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INDEPENDENT DIRECTORS UNDER THE NIGERIAN LEGAL REGIME

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It is vital for any company, wishing to adhere to corporate governance principles, to ensure that its board of directors is independent. The independence of the board of directors is vital, as it ensures the Board's unfettered ability to fairly and impartially direct the affairs of the company. The end result should be the ability to *inter alia* provide: returns to shareholders, reassurance to employees, security for creditors, and protection of the common good. Consequently, the idea of ensuring that at least one independent director sits on the boards of companies has found its way into various corporate governance codes.

In Nigeria, the Securities and Exchange Commission (SEC) was the first regulator to produce a corporate governance code – "*Code of Corporate Governance for Public Companies in Nigeria*" (SEC Code). Other regulators like the Central Bank of Nigeria (CBN), the National Insurance Commission (NAICOM) and the National Pension Commission (PENCOM) have also produced similar codes to guide companies in the various sectors they regulate. While the SEC Code regulates public companies, the other codes can apply to private companies operating in the insurance, pension or banking sectors of the Nigerian economy. However, there is no general corporate governance code which applies to private companies in Nigeria yet.

Section.4.3 of the SEC Code, in effect, states that the majority of the directors on the board of public companies should be non-executive directors and that at least one of them should be an independent director. A non-executive director is not a part of the management of the company; an independent director is not only a non-executive director but also a director who holds no substantial shares of the company. In addition, an independent director is not a representative of any stakeholder (employees, the general public etc.) of the company and holds no interests in the company.

contractual relationship in existence between such an individual and the company/ group that would fetter his capacity to act in an independent manner.

Interestingly, the CBN *Code of Corporate Governance for Banks and Discount Houses in Nigeria* and NAICOM's *Code of Good Corporate Governance for the Insurance Industry in Nigeria* effective 2009 as well as PENCOM's *Code of Corporate Governance for Licensed Pension Operators* effective June 2008 also stipulate that independent directors must be present on the board of the various companies in the sectors that these regulators oversee.

In fact, the CBN goes further to state in Section.2.2.4 of its Code that there must be at least two independent directors on the boards of all banks and at least one independent director on the boards of discount houses. The definition of an independent director by the CBN is contained in its *Guidelines for the Appointment of Independent Directors* and is similar to the definition provided in the SEC Code of Corporate Governance.

The CBN Guidelines state in addition that independent directors to be appointed to the boards of financial institutions must possess a minimum of a first degree, not less than 10 years of relevant working experience, and proven skills and competencies in their fields. In addition, the CBN Code states that independent directors must not: borrow funds from the bank, its officers, subsidiaries and affiliates; be part of the management, executive committee or board of trustees of an institution supported by the bank or discount house; nor serve on the board of a subsidiary of the bank. Even more stringently than the SEC Code, the CBN Code states that a candidate for appointment as an independent director should not have provided any form of consulting services to the bank or its subsidiaries/affiliates, nor have been an

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employee or related to an employee at the top management level in the 5 years preceding the proposed appointment.

Section 5.5 of the SEC Code contains the qualifying criteria for an independent director. The candidate should not: hold more than 0.1% of the paid up share capital of the company; represent a shareholder with the ability to control or influence management; have a familial relationship with any employee of the company to which he is to be appointed; have served in an executive capacity in the company or the group of companies to which he belongs for three financial years preceding the proposed appointment. Furthermore, the candidate must neither be a professional adviser (or supplier) to the company/group nor a partner or executive of the company's internal or external audit firm, legal or other consulting firm. There should also not be any significant

Though laudable and capable of strengthening the independence of the boards, the presence of independent directors on the boards is not without its weaknesses. The very phrase "independent director" and the qualifying criteria for the position suggest that the candidate is expected to be objective and loyal to no particular group. The independent director is expected to be objective and loyal to no particular group. The independent director is expected to keep the interest of the company above any other.

One wonders if this will always be possible, as the board representative of a majority shareholder may influence who emerges as the independent director and as such, indirectly control such individual. It is also possible for the management of a company to influence the choice of independent directors, as it is commonplace in Nigeria, for management to engage different groups of shareholders associations with a view to influencing them to support management's decisions. The independence of such a director will therefore be questionable.

The CBN Code seems to have addressed the problem of questionable independence by stating in the CBN *Guidelines* that the approval of the CBN must be obtained in relation to the nomination/appointment of an independent director. It is also hoped that the CBN's provision in paragraph (f) of the CBN *Guidelines* (for the evaluation of the performance of independent directors), not only when the rest of the board is being evaluated but also where there is a change that may affect the independence of the independent director, will also help to ensure that a yes-man is not appointed or retained as an independent director.

It would also be advantageous if, as it has been done in China through the *Guidance Opinion on the Establishment of an Independent Director System in Listed Companies (Guideline Opinion) 2001*, independent directors are empowered to ensure that the lawful rights and interests of minority shareholders are not prejudiced. Likewise, they should be empowered to issue statements of independent opinion on material matters of the company that may damage the rights and interests of minority shareholders.[1] If similar powers are granted to independent directors in the Nigerian corporate governance codes, they will then have to mandatorily perform their roles as a counterfoil to the interests of the majority and as a voice of objectivity. As it presently stands, the independent director in Nigeria only knows that she should express her personal views to the board but is not empowered to issue statements that are independent of the rest of the board.

All being said, the introduction of the concept of independent directors into our corporate governance system is laudable. The Codes have recognised that the independent director is critical in the evaluation of the performance of the board and management and as such, have created a relatively strong role for independent directors in Nigeria by stipulating that they are part of the nomination committees for selecting directors and deciding their remuneration.

"A major drawback of the Nigerian legal regime on independent directors is that failure by companies (save for public companies to which the SEC Code applies) to adhere to the corporate governance codes of their various regulators does not attract any sanction. The codes therefore possess only persuasive power. The force of public and professional opinion is the primary reason why many companies are complying with the codes. A change in this position may be imminent, as the SEC revised its Code of Corporate Governance in May 2014 to state that compliance is now mandatory and non-compliance shall attract sanction."

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It is hoped that the concept will become so ingrained in our corporate culture that even private companies, which are not required to comply with any of the present corporate governance codes, will see the value of appointing independent directors to their boards.

Editor's Note

Employment issues seem to have dominated socio-economic discussions in Nigeria in the last month. President Jonathan inaugurated the Presidential Jobs Board charged to engender the creation of 3 million jobs in Nigeria in the next 12 months. The National Pension Commission (PenCom) prohibits all Licensed Pension Operators from employing contract staff other than for sales and marketing purposes. The National Automotive Policy is also claimed to increase employment in Nigeria, with 22 companies indicating interest to assemble vehicles in Nigeria before the end of 2015 and another 4 assembly plants will start assembly operations before the end of this year.

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