

Independent Directors – The Companies and Allied Matters Act 2020 and the Nigerian Code of Corporate Governance

Independent directors have long been viewed as a solution to many corporate governance problems. Following the Enron and other corporate scandals, the requirement that independent directors constitute the majority on the board was introduced under the Sarbanes-Oxley Act (SOA) for listed companies. Likewise, in the United Kingdom, a series of corporate scandals led to the widely acclaimed Cadbury Report and other reports that clamored a greater role for “external” and independent directors. In this article, we explore the provisions of the companies’ law in Nigeria as it relates to independent directors’ vis a vis the applicable relevant corporate governance codes

The Concept of Independent Director

An independent director is a person that represents an independent voice on the board of a company wherein he/she sits as a Director. The idea is to have on the board, an independent minded person whose judgement is unfettered and cannot be influenced due to the absence of vested interest,

position, association or relationship with the company, its management or substantial shareholders of the company whereat he/she sits as a member of the board.

The International Financial Reporting Council defines an *independent director* to mean a director who has no direct or indirect material relationship with a company other than membership on the board.

The Companies and Allied Matters Act, 2020 (the “Act”, “CAMA”) defines an independent director as a *director who or whose relatives either separately or together with him or each other, during the two (2) years preceding the time in question was not an employee of the company, did not make to or receive from the company payments of more than N20,000,000, or 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 N20,000,000 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 such amount, did not own*

directly or indirectly more than 30% of the shares of any ntype or class of the company, and was not engaged directly or indirectly as an auditor for the company.

Also, Principle 7 of the Nigerian Code of Corporate Governance, 2018 (the “NCCG”), states that an independent director is an independent Non-Executive Director who brings a high degree of objectivity to the board for sustaining stakeholder trust and confidence, represents a strong voice on the board and is free from relationships or circumstances with a company, its management or substantial shareholders as may or appear to impair his/her ability to make independent judgement.

Whilst it is desirable for a private company to have at least one (1) independent director on its board, pursuant to the Act, it is mandatory for a public company to have at least three (3) independent directors .



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Qualification of an Independent Director

The qualification criteria applicable to other types of directors under the Act applies to an independent director. However, for a person to be appointed as an independent director of either a private or a public company, the person must qualify and or fall within the category of person outlined in the Act and the NCCG as an independent director. Accordingly, the following criteria, albeit not exhaustive, constitute minimum standard in determining whether a person qualifies as an independent director:

(a) Whether the person possesses a shareholding in the Company the value of which is material to the holder such as will impair his/her independence or in excess of 0.01% of the paid-up capital of the company or own more than 30% shares or other ownership interest directly or indirectly in the company ;

(b) Whether he/she is a representative of a shareholder that has the ability to control or significantly influence management;

(c) Whether he/she has not been an employee of the company or group within the last two (2) years .

(d) Whether he/she is a close family member of any of the company's

advisers, directors, senior employees, consultants, auditors, creditors, suppliers, customers or substantial shareholders ;

(e) Whether he/she has had within the last five (5) years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has, or has had, such a relationship with the company;

(f) Whether he/she has served at directorate level or above at the company's regulator within the last three (3) years;

(g) Whether he/she renders any professional, consultancy or other advisory services to the company or the group, other than in the capacity of a director;

(h) Whether he/she receive, and has received additional remuneration from the company apart from a Director's fee and allowances; participate in the company's share option or a performance-related pay scheme, and is a member of the company's pension scheme; and

(i) Whether he/she has served on the board for more than nine (9) years from the date of his first election.

The Dichotomy between Independent Director provisions under CAMA and the Nigerian Code of Corporate Governance

The Act does not prescribe the number of independent directors for a private company but mandates a public company to have at least three (3) independent directors. The **NCCG** on the other hand provides that there must be an appropriate mix of non-executive directors ("NEDs") and it is desirable that most of the NEDs are independent. There are significant inconsistencies between the Act and NCCG on the qualification of an independent director particularly with respect to shareholding , affiliation , contractual relationship and previous directorship.

The Act states that an independent director is one who or whose relative, separately or together with him or each other, during the two (2) years preceding his appointment.

(a) Shareholding – did not own more than 30% of shares or other ownership interest directly or indirectly in the relevant company; NCCG pegged the minimum shareholding at 0.01% respectively.

(b) Affiliation – was not an employee. Under the NCCG, the independent director must not have been an employee for at least 5 years respectively

1. Section 275(3) of the Act
2. Section 275(1) of the Act.

3. Principle 7 of the NCCG.

4. Section 275(3)(b)(ii) of the Act.

5. Section of the Act. Please note that under the NCCG, it is five (5) years and for public companies, it is three (3) years.

6. Principle 7 of the NCCG.

7. The Act caps the minimum shareholding to 30% shares or other ownership interest whilst the CGCPC and NCCG is at 0.1% and 0.01% respectively.

8. The Act stipulates that two (2) years preceding his appointment whilst the CGCPC and NCCG is at 3 and 5 years respectively.

9. The Act limits the contractual relationship to engagement as an auditor whilst the NCCG and CGCPC have a wider scope of application – no material business relationship or significant supplier or contractual relationship with the company.

10. This is not provided for under the Act unless the Act uses the "not an employee of the company" requirement. The CGCPC allows him to have been a director with no limitation on years whilst the NCCG limits it at nine (9) years

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(c) Contractual relationship – not engaged directly or indirectly as an auditor of the company or a Partner, director or officer or own more than 30% of share directly or indirectly in a company or firm that made N20m from or to the relevant company. Under the NCCG, there is no significant /material business/ contractual relationship with the company within 5 years to his appointment as independent director, respectively.

(d) Previous directorship – not provided in the Act. NCCG allows the independent director to be a director but must have not served on the Board of the company for more than nine (9) years.

In view of the above, clearly, there is an inconsistency between the provisions of the Act and the Corporate Governance Codes. However, as we all know, a regulation is mandated by a government body and requires that—by law—those in the industry comply. Thus, a regulation can either incorporate codes or standards or guidelines or be created completely on

its own. Unlike a code or standard, a regulation does not necessarily require any industry consensus or knowledgeable body to put it in effect. A code on the other hand, does not need to be followed, but compliance is often considered best practice.

The intent of a code is to apply widely across an industry, making it easy to be adopted. Finally, the principle of hierarchy of laws is fundamental to the rule of law, as it dictates how the different levels of law will apply in practice particularly, in case of inconsistencies such as this. In general, the fundamental levels of hierarchy consist of a constitution or ground norm; statutes or legislation; regulations; and procedures in that order. Based on the hierarchy levels, the provision of the Act will first be considered, applied and or adopted before the Corporate Governance Codes are considered, applied or adopted.

Recommendation

It is commendable that the Act and the Corporate Governance codes including the NCCG provide for independent directors and the procedure for such appointments, however, the provision of the Act should have aligned with the provision of NCCG seeing that the NCCG and other CG codes predate the Act. It is worthy to note that in practice, most public companies have one (1) independent director rather than three (3) mandated in the Act.



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UP COMING EVENTS

Event, Date and Fee	Modules
<p>Company Secretaries Roundtable</p> <p><i>DCSL eConnect: The Company Secretary & Technology</i></p> <p>February 17 2022</p> <p>By Invitation</p>	<ul style="list-style-type: none"> • The Future Forward Company Secretary • Key Developments in ESG regulation and Reporting • Director Remuneration - Benchmarking and Best Practice • Dealing with Conflicts of Interest and Related Parties - The role of the Company Secretary • Using Technology to Drive Board Effectiveness
<p>The Board Chair: First Amongst Equals</p> <p><i>DCSL eConnect: The Company Secretary & Technology</i></p> <p>February 24 2022</p> <p>N100,000</p>	<ul style="list-style-type: none"> • A Board in a crisis - Whither the Chair? • Understanding and dealing with Boardroom dynamics • Achieving Effective Meetings: Role of the Chair • Measuring and Monitoring Board & Director Performance • Directing the Focus of the Board: The Role of the Board Chair
<p>Board Effectiveness Masterclass</p> <p>March 17th- March 18th 2022</p> <p>N180,000</p>	<p>Keynote: Board Effectiveness: A Key Imperative</p> <ul style="list-style-type: none"> • Assessing the 2022 Risk Agenda - Prioritizing Board Risk Oversight • Strengthening Board Oversight on ESG • Succession Planning- Managing Keyman Risk • Board Effectiveness - Red Flags • Business Continuity Management - Myths & Misconceptions • The Evolution of Corporate Culture - Tone at the Top • Diversity and Inclusion • Emotional and Mental Wellness • Disruptive technology trends