investors are organized and invest a lot of capital in companies, they therefore seek to protect their investments by pressuring the Boards to put in place appropriate governance arrangements. For example, when the former CEO of Apple, Steve Jobs, had to take breaks from the role because of his illness, the investors pressured the Board into creating a succession plan, which was implemented after his passing.Also, institutional investors occasionally lobby government agencies to enact regulations to promote corporate governance arrangements. Due to this increasing role of institutional investors, the UK government enacted the Stewardship Code for Institutional Investors which is the one governance regulation that is not replicated in Nigerian governance framework.

Besides the impact of institutional investors and shareholders, corporate governance culture can also be promoted through concerted efforts of regulators and the stock exchange through the listing. The Nigerian Stock Exchange (NSE) promotes corporate governance through its listing rules. The NSE has implemented a number of initiatives to promote corporate governance among companies. An example is the Corporate Governance Rating System (CGRS) Certification which is given to companies whose corporate governance practices are deemed adequate. These companies are then added to a Corporate Governance Index which makes them more attractive to foreign investors.

Ultimately, while legislations can serve as good foundation for corporate governance, theyare an ineffective means of entrenching the culture among corporate organizations. There must be collaborative efforts between all relevant regulatory agencies, the Nigerian Stock Exchange, Boards and Investors towards promoting the right corporate governance culture.

The CAMA 2020 is an Act of the Federal Republic of Nigeria and its provisions are therefore obligatory and binding on affected companies. However, Corporate Governance is not solely about regulatory compliance. Rather it is a tool towards sustainable business growth, enhancing investor confidence and attracting domestic and foreign investments. Consequently, it is imperative upon companies, their boards, management and shareholders to embrace corporate governance beyond the minimum standards prescribed in the new CAMA 2020 as well as other statutes. They must analyze the codes of corporate governance, relevant regulations and guidelines and international best practices towards developing a corporate governance structure and culture that is best suited to the company for business growth and sustainability.

In addition, while it might appear that the corporate governance provisions discussed apply more to large public companies; small businesses, companies and even not-for-profit organizations must also embrace corporate governance and design governance arrangements suited to the peculiarities of each organization. Finally, with the increasing importance of corporate governance from the dual perspectives of regulatory compliance and business growth, the role of company secretaries has evolved beyond merely administrative functions but the company secretary must act as an active support to the board and management in structure, maintenance and review of the corporate governance mechanisms of the company.

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