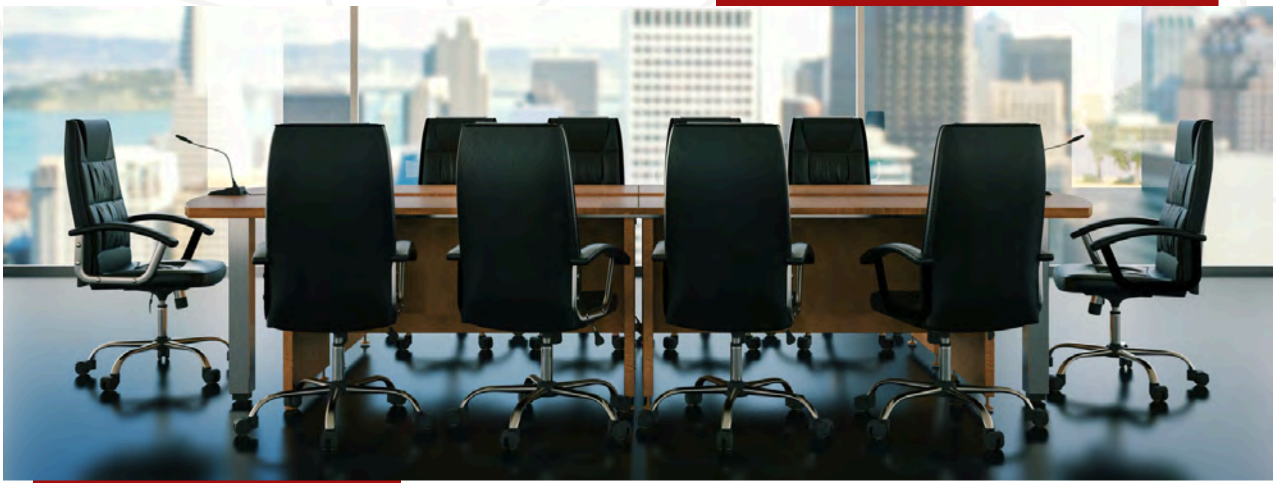

Navigating *Corporate Governance* for Financial Institutions

Key insights for Banks, Financial Holding Companies, and Public Companies under the CBN Guidelines and SEC Code of Corporate Governance in Nigeria

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INTRODUCTION

On 13th July 2023, the Central Bank of Nigeria ("CBN") issued the Corporate Governance Guidelines for Commercial, Merchant, Non-Interest and Payment Services Banks in Nigeria ("CGGCMNIBs") and the Corporate Governance Guidelines for Financial Holding Companies in Nigeria ("CGGFHCs") (together referred to as "the CBN Guidelines") pursuant to its powers under the CBN Act and Banks and Other Financial Institutions Act ("BOFIA")2020. The CBN developed the CBN Guidelines by adapting relevant principles and recommended practices of the Nigerian Code of Corporate Governance ("NCCG") issued by the Financial Reporting Council("FRC") in 2018, global corporate governance practices, and other governance codes and directives issued by the CBN.

The CBN Guidelines supersede all previous codes, circulars, and related directives on corporate governance issued by the CBN. It creates a broader scope for the oversight functions of the CBN in relation to Commercial, Merchant, Non-Interest and Payment Services Banks ("CMNIBs") and Finance Holding Companies("FHCs").

On 4th April 2011, the Securities and Exchange Commission ("SEC") issued the Code of Corporate Governance for Public Companies in Nigeria (the "SEC Code"). The SEC Code was issued to ensure the highest standards of transparency, accountability and good governance for public companies in Nigeria.

This article is divided into 3 parts as it attempts to provide a comprehensive overview of the provisions of the CBN Guidelines, in comparison with the provisions of the SEC Code.

APPLICABILITY

The CBN Guidelines was issued to specifically apply to Commercial, Merchant, Payment Service and Non-Interest Banks as well as Financial Holding Companies. The SEC Code applies to all public companies with securities listed on a recognized stock exchange in Nigeria, companies seeking to raise funds from the capital market through the issuance of securities or seeking listing by introduction and all other public companies.

The scope of the CBN guidelines is more specific, unlike the SEC code which is more broadly applicable and recommended for various types of companies beyond the public companies for which it was originally developed.

ANALYSIS OF KEY DIFFERENCES IN THE SEC CODE vis-à-vis THE CBN GUIDELINES

1. **Structure of Board**
   The SEC Code provides that that the membership of the board should not be less than 5. However, theCBN Guidelines establish limits on the number of board members for different types of financial institutions. CMNIBs must have between 7 and 15 directors, Payment Service Banks (PSBs) between 7 and 13 directors, and FHCs between 7 and 9 directors. Additionally, the CBN Guidelines provide that members of the board of a bank and FHC shall be appointed by their shareholders and subject to the approval of the CBN.

2. **Composition of the Board**
   According to the SEC Code, the board composition should include both non-executive and executive directors, a minimum of 1 independent director, and a Chairman who would head the board. However, the CBN Guidelines increase the minimum requirement for Independent Non-Executive Directors (INEDs) by providing that Banks and FHCs shall have at least 3 INEDs. This requirement applies to commercial banks with international and national authorisations, merchant banks, and non-interest banks (NIBs) with national authorization; while PSBs, Commercial Banks with regional authorization, and NIBs with regional authorization shall have a minimum of 2 INEDs.

3. **Concurrent / Multiple Directorship**
   By the provisions of the SEC Code, there is no limit to the number of concurrent directorships that a single director may hold. However, the provisions of the CGGCMNIBs is to the effect that the concurrent directorship by the director of a bank with its group structure or holding company structure shall be limited to 2 institutions only.

4. **Roles and Responsibilities of the Board**
   The SEC Code provides for a limited number of roles and responsibilities for the members of the board of directors. The Board's responsibilities encompass:
   - Establishing strategic goals and resource deployment.
   - Overseeing management for shareholder value and obligations.
   - Ensuring corporate governance, legal compliance, ethics, and sustainability.
   - Delegating authority to management within a defined framework.
   - Retaining ultimate accountability for company affairs and performance.

The CBN Guidelines provide an extended list of roles and responsibilities for the members of the Board of banks and FHCs. This covers the review of investment policies, anti-money laundry policies, enterprise risk, etc.

5. **Board Charter**
   The SEC code does not include a requirement for companies to have a Board Charter. Consequently, the requirement for a Board Charter is a novel provision in the CBN Guidelines as it mandates banks and FHCs to have a Board Charter which shall be reviewed once every 3 years. Furthermore, the provision mandating the submission of the Board Charter to the CBN within 30 days of its approval underscores the regulatory oversight role of the CBN outlined in the CBN Guidelines.

6. **Tenure of Board Members**
   The SEC Code provides that subject to the provisions of the Companies and Allied Matters Act(CAMA), directors will be submitted for re-election once every 3 years. On the other hand, the CGGMNIBs stipulates that the maximum tenure for Managing Directors/Chief Executive Officers (MD/CEO), Deputy Managing Director, Executive Directors and Non-Executive Directors is 12 years, except for an INED whose tenure is limited to 2 terms of 4 years each.
   The CGGFHCs specifically provides that the maximum tenure of the MD/CEO of a holding company shall be 10 years.

7. **Company Secretary**
   The SEC Code provides that the company secretary shall be a person with relevant qualifications and competence and has the primary duty of assisting the Board in implementing the SEC Code. The CBN Guidelines specifically state that the role of the company secretary in both FHCs and banks shall not be outsourced. Additionally, it specifies that the role of company secretary shall not be combined with the role of the Head of Legal. Finally, the removal of the company secretary is subject to ratification by the CBN in line with the oversight functions of the CBN.

8. **Tenure of Board Committee Members**
   The CBN Guidelines provide that the membership of the Board committee for banks and FHCs shall be reviewed at least once in 3 (three) years unlike the SEC Code which is silent on the tenure of committee members.

9. **Cooling-Off Period**
   The cooling-off period is a period when a key officer of an entity is prohibited from taking up a similar or different role in that entity or another.
   While the SEC Code is silent on the cooling-off period for officers of public companies, the CBNGuidelines provide for different cooling-off periods for officers of banks and FHCs. For example, there is a cooling off period of 2 years where a director of a bank transitions to a sister subsidiary and it results in a change of role.

10. **Access to Independent Professional Advice**
   The CBN Guidelines permit banks and FHCs to resort to independent professional advice for either its directors or committees and set out the procedure for obtaining such advice whereas the SEC Code does not refer to the use of independent professional advice.
   This provision ensures that the directors or committee members are well-equipped to manage the affairs of the bank or FHC using expert knowledge.

11. **Location of Board and Board Committee Meetings**
   The CBN Guidelines embrace technological innovations in conducting the affairs of the board and aids ease of doing business in Nigeria as it allows banks and FHCs to host their Board or committee meetings at a specified location or virtually, where the physical meeting seem difficult. The SEC Code on the other hand, made no provision for any specific location that a meeting of the Board should hold.

12. **Cumulative Tenure**
   While the SEC Code is silent on the cumulative tenure of a director in a public company, theCGGMNIBs provides that the directors in a bank are permitted to serve for a cumulative tenure of 24 years. This is however not provided for FHCs.
   The cumulative period is calculated from the date of first appointment to the board of the bank.

13. **Evaluation of the Board**
   The SEC Code empowers the board to ensure the evaluation of the individual and collectiveperformance of the board and its committees. It additionally prescribes the procedure for boardevaluation and states that the cumulative result of the evaluation should serve as a guide for re-election. The CBN Guidelines further provide that the evaluation of the Board shall be conductedannually by external consultants in line with the extant guidelines for Annual Board Evaluation by External Consultants of Banks and other Financial Institutions in Nigeria.

The CGGMNIBs specifically requires that the report from the evaluation be presented at the Annual General Meeting ("AGM") of the bank and the continuous unsatisfactory performance of a director shall be a basis for non-renewal of a director's tenure.

14. Whistle Blowing Policy

Regarding whistleblowing, the SEC Code mandates that public companies establish and enforce a public whistleblowing policy, with board support and whistleblower protection. Additionally, it necessitates the appointment of a senior-level officer, such as the CEO/MD, to oversee reported cases and take appropriate action. The CBN Guidelines require both banks and FHCs to adhere to the recommended practice prescribed in the NCCG 2018. The NCCG 2018 mandates the establishment of an effective whistleblowing framework for reporting illegal and unethical behaviours, accessible to employees and external stakeholders. Additionally, it prescribes compensation for any whistleblower who suffers any detriments.

There is no provision in the NCCG2018 that the person(s) in charge of managing the whistle-blowing disclosures must be a senior-level officer as stated in the SEC Code.

15. Appointment of External Auditors

The SEC Code does not specify the procedure for appointing external auditors; however, it mandates the regular rotation of the partners of the audit firm. Furthermore, it limits the tenure of external audit firms to a maximum of 10 years, with the possibility of reappointment 7 years after disengagement. The CBN Guidelines specify that the Board shall be responsible for the appointment and removal of external auditors subject to the approval of the CBN. This is another instance where the CBN exercises oversight functions.

16. Review of Internal Shariah Compliance of the Non-Interest Banks

While the SEC Code does not provide for a review of internal shariah compliance, the CGGCMNIBs requires external auditors to review the internal shariah compliance within non-interest banks by assessing the work of the internal shariah auditor and compliance officer.

17. Publication of the Annual Audited Financial Statement

The CBN Guidelines provide that banks and FHCs are required to publish their annual audited financial statement in 2 national daily newspapers and on their websites.

The CBN Guidelines are clear on the full disclosure of the audited financial statements of banks and FHCs while the SEC Codeno provision for publication of the financial statements of a public company.

18. Removal of the External Auditors by CBN

The CBN Guidelines state that the CBN has the authority to request the removal of external auditors from banks and FHCs if it determines that the auditor has been involved in unethical practices or illegal activities. The SEC Code on the other hand does not provide for the removal of external auditors.

19. General Meetings

The SEC Code requires that the general meetings of public companies be the primary platform for shareholder, management, and Board interaction, conducted openly to ensure full shareholder participation and effective contribution.

The CGGCMNIBs allows the Board to rotate general meeting venues to enhance shareholder access and permits banks to hold virtual meetings when physical gatherings are not feasible. Both the SEC Code and the CGGCMNIBs aim to promote active shareholder engagement during general meetings, the provisions ensure that shareholders are given adequate opportunities to interact with management and the Board, which is essential for good corporate governance.

20. Ownership of controlling interest in more than one Bank/FHC

While the SEC Code has no clear provision on the ownership of controlling interest in a public company, the CBN Guidelines ensures that no individual, group of individuals, their proxies, or corporate entities, owns controlling interest in more than one bank or FHC except with prior approval of CBN.
This provision ensures transparency in both banks and FHCs while also limiting the extent of control a single shareholder can exert over their operations.

21. Prohibition of subsidiary ownership in an FHC.

The CGGFHCs prohibits subsidiaries of an FHC from acquiring shares in either the FHC or other subsidiaries within the group.

22. Approval for Restructuring of Banks and FHCs

The CBN Guidelines require obtaining prior written approval and "No Objection" from the CBN before any arrangement leading to a significant change of control in a bank or FHC can be made; whereas the SEC Code is silent on restructuring.

The CBN Guidelines specifically provide that any acquisition of shares in a bank or FHC of 5% (five per cent) and above will require approval from CBN.

23. Business Conduct and Ethics

The SEC Code provides that public companies should have a Code of Ethics and Statement of Business practices, which should be implemented as part of the corporate governance practices of the company. The provision of the CBN Guidelines is to the effect that banks and FHCs must establish a Code of Business Conduct and Ethics, which shall maintain the confidence of the public in the banks and FHCs.

Furthermore, the CBN Guidelines require that such code should be revised within a year interval, the requirement for revision was absent in the SEC Code.

24. Related Party Transactions

The SEC Code mandates disclosures on related party transactions concerning directors' current accounts or loans in the company's annual reports. The CBN Guidelines provide that banks and FHCsshall implement a policy on insider trading and related party transactions, which shall be published on the website of the banks and FHCs.

25. Writing off Director Related Loans

While the SEC Code makes no provision for writing off director-related loans or interests, the CBNGuidelines allow director-related loans and/or interest to be written off subject to the approval of CBN. This is an innovation introduced to curtail the mismanagement of banks and FHCs funds and encourage transparency in the affairs of banks and FHCs.

26. Removal of Directors with Non-Performing Facilities

Non-performing facilities are loan facilities that cannot make a profit due to non-payment as scheduled. The SEC Code makes no provision for removing directors with non-performing facilities. Conversely, the CBN Guidelines provide that directors with non-performing facilities exceeding 1 year in any financial institution/banking subsidiary of an FHC will be removed from the boards of thebanks/FHCs and blacklisted from serving on the board of any financial institution under the purview of the CBN.

27. Sustainability

The SEC Code provides that public companies should prioritize stakeholders' interests, including employees, host communities, consumers, and the public while being mindful of Nigeria's social and cultural diversity. The CBN Guidelines stress the importance of ethical business conduct, environmental responsibility, and stakeholder engagement. It encourages banks and FHCs to adopt the provision of the Recommended Practice 26 of the NCCG 2018 which emphasizes the importance of sustainability in business performance and portraying the Company as a responsible corporate citizen.

28. Disclosures

The SEC Code emphasizes increased disclosure beyond statutory requirements for companies to foster good corporate governance. The CBN Guidelines provide that the annual report disclosure of banks/FHCs shall cover material information on directors, remuneration policy, share buybacks, significant shareholders, risk management practices, and strategic modifications for better decision-making.

The CBN Guidelines ensure stakeholders have comprehensive insights into the operations of banks/FHCs risk management practices and strategic modifications for better decision-making.

29. Returns

While the SEC Code makes no provisions for making returns by public companies, the CBNGuidelines state that banks and FHCs shall submit periodic returns to the Director of Banking Supervision Department at the CBN, as specified in the extant Guidelines for Licensing and Regulation of Financial Holding Companies in Nigeria.

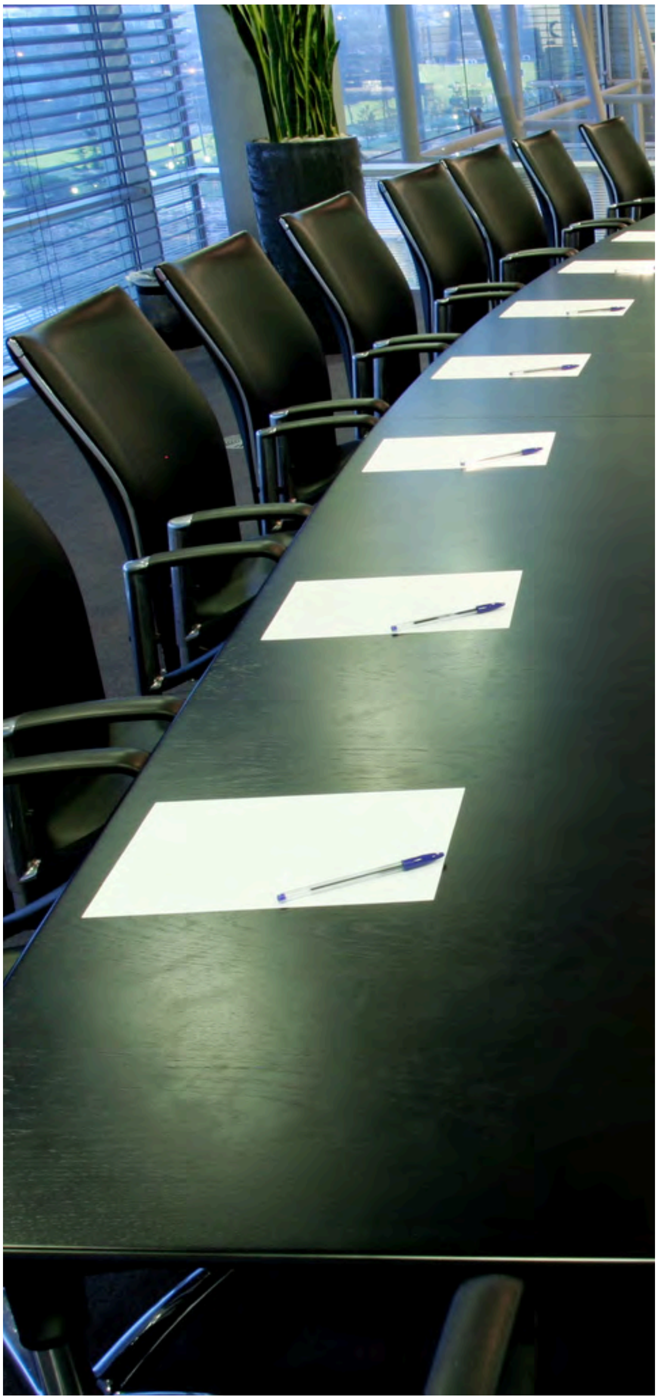
The returns should be submitted through a dedicated web portal as prescribed by the Financial Reporting Council (FRC) for banks and FHCs shall submit their returns through a dedicated web portal as maybe prescribed by the FRC or CBN.

30. **Sanctions**

The SEC Code does not prescribe sanctions for the violation of its provisions; whereas the CBNGuidelines provides that non-compliance with the Guidelines and NCCG 2018 by a bank and FHCconstitutes a regulatory breach, leading to penalties determined by the CBN. These penalties extend to personnel of the defaulting bank and/or FHC, and the penalty includes:

- Administrative action (Both the Individual and Banks);
- Monetary penalties;
- Suspension.

Unlike the SEC Code, the CBN Guidelines established a clear and comprehensive framework for enforcing compliance and accountability within banks and FHCs and their personnel. The outlined sanctions serve as a deterrent against non-compliance and dishonest practices, promoting transparency and adherence to regulatory standards. By incorporating measures for both the institution and individuals responsible for any breaches, it emphasizes the importance of upholding the Guidelines and NCCG 2018 for sound governance and risk management.



CONCLUSION

The CBN Guidelines are a welcome development, essentially aimed at promoting accountability, transparency, and good corporate governance practices in the banking sector in Nigeria. It increases the CBN regulatory oversight over financial institutions in Nigeria and its innovations promote the ease of doing business in Nigeria.

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