

Thought Leadership | *Afolabi Elebiju and Gabriel Fatokunbo*

## OVERVIEWS: NAICOM'S CORPORATE GOVERNANCE GUIDELINES FOR INSURANCE AND REINSURANCE COMPANIES 2021 (CGGIRC)

### Introduction

The National Insurance Commission (NAICOM) issued the **CGGIRC 2021** on 17<sup>th</sup> March 2021, with an effective date of 1<sup>st</sup> June 2021. The **CGGIRC 2021** replaced the **Code of Good Corporate Governance for the Insurance Industry in Nigeria 2009 (CGGII)** vide **Guideline 1.0(v) CGGIRC 2021**. Prior to the issuance of **CGGIRC 2021**, the Financial Reporting Council of Nigeria (FRCN) pursuant to **sections 11(c) and 51(c) FRCN Act 2011** essentially harmonised all sectoral codes into the **Nigerian Code of Corporate Governance 2018 (NCCG)**.



[a.elebiju@lelawlegal.com](mailto:a.elebiju@lelawlegal.com)



[g.fatokunbo@lelawlegal.com](mailto:g.fatokunbo@lelawlegal.com)

Therefore, the **NCCG 2018** displaced prior sectoral codes: (a) **Code of Corporate Governance for the Telecommunication Industry 2016**, issued by the Nigerian Communications Commission (NCC); (b) **Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014** issued by the Central Bank of Nigeria (CBN); (c) **Code of Corporate Governance for Public Companies in Nigeria 2011** issued by the Securities and Exchange Commission (SEC); (d) **Code of Good Corporate Governance for Insurance Industry in Nigeria 2009** issued by the National Insurance Commission (NAICOM); and (e) **Code of Corporate Governance for Licensed Pension Fund Operators 2008** issued by the National Pension Commission (PenCom).<sup>2</sup>

The issuance of **CGGIRC 2021** raises some questions: *what is the need for CGGIRC 2021*

*given harmonised code under the NCCG 2018?* Whilst there is no law that restricts NAICOM from issuing guidelines, circulars or directives that will further deepen the insurance penetration rate/compliance except it fails the repugnancy tests; besides, **the Guideline 1.0 (v) CGGIRC 2021** states that: *“The Guidelines shall be read and interpreted in conjunction with the provision of NCCG 2018 and replaces the NAICOM Code of Good Corporate Governance for the Insurance Industry 2009”*.<sup>3</sup>

A second question that may arise is: *when there is conflict between provisions of the CGGIRC 2021 and the NCCG 2018, which one will prevail?* In my view, the answer is the latter because the former is to support its implementation. Accordingly, it would actually be an incongruence if there is conflict, since the **CGGIRC 2021** is meant to provide clarity and fill

<sup>1</sup> NAICOM, ‘Corporate Governance for Insurance and Reinsurance Companies In Nigeria 2021’: View at: <https://naicom.gov.ng/docs/guidelines/APPROVED%20CORPORATE%20GOVERNANCE%20GUIDELINE.pdf> (accessed 30.04.2021).

<sup>2</sup> **NCCG 2018 (Introduction, Para. B (p. iv)** (akin to **Guideline 1.0 CGGIRC 2021**) states that: *“The Nigerian Code of Corporate Governance 2018 seeks to institutionalise corporate governance best practices in Nigerian companies. The Code is also to promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment. By institutionalising high corporate governance standards, the Code will rebuild public trust and confidence in the Nigerian economy, thus facilitating increased trade and investment.”* Per **Guideline 1.0(iii)CGGIRC 2021**, *“FRCN issued the Nigerian Code of Corporate Governance (NCCG) 2018 to institutionalise corporate governance best practices in all Companies in Nigeria and repealed all other sectoral codes.”*

<sup>3</sup> Incidentally, the **NCCG 2018**, at p. v, (**Introduction, Para D (Monitoring the Implementation of the Code)**), provides as follows: *“The implementation of this Code will be monitored by the FRC through the sectoral regulators and registered exchanges who are empowered to impose appropriate sanctions based on the specific deviation noted and the company in question. Additionally, the FRC may conduct reviews on the implementation of the Code where deviations from the Code recur. Other monitoring mechanisms adopted by the FRC will be based on its review of the level of implementation of the Code. In consonance with the relevant regulatory agencies of the Federal Government of Nigeria, the Council will subsequently issue corporate governance guidelines to assist implementation as may be required to respond to prudential considerations in different sectors of the economy.”* Emphasis supplied. Given these provisions, is the approach leading to issuance of **CGGIRC 2021** by NAICOM consistent with what was envisaged by the **NCCG 2018**? This also leads to the question whether the FRCN was consulted and/or what kind of input did they make to the **CGGIRC 2021**?



gaps in the **NCCG 2018** from an insurance industry perspective. In other words, **CGGIRC 2021** is putting an insurance flavour on implementation of the **NCCG 2018** as it pertains to the insurance industry. That is why **Guideline 12.0 CGGIRC 2021** reads: “The non-compliance with the **NCCG 2018** and this Guidelines shall be a violation of section 49(1)(b) of the National Insurance Commission Act 1997...”

The thrust of the **CGGIRC 2021** is to supplement the **NCCG 2018** in ensuring good corporate governance in the insurance industry and frankly, there seem not to be too much difference in both provisions, except that the **NCCG 2018** had a wider coverage whilst the **CGGIRC 2021** narrowed the compliance requirements to the insurance industry.

Obviously, the **NCCG 2018** may not be able to the whole hog, to give full effect and recognition to sector peculiarities, for example, in **NCCG 2018’s** principles on timelines and reporting mechanisms due to the. Thus, **the CGGIRC 2021** relevantly identifies areas where there are lacunas, and seeks to clarify them. Some of the ‘sweet spots’ that the **CGGIRC 2021** introduced which were not lucidly stated in the **NCCG 2018** include:

(a) **Guideline 2.1 CGGIRC 2021** provides that each Board member shall attend not less than 75% of

the Board meetings annually, whilst **Principle 10 NCCG 2018** is stricter on attendance; providing that Board members must attend all meetings and prescribes at least one board meeting per quarter. **Principle 10** further states that attendance will form part of the criteria for the reelection of a director.

(b) Aside the four Committees (Nomination and Governance, Remuneration, Audit, and Risk Management) listed under **Principle 11 NCCG 2018**, the **CGGIRC 2021** provided two additional Committees namely *Finance, Investment and General Purpose*; and *Compliance: Guideline 2.2.*

(c) Although the **NCCG 2018** provides for induction and continuing education of Board members, however, no specific timeframe was given regarding the implementation of such. Accordingly, **Guidelines 3.0 and 4.0 CGGIRC 2021** mandate a company to *hold such trainings at least once a year* for the Board members; also, an evaluation of such training must be reported to NAICOM before the end of first quarter of the succeeding year.

(d) There is some digression in the number of years for retaining and rotating an external auditor in both the **NCCG 2018** and the **CGGIRC 2021**. **Principles 20.2 and 20.4 NCCG 2018** provide that external auditors may

be retained for no longer than ten (10) years continuously; if disengaged after ten years continuous service, they are subject to seven year cool-off period. Also, audit engagement partners must be rotated every five years. However, **Guideline 6.0 CGGIRC 2021** provides for a four (4) year tenure for appointed external auditors in the first instance, and re-appointment for maximum of another four (4) year terms; whilst the client audit teams shall be rotated at least once every two years.

### **CGGIRC 2021: Other Highlights**

Major highlights of the **CGGIRC 2021** can be categorised under the following headings, viz: (a) Disclosure requirements; (b) Reporting requirements; (c) Governance requirements; (d) Risk management requirements; and (e) Management structure requirements.

#### (a) Disclosure requirements

By **Guideline 10.0 CGGIRC 2021** (akin to **Principle 28.1 NCCG 2018**), the insurance firm’s Annual Report must disclose the manner of its compliance or deviation from the **NCCG 2018** and/or **CGGIRC 2021**. It must disclose the attendance record of directors at Board meetings, etc.

#### (b) Reporting requirements

The reporting requirements under the **CGGIRC 2021** are focused on periodic reports, such as quarterly reports to be filed by the Internal Audit Unit to NAICOM; whilst the report of the external assessment of Internal Audit functions shall be submitted to NAICOM not later than the second quarter of the succeeding year: **Guideline 5.0 CGGIRC 2021**. Other reporting requirements involve external auditors’ appointment and renewal subject to NAICOM’s approval: **Guideline 6.0 CGGIRC 2021** (akin to **Principle 20 NCCG 2018**).

#### (c) Governance requirements

**Conflict of Interest:** Each director and employee of an insurance/reinsurance



company shall formally disclose to the Board of Directors or Shareholders his/her interest in any insurance firm, inclusive of any commissions or fees paid in respect of such insurance firm: **Guideline 7.0\_CGGIRC 2021**. Similar issue of conflict of interest was addressed in **sections 306 and 307 CAMA**. Unlike the **NCCG 2018** that focused on the Directors' duty to comply with Conflict of Interest policy, **Guideline 7.0\_CGGIRC 2021** expressly preclude directors and employees from engaging in such activities that would amount to Conflict of Interest.

**Whistle Blowing: Guideline 11.0\_CGGIRC 2021** (cf. **Principles 19 and 29.1.7 NCCG 2018**) protects the rights of a whistle blower by giving such a person the opportunity to present a complaint to NAICOM if he or she has been subjected to any detriment. This further encourages individuals to take steps in reporting any shady activities in the insurance industry.

#### (d) Risk management requirements

The **CGGIRC 2021** provisions on risk management is *in pari materia* to those of the **NCCG 2018**,<sup>4</sup> particularly **Guidelines 2.03 and 2.04 CGGIRC 2021** that impose a responsibility and duty on the Board to review corporate strategy, risk policy and monitor potential risks within the company. Essentially, under both documents, the risk management framework is expected to address all material risks, amongst them are: market risk/investment risk, credit risk, operational risk, liquidity risk, reinsurance risk, underwriting risk etc.<sup>5</sup> It will also help promote more efficient and consistent operations, result in more satisfied customers, a healthier bottom line and engenders a viable

insurance industry; and that can only be achieved if there is full compliance.<sup>6</sup>

#### (e) Management structure requirements

Basically, the management structure of the insurance industry focuses on the appointment and removal of the Board of directors, selection criteria, legal duties, compensation etc. **Guideline 2.0 CGGIRC 2021 provides detailed explanation in this regard**. For instance, the Board composition of an insurance and reinsurance company shall not have less than seven (7) members and not more than fifteen (15) members. The Board shall consist of executive and non-executive directors out of which not more than 40% of the members shall be in the executive capacity. Moreso, **Guideline 2.01 CGGIRC 2021** further states that at least one (1) Independent Non-Executive Director (INED) who does not represent any particular shareholding interest nor hold any business interest in the company should be included as a member of the Board.

The **NCCG 2018** was not specific as to the size of the Board; rather, **Principle 2 NCCG 2018** listed factors to be considered in determining its member composition, which include: (a) appropriate mix of knowledge, skills and experience, including the business, commercial and industry experience needed to govern the Company; (b) appropriate mix of Executive, Non-Executive Directors (NED) and INED. Such that majority of the Board should be NED and must be independent; (c) need to secure quorum at meetings; and (d) diversity targets relating to the Board composition.

### **NCCG 2018 and CGGIRC 2021: Clarifications and Conflicts?**

From the foregoing analysis, we have shown that in trying to clarify the **NCCG 2018**, the **CGGIRC 2021** has also introduced conflicting provisions, and the question of how to deal with such conflicts will always arise. The approach to take may depend on the specific matter and the nature of the conflict. Will the **CGGIRC 2021** be regarded as specifying minimum standards relative to the **NCCG 2021** or *vice versa*?

Or will it be a question of which instrument is later in time? Here, the peculiar facts are interesting because whilst the **FRCN Act** pursuant to which **NCCG 2018** was made is later in time to the **NAICOM Act (CGGIRC 2021's** enabling law); whilst the **CGGIRC 2021** is more recent than the **NCCG 2018**. Theoretically, both are subsidiary legislation that should enjoy equal status, being issued by donees of statutory power. So resort may have to be made to the rules of statutory interpretation on conflict between general and specific provisions on the same subject - which one will prevail?

The Supreme Court (SC) held in **Inakoju v. Adeleke** that where **the Constitution** or a statute contains a general provision and a specific provision, the latter will prevail in case of conflict. In other words, the admittance in the **CGGIRC 2021** that it shall be read and interpreted in conjunction with the **NCCG 2018**, coupled with the fact that other insurance **Guidelines (Guideline 8.4.0 Market Conduct and Business Practice Guidelines for Insurance Institutions 2015)** seeks to comply with **FRCN Act 2011** requirements, may not be conclusive on the issue.

<sup>4</sup> Cf. **Principles 11.5.6.1 and 17 NCCG 2018** Thus, the Board is expected to have a committee on risk management/risk management framework. The essence of emphasising the risk management requirement in both the **NCCG** and **CGGIRC** is to protect the interest of the insured and to ensure compliance by the industry players.

<sup>5</sup> **Guideline 6.2(b) NAICOM's Prudential Guidelines for Insurers and Reinsurers in Nigeria July 2015** listed all the material risks that the risk management framework must cover. Other material risks aside from the ones mentioned above are: Provisioning risk/reserving risk, claims management risk, group risk, reputational risk, legal/litigation risk and such other risks to which the Company may be exposed.

<sup>6</sup> This raises the question: why is the **CGGIRC 2021** reiterating what the **NCCG 2018** has already provided for?

<sup>7</sup> (2007) LPELR-1510(SC).

<sup>8</sup> The Court of Appeal towed the same line in **Omini & Ors v. Yakurr LGA & Ors (2019) LPELR-46300(CA)** and **American Specification Autos Ltd & Anor v. AMON (2017) LPELR-44016(CA)**: where there is a specific provision and a general provision on the same subject matter, the special provision enjoys supremacy.

<sup>9</sup> **Guideline 8.4.0 (Compliance with Financial Reporting Council Act 2011)**, in **Market Conduct and Business Practice Guidelines for Insurance Institutions 2015** states that: "There are a number of requirements of the **Financial Reporting Act 2011** compliance with which will satisfy our other supervisory interests. As the Commission expects full compliance with the Act in the financial reports issued for the year ending 31 December, 2013, the items have not been addressed in this document." Emphasis supplied. View at: <https://www.naicom.gov.ng/docs/regulations/Market%20Conduct%20Guidelines.pdf> (accessed 29.04.2021).

Whilst such is indicative of regulatory intent, they arguably do not preclude the court from examining the legal status of the two subsidiary legislation to determine which respective provision should prevail in case of conflict on specific matters.<sup>10</sup> Can a company being sanctioned by the FRCN, claim that having met the **CGGIRC 2021** requirements, it is not liable to sanction under the **NCCG 2018** and vice versa? Would insurance companies be subject to parallel enforcement actions by the NCCG and NAICOM on essentially the same infraction,<sup>11</sup> and can they not challenge such “double jeopardy”?<sup>12</sup> It would be interesting to see the court’s interpretative stance/approach in dealing with such conflicts, at the appropriate time, when matters are brought before it.

### Conclusion

The **CGGIRC 2021** is a good initiative from NAICOM, although for the most part, it appears to be a rehash of the **NCCG 2018**, which further strengthens the ethos of the **NCCG 2018**. It is a welcome development, following the stalling/suspension of many of NAICOM’s recent industry recapitalisation initiatives such as Tier Based Minimum Solvency Capital (TBMSC), and its recapitalisation requirements/deadlines, due to litigation by different stakeholders.



The **CGGIRC 2021** is reflective of NAICOM’s commitment to ensuring that good corporate governance is instilled in the insurance industry, as part of the efforts to actualise industry potential. Recent announcements of winding up and suspension of some insolvent insurers show that the effort to safeguard the health of the industry through robust corporate governance measures, cannot be over-emphasised. It is prescient that industry stakeholders need to ensure proper internal checks and review of their corporate governance to avoid NAICOM (and FRCN)’s sanctions.

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<sup>10</sup> The doctrine of implied repeal may arise if the later subsidiary legislation conflicts with the previous legislation. However, where two enactments are entirely affirmative and identical no question of inconsistency can arise. Where the operative terms of the two enactments are identical, and the enactments run parallel to each other there can be so to speak no scope for the application of the doctrine of implied repeal, see *Trust Mai Lachmi Sialkoti Bradari v. Chairman, Amritsar Improvement Trust*, AIR 1963 SC 976 (1963) 1 SCR 242. Also, in determining ways in which a retrospective legislation may be relevant in the interpretation of a later legislation, the SC held in *A-G Ogun State & Ors v. A-G Federation (2002) LPELR-621(SC)* that: “A previous legislation may be relevant to the interpretation of a later legislation in two ways: ‘First, the course which legislation on a particular point has followed often provides an indication as to how the present statute should be interpreted. It is in such cases presumed that the interpretation in the former must have been known to those who drafted the latter...’”

<sup>11</sup> Note that the **NCCG 2018** did not provide for penalties and fines for default; rather, **Introduction Para D (supra)**, see footnote 3 above), envisages enforcement sanctions through sectoral regulators. **Principle 28.2(m) NCCG 2018** however provides that a company is expected to disclose all fines and penalties imposed on it by regulators at the end of the reporting period. Cf. with for example, **sections 64 (Sanctions for Noncompliance)**, and **65 (Sanctions on Public Interest Entities) FRCN Act**. On its own part, **Guideline 12.0 CGGIRC 2021 (Enforcement and Sanctions)** covered the field by providing that: “The non-compliance with the **NCCG 2018** and this Guideline shall be a violation of Section 49(1)(b) of the National Insurance Commission Act 1997 and attracts penalty under section 49(5) of the Act.” For a discussion of a successful challenge to FRCN’s purported exercise of its powers, see Afolabi Elebiju, Gabriel Fatokunbo, et al, ‘Definitions And Developments: Corporate Governance Implications Of Judicial Interpretation Of ‘Public Interest Entities’ In *Eko Hotels Limited v. FRCN FHC/L/CS/1430/2012*’, LeLaw Thought Leadership, July 2019: <https://lelawlegal.com/add11pdfs/PIE-ARTICLE.pdf> (accessed 30.04.2021).

<sup>12</sup> **Section 36(9) Constitution of the Federal Republic of Nigeria 1999, (as amended)** provides that: “No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court” Also, the SC has held in *FRN v. Nwosu [2016] 17 NWLR (Pt. 1541), 226 at 305-306H-G* that: “The concept or rule of double jeopardy is specifically provided for under section 36(9) of the 1999 Constitution. The underlying principle of the provision is to guide against a situation where an accused would be punished twice for the same offence. It presupposes a situation where an accused would be subjected to double trial for the same offence...”