LEGAL FRAMEWORK FOR CORPORATE GOVERNANCE IN NIGERIA.*

Abstract:

Corporate Governance issues are as old as companies themselves but despite this, the phrase 'corporate governance' is somewhat malleable. Almost every writer/author offers a different view to what the phrase means to the writer/author concerned. To this writer, Corporate Governance generally refers to how a company is run. This includes not only how a company is directed and controlled but also how it is performing, how that performance can be enhanced and how the company should account to interested parties such as the shareholders.

The Board of Directors is responsible for the governance of the company. The Shareholders' role in governance is to appoint the Directors and the Auditors and to satisfy themselves that an appropriate governance structure is in place.

The responsibilities of the Board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to the Shareholders on their stewardship. The Board's functions also include ensuring the integrity of financial controls and report and also ensuring that ethical standards are maintained and that the corporation complies with the laws. The Board engages the services of Managers to run the day to day affairs of the company. It is therefore the responsibility of management to run the business of the company, while the Board ensures that the company is properly managed. Consequently, rules and regulations are made to ensure sound corporate governance for the entity.

This paper therefore, seeks to discuss the legal framework for Corporate Governance in Nigeria in terms of whether the governance mechanisms are adequate in the face of changes and challenges and what can be done to enhance the situation and remedies that can be sought against wrong doers.

Introduction

Corporate Governance is a relevant and important issue to all companies particularly for listed companies. It is not possible for shareholders to formulate policies and strategies for the organization, they therefore elect the Board of Directors to protect and enhance the fortunes of the

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organization. The Board then appoints management to supervise and monitor the day to day operations of the company. Management is directly accountable to the Board and the Board is directly accountable to the Shareholders. This is the basic structure of Corporate Governance, where the shareholders delegate power and authority to the Board members and management personnel with a view to achieving efficiency, effectiveness and excellence. Corporate Governance is therefore based on the principles of integrity, fairness, equity, transparency, accountability and commitment to values. This is where rules and regulations come into play.

It is the responsibility of the Board to ensure that the interests of the stakeholders are protected. It is this need to protect the interest of all stakeholders that constitute the best justification for the existence and importance of the Board of Directors.[1]

An important aspect of Corporate Governance is the nature and extent of accountability of people in the business. In 1999, the Organisation for Economic Co-operation and Development (OECD) published a set of principles on corporate governance in an attempt to develop international standards for corporate governance.[2] The OECD principle provides that the statutory and regulatory Corporate Governance framework should ensure that timely and accurate disclosures are made on all matters regarding the company, including its financial situations, performance, ownership and governance. Disclosure should include but not limited to material information on:

a) The financial and operating results of the company;
b) Company objectives;
c) Major share ownership and voting rights;
d) Members of the board and key executives and their remuneration;
e) Material issues regarding employees and other stakeholders and
f) Corporate governance structures and policies.[3]

Following the collapse of some major international corporations such as Enron Corporation, Adelphia, MCI Inc. (formerly Worldcom) etc, which jolted the business world, the issue of corporate governance became a global one. As a result, some countries issued corporate governance codes to address the issues that their company laws did not sufficiently contain.[4] For instance, in the United States, in response to the Enron and Worldcom scandals, the U.S Sarbanes-Oxley Act became law on 30 July, 2002 and applies to all United States and non-United States companies

[1] C. Kolade, "Corporate Governance and Boards" being a lecture delivered at the Lagos Business School, 1998, Lagos.
[2] 2012 Nigerian Observatory on Corporate Governance-Disclosures in Annual Report by Public Quoted Companies in Nigeria. Editorial Commitee: Fabian Ajogwu SAN, Charles Nwabulu and Chioma Mordi.
[3] 2012 Nigerian Observatory on Corporate Governance supra.

that are required to file periodic reports with the US Securities and Exchange Commission (SEC).- Alan Dignam & John Lowry, Company Law, fifth Edition, Oxford University Press, P 392.

Today, the strategy for addressing corporate governance has taken various forms both nationally and internationally. This has culminated in the issuance of different reports, guidelines and codes aimed at enhancing best practices.

The different Codes of Corporate Governance in Nigeria are explicit in their recommendations on best practices including constituting an effective Board, identifying the major responsibilities of the Board, remuneration of Directors, Board performance assessment and the Audit Committee.

All the codes recognize the fact that good Corporate Governance ultimately rests with the Board. It is therefore necessary to understand the fact that high standard of probity and fiduciary responsibility on the part of the Directors are very critical.

In Nigeria, the origin and implementation of Corporate Governance can be traced to allegations of financial misrepresentation or misstatement by Lever Brothers (now Unilever Nigeria) in the 1990s which negatively affected its investors and resulted in the establishment of a Committee on corporate governance by the Securities and Exchange Commission (SEC).[5] The committee produced its result as well as its first code of corporate governance and best practices in October 2003. The code laid emphasis on the role of Board of Directors and management, Shareholders' rights and the Audit Committee in the corporate governance process

Another failure of corporate governance in Nigeria was recorded in 2006 when the Chief Executive Officer of Cadbury Nigeria PLC made allegations of over-statements of earnings by the company.[6] The Securities and Exchange Commission's (SEC) administrative inquiry into the allegation found the company and its Board guilty. SEC imposed various sanctions and penalties against the Director, Management, Auditor and Chairman for different degrees of wrongdoing or negligence. This did not deter future offenders as was witnessed in the banking sector.[7]

However, before the development of the code of Corporate Governance practices, the Companies and Allied Matters Act (CAMA)[8] had been in existence as the main enactment for the regulation of companies' activities in Nigeria.[9] The provisions of CAMA as they relate to Corporate

[4] Odunayo Boyeje Ani- Fraudulent Financial Reporting: The Nigerian Experience. Available on http://cluetinstitute.com/conference-proceedings/2014-SAPapers/Article%20128. Assessed on 16th August, 2014.

[5] Killian Osikhena Ogedu and James Odia - Fraudulent reporting in Nigeria Management Liability for Corporate Financial Statements as an Antidote available on http://www.mcser.org/journal/index.php/EJBM/article/viewFile/6218/6322. Assessed on 16th August, 2014.

[6] Bank failures involving Oceanic Bank Plc, Intercontinental Bank Plc, Union Bank of Nigeria Plc, Afribank Plc and Spring Bank Plc in 2011.

[7] CAP C20 LFN, 2004.

[8] However, there are other legislations such as the Investment and Securities Act, Banks and Other Financial Institutions Act, The Nigerian Accounting Standard Board Act (which was repealed by the Financial Reporting Council Act, 2011 etc.

Governance together with the various codes issued by regulators and some sectors of the economy, specifically for the sectors concerned together with the newly promulgated Financial Reporting Council of Nigeria Act, 2011 will be examined.

Historical background of Corporate Governance in Nigeria

Before the concept 'Corporate Governance' became popular, company law generally recognised and still recognises two organs of a company, to wit: the Board of Directors and the Company in General Meeting. Corporate Governance therefore simply broadened the concept of running a company or how a company should be run.

Prior to the promulgation of the Companies and Allied Matters Act (CAMA), the principal enactment on company law was the Companies Act of 1968, which was modeled after the Companies Act of United Kingdom of 1948.

The Companies Act of 1968 had provisions in respect of Board of Directors and members in general meeting, among others. Due to criticisms by stakeholders about the inadequacy of the Act, it was repealed in 1990 and the Companies and Allied Matters Act (CAMA) was enacted.

The CAMA contains more elaborate provisions than the Companies Act of 1968. These provisions relate to Appointment of Directors, disqualification of Directors, retirement and reappointment of retiring Directors, vacation of office of Directors, remuneration of Directors and more importantly duties of Director.[10] The CAMA also made provisions on the administration of companies registered in Nigeria. As at this period, corporate governance as a concept had not emerged in Nigeria.

However, following the collapse of some major international corporations such as Enron Corporation, Adelphia, MCI Inc. (formerly Worldcom) etc, which jolted the business world, the issue of corporate governance became a global one. The clear lesson Enron, Parmalat, Worldcom, Barings Bank etc taught the corporate world is that no company can be too big (financially or otherwise) to fail. A common thread that ran through these monumental corporate failures was their poor corporate culture, to wit, poor management, fraud and insider abuse by management and Board members, poor asset and liability management, poor regulation and supervision.[11]

As a result, some countries including Nigeria issued corporate governance codes to address the issues that their company laws did not sufficiently contain. The first code issued in Nigeria was the code of corporate governance for banks and other financial institutions, which came into

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[10] See generally Part ix, chapter 1 of Companies and Allied Matters Act.

[11] Inam Wilson, "Regulatory and Institutional Challenges of Corporate Governance in Nigeria's Post Banking Consolidation, Published In the Nigerian Economic Summit Group (NESG) Economic Indicators, April-June 2006, Vol. 12 No. 2.

being sometime in August, 2003. This code was not of general application, having been issued by the Bankers' Committee specifically for banks and other financial institutions. The code provided for the following: Responsibilities of the Board of Directors; Structure of the Board of Directors; Position of Chairman and Chief Executive Officer; Appointments to the Board; Proceedings of the Board of Directors; Remuneration of Directors; Assessment of Board performance; Risk Management; Financial disclosure; Relations with Shareholders and Audit Committee.

Barely two months after the issuance of the above-mentioned code, another code was mid-wifed in October, 2003 by the Securities and Exchange Commission (SEC) in collaboration with the Corporate Affairs Commission (CAC).[12]

It is the first to be issued by a regulatory authority and it came into being as a result of the need for the country to identify with international best practices. It was the first code that applied to all public companies quoted on the Nigerian Stock Exchange. This code made a lot of impact on the corporate scene in Nigeria. However, due to the rapid business growth and the failure of the regulator (SEC) to review and update the code in line with current business realities, some regulators of specific sectors of the economy decided to issue specific corporate governance codes that relate specifically to the particular industry. For instance, in 2006, the Central Bank of Nigeria (CBN) issued its code of corporate governance for banks in Nigeria's post-consolidation.[13] This code, which came immediately after the consolidation, was an improvement on the 2003 code and was meant to address the identified weaknesses in corporate governance of banks in Nigeria and to resolve post-consolidation corporate governance challenges. Its provisions are mandatory for all banks.

Another sector specific code was the Code of Corporate Governance for Licensed Pensions Operators, 2008 issued by the National Pension Commission. This code was issued as a result of the reforms in that sector, which gave rise to private sector involvement in pension funds management. The code sets out rules to guide pension fund custodians and administrators.

In 2009, another industry-specific code known as the Code of Corporate Governance for Insurance Industry in Nigeria was issued by the National Insurance Commission (NAICOM). The provisions of this code are mandatory for all insurance and re-insurance companies in Nigeria.

Again, on 1st April, 2011, the Securities and Exchange Commission (SEC) issued the Code of Corporate Governance in Nigeria, which replaced the 2003 SEC Code. Though not a perfect document, this code was adjudged to be quite comprehensive. The Code was strengthened to meet the challenges facing a number of listed companies at the time (especially the

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[12] The code is known as "the code of best practices on corporate governance in Nigeria, 2003.

[13] This was known as 2006 CBN code.

banking and financial services industry). It provided for responsibilities of the Board, duties of the Board, composition/structure of the Board etc. It also provided for whistle-blowing policy whereby companies through their Boards are encouraged to implement such policy and to establish a whistle-blowing mechanism for reporting any illegal or substantial unethical behaviour.

The SEC Code 2011 also contains standards of Corporate Governance which should guide the activities of public companies. It does not cover activities of private companies, but they are encouraged to imbibe and implement Corporate Governance principles.

Almost immediately after the 2011 SEC Code became operational, the Federal Government enacted the Financial Reporting Council of Nigeria Act, 2011 which repealed the Nigerian Accounting Standard Board Act No. 22 of 2003. As at this time, that is 2011, four regulators had issued different codes and these were, the Central Bank of Nigeria, the National Pension Commission, the National Insurance Commission and the Securities and Exchange Commission. Some important features of all the codes include honesty, ethics, trust and integrity, performance, responsibility and accountability, commitment to organization.[14]

As good as the intendments of these regulators may seem, they are handicapped by the fact that the regulatory authorities do not have the legal power under the codes to enforce compliance to the principles of the codes. The scope of these codes show that there are many companies that are bound by two codes at the same time[15] and the question is: where there is conflict, which of the codes will such a company apply? The answer is found in Section 1.3 (g) of Securities and Exchange Commission Code which provides that "where there is a conflict between this code and the provisions of any other code in relation to a company covered by the two codes, the Code that makes a stricter provision shall apply". This provision, it is submitted has watered down the impact of the Code. It should have insisted on strict compliance by all companies concerned because it has a wider scope than all other Codes on Corporate Governance in Nigeria.

Another short-coming of the SEC Code 2011 is found in Section 1.3 (b) & (c) of the code. Section 1.3 (b) gives the Board of Directors the primary responsibility to ensure compliance with or observance of the principles and provisions of the code by the company. It then advised the Shareholders to familiarize themselves with the letters and spirit of the

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[14] Duru Onyekachi Caesar-Independence of Board of Directors under Corporate Governance codes in Nigeria available on http://www.academia.edu/5185469/INDEPENDENCE_OF_BOARD_DIRECTORS_UNDER_THE_CORPORATE_GOVERNANCE_CODES_IN_NIGERIA_AN_OVERVIEW By_Duru_Onyekachi_Wisdom_Caezar accessed on 26th August, 2014.

[15] A good example are the banks. Most banks are public companies.

code and encourage or where necessary demand compliance by the company. Meanwhile, Section 3.1 (c) thereof provides that:

> "the question whether a company or entity required to comply with or observe the principles or provisions of this code, has complied with or has so observed the provisions of the code shall, in the first instance, be determined by the Board and its Shareholders and thereafter by SEC".

Though the Board is given the responsibility to determine whether the company has complied with the provisions of the code and the Shareholders have a kind of oversight function in that regard, how will SEC determine whether the company is in breach? If the company fails to comply, who reports the breach to SEC before it takes action? The Board of Directors or the Shareholders? This provision is vague. There is no doubt that there will be cases of non-compliance by companies but it will be difficult for the Board or Shareholders to report such cases to SEC.

Whilst it is admitted that the primary duty to ensure that the company is well run remains that of the Board of Directors, it is submitted that it is the Regulator's responsibility to enforce rules and guidelines made by it for the regulations of companies within its sphere of authority. It is for this reason that it is hereby suggested that SEC, as the regulatory authority, should put a policy in place whereby it can carry out regular and impromptu checks on the companies to ensure that the principles and provisions of the code are complied with by the companies.

Securities and Exchange Commission Code of Corporate Governance 2011 and the provision for whistle-blowing policy

By Section 32.1 of the code, companies are enjoined to have a whistle-blowing policy which should be known to employees, stakeholders such as contractors, shareholders, job applicants and the general public. The responsibility to implement such policy is placed on the shoulders of the Board of Directors.

There is no doubt that whistle blowers are invaluable in exposing corruption, fraud and mismanagement. Early disclosure of wrong doing or risk of it can protect the fortunes of the company and help preserve the rule of law.

The whistle blower may be working within the organization or a past employee or even a complete outsider, who decides to report misconduct. The misconduct may be ongoing at the time of the report or may have taken place in the past. In most cases, the misconduct reported by the whistle blower violates a law or threatens the public in one way or another.

Whistle blowing is not new in Nigeria. We have had series of cases involving whistle blowing. The most outstanding occurred in 2006 when the Board of Cadbury Nigeria Plc notified the world, including its stockholders and regulatory bodies of the discovery of "overstatement" in her accounts, which according to it, had spanned many years.[16] In reaction to the scandal, Bunmi Oni, the Managing Director and Ayo Akadiri, the Finance Director, were relieved of their employment. Following suit, the Council of the Nigerian Stock Exchange barred the duo from running any publicly quoted company for life, whilst the apex regulatory authority, the Securities and Exchange Commission instituted an investigation into the allegation. SEC's administrative inquiry found the company and its Board guilty; imposed various sanctions and penalties against the Directors, Management, Auditor and Chairman for different degrees of wrongdoing or negligence.[17]

Whistle blowers are not protected in Nigeria. In many countries such as the United Kingdom and the United States of America,[18] the whistle blower is protected by law.

In the United States of America, various states have laws on the protection of whistle blower. However, the Whistleblower Protection Act (WPA) of 1989 is a federal law that prohibits a federal agency from taking action or threatening to take action against an employee or applicant for disclosing information that he or she believes violated the law, compliance rules or other regulation. The disclosed information could include reports of mismanagement, wrongdoing, the waste of funds, an abuse of authority and/or a potential risk to public health or safety.[19]

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[16] Adekunle Obebe-Whistleblowing in Corporate Nigeria: Myth or Reality available on http://www.bloomfield-law.com/publications, assessed on 26th August, 2014.

[17] Another example is the current NNPC's non-remittance of about $20million oil fund as reported by the former CBN Governor Mallam Sanusi Lamido Sanusi (now the Emir of Kano), which earned him a suspension. The issue became a subject of litigation but the Plaintiff subsequently withdrew the matter from the court.

[18] The United Kingdom passed the Public Interestsignificance of mandatory compliance with laws and regulation through a strict monitoring and regulatory system is very crucial in corporate governance. It is not also in doubt that Nigeria parades a good array of institutions and laws for ensuring maximum corporate governance, some of which have been discussed here, however, the problems lies in the implementation of these laws. In Nigeria, The Companies and Allied Matters Act, (CAMA) is the main basis for the legal framework for the establishment of corporate entities and also set out rules and regulation for the companies to be able to work within. It also provides for corporate governance and auditing and punishment for breaches. The statutory provisions may not be exhaustive of the legal framework to regulate the management of the affairs of companies. Because of this and the need for alignment with global best practices on corporate governance, different sectors came up with different codes of corporate governance that had no legal muscle to enforce compliance. With the promulgation of the Financial Reporting Council of Nigeria Act, 2011, and the plan by the Financial Reporting Council of Nigeria to issue a National Code of Corporate Governance, it is believed that the era of sector-specific codes is over. The new code, it is hoped, will harmonize all the other codes for easy compliance by stakeholders. This Act protects employees from being fired when reporting malpractice or other forms of misconduct. The United States of America also has laws in place to protect whistle blowers, though the specific protection depends on the State in which the report takes place as well as the type of misconduct reported.

[19] http://fas.org/sgp/crs/misc/RL339, assessed on 6th September, 2014.

The WPA makes it a prohibited personnel practice to take an adverse personnel action against a covered employee because that employee makes a protected disclosure. An employee who claims to have suffered retaliation for having made a protected disclosure may seek a remedy from the Merit Systems Protection Board (MSPB), may ask the Office of Special Counsel (OSC) to investigate the situation and advocate for the employee or may file a grievance under a negotiated grievance procedure contained in a collective bargaining agreement.[20]

It is not in doubt that the decision to step forward and blow the whistle is sometimes a hard one and can be a scary proposition for some. Unless there is a law, which indicates that it is safe and acceptable for individuals to raise genuine concern about corruption or illegality, whistleblowers, especially employees stand the risk of victimization, loss of job, damage to their career etc. People should not just be told by the authorities to blow the whistle but those who are contemplating blowing the whistle can take comfort in the fact that there are laws that protect the rights of bona fide whistleblowers.

It is therefore, suggested that a comprehensive legislation be passed in Nigeria,[21] which would protect the whistleblower from victimization. Without such legal framework to protect those that speak out from victimization, any policy for whistle blowing will not be effective.

Corporate Governance in Nigeria: The Companies and Allied Matters Act's perspective

It is a basic principle of company law that once a company is incorporated, it becomes a legal entity, different and distinct from the members. But a company, although a legal person, is an artificial one, which can only act through its human agents and officers.[22] This human personification of a company was clearly brought out by Lord Denning LJ (as he then was) when he said:

> "a company may in many ways be likened to a human body. It has a brain and nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directives from the center. Some of the people in the company are mere servants and agents, who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are Directors and Managers who represent the directing mind and will of the company and control what it does. The state of mind of those Managers is the state of mind of the company and is treated by law as such".[23]

[20] http://fas.org/sgp/crs/misc/2012_rp. visited on 6th September, 2014.
[21] As was done by the United Kingdom and the United States of America.
[22] Aniagolu JSC in Trenco (Nig) Ltd. v African Real Estate & Investment Co. Ltd & Another (1978) 1 LRN 146.
[23] Bolten (Engineering) Company Ltd. v Graham & Sons (1957) 1QB 159 at 172-173.

In the governance of a company, the Board of Directors and Shareholders in General Meeting play significant roles. While the Board exercises management powers, there are certain corporate decisions that cannot be taken without the resolution of members.[24]

The Companies and Allied Matters Act (CAMA), in recognition of the fact that Directors represent the 'directing mind and will' as well as the 'hands' of the artificial person called the company, to manage the day to day affairs of the company, has accorded special attention to the Director by regulating his appointment, functions, powers and duties in order to achieve efficiency and effectiveness.

The Act also made provisions for other Corporate Governance mechanisms such as the removal of Directors by ordinary resolution; liabilities of Directors; provisions for Auditors and Audit Committee; mandatory involvement of Shareholders in some corporate decisions.

Every registered company must have at least two Directors. The first Directors are appointed in writing by the subscribers to the Memorandum and Articles of Association or a majority of them or they may be named in the Articles.[25] It is not clear from the provisions of CAMA, the qualifications a person must possess in order to be appointed a Director. It has been opined that 'as much as possible, the Board of Directors should be composed in such a way as to ensure diversity of experience without compromising compatibility, integrity, availability and independence. The members of the Board should be individuals with upright personal character and relevant core experience, preferably those with record of tangible achievement, knowledge on Board matters, a sense of accountability, integrity, commitment to the principles of corporate governance and institution building...'[26]

In order to ensure that the Directors carry out their responsibilities, the Act provides that a Director shall act at all times in what he believes to be the best interest of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful Director would act in the circumstances.[27] Section 279(9) of the Act provides that any duty imposed on a Director under Section 279 shall be enforceable against the Director by the company.[28]

The Act imposes some other duties on the Director, such as the duty not to make secret profit. Also, every Director of a company shall exercise the

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[24] Section 63(3) CAMA. See also Shaw & Sons Salford Ltd. v. Shaw (1943) 1 All ER 582.

[25] Section 247 CAMA. See also Section 41 (3); Section 248 CAMA on subsequent appointment of Directors.

[26] Blaiddous on Corporate Law Practice by Y. H. Blaiddus, 1st Edition, published and printed by Chenglo Limited, No. 6, Plot 1123 ECA Mbeke Cresent, Corridor Layout, Off Maryland, Enugu. P. 158.

[27] Section 279 (3) CAMA. See also Okeowo v Migliore (1979) NS CC 210 at 263, where it was held that the Director's fiduciary duty is not for any individual Director's advantage but for the advantage of the company.

[28] Section 279(9) follows the rule in Foss v Harbottle (1843) 2 Hare 461.

powers of his office honestly, in good faith and in the best interest of the company and shall exercise that degree of care, diligence and skill which a reasonably prudent Director would exercise in comparable circumstances. This is known as the duty of care and skill and failure to take reasonable care in accordance with the provisions of Section 282 of the Act shall ground an action for negligence and breach of duty.[29]

Each and every Director shall be individually responsible for the actions of the Board in which he participated and the absence from the board's deliberation unless justified shall not relieve a director of such responsibility.[30]

Another statutory duty imposed on the Director by the Act is that of trusteeship. The Act makes Directors of a company Trustees of company's money and as such the directors must account for all monies over which they exercise control and must refund any money improperly paid away and shall exercise their power honestly in the interest of the company and all the shareholders and not in their own sectional interest.[31]

A Director of a company stands in fiduciary relationship towards the company and the company alone[32] and shall observe utmost good faith towards the company in any transaction with it or on its behalf.[33] A Director shall also stand in fiduciary relationship with the company when he is acting as agent of a particular shareholder.[34]

Before the concept of Corporate Governance became a major issue in Nigeria, CAMA had abhorred bribery and corruption in whatever form or guise, when it provided that a Director shall not accept a bribe, a gift or commission either in cash or kind from any person or a share in the profit of that person in respect of any transaction involving his company in order to introduce his company to deal with such a person. This is otherwise known as prohibition against secret benefits. A breach of this statutory duty entitles the company to recover the actual gift from the Director and sue him and the other person jointly or severally for damages sustained without any deduction in respect of what the Director has returned.[35]

A Director shall be made personally liable where a company receives money by way of loan for a specific purpose or other property by way of advance payment for the execution of a contract or project and with intent to defraud, fails to apply the money or other property for the purpose for which it was received. In such a situation, the Director shall refund the money.[36]

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[29] Section 282(2) CAMA.
[30] Sections 280 (2) and (3); 282 (1), (2) & (3) CAMA
[31] Section 283; Trenco (Nig) Ltd v African Real Estate & Investment Co. Ltd & Another (1976) 1 LRN 146.
[32] Percival v Wright (1902) 2 CH421
[33] Section 279 (1) CAMA
[34] Section 279(2) CAMA.
[35] Sections 287 (1), (2) and (4).
[36] Section 290 CAMA.

Where a Director breaches any of the duties, the company is not without remedies and the remedy applicable depends on the duty that was breached by the Director. The company can apply for the following remedies against the erring Director:

a. An order of court for injunction against a threatened or continuing breach of statutory duty.
b. Compensation and/or damages for breach of duty.
c. Where a Director acts ultra vires the objects of the company, the company can rescind the contract.
d. Restoration of company property.
e. An order to give account of profits made.
f. Removal from office.

There is no doubt that the members in general meeting is vested with so much power by the CAMA, but in reality, the members in general meeting hardly ever exercises the powers as they should. One of the reasons for this could be that members cannot act individually but as a body in general meeting. Moreover, a Director owes his duties directly to the company and only the company can complain of any breach.[37] Shareholders have no right to claim against a Director for any loss they believe they may have suffered as a result of a breach of duty. Claims by a company are often retrospective, brought by members against the Director concerned.

Again, few companies will be ready to file claims against their own Directors. However, the law has over the years, developed a mechanism that allows Shareholders to force the company to seek redress. With the permission of the court, Shareholders can file an action against a Director in the name of the company. The claim is initiated and prosecuted by the Shareholders but it is brought in the name of the company and to recover company loss.[38] The distinction is important. The Shareholders are not claiming in their own name for the breach rather they are claiming in the name of the company for the breaches. It follows that any sum recovered goes to the company.[39]

Apart from litigation with its attendant difficulties (in terms of delays, finance etc), Shareholders can exercise the powers bestowed on them by the CAMA to check the excesses of the Board of Directors by attending and voting at the company's Annual General Meeting (AGM). The powers include re-electing or refusing to re-elect retiring Directors, removal of Directors etc.

[37] See Section 299 CAMA. This is a codification of the Rule in Foss v Harbottle (1843) 2 Hare 461.
[38] The cost of litigation is borne by the company.
[39] It is board's decision whether to pass the benefit on to the shareholders by way of dividend.

It is at the AGM that the Board gives account of its stewardship to the company, represented by the Shareholders. Unfortunately, a good number of Shareholders, particularly those that hold small shares do not attend the Annual General Meetings either due to ignorance of the importance of such meetings or financial constraints (particularly if such meetings are held very far away from where they live and it will require them to transport, accommodate and feed themselves).

Corporate Governance is important in the management of companies. Its existence in a company is a sign that it is healthy. Its absence is an indication that the company is poorly managed and necessitates the intervention of the shareholders or the regulator.[40]

The bigger Shareholders (both individual and institutional investors) can be said to be interested in how the affairs of the company is managed. They have undoubted powers to influence compliance with Corporate Governance in their investee companies.[41] One of the modes they can achieve this is through exercising their franchise at the general meeting but unfortunately, they rarely interfere. This is probably because they expect maximum return on their investment. They therefore believe that Directors should be given freedom to steer the company to economic progress and advantage. The result is that in many cases the members in general meeting are reduced to mere approval/confirmatory arm of the Board.

Another power that the Shareholders can wield to ensure observance of Corporate Governance principles by the Board of Directors, which is perhaps the most potent, is the power to remove a Director. Section 262 CAMA provides that a company may by ordinary resolution remove a Director before the expiration of his period of office, notwithstanding anything in its Article or any agreement between him and the company. However, for a removal to be valid, the statutory procedure for its exercise must be strictly complied with.[42]

It is clear that Shareholders have a lot of powers bestowed on them by the law. It is left to them to rise up to the challenge and make adequate use of their powers for the corporate good of their organizations.

Powers of the Board of Directors in Corporate Governance

The basic principle on the governance of the affairs of a company is set out in the Companies and Allied Matters Act. Section 63 thereof provides that a company shall act through its members in general meeting or its

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[40] Corporate Governance and Group Dynamics by Fabian Ajogwu, SAN. Published by Center for Commercial Law Development, 8, Omagba Street, Oniru, Lagos. Printed and bound in Nigeria by Mbeyi & Associates (Nig) Ltd, Okota, Isolo, Lagos P.124.

[41] Stuart Gillian & Laura T Starks, 'Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective' (2003) 13 Journal of Applied Finance, quoted by Fabian Ajogwu, SAN in Corporate Governance and Group Dynamics by Fabian Ajogwu, SAN. Published by Center for Commercial Law Development, 8, Omagba Street, Oniru, Lagos. Printed and bound in Nigeria by Mbeyi & Associates (Nig) Ltd, Okota, Isolo, Lagos P.125.

[42] See Yalaju-Amaye v Associated Registered Engineering Contractors Limited & Others (1990) 4 NWLR (Pt. 145) 422; Eromin v Harbor & Others (1957) NSCC 17.

Board of Directors or through officers or agents, appointed by, or under authority derived from the members in general meeting or the Board of Directors.

Furthermore, Section 63 (3) of the Act clearly stated that except as otherwise provided in the company's Articles, the business of the company shall be managed by the Board of Directors who may exercise all such power of the company as are not by this Act or the Articles required to be exercised by the members in general meeting.

As already stated, every company registered under the Companies and Allied Matters Act is required to have two organs: the Board of Directors and the members in General Meeting. By this provision, there is a division of power within the company. Some of the powers may, in accordance with the Articles, be exercised by the Directors while some are the exclusive preserve of the members in General Meeting (Shareholders).

The Shareholders are supposed to exercise their powers corporately as members in general meeting. The separateness of a company from its shareholders is one of the key principles of company law derived from Salomon v Salomon[43] that a company is a separate legal entity from its shareholders. Separation here refers to a situation where the shareholders have little or no direct control over the management of the affairs of the company by its Board, represented by the management. This situation is even more pronounced in companies with fragmented shareholding[44]. Most text writers and judicial decisions have concluded that once powers have been conferred on the Directors by the Articles, the General Meeting cannot give directions to the Directors as to what they are to do nor over-rule their decisions except by altering the said Articles[45]. The members must not interfere, provided that the Directors acted in good faith and with due diligence[46]. If, for any reason, the members feel dissatisfied with the conduct of the Directors, they can exercise their power to remove them from office or refuse to re-elect them when they seek re-election. The members cannot usurp the powers vested in the Directors by the Articles and vice-versa.

Accountability in Corporate Governance

Corporate governance issues, particularly accounting irregularities, had been raised in the past with reference to Lever Brothers of Nigeria (now Unilever) and Cadbury Nigeria Plc's financial misstatements as well as

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[43] (1897) Appeal Cases 22 H.L. P. 51; Marinner Nominees Ltd. v F.B.I.R. (1986) 2 NWLR (Pt.20) 48 at 55.

[44] Corporate Governance and Group Dynamics by Fabian Ajogwu, SAN. Published by Center for Commercial Law Development, 8, Omagba Street, Oniru, Lagos. Printed and bound in Nigeria by Mbeyi & Associates (Nig) Ltd, Okota, Isolo, Lagos. P.65-66.

[45] Boyles A. J et al, Gore-Brown on companies, Jordan & Sons London (1972) 42nd edition P. 719; Automatic Self-Cleansing Syndicate Co. v. Cuninghame (1906) 2 CH. 34 C.A.

[46] Section 63 (4) CAMA.

the banking failures involving Oceanic bank Plc, Intercontinental bank Plc, Union bank of Nigeria Plc, Afribank Plc and Spring bank Plc.[47]

The Companies and Allied Matters Act (CAMA) requires every company to keep accounting records, which shall inter alia disclose with reasonable accuracy, at any time, the financial position of the company.[48] The Act also provides for the examination of the books of accounts of a company for better performance. This responsibility is left for the Auditors or the Audit Committee as the case may be.

The first Auditors of a company may be appointed by the Directors at any time before the company is entitled to commence business and shall continue in office until the conclusion of the next annual general meeting. Thereafter, the Auditors are appointed at each Annual General Meeting of the company.[49] CAMA makes it mandatory for a company to appoint an Auditor at each Annual General Meeting to audit its financial statement and to hold office from then until the conclusion of the next AGM. Appointment of Auditors is one of the ordinary businesses transacted at companies' Annual General Meetings.

The Auditor is required to make a report to members on the accounts examined by them and on every balance sheet and profit and loss account and on all group financial statements, copies of which are to be laid before the company in general meeting during the Auditor's tenure of office and in the case of a public company, a similar report shall be made to the Audit Committee to be established by the public company.[50]

The objective of an audit of financial statements is to enable the Auditor to give an opinion on the financial statements taken as a whole and thereby to provide reasonable assurance that the financial statements give a true and fair view and have been prepared in accordance with relevant accounting or other requirements. The Auditor should therefore have or obtain sufficient knowledge of the business of the company to be audited to enable him identify and understand the transactions and practices that may have significant effect on the financial statements or their audit thereof.[51]

Although the Act provides that Auditors report to members of the company, the audited report of a company is required to accompany the financial statements whenever they are published. The report will be read by a wider audience than those to whom it is addressed. Different parties such as investors, customers, suppliers of goods and services, employees, shareholders, governments etc will be interested in the audited accounts of a company and typically place reliance on such report.

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[47] Corporate Governance and Group Dynamics by Fabian Ajogwu, SAN. Published by Center for Commercial Law Development, 8, Omagba Street, Oniru, Lagos. Printed and bound in Nigeria by Mbeyi & Associates (Nig) Ltd, Okota, Isolo, Lagos. P.2.

[48] See Section 331 CAMA.

[49] Section 357 (1) CAMA

[50] Section 359 (1) & (3)

[51] Company Law Handbook 2005. Printed in Great Britain by Clays Limited, St. Ives Plc, 15, London Road, Kingston upon Thames, Surrey KT2 6BR. P. 251 & 261.

Auditors therefore, play key roles in bringing about effective corporate governance. In order to provide the investing public with the level of assurance that will enable them to make decisions on the basis of the financial statements, the Auditors have to perform their duties in an independent and reliable manner. This demands that the Accountants that perform this duty maintain total independence from the client at all times. This also requires complete fidelity to the public trust.

The setting up of Audit Committees is a standard practice in most governance systems. Many of the codes specify the duties of the Audit Committees to include ensuring that proper accounting and transparency are the hallmark of effective governance. The Audit Committee has the responsibility to monitor the financial integrity of the company and to perform general audit work.

In order for Audit Committees to fulfill their role as watchdogs over the financial reporting process, members of the committee need to receive important information about the company's business activities and the proper accounting for those activities. This implies that good audit is a function of good accounts and good accounts come from full disclosure which clearly shows the financial health of the company.

The Securities and Exchange Commission Code of Corporate Governance, 2011 provides for the establishment of Audit Committees by public companies as required under CAMA. It is the responsibility of the Board to ensure that the committee is constituted as required. Members of the committee are expected to have basic financial literacy and should be able to read financial statements.[52]

Section 359 (2) CAMA provides that the Auditor's Report, which shall be countersigned by a Legal Practitioner, shall state the matters set out in schedule six of the Act. The Act did not specify whether such a Legal Practitioner should be an internal or external officer of the Audit firm. It is submitted that the Act will perhaps achieve a better result if the Legal Practitioner is an independent practitioner. Whilst it is admitted that lawyers are not Accountants or Auditors it is expected that such Legal Practitioner should be conversant with the basic financial statements and must also review not only external reports but also internal reports before appending his signature, since stakeholders as well as the public will naturally believe that such report is authentic.

It has been pointed out that the members in general have the responsibility to approve the appointment of Auditors, the financial statements of the company etc. However, in practice, the shareholders usually rubber stamp the financial statements presented to it. Sometimes, it assumes that the financial statements ought to be in order because it has gone through internal audit controls.

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[52] Section 30(1) & (2) of SEC Code 2011.

It is clear that the Companies and Allied Matters Act has been the major statute that regulates corporate governance in Nigeria. Unlike the corporate governance codes, the provisions of CAMA apply to both private and public companies in Nigeria. However, it is apparent that the statutory provisions of CAMA are not exhaustive of the entire legal framework to regulate the management of the affairs of a company. This could be a justification for the need for an amendment of the Act or the issuance of a supplementary code in line with global best practices.
The promulgation of the Financial Reporting Council of Nigeria Act, 2011[53] can be said to be a welcome development.

Beyond the Companies and Allied Matters Act (CAMA)
The Financial Reporting Council of Nigeria Act is given responsibility over every sector of business in Nigeria. Section 7(2) (a) of the Act gives the Council[54] power to enforce and approve the enforcement of compliance with accounting, auditing, corporate governance and financial reporting standards in Nigeria. The Council is expected to act through its Directorates.[55] Section 11 spells out in clear terms the objects of the Council and these are:

(a) to protect investors and other stakeholders' interest;
(b) give guidance on issues relating to financial reporting and corporate governance to bodies listed in section 2 (2) (b) (c) and (d) of the Act;
(c) ensure good corporate governance practices in the public and private sectors of the Nigerian economy;
(d) ensure accuracy and reliability of financial reports and corporate disclosures, pursuant to the various laws and regulations currently in existence and
(e) harmonise activities of relevant professional and regulatory bodies as relating to corporate governance and financial reporting.

By virtue of Section 23 (g) of the Act, a Directorate of Corporate Governance is established under the Act and the objectives of the Directorate are:

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[53] This Act repealed the Nigerian Accounting Standard Board Act No.22 of 2003.
[54] The Financial Reporting Council of Nigeria was established under the Act as a body corporate with perpetual succession and a common seal, which may sue and be sued in its corporate name - Section 1 (2) of the Act.
[55] Section 23 of the Act.

a. To develop principles and practices of corporate governance;
b. Promote the highest standard of corporate governance;
c. Promote public awareness about corporate governance principles and practices;
d. Act as the national coordinating body responsible for all matters pertaining to corporate governance;
e. Promote sound financial reporting and accountability based on true and fair financial statements duly audited by competent independent Auditors;
f. Encourage sound systems of internal control to safeguard stakeholders' investment and assets of public interest entities
   1. and
g. Ensure that audit committees of public interest entities keep under review the scope of the audit and its cost effectiveness, the independence and objectivity of the auditors.[56]

The Directorate of Corporate Governance is empowered to assess the need for corporate governance in the public and private sector, organize and promote workshops, seminars and training in corporate governance issues; issue the code of corporate governance and guidelines and develop a mechanism for periodic assessment of the code and guidelines in respect of the adoption or institution of the code in order to fulfill its objectives; and establish links with regional and international institutions engaged in promoting corporate governance, enforce compliance with the Act and the Rules of the Council on registered professionals and affected public interest entities.[57]

It is in line with these provisions that the Financial Reporting Council came up with a plan to produce a uniform National Code of Corporate Governance (NCCG). To this end, the Minister of Industry, Trade and Investment, Olusegun Aganga, on 13th January, 2013, constituted a steering Committee for the National Code of Corporate Governance, made up of executives from the Central Bank of Nigeria (CBN), the Nigeria Deposit Insurance Corporation (NDIC), the Pension Commission, Securities and Exchange Commission (SEC), the Nigerian Communication Commission (NCC), Corporate Affairs Commission (CAC), Association of Professional Bodies of Nigeria etc.[58]

Unlike the existing Codes of Corporate Governance that are only persuasive in nature, the new Code would contain stiff penalties for varying infractions on the part of corporation and their executives.[59] It is expected that once the National Code of Corporate Governance is out, all other Codes will be taken from the table.

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[56] Section 50 of the Act.
[57] Section 51 of the Act
[58]http://www.financialreportingcouncil.gov.ng/attachments/article/132/List%20of%20Corp%20Governance%20Committee.pdf assessed on 6th September, 2014.

This is a move in the right direction. The question is: will the issuance of a National Code of Corporate Governance automatically ensure better implementation of corporate governance principles by companies in Nigeria? The answer depends on how the regulator (FRCN) implements the principles of the Code.

It is suggested that the Committee should include in the new code, an effective monitoring and enforcement mechanism, which will ensure that errant corporate entities and their executives are sanctioned. This will perhaps ensure that the new code will not be a wasted effort.

What can be done to enhance the situation?

According to Sir Adrian Cadbury "Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. Corporate governance legal framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society".[60]

The major parties that play key roles in corporate governance are the Board of Directors, which oversees the affairs of the company by setting policies, monitoring management performance and protecting the assets of the company; the Management team, appointed by the Board, which implements the policies set by the Board; the Shareholders, which are the real owners of the company because they invest their money in the company. The Auditors also play important role in the governance of a company. Other Stakeholders include the employees, contractors, customers, creditors etc.

The Board of Directors is ultimately responsible for all the actions and decisions of an organization. It has the duty to put in place specific policies that guide the company. Consequently, to enhance good corporate governance, appointment of Directors by the Shareholders should be considered on the additional qualities they possess, as these qualities will impact on their performance on the Board. Also people of character, who have the right skills and experience in relevant areas of the company's activities, should be appointed. These individuals should be those that will devote their time for the corporate good of the organization.[61]

To further enhance Corporate Governance, companies should have in place, induction programs for new Directors, constant training and re-training programs, seminars and workshops on corporate governance for all Directors and Managers. These will help reduce corporate governance challenges.

[59] the chief executive officer of financial reporting council of Nigeria, Mr. Jim Obazee on Thursday, July 22, 2013 at a press conference in Lagos http://www.punchng.com/business/money/fg-to-implement-corporate-governance-code-in-2014/ assessed on 6thSeptember, 2014.

[60] Sir Adrian CadburyGlobal Corporate Governance forum, World Bank, 2000.

[61] See also Section 4.4 of Securities & Exchange Commission Code of Corporate Governance 2011.

[62] See also section 5.1 (d) (ix) of SEC Code 2011.

Shareholders invest and expect good returns. They provide the capital, which if used wisely, will result in the expansion of the organization. The Shareholders should therefore impress it upon the Board from the onset that they expect good returns on their investment. This expectation, it is believed, will in turn ensure that the Board remains focused, purposeful and disciplined. It is hoped that this will ultimately result in good corporate governance in the organization.

Again, to ensure that their investment objectives are met, Shareholders should fully play their roles and exercise their rights effectively. Some of the ways to do this include attending every general meeting. The rights to attend and vote at these meetings are important rights which every Shareholder should exercise. Shareholders can use the meetings to express and exercise their collective will as a corporate body. Infact, it is at these meetings that the shareholders have the opportunity to express their opinions about the way the company is run, ask questions on issues affecting the company and make suggestions, if any, about how the company's operations can be improved.

At the Annual General Meeting (AGM), the Shareholders,[63] receive and approve the company's Annual Report, Directors' Report and Auditors' Report. Shareholders should therefore carefully study these reports. The Shareholders should also study the items on the agenda and all information relevant to their decision making. For instance, approval of the company's financial statements. The Financial Statements reflect a company's latest financial performance and position. Shareholders are hereby advised to compare the latest year's financial performance and position with those of the previous years.

Before approving financial statements, Shareholders should question anything they find irregular or unclear. The Auditors' Report should also be reviewed because they will point out irregularities, if any, to the Shareholders.
The AGM is expected to act as check on the performance of the Directors. It is at the AGM that existing Directors may be re-elected, new Directors may be presented for appointment, Auditors are appointed and re-appointed.[64] Shareholders are hereby advised to carefully study the nomination process and Directors' profile such as age, qualification, experience, previous performance, etc.[65] Appointing the right people as Directors is important in ensuring corporate governance.

Conclusion
It is not in doubt that good Corporate Governance is largely as a result of a sound internal monitoring system, an effective regulatory environment, accountability, transparency and adequate disclosure requirement.[66]

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[63] Acting as a collective body.
[64] See sections214, 248 and 357 CAMA.
[65] In case of re-election
[66] Accountability, transparency and disclosure pertain to the role of the Board of Directors in fulfilling their duties as envisaged in CAMA.