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Central Bank of Nigeria Imposes Tighter Tenure Limits on Bank Directors

Introduction

The Central Bank of Nigeria ("CBN") on 24 February 2023 issued a circular[1] announcing changes to the tenure of executive and non-executive directors in the Nigerian banking industry.

The circular titled "Review of Tenure of Executive Management and Non-Executive Directors of Deposit Money Banks in Nigeria" (the "Circular" or the "2023 Circular"), is a successor to the Guidelines for Tenure of Managing Directors of Deposit Money Banks and Related Matters issued by the CBN in 2010 (the "2010 Tenure Guidelines") and the Code of Corporate Governance for Banks and Discount Houses issued by the CBN in 2014 (the "2014 Corporate Governance Code").

In this client alert, we summarise the provisions of the Circular, highlight the key changes that it has introduced and analyse its implications for the Nigerian banking industry.

Key takeaways from the 2023 Circular include the following:

a) All executive directors of deposit money banks[2], including Managing Directors (MDs or CEOs) and Deputy Managing Directors (DMDs), shall be subject to a maximum tenure of 10 years.

[1] Circular no. FPR/DIR/PUB/CIR/001/070.
[2] Under the CBN's regulatory framework, deposit money banks refer to commercial banks, merchant banks and non-interest banks but do not include microfinance or community banks.

b) Where a DMD becomes CEO of the same bank where he has been DMD or another bank before the end of the above-stated maximum 10-year tenure, they will be allowed the exception of a maximum cumulative tenure of 12 years (the "DMD Exception").No similar exception is extended to an Executive Director who becomes DMD of the same bank where he has been an Executive Director or another bank.

c) Non-executive directors (NEDs), with the exception of independent non-executive directors (INEDs), shall be subject to a maximum tenure of 12 years on the board of one bank, broken into three terms of four years each.

d) All executive directors (including CEOs and DMDs) who leave their position in one bank (whether upon or before the expiration of their maximum allowable tenure) shall be subject to a one-year cooling-off period before being eligible for appointment as NEDs of the same bank. Maximum tenure of 10 years.

e) NEDs who leave their position in one bank (whether upon or before the expiration of their maximum allowable tenure) shall be subject to a one-year cooling-off period before being eligible for appointment to the board of any other bank.

f) All directors across the banking industry, whether NEDs (presumably including INEDs) or executives (including CEOs and DMDs), shall be subject to a cumulative tenure limit of 20 years.

Analysis

As might be expected, the 2023 Circular has led to animated discussions in the market with some supporting, but mainly dissenting voices. Even though the Circular is stated as *"part of measures aimed at strengthening governance practices in the banking industry"*, it is not entirely clear what particular governance lapses it is intended to address.

There has been some speculation that one possible motivation of the Circular is to plug the so-called 'HoldCo structure' loophole through which term-limited bank CEOs and founders return to service by being appointed to the board of directors of at the holding company level of their former banks. If indeed the HoldCo structure was a target of the Circular, it appears to have only addressed it indirectly.[3] This is so because, although the 2023 Circular in its introductory paragraph speaks of the CBN having *"revised the regulatory requirements for the tenure of Executive Management and Non-executive Directors of Deposit Money Banks and Financial Holding Companies[4] in the Code of Corporate Governance for Banks and Discount Houses"*, the substantive provisions of the circular strangely appear to be solely focused on directors of deposit money banks.[5]

In addition to this ostensibly redundant reference to "Financial Holding Companies", the Circular also appears in two places to use the expression "a bank or any other deposit money bank" in a way that could give the false impression that a "bank" and a "deposit money bank" mean two different things.

Whilst the 2010 Guidelines set a maximum tenure limit of 10 years for bank CEOs, the 2023 Circular has now extended that restriction to all executive directors including DMDs.

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[3] And possibly at an exorbitant cost in the form of loss of experienced stewardship in the industry as shown elsewhere in this Client Alert.
[4] By paragraph 1.1 of the Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria 2018, a financial holding company, "*is a company whose principal object includes the business of a holding company set up for the purpose of making and managing (for its own account), equity investment in two or more companies, being its subsidiaries, engaged in the provision of financial services, one of which must be a bank*."
[5] Except perhaps the "cumulative tenure limit" provision that appears to extend to the entire banking industry.

Unless it is an unintended omission or drafting error, it is not clear why the DMD Exception that increases the cumulative tenure limit of DMDs that becomes CEOs does not extend to other Executive Directors that become CEOs without being DMD.

The tenure limit of 12 years comprising three terms of four years each for NEDs under the 2023 Circular essentially restates the standard under the 2014 Corporate Governance Code,[6] except that the Circular appears to have removed the limit in relation to INEDs. In other words, under the new circular INEDs would no longer be subject to a 12-year tenure limit and may therefore serve as bank directors up to the newly introduced industry tenure limit of 20 years.

Whilst the 2010 Tenure Guidelines required a three-year cooling-off period before bank CEOs that have completed their tenure may be re-appointed as NEDs in their former banks or their affiliates, the 2023 Circular extends the cooling-off requirement to all executive directors (including CEOs, DMDs and Executive Directors), but only for a one-year period. In other words, because of this extension of the requirement, the standard previously applicable to CEOs has now been reduced from three years to one. The Circular similarly requires a one-year cooling-off before NEDs (including INEDs) that leave office can be eligible for appointment to the board of any other bank.

The introduction for the first time of regulatory tenure limits on executive directors (other than CEOs) is likely to cause a massive purge of experienced executives from the industry. This measure is significantly out of step with the position in such other markets as South Africa, the United Kingdom and the United States none of which impose any specific tenure limits on EDs, NEDs and CEOs in the banking industry. In Ghana, where there is a 12-year tenure limit on bank CEOs, there is no term limit on EDs, NEDs or INEDs.

Similarly, the new industrywide 20-year service limit would mean that a host of senior bankers serving as NEDs after retiring from executive positions in the industry would soon be forced to leave their non-executive roles. Indeed, by making this service limit industrywide, the 2023 Circular may well have the unintended consequence of precluding affected persons from service on the boards of CBN-regulated non-bank financial institutions and microlenders.

The Circular has an effective date of 24 February 2023 but is silent on whether the tenure limits that it imposes should be calculated retroactively or prospectively. This is in contrast to the 2010 Tenure Guidelines which in introducing a ten-year tenure limit on CEOs expressly stated as follows: "All CEOs who would have served for ten years by July 31, 2010 shall cease to function in that capacity and shall hand over to their successors." By this omission, the CBN leaves the Circular open to avoidable questions as to whether it either clearly intended or necessarily and distinctly implied an intention to apply retroactively.[7]

[6] Section 2.4.3 of 2014 Corporate Governance Code provides 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."

[7] In ***Toyin v. PDP*** [2019] 9 NWLR (Pt. 1676) 50 Pp. 64-65, paras. H-B., the Nigerian Supreme Court held that *"[n]o statute shall be construed to have retrospective operation, unless such construction appears very clearly in the provisions of the statute, arising therefrom by necessary and distinct implication. Generally, retrospective laws are prima facie of questionable policy and contrary to the general principle that the legislation shall not have retrospective effect and that courts lean against interpreting a statute to deprive a party of an accrued right. That is, the fundamental canon of interpretation is against a construction that gives a statute retrospective operation so as to impair existing right or obligation."*

Conclusion

Having reviewed the provisions and implications of the 2023 Circular, one may be led to the conclusion that, if governance is the key concern it seeks to address, then perhaps a more appropriate approach would be more thorough supervision of board activities rather than more extensive tenure limits for the leadership of Nigerian banks. Indeed, the loss of experienced stewardship that is certain to result from the application of these new restrictions may indeed be more costly to the industry than the governance gains that they may produce.