



AN EXAMINATION OF DISCLOSURE PHILOSOPHY IN COMPANY LAW:
MAKING A CASE FOR REFORM IN NIGERIA

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ABSTRACT

This paper examines the concept of Disclosure in Company Law and its underlying philosophy of affording creditors and investors, protection against frauds and ultimately corporate failures. It examines the various shades of disclosure requirements in Nigeria corporate law with a view to discovering the effectiveness or weakness in the legal framework. The paper specifically queries the continued failures of corporations as a result of insider abuse and information asymmetry in Nigeria, despite the monitoring and supervisory roles of regulatory bodies as the Corporate Affairs Commission and the Securities and Exchange Commission. The question asked is whether the disclosure requirements are sufficient and have been able to guide investors and other stakeholders who come in contact with the corporate form, to make informed decisions and safeguard their investments. In doing this, the paper did a comparative analysis of what is obtainable in other jurisdictions to see where the Nigerian system lacks. The paper concludes that if the fight against company failures and insider abuse must be won in Nigeria and the economy revamped, our laws on corporate disclosures should be amended and make more punitive to deter flouters and defaulters.

Keywords: Disclosure, Corporate fraud, Reforms, Nigeria.

1. INTRODUCTION

Disclosure connotes openness in company affairs at all levels. It refers to the volume of information to be made available to concerned and interested members of the public either through the regulatory authorities or by all persons involved before, during, or after the formation of the company on the one hand; and during the lifetime of the company, its dying times and after the death of the company on the other hand. Disclosures of information by companies have over the years; become a very important tool of corporate governance. Its importance is anchored on the fact that issues of transparency and good governance have attained prominence in the effort by nations to increase their competitiveness in the global economic market. Disclosure has become more relevant in recent times in view of several high profile corporate scandals, the unimaginable collapse of several industrial giants, business failure and particularly in Nigeria's banking sector; monumental level of corruption and insider abuse.¹ The securities market will be efficient if information affecting the value of securities is

¹Igwe Kingsley, 'Investment, Nigeria Capital Market and Corporate Governance Laws, Practice and Ethics' (2005) Corporate Governance, Disclosure and Transparency Law Development, Research,

readily available to investors. The ultimate aim of regulation, therefore, is to prevent or minimize abuse, which might distort information and the value of securities, thereby having investors' confidence and the market's integrity marred. As succinctly put by Farrar², disclosure of information is the best guarantee of fair dealing and the best antidote to mistrust. Its overriding aim is to afford an umbrella protection primarily to investors and to some degree, to creditors and those to whom the corporate form owes corporate responsibility³. Arguing further, Gower⁴ noted as follows:

England has pinned its faith on a philosophy of disclosure rather than supervision. Our rules are based upon the assumption, which indeed underlies the whole of our company law that the best protection of the public lies in publicity. It is assumed that if one gives the investor full information about the company's affairs, he will avail himself of it and make an intelligent appraisal of the worth of the security offered. For example, to ensure transparency in the operations of banks in Nigeria,⁵ the Central Bank of Nigeria has recently adopted the practice of publishing on its website the total interest rates and charges obtainable in each of the financial institutions in Nigeria.

There are four main themes underlying disclosure of information on company law. The first theme is the assumption that behaviour can be influenced merely by requiring it to be disclosed without the need of negative prohibition or positive regulation. According to Gower, if those who invest in and manage companies know that their activities will be subject to public scrutiny; their behaviour will be modified to avoid public disapproval.⁶ The second theme is that apart from making full and frank disclosure to the creditors and shareholders, pieces of information that are more obviously in the public interest must also be disclosed by the companies because of the externality companies generate. The third underlying theme is that company must make disclosure to the shareholders by the registration of its audited balance sheet, financial information and at registration at the Companies House.⁷ The purpose of disclosure to the shareholders is to promote efficient management by requiring the management to account for their stewardship of the company thereby making management accountable to the

Publications & Consulting Ltd Vol 3 p.1 in Funmi Ogundare's, 'Sanusi: Corporate Governance, Key to Financial Stability' *ThisDay* (Lagos, 11 February 2010) p. 44.

²Farrar JH & Hannigan BH, *Farrar's Company law* (4th edn, London, Butterworth 1998) chapter 29, 463. See also Tosin Fodeke, 'Tightening the bolts in banks' corporate governance structure', *The Guardian* (Lagos, 03 November 2010).

³The general principles of regulatory control centre around the following issues; Reporting: the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004 (hereinafter referred to as 'CAMA'), Investment and Securities Act 2007 (hereinafter referred to as 'ISA'), Bank and Other Financial Institutions Act (hereinafter referred to as 'BOFIA') et al; impose various reporting requirements. These may be general such as Directors' Reports under s 342 of CAMA or Financial Statements under s 345 of CAMA and Auditors Report and filing with the Commission under s 345 (3) of CAMA. Reporting could be to shareholders in a general meeting or to the regulators or both. See also Solomon, Lewis D Bauman, Jeffrey D et al, *Corporation Law and Policy Materials and Problems* (4th edn, St Paul, MINN, 1990) 281. They submitted that the only standard which must be met when registering securities is adequate and accurate disclosure of required material facts concerning the company and the securities it proposes to sell.

⁴Gower LCB, *Principles of Modern Company Law* (4th edn, London, Stevens & Sons Ltd, 1979).

⁵According to Bolodeoku Ige, 'Corporate Governance: The Law's Response to Agency Cost In Nigeria' [2007] 32 *Brooklyn Journal of International Law* 467; the Code of Corporate Governance Practices issued by the Central Bank of Nigeria known as Code of Corporate Governance for Banks in Nigeria Post Consolidation (2006) 1.7, unlike most corporate governance code is mandatory.

⁶Gower, n 4 at 463. The Learned Authors cited the example of the philosophy behind the provision introduced in the United Kingdom in 1967 that companies must keep a copy of any written service contract or if not in writing a written memorandum of its terms available for inspection by members of the company – the philosophy is that if the members could see how the Directors provided for themselves they might be more restrained in their generosity.

⁷Farrar & Hannigan, n 2 at 464. In Nigeria, the Companies House is the Corporate Affairs Commission established under the Companies and Allied Matters Act 1990.

shareholders. The last underlying disclosure philosophy in company law is that disclosure of information is needed by corporate regulators such as the Security and Exchange Commission and the Corporate Affairs Commission for the purpose of carrying out their supervisory and monitoring functions, and providing investment advice and information to the investing public, creditors and to those who seek information about the corporation.

Disclosure therefore, helps to reduce asymmetric information, and hence, lowers the cost of trading the firm's securities and the firm's cost of capital.⁸ According to Oladele,⁹ despite regulatory and institutional efforts to make information available to investors, there usually is inequality of information between securities issuers and investors.¹⁰ This paper argues that the requirement of registration of companies at the Corporate Affairs Commission (CAC), (as it is known in Nigeria) is in itself a justification for disclosure in the public interest. Therefore, disclosure is all about openness and transparency in the affairs of the corporate form. Many authors have referred to the word 'disclosure' in a number of ways which captures its very essence.¹¹ The critical issue about disclosure is that it is the price to be paid by shareholders in return for the conferring of limited liability which insulates their personal fortunes from the reach of the company's creditors unless the shareholders have been persuaded to give personal guarantees.

This paper answers the questions: Is the disclosure regime in Nigeria adequate and contains information needed to safeguard the corporation, corporate investors and the public from corporate frauds? How efficacious and punishments are the sanctions contained in the Company and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 (hereinafter referred to as 'CAMA'), the Securities and Exchange Commission Act 2007 (SEC Act) and the Investments and Securities Act 2007 (ISA) in deterring those who man corporations in Nigeria from hoarding and trading such information against the corporations' interest and the investing public? Part II of the paper discusses Disclosure at the formation of the Company in Nigeria. It highlights the scope of CAMA and other extant laws dealing with the issue while bringing out the underlying philosophy of Disclosure at the formation stage of the Corporation. Part III examines Disclosure by way of recurrent obligation and financial reporting.

The need for continuous disclosure after the Corporation has been registered is highlighted and the underlining philosophy examined. Part IV examines Disclosure at the dying times of the company and Disclosure under Securities Laws. This entailed a study of public offers and necessary disclosure items required in a prospectus under the relevant laws with particular reference to the following options: securities based registration system versus company based registration system; and mandatory versus voluntary disclosure rules. Part V raises a poser whether with the volume of disclosure required, the National Assembly has been able to achieve its very aims and objectives for imposing disclosure obligations. The imperativeness of the Company Law Reform in Nigeria is highlighted. The paper asserts that the disclosure regime in Nigeria has not been able to check corporate frauds and failures compared to what obtains in other jurisdictions. It reasons that the Disclosure practice in Nigeria is grossly insufficient and ineffective to combat corporate fraud in Nigeria. Even the various disclosure items required under the Nigeria's companies' laws are hardly monitored to ensure compliance. The paper proffers suggestions and recommendations. Finally the paper is concluded in Part VI.

⁸See Christian Leuz and Peter Wysocki, 'Economic Consequences of Financial Reporting and Disclosure Regulation: What have we Learned?' (2006) University of Chicago Working Paper ><http://www.lums.lancs.ac.uk/files/02PaperEconomicCon.pdf> > accessed 22 January 2014.

⁹Olayiwola Oladele, 'How Secured are Securities', (2011) Osun State University, Osogbo, Nigeria, 2nd Inaugural Lecture. <[http://www.google.com.ng/search?q=Olayiwola+Oladele%2C+'How+Secured+are+Securities'%2C+\(2011\)+Osun+State+University%2C+Osogbo%2C+Nigeria%2](http://www.google.com.ng/search?q=Olayiwola+Oladele%2C+'How+Secured+are+Securities'%2C+(2011)+Osun+State+University%2C+Osogbo%2C+Nigeria%2)> accessed 14 December 2013.

¹⁰See Leuz and Wysocki, n 8.

¹¹Brenda Hannigan, *Company Law* (2nd edn, London, Oxford University Press, 2008) 500, refers to Disclosure as 'Transparency Obligation'.

2. DISCLOSURE AT THE FORMATIVE STAGE OF THE COMPANY.

Till date, the cardinal business legislation in Nigeria remains the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004¹² and the Investment and Securities Act 2007 as amended.¹³ An important aspect of company law which those forming and running a company must cope with is the amount of disclosure they must make to the investing public and creditor. Because the corporation was seen since its inception as a privilege or concession to businessmen, in return, a certain amount of documentation is required to be opened for public inspection and scrutiny. According to Goulding:

The reasoning behind the disclosure requirements is that fraud and malpractice are less likely to occur if those in control of corporate assets have to be specific [identified] and know they have to disclose what they have been doing. This means that public disclosure is intended to protect investors and creditor who either put money into the company or who deal with it.¹⁴

Incorporation requires the submission of various documents to the Registrar of Companies who will then issue a Certificate of Incorporation signaling the commencement of the company's existence.¹⁵ Foremost among the documents are the copies of the proposed Company's Memorandum and Articles of Association¹⁶ which must disclose the name of the proposed company,¹⁷ the registered office of the company, the nature of the business which the company is authorized to carry on, that the company is a private company as the case may be, and that the liability of the members is limited by shares.¹⁸ If the company has a share capital,

¹²S 1 of CAMA established Corporate Affairs Commission (hereinafter called 'CAC'). S 7 sets out the functions of the CAC amongst others thus: (a) – for regulation and supervision of the formation, incorporation, registration, management and winding up of companies under or pursuant to this Act; (b) to establish and maintain a company's registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act; (c) to arrange or conduct an investigation into the affairs of any company where the interest of the shareholder and the public demand. In the United Kingdom, Registration under the Companies Act 2006 is the responsibility of the Registrar of Companies. The head office of the registrar is Companies House in Cardiff. Companies House is a public registry with three main functions to wit (i) the incorporation, re-registration and striking-off of companies; (ii) The registration of information relating to companies which is required to be delivered under companies. Insolvency and related legislation; and (iii) the provision of company information to the public together with compliance functions relating to these matters. Generally on this, see <<http://www.companieshouse.gov.uk> > accessed 18 December 2013. It is submitted that although the legislative drafting style employed in respect of the English Act appears to have conveyed the functions of the Companies House in much simpler language, the functions of the CAC are broader in scope.

¹³The Companies and Allied Matters Act Cap C20 LFN 2004 governs corporate affairs under the administration of the 'Corporate Affairs Commission', while the Investment and Securities Act 2007 governs investment and securities matters under the administration of the Securities and Exchange Commission (SEC). Other legislation aimed at facilitating the inflow of foreign investment into Nigerian Economy include: The Nigerian Investment Promotion Commission Act Cap N LFN 2004. Foreign Exchange (Monitoring and Miscellaneous Provision) Act, Cap F LFN 2004; National office for Technology Acquisition and Promotion Act, Cap N LFN 2004, Industry Inspectorate Act, Cap I LFN 2004; and the revised Immigration Act Cap I LFN 2004.

¹⁴ibid 10.

¹⁵S 27 of CAMA; see also s 8 (1) and (2) and s 9, UK Act 2006.

¹⁶S 27(1) of CAMA; see also s 8(i)(a) of the UK Act 2006. A Memorandum of Association is a Memorandum stating that the subscribers (a) wish to form a company under this Act and (b) agree to become members of the company and in the case of company that is to have a share capital to take at least one share each.

¹⁷S 27(1) (b) CAMA; see s 9 (5) of the UK Act 2006.

¹⁸S 27 (1) (f) CAMA; see s 3 (2) of the UK Act 2006.

the Memorandum shall state the amount of authorized share capital¹⁹ reflect the total number of shares the shareholder has taken among themselves.²⁰ The Memorandum shall state the number of shares taken by each subscriber written opposite their names.²¹ Apart from these, other documents of incorporation to be submitted at the CAC include the Notice of Address of the registered office of the company also referred to as Form CAC3, a list and particulars together with the consent of the persons who are to be First Directors of the proposed company also referred to as Form CAC7, a statement of the authorised share capital signed by at least one Director also called Form CAC2, a statutory declaration of compliance also called Form CAC4. The rationale behind these items of disclosure was aptly stated by Tom Hadden²² as intended to ensure that the current capital structure, ownership and control of any company at any time may be ascertained by any interested party thereby guiding against fraud by promoters.

It is against this background that the CAMA at section 293 (1) provides for and makes it compulsory for every company to have a secretary with a view to maintaining and keeping accurate and reliable books of account. The Company Secretary is under a duty to maintain statutory registers and books through the Company Secretary as part of the Company's disclosure mechanism and makes the registers accessible to the public. The statutory registers and books include the following:

- Register of members and shareholders
- Index of members where there are more than 50 members
- Register of Debenture holders
- Minutes Book
- Register Directors/Secretary
- Register of directors' shares and debentures
- Accounting records
- Register of charges
- Register of interest in shares

Corporate fraud (also known as Accounting scandals, or corporate accounting scandals) are political and business scandals which arise with the disclosure of misdeeds by trusted executives of large public companies.²³ Such misdeeds typically involve complex methods for misusing or misdirecting funds, overstating revenues, understating expenses, overstating the value of corporate assets or underreporting the existence of liabilities, sometimes with the cooperation of officials in other corporations or affiliates.

In public companies, this type of 'creative accounting', do amount to fraud and investigations are typically launched by government regulatory agencies, such as (in Nigeria for example) the Securities and Exchange Commission (SEC), the Institute of Chartered Accountants of Nigeria (ICAN), etc. Moreover, the accounting scandals that rocked the corporate world have been blamed for a range of factors, including unethical behavior among executives, incentives to manipulate financial information for personal gain and lack of independence among monitors.²⁴

¹⁹S 27 (2) (a) CAMA; see s 10 (2) of the UK Act 2006.

²⁰S 27 (2) (b) CAMA; see s 10 (4) of the UK Act 2006.

²¹S 27 (2) (c) CAMA; see s 10 (4) (a) of the UK Act 2006.

²²Tom Hadden, *Company Law and Capitalism* (2nd edn, London, Weidenfeld & Nicholson, 1972) 208.

²³John Wiley & Sons, Microsoft Encarta Premium (2006), *Corporate Fraud and Accounting Scandals*. United States: Microsoft Inc.

²⁴Grant, R. M. and Visconti, M. (2006), *The Strategic Background to Corporate Accounting Scandals*, United Kingdom: Elsevier Ltd.

2.1 SOME EXAMPLES OF GLOBAL CORPORATE FRAUD

As contained in Microsoft Encarta Premium, 2008, the summary of some notable corporate frauds and accounting scandals that occurred in this new millennium is provided below:

a) *Worldcom Inc.*

The accounting fraud uncovered at Worldcom in 2001/2002 proved to be the largest in U. S. history. The company overstated its earnings by \$11 billion, and its subsequent bankruptcy cost investors an estimated \$200 billion. The U. S. Department of Justice brought criminal charges against Worldcom's former chief financial officer, and the Security and Exchange Commission of the United States filed civil lawsuits against four former Worldcom executives.

b) *Enron*

In April 2001 Enron revealed that it was owed more than \$500 million by bankrupt California energy companies. In August its chief executive officer (CEO), Jeffrey Skilling, resigned, a sign that all was not well in the company. On October 16 Enron reported a third-quarter loss of \$618 million. The next day Enron revealed that due to an accounting error it had overstated the company's net worth by more than \$1 billion. The two reports caused investors to lose confidence in Enron and its stock price fell.

c) *American International Group (AIG)*

In 2005, AIG was under investigation for accounting fraud. The company already lost over 45 billion US dollars worth of market capitalization because of the scandal. This has been the fastest decrease since the Worldcom and Enron scandals. Investigations also discovered over a billion US dollars worth of errors in accounting transactions. Future outcome for the company is still pending.

d) *Cadbury Nigeria Plc*

The most notable corporate fraud or accounting scandal in Nigeria involved Cadbury Nigeria PLC, one of the biggest food and beverage manufacturer in Nigeria. It was discovered that the profit reported by the company for some years were overstated by N1 billion to N2 billion via creative accounting. Cadbury, which is one of Nigeria's leading companies, was fined for publishing misleading accounts for a number of years in order to boost its profits. The suspicion, however, is that it is not the only company engaged in this practice. The case is believed to be the first of its kind in Nigeria, the country that is trying to shed its image of corruption to attract foreign investment. The Nigerian chief executive of Cadbury, Bunmi Oni, who was named by PricewaterhouseCoopers, the company's auditors, as Nigeria's 'most respected CEO' in at the time and the finance director, Ayo Akadiri, were 'relieved of their positions'.

In 2002, a wave of separate but often related accounting scandals became known to the public in the U.S. All of the leading public accounting firms, for example, Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG, PricewaterhouseCoopers, and others have admitted to or have been charged with negligence in the execution of their duty as auditors to identify and prevent the publication of falsified financial reports by their corporate clients which had the effect of giving a misleading impression of their client companies' financial status. He also stated that in several cases, the monetary amounts of the fraud involved are in the billions of US Dollars. The audit firms and the companies ensnared by accounting scandals which mostly occurred in the third millennium are listed below:

- Deloitte & Touche: Adelphia, AES, Duke Energy, El Paso, Merrill Lynch, Reliant Energy, Rite Aid, Parmalat.
- Ernst & Young: AOL Time Warner, Dollar General, PNC Bank, Cendant, HealthSouth.

- KPMG: Citigroup, Computer Associates, ImClone, Lernout and Hauspie, New Century, Peregrine, Xerox, Siemens AG, Banco National S. A. (Brazil), BMW Group.
- PricewaterhouseCoopers: Bristol Myers, HPL, JP Morgan Chase, Kmart, Lucent, MicroStrategy, Network Associates, NKFS, Tyco, Cadbury Nigeria Plc.

3. CONTINUING DISCLOSURE OBLIGATION

Once incorporated and on the Register of Companies, companies are subjected to continuing disclosure to ensure that the company's public record remains up to date²⁵. There are two aspects to these on-going obligations:

a) Occasional Disclosure

Companies must notify the Registrar General at the CAC of what can be described as occasional changes, such as change of company name,²⁶ changes of director²⁷ or of company secretary, of location of registered office, of alteration to the share capital and increase in share capital, creation of company charges and changes in the company register of charges. This is to enable anyone proposing to grant credit to the company or to invest in its securities, valuable safeguard to see what extent the company's assets are already mortgaged.²⁸

b) Disclosure By Way of Recurrent Obligation

The address of the registered or head office of the company given to the commission in accordance with s 35 (2) (1) of CAMA, or any change in the address made in accordance with the provisions of this section shall be the office to which all communications and notices to the company may be addressed. Notice of any change in the address of the registered or head office of the company shall be given within 14 days of the change to the commission.²⁹ Also director's service contract³⁰ disclosure by directors of interest in contracts, disclosure of registration and copies of certain resolutions,³¹ publication of the name and disclosure of beneficial interest in shares,³² must all be made to the commission. The rationale behind this category of disclosure is to give creditors, investors, suppliers and the public the confidence that they are dealing with a known personality with an address and location and certainly not with fictitious persons who may not be traced or found in the event of any liability or fraud against the investing public and creditors.

²⁵The writer is of the view that the historical significance depicted by this requirement reminds one of the Bankers engaged by the South Sea Company for purposes of its floatation. It would be recalled that one of the major scandals of that era was the discovery that Bankers were operating on a charter belonging to a sword blade company.

²⁶See Part 4 chapter 5 section 80 UK Act 2006 on Change of Name.

²⁷S 292 (4) CAMA and s 164 UK Act 2006.

²⁸Hannigan, n 11 8.

²⁹S 83 on Register of members. See also s 114 UK Act 2006.

³⁰S 291 on Director's Contract of employment for more than 5 years. See also s 228 UK Act 2006.

³¹S 237 CAMA.

³²S 94 (1) CAMA. The rationale behind this provision is to prevent sudden, unexpected and usually hostile takeover bids. Also it is to prevent surreptitious accumulation of control of public companies through nominees, and finally obligation to disclose arises in this instance because it brings to focus and exposes those members who have acquired or cease to acquire shares carrying an unrestricted right to vote at General meetings.

3.1 ANNUAL DISCLOSURE

The most significant disclosure requirements imposed on companies are the annual requirements with respect to filing of accounts³³ to be prepared by the directors and to be supplemented by the Auditor's reports and Directors' report and the publication of full individual or group financial statements as well as abridged financial statement. The overriding philosophy in respect of the balance sheet and profit and loss account is that they should reveal accurately and in detail sufficient information on the total and types of company's liabilities and how its fund are spread between various types of assets and more importantly the liquidity position of the company in order to avoid cash flow problems. Explaining the underlining philosophy behind these items of disclosure Gower³⁴ said that:

Members and the public (which for practical purposes, mean creditors and others who may subsequently have dealings with the company and become its members or creditors) are supposed to be able to obtain information which they need to make an intelligent appraisal of their risk, and to decide intelligently when and how to exercise the rights and remedies which the law affords them.

Finally, the principal source of financial information still remains the periodical balance sheets, profit and loss account and directors and auditors' reports that companies are required not only to lay before their general meetings but also to deliver them for registration thus making them available to the general public.

3.2 ANNUAL RETURNS

Every company shall at least once in every year, make and deliver to the Commission an annual return in the form, and containing the matters specified in sections 371, 372 or 373 of CAMA³⁵ as may be applicable except in the year of its incorporation. The disclosure philosophy behind the requirements for companies to file Annual Return include providing annual consolidation of the periodical information so that a searcher will not generally have to go back beyond the last annual return and providing the public with an opportunity to obtain certain additional information which would otherwise be available only at the company's office but for the disclosure items contained in the Form of Annual Return submitted at the commission. It also affords the registrar the opportunity to strike-off the names of erring moribund companies from the Register.

This paper argues that the issue of recurrent Disclosure in Nigeria corporate law has not been encouraging. Corporate Nigerians are notorious for going to sleep as soon as they are registered. They hardly make the mandatory annual returns to CAC and to the Nigerian Stock Exchange (NSE)³⁶. This paper submits that because corporation as a person is subject to change, the investing public and the creditors should be updated on the current situation of the company through continuous disclosure. This is a particularly important as it is hard for

³³S 334 CAMA contains the disclosure items set out under s 334 (2) (a) – (g).

³⁴Gower n 4, 497.

³⁵The items to be disclosed in the Annual return forms are the address of the registered office of the company, register of members and debenture holders, shares and debentures, the amount of share capital, the number of shares taken by members, particulars of Directors and Secretary, particulars of existing members of the company containing the names and addresses and those who have ceased to be members after the last AGM and the amount of shares held by each of the existing members at the date of the return.

³⁶Michael Eboh, 'CBN backs NSE, Threatens to Sack Banks' Chairmen, CEOs', *The Vanguard* (Lagos, 13 April 2012) <<http://www.vanguardngr.com/2012/04/cbn-backs-nse-threatens-to-sack-banks-chairmen-ceos/>> accessed 19 January 2014.

companies to concentrate hundred percent of their paid up capital without considering other sources of financing company operation. Debt is therefore one of the sources of financing corporate activities. There are a lot of benefits that can be derived from corporate risk reporting. For instance, corporate risk disclosure is very important because it can improve corporate transparency; consequently the activities of the capital market can be boosted and increase the shareholder value.

In addition to the above, if transparency is achieved by way of conveying adequate information to stakeholders, the relevance and reliability of accounting information in the part of the stakeholder's decision will be enhanced. Corporate Transparency can increase and maintain investors' confidence; hence accurate stock valuation can be achieved. Transparency can eliminate the disparities between what investors perceive and expect from what the corporate management can deliver.

Providing inadequate disclosure means that managers have superior information to investors, who may not fully understand the accompanying risks and rewards of a firm's business. Additionally, the paper suggests that, companies might appreciate the benefit associated with corporate disclosure and understand that markets will penalize all companies that provide insufficient information relative to their peers. Corporate disclosure ensures corporate competitive advantage in attracting capital. However, corporate managers may fear litigation and reputation costs as a result of providing voluntary risk information to investors; there is the need for rules/regulation that can protect managers from unnecessary litigation due to corporate disclosure.

Nonetheless, the provision of adequate corporate risk disclosure will enable investors to incorporate such risk, especially in course of valuing their investments; thereby reducing excess demand that can cause the stock price to be critically higher than they would be especially in the event market had the information that is available to managers. However, communicating risk related information will improve corporate transparency; hence, the problem of information asymmetry can be resolved. If the problem of information asymmetry is not fully resolved between management and investors, consequently, capital markets could undervalue some good companies and overvalue some bad companies relative to the information made available to investors and other stakeholders. Moreover, accurate disclosure on corporate risks and uncertainties can prevent severe damage to the long-term health and reputation of a company that may otherwise result from overvalued corporate equities. In addition, less information asymmetry however, lowers the risk of investors in forecasting future payoffs from their investment. It can also reduce the firm's cost of capital and increase company value. There would be a beneficial positive impact upon the cost of capital arising from enhancing the confidence of the providers of capital who would be reassured through the conveying of such risk information.

Nevertheless, if a company is known to have disclosed corporate risk, there is a tendency to come up with strong measures in managing the risk. High quality corporate risk disclosures contribute to financial stability by providing investors and other stakeholders with a better understanding of company's risk exposures and risk management practices. It can be evident that various risk management approaches have evolved over time and corporate entities have learnt to use sophisticated techniques to quantify and manage risk effectively, consequently reducing the gap in internal risk management systems.

The need to report on risks and risk control measures can lead to the improvement of internal information being collected on the risks that the company faces. And indeed, the need to assure that the risks identified are being managed, as shareholders hold directors to account for their risk management. From a shareholder's perspective, the corporate risk disclosure practices of a company must be able to relate the effectiveness of its risk management and control systems due to improve shareholder value.

In supplementary note, proving adequate corporate risk disclosure could enhance corporate stability. The role of forward-looking information in voluntary corporate disclosure

has been associated with more accurate analysts' earnings forecasts and with more accurate share-price anticipation. This is in line with signaling literature, which posits that if no information is released to the market, investors' uncertainty increases and hence the market value of companies decreases. On the other hand, corporate risk reporting is not completely advantageous as risk disclosures can create negative effects to the companies in different ways. There are shortcomings associated with corporate risk reporting, for instance, directors of the corporate entities are often reluctant to convey supplementary disclosure in their annual report, because competitors may opportune to use strategic information disclosed to their advantage. This can cause the imposition of a proprietary cost, consequently putting a company at a competitive disadvantage and impacted upon the company negatively. Therefore, a company has to trade off the positive and negative effects of corporate voluntary disclosure. This can only be relevant whereby the disclosure is on voluntary ground not mandated by any authority or regulation.

Moreover, the truth about corporate risk reporting can cause the stock price to crash seriously especially in the short run. Long horizon managers prefer current pain associated with the short run price declining because is very slightly compared to that arising from colluding in myth telling. Additionally, corporate risk disclosure is not a costless undertaking because, identifying and reporting timely and accurate corporate risk information consumes valuable management time. Secondly, managers may perceive that there is a serious cost imposed on the company from the part of competitors who exploit the information to the detriment of the risk-disclosing company. Thirdly, there is the possibility of litigation in connection with a corporate risk-disclosure that is why directors are often reluctant to report such kind of risk information as it is inherently unreliable and could leave them open to potential claims from investors and other stakeholders who have acted upon this information. Finally, companies may be afraid to set a corporate risk disclosures precedent they cannot stick to.

4. DISCLOSURE AT THE DYING TIMES OF THE COMPANY AND UNDER SECURITIES LAW

Just as the law compels disclosure of certain pieces of information on the formation of a company, the law makes it obligatory for disclosure to be made when a company is insolvent or otherwise restructuring or being taken over. There are a variety of mechanisms, such as receivership³⁷ and liquidation³⁸ all of which will come to play in the dying stages of the company. Disclosure will be required of these processes in order that those searching the public record are aware of the termination or imminent termination of the company's existence.³⁹ For example, during the receivership, notice of the appointment of a receiver shall be given to the Commission within 14 days disclosing the terms and remuneration for the appointment and publication shall be made of the appointment on all documents bearing the name of the company.⁴⁰ Other sections of the Act relating to a company under receivership also impose disclosure obligations both on the company and on the Receiver.⁴¹

Moreover, at liquidation, disclosure under the head is governed by two regulations in Nigeria.⁴² The Liquidator is appointed under CAMA and he must disclose the fact of his appointment by publishing same in the Gazette and in two daily newspapers and also register the Notice of its appointment with CAC so that both searchers and the public will be forewarned that the company is in liquidation.⁴³ Once liquidation begins, the importance of

³⁷S 392 (1) CAMA.

³⁸S 392 (1) CAMA.

³⁹Hannigan, n 11 8.

⁴⁰S 392 (1) CAMA.

⁴¹See s 396 (1)(b) and s 396 (1)(c) CAMA.

⁴²CAMA and Company Winding up Rules.

⁴³S 473 (1) CAMA.

disclosure becomes enhanced as it ensures that creditors and investors are not unfairly treated by the liquidator.⁴⁴ The disclosure requirements entitle every member and creditor to inspect the court's file of proceedings⁴⁵ and attend hearings if they wish. Also, creditors and members are entitled to inspect the minute books which have to be maintained by the Liquidator.⁴⁶ All business communication from the company must contain a statement that the company is being wound up⁴⁷ to wit '*In receivership*' or '*In Liquidation*'.

This paper finds that the disclosure requirements at the dying time of the company is not exhaustive enough as information leading to the causes of the liquidation and death of the company may not always be captured in the disclosed information. Besides, it is illogical to ask a company to disclose the reasons for its failure cum liquidation by the same directors or shareholders who might have fraudulently contributed to the failure of the company in the first place. Without sounding too pessimistic, this paper opined that such disclosure has the tendency of being tainted or blurred and leans towards exonerating insiders and management from the guilt of the corporate failure. Except independent liquidators are appointed to oversee the liquidation of the company, this paper fears that the transparency of such exercise is prone to suspect. For example, report has it that the special anti-fraud unit of the Nigerian police arrested the former managing director of InterContinental Bank, Mahmoud Lai Alabi, for fraud related to questionable loan write-off.⁴⁸ Mr. Alabi had improperly written off N8 billion in loans to companies with links to Saraki. He gave the companies' names as Linkers, Dicetrade, Skyview Properties and Joy Petroleum. Mr. Alabi wrote off billions of Naira in unserviced loans linked to Mr. Saraki after Alabi released four houses in Lagos and another two in Abuja that the Sarakis had used as collateral to secure the huge loans.

The paper argues that the role of the CAC and the SEC during period of liquidation should go beyond merely sitting down at their office and receive disclosure items from the dying corporation as experience has shown that at such time, corporate fraud and insider abuse are high and the perpetrators can do anything within their reach to cover up their dirty record in the corporate file. The Commission must be more vigilant and diligent in its supervisory and monitoring role.⁴⁹

4.1 DISCLOSURE UNDER SECURITIES LAW

This area of the law deals with the responsibility of the company and its Directors and others who sponsor issues for the way they present the company's affairs to the public when raising its share and loan capital.⁵⁰ It is also concerned with regulations which have to be complied with, whenever a public issue is made in order to give the public the fullest possible information about the nature of the concern in which they are being invited to invest.⁵¹ Eminent Authors and commentators⁵² have addressed this issue in their various books under different names. However, they have unanimously agreed on the basic principle that 'Going Public' refers to the modalities by which a company becomes entitled to raise capital from members of the public.⁵³ Therefore, if a private company desires to raise capital by way of public

⁴⁴S 491 (1) CAMA.

⁴⁵Rule 10 Company Winding up Rules of the Federal High Court 2001.

⁴⁶S 430 CAMA.

⁴⁷S 512 (1) CAMA.

⁴⁸*Sahara Reporter* (New York, 18 April 2012) <<http://saharareporters.com/news-page/former-bank-executive-arrested-writing-massive-loan-sarakis>> accessed 20 December 2013.

⁴⁹ *ibid.*

⁵⁰Gower, n 4 at 296.

⁵¹*ibid* 345.

⁵²Joseph Abugu, *Company Securities: Law and Practice* (Lagos, University of Lagos Press, 2005) 153 captions it 'GOING PUBLIC'; Hannigan (n 11) 643 named the chapter, 'Raising Capital from the Public', Gower (n 4) 338 addressed the issues involved in detail under the chapter on 'Floatation'. See also Oladele, n 9.

⁵³Abugu, n 52 153; Gower, n 4 338 and Hannigan, n 11 644.

subscription, it must first be converted to a public company by following the procedure laid down under the law.⁵⁴ The need for Capital Market regulation cannot be faulted.⁵⁵ Disclosure under securities laws is regulated by a combination of the following:

- Investment and Securities Act, 2007
- Rules and Regulation of Securities and Exchange Commission made pursuant to the Investment and Securities Act 2007
- Companies and Allied Matters Act
- The Borrowing by Public Bodies Act
- The Insurance Act
- The Central Bank of Nigeria Act
- The Nigeria Social Insurance Trust Fund Act
- The Banks and other Financial Institutions Act
- The Foreign Exchange (Monitoring & Miscellaneous Act)
- The Chartered Institute of Stockbrokers Act.

⁵⁴S 50 CAMA provides thus: (1) Subject to this section, a private company having a share capital may be reregistered as a public company if- (a) a special resolution that it should be so re-registered is passed; and (b) an application for re-registration is delivered to the commission together with the documents prescribed in subsection (3) of this section (2) The special resolution shall - (a) alter the company's memorandum so that it states that the company is to (become) a public company and (b) make such alterations in the memorandum as are necessary to bring it into conformity with requirements of this Act with respect to the memorandum of a public company in accordance with section 27 of this Act; and (c) make such alterations in the company's article as are requisite in the circumstances. (3) The application shall be made to the commission in the prescribed form and be signed by at least one director and the secretary of the company and the document to be delivered with it are the following- (a) a printed copy of the memorandum and articles as altered in pursuance of the resolution; and (b) a copy of a written statement by the directors and secretary certified on oath by them, and show in that the paid up capital of the company as at the date of the application is not less than 25 percent of the authorized share capital as at that date; and (c) a copy of the balance sheet of the company as at the date of the resolution or the preceding 6 months, whichever is later; and (d) a statutory declaration in the prescribed form by a director and the secretary of the company (i) that the special resolution required under this section has been passed; and (ii) that the company's net assets are not less than the aggregate of the paid up share capital and undistributable reserves; and (e) a copy of any prospectus or statement in lieu of prospectus delivered within the preceding 12 months to the Securities and Exchange Commission established under the Investment and Securities. (4) If the Commission is satisfied that a company has complied with the provisions of this section and may be re-registered as a public company, it shall - (a) retain the application and other documents delivered to it under this section; (b) register the application and other documents; and (c) issue the company a certificate of incorporation, stating that the company is a public company. (5) Upon the issue to a company of the certificate of incorporation under this section. (a) the company shall by virtue of the issue of that certificate become a public company; and (b) any alterations in the memorandum and articles set out in the resolution shall take effect accordingly. (6) The certificate shall be prima facie evidence that - (a) the requirements of this Act in respect of re-registration and of matters precedent and incidental thereto.

⁵⁵See Securities and Exchange Commission, (2000) "20 years of Securities Market Regulation in Nigeria" at page 23 – 25 where it was submitted that the instrument traded in at the securities market do not lend themselves to physical examination by the buyers, unlike familiar consumers goods. The prospective investor therefore relies on the information available to him on every particular issuer and issuer to make an informed judgment. Such information must be concise, comprehensive, timely and not misleading or ambiguous. The objective of regulation is thus the protection of investors from deceitful and other unscrupulous and manipulative practice in the sale of securities which can destabilize the market and erode confidence. Regulation therefore maintains stability in the capital market and prevents systemic risks. However, Oladele Olayiwola, in 'The Bases of Securities Information Disclosure' (2010) ISLJ 49-66, appraised the capacity and effectiveness of the existing regulatory system to sustain market integrity and investors protection in Nigeria through information disclosure and compliance enforcement in the light of theoretical underpinnings and concluded that despite the regulatory and institutional effort to make information available to investors, there usually is inequality of information between securities issuers and investors. He submitted that even finance experts investing in securities could suffer the diluting adverse effect of information asymmetry in the hands of corporate insiders who abuse non-public price-sensitive information in insider securities trade.

4.2 DISCLOSURE OF INFORMATION BY REGISTRATION

The present SEC (hereinafter called ‘The Commission’) is the apex regulatory body for the Nigerian Securities Market.⁵⁶ The Commission is charged as provided in the Investment and Securities Act 2007,⁵⁷ with the power to carry out the functions⁵⁸ set out in the Act. The relevant points for the purpose of emphasis are those functions of the Commission contained in clauses (a), (b), (c), (f), (g), (k), (l), (n), (o), (q) and (r). These sections deal with the requirement of registration. A great deal of disclosure is required at the stage of registration of securities market institutions. In this respect, registration of securities market institutions and participants by the Commission compels a disclosure of information on a variety of issues

⁵⁶Abugu, n 52 at 80 herein obviously restates part of the head note to the Investment and Securities Act 2007 almost in the same context the only different being that in place of ‘capital’ the Learned Author used ‘securities’.

⁵⁷The Investment and Securities Act 2007 (hereinafter called ISA 2007). The Act establishes the Securities and Exchange Commission as the apex regulatory authority for the Nigerian Capital market as well as regulation of the market to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of system risk and for related matters.

⁵⁸S 13 of ISA 2007 sets out the functions of the Commission thus – S. 13 provides that the Commission shall be the apex regulatory organization for the Nigerian capital market and shall carry out the functions and exercise all the powers prescribed in this Act and in particular, shall: (a) regulate investments and securities business in Nigeria as defined in this Act; (b) registered and regulate securities exchanges, capital trade points, futures, options and derivatives exchange, commodity exchanges and any other recognized investment exchange; (c) regulate all offers of securities by public companies and entities; (d) register securities of public companies (e) render assistance as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points; (f) prepare adequate guidelines and organize training programmes and disseminate information necessary for the establishment of securities exchanges and capital trade points. (g) register and regulate corporate and individual capital market operators as defined in this act; (h) register and regulate the workings of venture capital funds and collective investments scheme in whatever form; (i) facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly markets; (j) facilitates the linking of all markets in securities with information and communication technology facilities; (k) act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administer by securities exchanges and capital trade points; (l) keep and maintain a register of foreign portfolio investments; (m) register and regulate securities depository and such other agencies and intermediaries; asset and securities, credit rating agencies and such other agencies and intermediaries (n) protect the integrity of the securities market against all forms of abuse including insider dealing; (o) promote and register self regulatory organizations including securities exchanges, capital trade points and capital market trade association which it may delegate its powers; (p) review, approve and regulate mergers, acquisition, takeovers and all forms of business combinations affected transactions of all companies as defined in this Act; (q) authorized and regulate cross-border securities transaction; (r) call for information from and inspect, conduct inquires and audit of securities exchanges, capital market operators, collective investment schemes and all other regulated entities (s) promote investors’ education and the training of all categories of intermediaries in the securities industry; (t) call for, or furnished to any person, such information as may be considered necessary by it for the efficient discharge of its functions; (u) levy fees, penalties and administrative costs of proceedings other charges on any person in relations to investments and securities business in Nigeria in accordance with the provisions of this Act; (v) intervene in the management and control of capital market operators which it considered has failed, is failing or crisis including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors; (w) enter and seal up the premises of persons illegally carrying on capital market operations; (x) in furtherance of its role of protecting the integrity of the securities market, seek judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of this Act, or any securities law or regulation in Nigeria or other jurisdictions; (y) relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into co-operative agreement on matters of common interest; (z) conduct research into all or any aspect of the securities industry; (aa) prevent fraudulent and unfair trade practices relating to the securities industry (bb) disqualify persons considered unfit from being employed in any arm of the securities industry; (cc) advise the Minister on all matters relating to the securities industry and (dd) perform such other functions and exercise such other powers not inconsistent with this Act as are necessary or expedient for giving full effect to the provisions of this Act.

relating to the fitness or otherwise of all institutions and persons proposing to operate in the capital market. Ascertaining their suitability is critical to confidence building, given that any unscrupulous action could erode confidence and destroy the fabric of the market. Registration demands that accurate and comprehensive information to be sought and obtained from prospective registrations. Information submitted is required to be sworn before a Commissioner for Oaths. The Commission verifies all information submitted to it a satisfactory police conduct certificate is also required for all prospective individual registrants to ensure that ex-convicts and criminals are revealed and denied entrance at the point of registration.

In addition, the Commission compels disclosure of information in the course of registering securities in the capital market. Its function in this regard⁵⁹ affords the Commission the opportunity to ascertain the value and worthiness of the securities and the credibility of the issuers. In this way worthless securities are revealed and denied entrance into the market. The overall aim of the Commission's insistence on the registration of all and sundry is the protection of investors. Other provisions of the ISA on disclosure items are the requirements enjoining capital market operatives to:⁶⁰

- Register prospectus
- Keep a register in the prescribed form of the securities in which they have an interest
- Particulars of the said register to be furnished to the Commission
- Yield to the powers of inspection by the Commission etc.

Besides, these disclosure provisions of the ISA are effectively backed up by the Rule and Regulations of the Commission.⁶¹ Prominent among these rules are those touching and concerning areas like registration of a securities exchange,⁶² capital market operators,⁶³ issuing house,⁶⁴ underwriters, broker,⁶⁵ dealers and jobbers,⁶⁶ rating agency,⁶⁷ capital market consulting,⁶⁸ notice of the proposed offering,⁶⁹ form, size, number, etc of prospectus,⁷⁰ statement required in a prospectus,⁷¹ content of a prospectus, application form, the purpose of the offer and proceeds of the issue. In all, the overriding rationale for disclosure in this area of the law is to lay bare before the investors full information about the company's affairs to enable him make an intelligent appraisal of the worth of the security before coming to a conclusion on whether or not to subscribe and participate in the scheme. This takes us to the first major issue for consideration: What are the various disclosure requirements under the law in respect of a prospectus? The prospectus is designed to give the company an opportunity to disclose so much of its affairs to prospective investors, so as to enable them to make an informed investment judgment in selecting or rejecting the securities on offer.⁷² It will usually contain detailed accounts of the company's activities of previous years, so as to give the person being invited to subscribe for securities in the particular company, some indication of the financial organization they are becoming involved with through the fund raising.⁷³ The mandatory content of a

⁵⁹Part VIII s 54 (1-6) ISA 2007.

⁶⁰ (i) s.80 ISA; (ii) s.56 (1- 5) ISA; (iii) s.57 (1-5) ISA; (iv) s 58 (1-3) ISA; (v) s 59 ISA; (vi) s 60 (2) (a-f) ISA; (vii) s 69 ISA; (viii) s 71ISA; (ix) s 72 ISA; (x) s 73(1) ISA.

⁶¹The available Rules and Regulations is still the old one made pursuant to the repealed Investment and Securities Act ISA 1999.

⁶² Part A3, Rule 22 – SEC Rules and Regulations 1999.

⁶³ Part A3, Rule 28 (1) – (13) – SEC Rules and Regulations 1999.

⁶⁴ Part A3, Rule 29 – SEC Rules and Regulations 1999.

⁶⁵ Part A3, Rule 30 – SEC Rules and Regulations 1999.

⁶⁶Part A3, Rule 31 – SEC Rules and Regulations 1999 .

⁶⁷ Part A3, Rule 28 (12) – SEC Rules and Regulations 1999.

⁶⁸Part A3, Rule 28 (13) – SEC Rules and Regulations 1999.

⁶⁹Part B1, Rule 51 – SEC Rules and Regulations 1999 .

⁷⁰ Part B1, Rule 53 – SEC Rules and Regulations 1999.

⁷¹ Part B1, Rule 55 – SEC Rules and Regulations 1999.

⁷²Abugu, n 52 at 162.

⁷³Robert Baxt, *An introduction to company law* (2nd edn, Sydney, the Law Book Co Ltd, 1982).

prospectus is set out in full under the Investment and Securities Act 2007 to include the following matters:

- Information on the company's proprietorship, Management and Capital requirement. Details are set out below.⁷⁴
- The prospectus shall state details of the offer and the issues contained under item 3, third Schedule.⁷⁵
- There shall be stated the number, description and amount of any shares or debentures of the company which any person has or is entitled to be given an option to subscribe for.
- The prospectus shall state the number and amount of shares and debenture which, two years preceding the current offer for shares, the existing shareholders have or agreed to be issued to them as fully or partly paid up shares otherwise than in cash.
- Property acquired or to be acquired by the company to be disclosed.⁷⁶
- As with respect to any relevant property the prospectus shall state.⁷⁷
- There shall be stated the amount (if any) paid or payable as purchase money in cash, shares or debentures for any relevant property, specifying the amount (if any) payable for good will.⁷⁸
- The definition of a vendor.⁷⁹
- The prospectus shall state the amount paid as commission within the two preceding years.⁸⁰
- The prospectus shall give the details of the parties to every contract concerning the company and also state the general nature the contract.⁸¹
- The prospectus shall state the names and addresses of the company's Auditors.
- The prospectus shall give full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property proposed to be acquired by the company.⁸²
- If the prospectus invites the public to subscribe for shares in the company and the company's shares capital is divided into different classes of shares the prospectus shall state, the right of voting at meetings of the company conferred by and the rights in respect of capital and dividends attached to the several classes of shares respectively.⁸³
- Prospectus to state the length of time during which the business of the company has been carried on.
- The prospectus shall set out a report by the Company's Auditor.
- The prospectus shall set out and contain accountant's report.
- The prospectus shall contain and set out Accountant's report on the application of the proceeds of sale subject to the conditions set out under s 18 (2) and (3) of Schedule 3 of the ISA.⁸⁴
- In summary, the original disclosure philosophy behind filing prospectus was to inform those subscribing for shares in the company of the identities of those behind the floatation and the precise nature of the enterprise. The range of information required was then cumulatively extended in the face of glaring malpractices by promoters to include details of pre-incorporation, contracts and arrangements, reports from experts

⁷⁴S 1, Third Schedule.

⁷⁵S 3, Third Schedule.

⁷⁶S 4, Third Schedule.

⁷⁷S 5, Third Schedule.

⁷⁸S 8 Third Schedule ISA.

⁷⁹S 9 (2), Third Schedule ISA.

⁸⁰ S 10, Third Schedule ISA.

⁸¹ S 11, Third Schedule ISA.

⁸² S 13, Third Schedule ISA.

⁸³ S 14 Third Schedule ISA.

⁸⁴ S 17 Third Schedule ISA.

and accountant and where appropriate to the actual performance of the enterprise in the years before floatation. This paper argues that as useful as the prospective appears, it poses an understandable challenge to the lowly informed businessman who may not have the entire patience to go through them before investing in a corporation. This is particularly so in a country such as Nigeria with a high illiteracy rate and weak independent regulatory bodies.

5. ADEQUACY OF CURRENT DISCLOSURE REGIME IN NIGERIA

In spite of its numerous merits, there is a sharp division among scholars on certain issues raised by the concept of disclosure. A school of thought⁸⁵ while acknowledging the merits of disclosure philosophy, contends that disclosure of information will only afford protection to investors if the information supplied is true. They argued that even though the penalties of being found to be untrue are severe, most rogues would be prepared to risk subsequent exposure if they had a reasonable chance of first collecting the proceeds of their villainy and disappearing with it.

Consequently, this school advocates prevention. To them, prevention is worth any amount of ex post facto penalties. Beyond this, the school of thought argued that there is an apparent inadequacy in checking the truth of the information disclosed. The Registrar-General cannot and does not attempt to check the accuracy of the data on incorporation documents at the point of submission at the CAC, all he ensures is that ex facie they comply with the statutory regulation. Abugu⁸⁶ argued that a company's past performance and future prospect should determine the value of its securities. He added that there however, are the problems of getting the information to the investors to enable them make informed decision concerning their existing investment. He added that the availability of the information that affects the value of the securities makes a securities market efficient. The ultimate aim of the regulation, therefore, is to prevent or minimize abuse, which distort information and therefore the value of the securities mar investors' confidence and the market integrity.

This paper does not agree with the position expressed by Abugu that the value of shares must be determined by the company's past and future prospect. Nigeria and most developing countries of the world are bedeviled by inaccurate and deliberately falsified audit records. A company's financial report may after all, is not a pointer to the fact that the company is doing well as figures are easily cooked up to attract the investing public notwithstanding that a great number of the companies may heavily be indebted. For example, before the CBN tsunami in the Nigerian banking sector, Nigerians have been made to swallow hook, line and sinker the falsehood churned out by banks as their annual financial reports. Some of them had won awards both locally and internationally ranging from 'Bank of the Year' to 'Most Capitalized Bank in Africa'.⁸⁷

However, On August 14 and October 2, 2009, the Governor of the Central Bank of Nigeria (CBN), Mallam Sanusi Lamido Sanusi, announced the firing of the chief executive officers (CEOs) and board of directors of Afribank PLC, Platinum Habib Bank (PHB) PLC, Equatorial Trust Bank PLC, Finbank PLC, Intercontinental Bank PLC, Oceanic Bank PLC, Spring Bank Place and Union Bank PLC.⁸⁸ The CBN highlighted the following as reasons for its action (henceforth termed intervention) in the Nigerian banking industry:⁸⁹

⁸⁵ Hadden, n 22 30.

⁸⁶ Abugu, n 52 cited with approval in Oladele, n 9.

⁸⁷ Mallam Lamido Sanusi, 'Address by the Governor of the Central bank of Nigeria, on Developments in the Banking System in Nigeria' <www.cenbank.org/documents/speeches.asp> accessed 05 January 2014.

⁸⁸ Tony Adibe and Clement Nwoji, 'Nigeria: CBN Sacks 3 More Bank CEOs, Directors' *Daily Champion* (Lagos, 03 October 2009) www.allafrica.com/stories/200910051496.html accessed 22 December 2013.

⁸⁹ *ibid.*

- The affected banks constituted a systemic threat to the financial sector in Nigeria due to their operational failure (insolvency).
- The affected banks lacked sound risk management processes.
- The absence of corporate governance regimes and practices in the affected banks.
- The prevalence of unethical practices by the management of the affected banks.
- For the CBN, the removal of these officers as well as the injection of 420 billion Naira (\$2.8billion) of government funds was necessary, not only because the managements of these banks had acted in manners that were detrimental to the interest of their depositors and creditors, but also in order to stabilize the banking industry and prevent its collapse.⁹⁰

It is, therefore, the submission of this paper, that to allow only SEC verify accuracy of information disclosed to it, is hopelessly inappropriate as the only time SEC may test the information is when the company decides to 'go-public' and the disclosed information becomes guiding tools in the hands of investors, else the information verification is left to the SEC and that is if ever the company decides to go-public. All these highlight the need for mandatory rules. Another school of thought views Disclosure under the Securities Laws from the regulatory point of view. The contention here is between two dominant regulatory approaches applicable on Registration of Public Issues. They are the Security-Based Registration Model and the Company based Registration Model.

a) The Security-Based Registration Model

The applicable registration model in Nigeria today is the Securities – Based Registration Model.⁹¹ The Thrust here is the registration of securities as opposed to registration of companies under the applicable law.⁹² That is, the regulations come into play only when a company decides to 'go public' with its securities. The Investment and Securities Act does not regulate⁹³ the private offering or securities sold other than by way of a public offer. It makes detailed provisions about the disclosure obligations of companies 'going public' and or updating information on companies whenever they intend to issue further or other securities.

It is aimed at disclosure that would inform an investor about an investment in a 'public offering' but does not aim at providing future or on-going information about 'an issuer'. The point to note is that once the public offering is completed, the Act required no further disclosure despite the fact that the securities may continue to be actively traded on the stock exchange, any regulation thereafter being left in the stock exchange. This paper is of the view that such a system is schemed to lead to corporate fraud and failures because investors are left at that point, at the mercy of stock brokers who could manipulate the naivety of investors to their advantage. Different rules are involved in the SEC and in the Nigerian Stock Exchange and these rules must be fully understood for an informed investment. Any regulatory system which does not allow for a continuous disclosure of information to investors in the same way the security is continuously traded, lacks the transparency needed for corporate undertakings.

b) Company-Based Registration System

The other equally important registration approach worldwide is the Company-Based Registration of the companies and not merely of the securities they resolve to issue. This system

⁹⁰Francis C. Chiejine, 'Corporate Governance in the Nigerian Banking Sector: An Ethical Analysis of The 2009 Regulator Intervention And Operators' Behaviors', University of Pennsylvania ScholarlyCommons <http://repository.upenn.edu/od_theses_msod/29> accessed 20 January 2014).

⁹¹Abugu, n 52 at 199.

⁹²Investments and Securities Act s 54(1 – 7).

⁹³Abugu, n 52 at 199.

requires certain companies identified either by size of capital assets or employment, enrollment, to mandatory register with the Commission, which by way of periodic filing, provide market information about its activities to investors and traders in its securities, whether such trade be on an exchange or not. Under this system, the Commission's record about an issuer and its performances in the market is readily available and updated by periodic filings. Consequently, at the time of an offering, less attention is paid to the issuer, but for the securities being issued. This would occasion less documentation and costs would be saved in accounting fees, legal fees and printing. Abugu, an exponent of this view,⁹⁴ made a strong case for the need to review the present regulatory scheme from the present Securities-Based Registration System to a Company-Based Registration System. He went further to enumerate the pitfalls of the present systems, while setting out the merits of the Company -Based Registration System to include the following:

- That a Company-Based Regulatory System lends more credence to available information on the issuer and the securities.
- That's the basic requirement of the regular filing inherent in the Company-Based Registration System leaves no room for the accounts presented to be tailored by an issuer essentially for the purpose of meeting the issue requirements because an issuer has a duty to put its accounting and other records in proper perspective always.
- That's the mechanism facilitates the flexibility of a company by raising a wide range of securities.
- That a Company-Based Regulation System would ensure parity of disclosure rules applicable to both public and private companies. He maintained that the hypothesis here is that an investor asked to invest in the shares of a private placement is as much entitled to full disclosure and informed as the investor who subscribes for shares on the basis of a publicly issued prospectus.

This paper hereby makes a case for the need to require private companies of a certain size to be subjected to the registration and disclosure rules of the commission. The paper advocates that eligibility for compliance purposes could be dependent on the size of the company measured by its capital and number of employees. A company with assets above N10, 000,000.00 (Ten Million Naira) for instance, has responsibilities to the public notwithstanding that its membership is 50. In addition, a private company with a staff strength of 100 can issue securities to its staff via a trust deed to raise capital and remain a private company even though the actual number of members is 50.

It must be stressed at this point that though the Company-based Registration System allows for parity of disclosure for both public and private companies, it would however; amount of begging the issue to conclude that the size of a company is determined by its assets and membership. This paper argues that disclosure remains a price that must be paid by corporation irrespective of size in assets or membership because corporations are insulated from personal liability, but to the amount of their investment alone, they are bound to disclose information to the investing public and creditors without whose resources, the company cannot remain in business. The concept of the corporate personhood of corporation supposes that corporation been a mere creation of the law and driven by natural persons should be made accountable for its actions to drive sanity into management who may hide under the corporate personhood of company to hoard and trade on information to their selfish gain at the detriment of investors. To me, this is the best way to prevent information asymmetry and boost investors' confidence in corporate business.

⁹⁴Abugu, n 52 at 200.

c) *Voluntary versus Mandatory Disclosure Rules*

Another issue generating a lot of controversy among scholars is the choice of the type of rules to invoke in the regulation of Securities Market Operations and disclosure requirement generally. The option is between voluntary and mandatory disclosure rules. The specificity of disclosure requirements varies among nations. Most developing countries like Nigeria and Ghana have opted for mandatory rules. There are two schools of thought in this respect. The first requires a list of items and specific instructions for fulfillment. Others give weight to custom and have only a general obligation to disclose all material information. The proponents of the compulsory disclosure regime include Louis Loss and Joel Seligman,⁹⁵ Franco,⁹⁶ Oladele,⁹⁷ as well as Abugu.⁹⁸ There is consensus amongst them that:

- Under this approach, companies are obliged, on a continuous basis to provide certain information for the effective evaluation of their securities in the market.
- Without a compulsory disclosure regime, some issuers would not disclose or would misrepresent information material to investment decisions.
- Underwriting costs, salaries and prerequisites would be higher.
- There would be less 'public confidence' in the markets and that neither state laws, nor the rules of self regulatory organizations would ensure an optimal level of disclosure.

Specifically, Oladele⁹⁹ argued that securities issuers have no incentive to voluntarily disclose information. He added that in the face of the ingenious overzealousness of some of the issuers to conceal or falsify information, mandatory disclosure, coupled with stiff sanction for infringement is highly commended. The paper suggests that corporations should have an internal reward mechanism for managers who voluntarily disclose information as the advantages of such disclosures in terms of corporate reputation and investors' confidence in the corporation are immeasurable on the long run. On the other side of the debate are Stigler, Benston and Kripke.¹⁰⁰ They argued that few benefits to investors could be shown from the mandatory disclosure regime in America and that the costs these laws imposed on corporations were unwarranted. Kripke contended that a mandatory disclose system is unnecessary because corporations have sufficient incentives to disclose information to investors without incurring costs required to comply with extensive disclosure requirements. He reasoned that because of competition for capital, a company that seeks to raise funds must furnish sufficient information to enable investors make intelligent investment decisions, for insufficient information will lead to either higher costs of capital or a complete lack of access to the capital market.

Moreover, companies will continue to make periodic disclosures to investors to attract market professionals on whom many investors rely. Failure to do so will cause a loss of confidence in the company, thus leading to lower prices. Kripke also argued that corporate managers have a personal incentive to ensure that their corporations perform their disclosure obligations. To Kripke, managers run the risk of personal liability for securities fraud resulting from inadequate or misleading corporate disclosure hence the need to make a voluntary disclosure. This paper submits that the need for the mandatory disclosure system far outweighs whatever atom of merit associated with the voluntary disclosure regime. In a corporation manager's compensation is tied to higher stock prices, they have significant motives to delay or

⁹⁵Seligman J, 'The Historical Need for a Mandatory Disclosure System [1983] J, Corp; Seligman J, 'Loss and Seligman on Securities Regulation: An Essay for Don Schwartz' [1990] 78 Georgetown LJ 1753.

⁹⁶Franco JA, 'Why Antifraud Prohibitions are not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure', [2002] 223 Columbia Business Law Review 236 – 237.

⁹⁷Olayiwola Oladele, 'Securities Information Disclosure and Legal Protections of Investors in Nigeria' (2007) PhD thesis, Faculty of Law, Obafemi Awolowo University, 244 cited in Oladele, n 9.

⁹⁸Abugu, n at 52.

⁹⁹Oladele, n 9.

¹⁰⁰Abugu, n 52 at 204.

conceal disclosure of adverse information. In addition, it is not true that disclosure decisions are based solely on financial consideration such as stock market prices, or the cost of capital; rather companies have traditionally resisted additional disclosure requirements because of the fear that increased information will give their competitors otherwise unavailable data. Thus, some firms would be willing to pay the financial price for non-disclosure rather than weaken their competitive position. It is clear from the above that if asymmetric information is a sine qua non in an ideal securities market, and if investors are to be given the opportunity to arrive at an informed decision based on the publicly available information, then, mandatory disclosure regime becomes inevitable and remains the only virile solution.

Despite the divergent views expressed by writers on several areas of disclosure under Securities Law,¹⁰¹ one fundamental area survived the criticisms and remains untouched; this area is 'the disclosure philosophy'. To Abugu,¹⁰² 'There is considerable unanimity that the philosophy of disclosure should be the guiding philosophy in securities regulations.' Other writers of repute have echoed the above view. Akanki¹⁰³ lucidly stated his view that: 'The virtue of publicity as a remedy against fraud was strongly urged and its philosophy transcends the entire gamut of Nigerian statutory law on companies'. Gower¹⁰⁴ also drove home the point with admirable clarity. Over and above this consensual obligation of disclosure is one yet more powerful fact, although devoid of any basis in law: Press publicity. The financial columnists have their own channel of information and once their interest is aroused, they explore these channels with sleuth-like pertinacity. The result may be that what the board had looked upon as a confidential decision or a domestic difference is suddenly brought out into the harsh light of day. This may be embarrassing, and even in some circumstances, detrimental to the true interest of investors: but if the power of the financial press is exercised with wisdom and fairness, as on the whole it undoubtedly is, informed newspaper comment is perhaps the most potent protection afforded to investors and, to a lesser extent, to creditors. At this juncture, this writer cannot but agree with the view expressed by Abugu that a mandatory disclosure system functions most effectively under a company based registration system. Compliance by issuer companies is more readily enforced if the issuer is registered and reports periodically to SEC.¹⁰⁵

Mandatory Disclosure, this paper submits, remains the best guarantee that investors would get the information they need to make investment decisions. Leaving disclosure to the voluntary desire of the corporation is to leave corporate investors and their investment to the whims and caprices of corporate managers. Competition among corporation is not a guarantee that a corporation would voluntarily disclose important information to the public because of the fear that such information could be used by competitors for corporate advantage. The paper submits that because a corporation would not lose focus of its overall goal of maximization of profits, it is prepared to avoid disclosure if it could without so doing make the profits at the detriment of investors and creditors.

5.1 CORPORATE GOVERNANCE AND CORPORATE FRAUD

Corporate governance is the set of process, customs, policies, laws and institutions affecting the way a corporation is directed, administered or controlled. Corporate governance also includes the relationships among the many stakeholders involved in the corporation and the goals for which the corporation is governed. The principal stakeholders are the shareholders, management and the Board of Directors. Other stakeholders include employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large. An

¹⁰¹ Abugu, n 52.

¹⁰² Abugu, n 52.

¹⁰³ Akanki E O, 'The history of Company Law' 77 Nigerian Journal of Contemporary Law volume II – cited with approval by Abugu in Abugu n 52 at 203.

¹⁰⁴ Gower, n 4 at 506.

¹⁰⁵ Abugu, n 52 at 205.

important theme of corporate governance is to ensure the accountability of certain individuals in an organization through mechanisms that try to reduce or eliminate the principal-agent problem.

Corporate Governance for quite some time was misconstrued as confining to only corporate management. However, it is something much broader for it must include a fair, efficient and transparent administration to meet certain well defined objectives.¹⁰⁶ Corporate governance also must go beyond the law. The quantity, quality and frequency of financial and managerial disclosure, the degree and extent to which the Board of Director exercises their trustee responsibilities and the commitment to run transparent organization. These should evolve due to interplay of many factors and the role played by more progressive elements within the corporate sector.

Key elements of good corporate governance principles include honesty, trust and integrity, openness, performance orientation, responsibility and accountability, mutual respect, and commitment to the organization.¹⁰⁷ Of importance is how directors and management to develop a model of governance that aligns the values of the corporate participants and then evaluate this model periodically for its effectiveness. In particular, senior executives should conduct themselves honestly and ethically, especially concerning actual or apparent conflicts of interest, and disclosure in financial reports. The positive effect of good corporate governance on different stakeholders ultimately is a strengthened economy, and hence good corporate governance is a tool for socio-economic development.

In most organizations, corporate governance and responsibility have been sacrificed at the altar of nepotism and corruption. In Nigeria, according to Ajayi,¹⁰⁸ it is no news to declare that more than 60% of the current banks in Nigeria today are padded up and their financial statements heavily suspect. Many of them are not worth placing funds with and their leaderships continue to carry on business as usual. The era of forex magic and round tripping may not be over yet at these banks. Financial reporting is a crucial element necessary for the corporate governance system to function effectively. Accountants and auditors are the primary providers of information to capital market participants. The directors of the company should be entitled to expect that management prepare the financial information in compliance with statutory and ethical obligations, and rely on auditor competence.

Current accounting practice allows a degree of choice of method in determining the method of measurement, criteria for recognition, and even the definition of the accounting entity. The exercise of this choice to improve apparent performance (popularly known as creative accounting) imposes extra information costs on users. In the extreme, it can involve non-disclosure of information. One area of concern is whether the accounting firm acts as both the independent auditor and management consultant to the firm they are auditing. This may result in a conflict of interest which places the integrity of financial reports in doubt due to client pressure to appease management.

The fraud committed in many corporate entities suggested that corporate governance in those entities is not living up to expectation. The Directors have failed and that is why in each of the corporate accounting scandals they are greatly held responsible. Therefore, good corporate governance should be the one that is fair to all the various stakeholders in terms of corporate general administration and reporting the actual operating performance and position of the entity as at a particular date.

This paper concludes that board composition and the structure of a board's oversight committees significantly correlate with the incidence of corporate fraud. As the number of independent outside directors increased on a board and in the board's audit and compensation committees, the likelihood of corporate wrongdoing decreases. Experiences have shown that corporate managers usually mount investigations after the incidence of fraud has occurred.

¹⁰⁶ Monks, R. A. G. and Minow, Nell, *Corporate Governance*. (2004) Dundee: Blackwell.

¹⁰⁷ Monks, R. A. G. and Minow, Nell, *Power and Accountability*, (1991) Dundee: Harper Business.

¹⁰⁸ Ajayi Babs, 'Cadbury: Nigeria's Enron', *The Times*, December 14, 2006.

However, it can serve as a deterrent measure to the perpetrators, especially where severe punishments are integrated. In the corporate environment, companies try as much as possible to show to the public that they are successful and profitable in order to attract the right type and quantity of investment and to ensure a steady movement in their share prices. That is why many of them resulted in creative accounting and income smoothening so that their financial performance and position are beautified.

In Africa, auditors are usually involved in corporate financial investigations, including those relating to fraud. In most of the African countries, forensic accounting is not viewed as a separate technique required for a thorough financial investigation. Once one qualifies as a chartered accountant and possesses the license to practice, he/she is adequately qualified to carry out financial investigations for the clients. The developments in the area of fraud investigation are yet to reach our environment in full and therefore heavy reliance is placed on the auditors as far as financial investigations are concerned.

South Africa, Italy and Japan have recently beefed up their corporate governance codes to strengthen shareholder oversight of corporate boards and pay practices. Financial investigation was used in these countries to discover the genesis and procedures of corporate fraud and other accounting scandals so that best strategies would be employed in curtailing and preventing the menace. According to Hatice, et al,¹⁰⁹ there are a number of systems available to help businesses protect themselves from corporate fraud, but being aware of the problem is the first step to closing the net on the criminals. His study reveals three commonly used types of corporate fraud mostly having direct bearing to the composition of the Board of Directors; and proffered strategies through which businesses can take some simple precautions to keep the fraudsters at bay. He, however, concluded that financial investigation could serve as a tool for unveiling the nature and attributes of such corporate frauds.

However, for financial investigation to be effective in checkmating and guarding against corporate fraud, there is the necessity to apply it both as a proactive and reactive mechanism. John and Rebecca¹¹⁰ revealed that the United States government and its investigative agencies fail in their roles to provide adequate protection to investors and their investments. They further stated that Wall Street Companies should be subjected to regular financial checks or investigations rather than waiting for an incidence to happen before mounting the investigation. This clearly reflects that even the largest economies in the world fail to take advantage of financial investigation as a proactive mechanism against corporate frauds. Thus the issue of corporate fraud is a global one. Many companies all over the world have been found in one way or the other adopting illegal measures towards making their financial statements attractive and beautiful. This paper has collected and collated background information on some of these incidences and the reasons behind them. The concept of financial investigation was looking into as a defense mechanism for guarding against corporate fraud. Also, detail discussions were provided on the concepts of corporate fraud, financial investigation and corporate governance. However, the paper concludes that though investigations are usually mounted after the incident had happened, it could be a useful tool in curtailing the occurrence of corporate fraud and can reduce or even prevent the menace resulting therefrom. It was also discovered that financial investigation is mostly used as a reactive mechanism in Africa and most part of the world for unveiling corporate and accounting scandals of corporate entities. It is however recommended that for financial investigation to be effective in curtailing and preventing corporate fraud in Africa, it should be complemented by the following:

¹⁰⁹Hatice, Uzun; Samuel, H. S. and Raj, Varma (2004), 'Board Composition and Corporate Fraud', *Financial Analysts Journal*, Vol. 60, No. 3, pp 33-43, May/June.

¹¹⁰John, R. E. and Rebecca Smith (2003), *24 Days: How Two Wall Street Journal Reporters Uncovered the Lies that Destroyed Faith in Corporate America or Infectious Greed*. Washington: HarperInformation.

- The introduction of more accounting and reporting reforms in the area of corporate financial reporting and the mounting of more severe punishments on any corporate entity discovered applying creative accounting and income smoothening.
- The composition of the Board of Directors and Audit Committees should be altered to incorporate more independent outside directors.
- The regulatory authorities to corporate entities in Africa should find a way of using financial investigation as a proactive mechanism rather than relying more on it as a reactive mechanism.

6. SUGGESTIONS FOR REFORMS

The question as to the adequacy or otherwise of the Disclosure requirements contained in Nigeria's corporate laws was answered. The idea of disclosure is to ensure that full information about the company's affairs are laid bare before investors, creditors and other stakeholders, thereby affording them excellent opportunities to make informed decisions about the worth of the securities offered. However, the capacity and effectiveness of the existing regulatory system to sustain market integrity and investor protection in Nigeria through information disclosure and compliance enforcement in the light of theoretical underpinnings is weak. As observed by Oladele,¹¹¹ despite the regulatory and institutional effort to make information available to investors, there is usually inequality of information between securities issuers and investors. This phenomenon, known as information asymmetry, is greater in the relationship between retail investors without expertise in finance on one side and issuers and securities market professionals on the other.

This paper identifies certain basic components of an ideal securities market regulatory structure. These shall be the benchmark for determining whether our securities laws and institutions are indeed in need of reform or not.¹¹² In this context, this paper submits that the Nigerian companies and securities laws on disclosure, and by extension, corporate governance must be revisited with a view to reforming the system and protecting corporate investors and the corporation as an entity. Firstly, the Nigeria Companies and Allied Matters Act 1990 should be amended to vest the Registrar-General with more powers under s 35 (1) – (3) to scrutinize the documents and information supplied on the incorporation documents with a view to confirming their correctness and reliability. The verification carried out on incorporation documents submitted at CAC is certainly not comprehensive enough. Under the Security and Exchange Commission Act, securities are registered through the use of prospectus to provide information to the investing public. The paper finds that information disclosed in the prospectus do not usually vouch that the issuer is viable and making profits. Summing up the import of securities registration, Solomon et al., Learned scholars in corporate law and securities regulation submitted as follows:

The only standard which must be met when registering securities is adequate and accurate disclosure of required material facts concerning

¹¹¹ Oladele, n 9.

¹¹²The parameters are: (a) Comprehensive Companies legislation governing the formation, operation and winding-up of companies; investor protection including the prescription of disclosure standards, investigation and accounting standards, and prohibition of securities market malpractice. (b) The establishment of a securities market control agency to oversee the securities market control agency to oversee the securities market and in particular regulate the issue, pricing sale and other aspects of dealing in company securities. (c) The establishment of formal market for trading in company securities such as a stock exchange. (d) Recognition and regulation of informal dealings in securities such as over the counter transactions. (e) Provisions for the existence and regulation of a sufficient number of securities market dealers such as Brokers, dealers and underwriters. (f) Provision for the existence and regulations of financial intermediaries such as saving institutions, leasing companies, venture capital companies, merchant banking firms and insurance companies. (g) An active judiciary that is well informed about securities law.

the company and the securities it proposes to sell. The fairness of the terms, the issuing company's prospectus for successive operation, and other factors affecting the merits of investing in the securities (whether price, promoters' or underwriters' profits, or otherwise) have no bearing on the question of whether or not securities may be registered.'¹¹³

Secondly, this paper suggests that our numerous laws on securities should be compiled and codified into a comprehensive volume. The Companies and Allied Matters Act 1990, and Investments and Securities Act 2007 both made attempts in this direction but left a lot to be desired. Not only should the laws be codified and made more reachable to the investing public, the language of these statutes should be simplified to meet the literacy challenges of Nigeria. It is in furtherance of this that this paper argues that commerce unarguably is not the preserve of the educated alone, but for the semi-illiterate and illiterate. Efforts must be made by the government and corporate experts to translate the companies and securities laws of the country into local languages, especially in the three main Nigerian language, so that those members of the public who, although illiterate in the English language, are able to access and understand disclosure rules and information in the language they understand rather than requiring the services of experts or lawyers for explanation and interpretation. This paper reasons that if the above recommendation is implemented, the danger of the corporate middlemen and agency cost will be ultimately watered down.

As submitted by Oladele,¹¹⁴ one of the most significant challenges to securities regulation in Nigeria is that a huge population of the target of disclosure is largely uninformed on this matter and; are unable to make sense out of the most exhaustive and truthful disclosure. Moreover, having taken an in-depth look at the role and functions of the SEC, this paper recommends that there is the compelling need to set up a regulatory body to act as an ombudsman to oversee the affairs of the securities market. This regulatory mechanism may function through some government recognised self-regulatory bodies comprising of participants in the securities market. Alternatively, the control of the securities market may be entrusted solely to a commission. The task involved here is to be able to strike a balance between market freedom and investor protection.¹¹⁵ Although by the existing law, SEC is the apex regulatory authority in the Nigerian Capital Market, the hegemony of the SEC is being proposed to be extended to the money market. In essence SEC's supervisory powers will transcend securities to cover Banking, Insurance and Pension Fund industries whose activities impact directly on the securities market by monitoring compliance to rules and regulations necessary to put confidence in these financial institutions.

There is an urgent need to enlarge the supervisory spectrum of the SEC in the financial industry. Such wide responsibility will be visionary and proactive being necessitated by a projection into the future course of developments in the financial markets. The attraction for adoption of this concept is embedded in the merits which includes; provision of opportunities for developing a rational and coherent regulatory system to accommodate rising cases of corporate fraud and failures, removal of avoidable duplications and inconsistencies in the regulatory powers of SEC to guarantee certainty and efficiency in the system and offering scope for significant effectiveness and economics of scale.

Mention must also be made by the primary and secondary securities market for newly issued and existing securities. The rate of growth of the stock exchange has not been encouraging. The stock exchange is characterized by various negative features ranging from few quoted securities, low level of market awareness, low demand for securities and a lack of timely and easy access to information. This paper therefore recommends improved information

¹¹³ Solomon, Lewis D, Bauman, Jeffrey D et al, n 3 at 281.

¹¹⁴ Oladele, n 9.

¹¹⁵ Abugu, n 52 at 99.

systems to address the problems of low level of security awareness as well as aggressive market advertisement and investor education for them to be able to demand, evaluate and constructively apply the information at their disposal to investment advantage.

Another part of securities law worthy of mention is the apparent conflict between some sections of the Investment and Securities Act and the Nigerian Constitution. The ISA by its s 274 established a Securities and Investment Tribunal. The Act purports to vest jurisdiction over all matters under the Act in the tribunal. This paper contends that there is a need for reform in this area of the securities law in that by purporting to vest jurisdiction over all matters under the Act in the tribunal the ISA has created a manifest absurdity in the light of the constitutional jurisdiction of the Federal High Court. The position in law is that the ISA is void to the extent of its inconsistency with the Constitution. The Constitution is a superior law to the statute. By virtue of section 315 of the Constitution, ISA is an existing law and only has effect with such modifications as may be necessary to bring it into conformity with provisions of the Constitution. It is therefore clear that the Federal High Court still retains exclusive jurisdiction flowing from s 251 of the Constitution over, all such issues from the operation of companies to securities law regulation.

Furthermore, a pertinent aspect of the Nigerian Security Law that needs to be reformed is the structure and operation of the SEC. The SEC has not been able to effectively monitor and prosecute malpractices such as insider dealings by company directors, brokers, solicitors, accountants, and others. The above weakness is attributable to a major gap in the regulation of securities and the activities of Capital Market Operators of the SEC and Corporate Affairs Commission. The CAC is further conferred with investigative powers over companies generally. Here it takes on the scope of a capital market ombudsman with powers to initiate prosecution of breaches of the Companies Act. The SEC on the other hand, lacks such powers. This certainly creates room for confusion and leaves a lacuna in the efficient regulation of the Securities Market. A reform is therefore suggested in this direction.

Again, this paper proposes that there should be a revisit to the state of the law regarding the regulations of private companies with a view to widening their scope. The realities of the present times contradict the view taken by the law that private companies are commercial ventures of private concerns and as such, private companies should be subjected to minimal disclosure. That view, this paper submits, is no longer valid and realistic. The law should accept the view that they are companies limited by shares and therefore there is the need for as much control over their activities in the same manner as SEC regulates dealings in shares by public companies. The reasons are not far-fetched. First, private companies constitute the majority of incorporated companies and have ceased to be mere family based businesses. Secondly, private companies are increasingly being funded by public funds and loans provided by financial institutions from the vast accumulation of public savings. This is beside the fact that there has been informal trading in the shares of private companies. In light of the above, the paper proposes that the present state of the law as it affects the securities of private companies be reviewed as follows:

- a) The disclosure philosophy should be extended to cover the formation and operations of private companies.
- b) There is a need for the SEC to regulate the private offering of private companies with the same tenacity as public affairs of public companies.
- c) The same law applicable to public companies in respect of prospectus, disclosure, allotments liability for misstatements and free transferability of shares should also extend to private companies.
- d) Considering the relevance of private companies in term of the externalities they generate with the investing public, there is the compelling need to subject private

companies to a compulsory registration and disclosure regime with a security ombudsman, SEC.

- e) Private placement documents generated by private companies should be subjected to the same disclosure rules stipulated by SEC for public companies.
- f) The private placement memorandum should be made to contain as much detail as the prospectus. The front page of the memorandum should summarize the terms of the offering. A brief description of the issuer's business should be given. Ideally, the front page should contain legal legends or red herring with respect to legal requirements of the offering; persons capable of accepting the offer, the absence of representation other than those contained in the memorandum and the need for investors to obtain independent advice with respect to the offering and other matters.
- g) The proposed reform should also provide for the requirement of thorough scrutiny of memorandum of private placement with same vigour as that imposed on prospectus.
- h) The statutory civil and criminal liabilities attached to a misstatement in the prospectus should also apply to misstatement in memorandum of private placement.

Furthermore, this paper recommends a review of the registration of public companies. The present position is that public issues in Nigeria are patterned after a securities-based registration model. That is, the regulations come into play only when a company decides to go public with its securities. The Investments and Securities Act 2007, does not regulate the private offering or securities sold other than by way of public offer. The present procedure is a complete antithesis of disclosure philosophy which in simple terms preaches continuous inflow of information.

Consequently, this paper proposes a company-based registration system where the focus will be on the registration of companies and not merely on the securities they intend to issue. The focus of a company-based registration system would be one which would require certain companies identified either by size of capital assets or employment enrollment to mandatory register with the SEC. The merits of this system are numerous, but paramount among them is the ease of information flow. Company-based registration models mandate the company (issuer) to make available information by periodically filing its performance in the market and updated records of its activities for the investing public. There is the urgent need for reform to require private companies of a certain size to be subject to registration and disclosure rules of the SEC. Eligibility for compliance by private companies could be dependent on the size of the company measured by its capital and number of employees. A company with assets about N10, 000,000 (Ten Million Naira) equity and loan capital inclusive for instance, has responsibilities to the public notwithstanding that its membership is below 50. Its loan portfolio is invariably owed to public finance institutions with obligations to savers/members of the public. This paper submits that they be co-opted under the regulatory ambit of the SEC.

Finally, this paper submits that it amounts to passing the bulk for a regulatory agency such as the Corporate Affairs Commission, a so called 'Super Regulator' and corporate ombudsman not to be saddled with the responsibility of verifying authenticity of information promoters of corporations bring to it to register companies. This writer believes that the CAC as a regulator should take responsibility and be accountable to not only the investors and creditors relying on the Commission's judgment of the state of affair of a company, but also to the public at large for harm that may result over information they obtained from the Commission on any corporation. It is illogical to hold that because a corporation must be registered, persons who ordinarily may be hiding under false identity, address and information, approach the CAC to register company without the Commission is going the mile to check and crosscheck the filled forms for accuracy of the information supplied. This situation had led to monumental frauds and abuses as people could just come together with no identifiable object to form a company with fictitious names and other information and use the company to defraud the unsuspecting public and the government with reckless abandon.

The recent conviction of James Onanefe Ibori, a former Governor of the oil-rich Delta State of Nigeria for money laundry through several companies registered under fictitious names and the sale of the shares of V-Mobile Limited,¹¹⁶ speaks volume of the extend the company could be so manipulated to the detriment of the investing public and creditors. This paper suggests that the Commission's duty of acceptance of documents for registration should at all times be complemented by carrying out corresponding investigations of the veracity or otherwise of the information provided to it by promoters. While critics may argue that such information are not to be regarded as ordinary as they are usually sworn on oath or presented for filing by duly accredited CAC's lawyers and accountants presumed to be above board in the discharge of their professional callings, experiences have shown that corruption and the tendency to hoard or distort information are not the preserve of non-lawyers and non-accountants. Lawyers and accountants have been found to be neck deep in corporate manipulation of information to suit their client's need irrespective of the lack of credibility that may taint the information.¹¹⁷

Of more shocking, are the revelations of the fraudulent activities of fuel importing companies in Nigeria and the Nigerian National Petroleum Corporation, where the lack of effective disclosure mechanisms and regulation on the part of the CAC have left Nigeria, milked high and dry of the billions of her revenue accruing from oil. It is reported by the House of Representative Committee that probed the Oil Subsidy regime in Nigeria between 2009 and 2011 that a waste disposal firm got N1.9billion subsidy payment for petroleum products that the company never supplied.¹¹⁸ According to the report¹¹⁹ of the House of Representatives Ad-Hoc Committee, which probed the controversial subsidy:

A representative example was that of two promoters who allegedly received an email and came in from the USA with a proposal of waste management with NNPC. Instead, the two promoters came together and incorporated Eco-Regen Ltd on 3rd August 2010 with corporate address as 3rd Floor, UAC Building, Central Business District, Wuse Abuja; applied for PPPRA registration on 11th September, 2010, got its first allocation of 15,000 mt on 20th January, 2011 and was paid N1, 984,141,091.10 as subsidy for products not supplied.

According to the report; 'It became apparent to the committee that the operations of the NNPC were opaque and not transparent. The implication of this is that it created room for abuses, inefficiencies and manifest lack of accountability.' Thus, NNPC acted as an importer, marketer, claimant, payer and payee; it was not accountable to anybody or to any authority.

This paper submits that unless there is a deliberate attempt at reforming this lopsidedness in the registration power of the CAC, the investing public and the creditors will continue to fall victim of corporate frauds and failures. The paper has examined the concept of

¹¹⁶Sky News, *ThisDay Live* (Lagos, 17 April 2012) <<http://www.thisdaylive.com/articles/money-launders-uk-court-gives-ibori-13-years/113938/>> accessed 30 December 2014. Ibori pleaded guilty to a number of corruption and money laundering charges against him put at about \$250million before Judge Pitts. This includes the V-Mobile and Bombardier scams which amounted to \$50million. Ibori and Victor Attah, former Akwa Ibom state governor also formed a phantom company called ADF to siphon US\$37.5million from Delta and Akwa Ibom states' shares in V-Mobile. He was accused of embezzling these funds during his tenure as governor and using most of them to live a lavish lifestyle and acquire property and assets around the world.

¹¹⁷ See Nairaland, 'Ibori's Lawyer Pleads Guilty In V-mobile Shares Fraud' (06 December 2011) <<http://www.nairaland.com/563712/iboris-lawyer-pleads-guilty-v-mobile>> accessed 04 January 2014.

¹¹⁸ Yusuf Alli, Victor Oluwasegun and Dele Anofi, 'Panel: Waste Disposal Firm got N1.9b Fuel Subsidy, *The Nation* (20 April, 2012) 1<<http://www.thenationonlineng.net/2011/index.php/news/43786-panel-waste-disposal-firm-got-n1-9b-fuel-subsidy.html>> accessed 04 January 2014.

¹¹⁹ Ibid.

disclosure philosophy from the formation of the corporate form to its termination. It had traversed the length and breadth of Company Law to highlight the importance of disclosure as an ideal concept in Company Law. In doing this, the paper also examined the concept from the standpoint of securities laws. Authorities and scholars on company law and stakeholders alike are unanimous in their voices that disclosure in the affair of the corporate form remains the most important guide and shield to corporate fraud and failure. The debate on whether the rules to be invoked in extracting information should be made voluntary or mandatory has been examined highlighting the merits and demerits of each side of the debate. The paper submitted that the rules should be mandatory and made a case for Company-Based Registration System as opposed to Securities- Based Registration System. The paper recommended that private companies and their offers as well as a memorandum of placement should be regulated by SEC the same way as those of a Public Company. Key areas of Nigerian laws on disclosure and securities were identified and suggestion made to strengthen them.

6.1 THE WAY FORWARD

The basic law on corporate governance in Nigeria is the Companies and Allied Matters Act Cap C20, 2004. This law which provides for the formation of corporate entities in the first place also sets the time and structures for corporate governance. It provides that every corporate entity must have a Memorandum and Articles of Association which is the Constitution.¹²⁰ This is the document setting up the structures of governance of the entity. The document is also regarded as a contract between the members of the company.¹²¹ It is from this document that the Board of Directors or Governors or Executive Council or Registered Trustees are established depending on the type of company. The CAMA provides numerous provisions for corporate accounting and auditing practices - auditing, disclosures, preparation and publication of financial statements. The Registrar of Companies at the Corporate Affairs Commission (CAC) is to monitor compliance with these requirements and specifies obsolete penalties in case of non-compliance.¹²²

It further provides for the appointment, remuneration, rights, functions, powers, and removal of auditors and the establishment of an audit committee.¹²³ It should be noted that the CAMA regrettably does not provide for joint audit or rotation of auditors. By virtue of section 358 CAMA only chartered accountants can be appointed as auditors of companies. The CAMA also provide for the meetings of corporate entities. For companies, it is usually the Annual General Meeting.¹²⁴ All companies are also required to file Annual returns which should contain their financial statement. It should be noted that CAMA allows for the creation of different kinds of corporate entities (e.g., Private limited liability company, public limited liability company, company limited guarantee, unlimited companies, incorporated trustee and business name or firm), each with its attendant distinct legal consequences associated with their incorporation and differential financial reporting requirements, thus creating varying degrees of elaborate corporate governance structure.

For instance, a public limited liability company which is quoted on the stock exchange is subjected to high level of corporate governance because in addition to separate personality and limited liability its shares are freely traded on the stock market mostly based on financial information supplied by the company to the market. So in addition to the general requirement on governance of companies public companies have to have an Audit Committee and are

¹²⁰ See section 35 of CAMA.

¹²¹ See section 41 of CAMA and the cases of *Hickman v Kent or Romney Mars Sheep Breeders Association* (1915) 1 Ch. 1881, 113 L.T. 159; *AG Lagos state v Eko Hotels Ltd* (2001) FWLR Pt 82, 1996 and *Obikoya v Ezenwa* (1964) 2ANLR, 133).

¹²² See generally sections 137, 211 (3) & (5), 343, 345, 354 CAMA.

¹²³ See generally sections 357, 358, 362,363 in part XI of CAMA.

¹²⁴ Section 213 CAMA.

subjected to the listing requirements of the Nigeria Stock Exchange as well as regulation by Securities and Exchange Commission.

It follows that apart from CAMA there are other laws which affect corporate governance of companies. These would include general laws such as the Companies Income Tax Act and ISA applicable essentially to public companies and sectoral laws such as the Nigerian Stock Exchange Act 2004, the SEC Rules and Regulation, the SEC Code of Corporate Governance in the field of Capital Market and regulation of disclosure and financial reporting for listed companies, the Institute of Chartered Accountants of Nigeria Act 1965 and the Nigerian Accounting Standards Board Act 2003 in the field of corporate governance, standardization and best international practices in audit and financial reporting, the Nigerian Communications Commission Act or the Nigerian Electric Sector Reform Act 2005 which regulate companies operating or intending to operate in communications or electric power sectors of the economy. There are other relevant laws for other sectors such as the petroleum industry, but further discussions on sectoral legislations save for ISA 2007 is beyond the scope of this paper. Also powerful self regulatory bodies such as Nigeria Stock Exchange (NSE), Chartered Institute of Stockbrokers (CIS) and the Capital Market Solicitors Association (CMSA) play a significant role in setting standards of conduct for their members which aim at good corporate governance.¹²⁵ In addition, both SEC and CAC teamed up with industry practitioners to produce a Code of Corporate Governance for Public Companies. Compliance with the Code is voluntary. SEC on the other hand has a Code of Conduct for Capital Market Operators which is enforceable. In fact, in the Union Bank, Registrar case against the SEC, which arose from the Bokanlans share scandal and the Investment and Securities Tribunal (IST) sustained liability of market participants based essentially on breach the Code.

Interestingly enough, the CAMA actually provides for the liability of the auditor for negligence if, as a result of failing to discharge his fiduciary duty properly, the company suffers loss or damage.¹²⁶ A case may also be made out in the realm of the Common Law and the Nigerian Law of Torts. However, the reality is that this aspect of entrenching good corporate governance in accounting and auditors practices is yet to be tested by litigation, but my law firm is currently actively working on this aspect in a few scarce briefs that have raised this issue with a view to correcting this regrettable anomaly. I expect that this is an area of the law that will develop rapidly with the current Nigerian economic growth and more importantly the very healthy Nigerian capital market boom quite in contrast with the setbacks witnessed in international capital markets. It should be borne in mind that civil liability of such professionals will be virtually unlimited (without prejudice to professional insurance) as even audit and accounting firms can only have the form of partnerships. It has been said that this feature of tortious liability makes it a more effective deterrent tool than criminal sanctions which always have a ceiling to financial penalties. Thus, the Nigerian statutory framework of corporate governance is expectedly multifaceted and is being continually beefed up.

6.2 AUDIT COMMITTEE AND CORPORATE GOVERNANCE

Part XI of CAMA makes extensive provisions for the keeping of accounting records of the company and the preparation of financial statements of purpose of corporate financial reporting. It also provides for audit of those accounting records by an external auditor to be appointed by the members in general meeting. The auditors are then required under section 359 of CAMA 2004 to make a report to members on the accounts examined by them, and on every balance sheet and profit and loss account in the financial statement to be laid before the

¹²⁵ For instance NSE has its listing requirement and a disciplinary procedure in event of breach by members or listed companies. Also CMSA has developed a Code of Conduct, Checklist and Standard Letter of Engagement for its members which require companies they work for to adhere to standards of due diligence higher than those under ISA 2007.

¹²⁶ See section 67 CAMA.

company in general meeting. It is significant to note that section 356 CAMA recognizes that the content of financial statements for purpose of financial reporting may change from time to time so as to achieve fair, transparent accounting and corporate financial reporting in line with the concept of good corporate governance discuss earlier in this paper. It provides that the Minister after consultation with the Nigeria Accounting Standards Board may, by regulation, add to the classes of documents to be comprised in the financial statements or modify the requirements of the Act as to matters to be stated in such documents or reduce the classes of documents to be delivered to the Corporate Affairs Commission CAC. This brings us to the role of the Nigerian Accounting Standards Board in ensuring good corporate governance in Nigeria to which we would revert in the course of this paper.

In addition, subsection 3 of the said section 359 CAMA require that the auditors in the case of a public company make a report to the Audit Committee of the company which committee is to be made up of equal number of directors and representatives of shareholders of the company subject to a maximum number of six (6), subject to re-election annually but with no remuneration. The function and powers of the Audit Committee are stated in section 359 subsection 6 CAMA as follows:

- Ascertain whether the accounting and reporting policies of the company are in accordance with legal requirements and agreed ethical practices;
- Review the scope and planning of audit requirements;
- Review the findings on management matters in conjunction with the external auditor and departmental responses thereon;
- Keep under review the effectiveness of the company's system of accounting and internal control;
- Make recommendations to the Board in regard to the appointment, removal and remuneration of the external auditors of the company; and
- Authorizes the internal auditor to carry out investigations into any activities of the company which may be of interest or concern to the committee.

There is no doubt that the introduction of the Audit Committee in the corporate governance structure of public companies is an innovation well ahead of its time. This is because for instance, no such structure exists in the United States and even with the enactment of the Sarbanes-Oxley law in the US there is still no such structure. The Audit Committee conceptually provides a veritable basis for instilling good corporate governance in public companies as this act as a check on the external auditor on the one hand and the company on the other hand. A further analysis of the law and the practice of the Audit Committee would reveal that the idea whilst being laudable has not really achieved its objective. Several factors can easily be identified as responsible for the lack of impact of the Audit Committee in promoting good corporate governance in Nigeria. First, the law did not provide for any qualifications for membership of shareholder representatives. The result was that those who cannot understand a financial statement get elected to the Committee and there bring no value to the meeting. Second, since voting is by show of hand organized shareholder groups with little holdings in the company who are susceptible to manipulation by the Board and or management of the company get elected. Third, there is no legal restriction on the ratio of the team from the company directors as between executive and non executive directors. Four, it is not clear who should produce the Chairman consequently the practice differs considerably from company to company. Lastly, there is no term limit for membership of the Audit Committee. Whilst the burgeoning shareholder associations are to be commended for their active participation in the protection of shareholder rights through elections into Audit Committees, the truth is that they are part of the problem. Many of them are only interested in the associated sitting allowances and are therefore willing tools for manipulation by management and/ or Board of some

companies. Nevertheless, their effort at a convention at the informal term limit for those they push onto these committees must be acknowledged.

In summary, so far unless further law reform is undertaken, there is not much hope that the Audit Committee would contribute significantly to good corporate governance in Nigeria. My suggestions on law reform will be made soonest.

6.3 AUDITOR INDEPENDENCE

As pointed out earlier Part XI of CAMA 2004 provides for audit of every company by an auditor appointed by the company. In particular Chapter 2 of Part XI in sections 357 to 369 CAMA makes elaborate provisions for appointment, qualification, duties and powers of the auditor, remuneration, removal, resignation, discipline, liability, etc of the auditor. The framework seems to be that the auditor is appointed by the general meeting under section 357 and reports to them and the Audit Committee under section 359 CAMA. Also under section 351 CAMA the company in general meeting is supposed to fix the remuneration of the auditors except where the company is yet to commence business and the directors are entitled to appoint the auditors under section 357 CAMA.

No doubt if the auditors carry out the duties set out in section 360 of CAMA 2004 and exercise the powers conferred on them in that section to investigate to enable them form an opinion and to qualify any opinion which they are not satisfied then all companies will endeavour to run their affairs in accordance with good corporate governance. The truth though is that they do not. Otherwise, we would not have had the problems around the world referred to earlier on in this paper. This raises the question why don't they? In Nigeria it seems that the strict provisions of CAMA 2004 are inadequate to address the problem of auditor independence. Although section 361 CAMA says the company in general meeting should fix the remuneration of auditors in fact, they usually delegate that power back to the directors and that falls back to the Executive Management of the company who probably in the first place recommended the auditor to the Board and in turn to the general meeting.

The phraseology is that he who pays the piper dictates the tune. Further, there is no provision in CAMA restricting the involvement of the auditor with the company. The only penal provisions are section 368 which imposes a duty to exercise such care, diligence and skill reasonably necessary in the performance of auditor and section 369 CAMA, which imposes criminal sanctions for those who supply false statement to the auditor. The result is that auditors become over involved with companies doing management consulting and tax and even human resources consultancy work for the very company they audit. They therefore lost their independence and professionalism in preparing their auditors' report. Whilst not every audit firm was involved, many, including the very top firms were. The fear of competition still drives audit firms to a frenzy about retaining their clients, at times at all cost.

6.4 NIGERIAN ACCOUNTING STANDARDS BOARD AND GOOD CORPORATE GOVERNANCE

Now one of the institutions that bring positive value to corporate governance is the Nigerian Accounting Standards Board (NASB) formally established under the provisions of the Companies and Allied Matters Act 1990 but now set up by the Nigerian Accounting Standards Board (NASB) Act, 2003. Originally established in 1982 as a private sector initiative housed in ICAN, NASB became a government agency in 1992 and reports to the Federal Minister of Commerce. Section 355 (1) CAMA provides:

The Financial statements of a company prepared under section 344 of the Act, shall comply with the requirements of schedule 2 to the Act with respect to their form and content, and with the accounting

standards laid down in the Statements of Accounting Standards issued from time to time by the Nigerian Accounting Standards Board to be constituted by the Minister after due consultation with such accounting bodies as he may deem fit in the circumstances for this purposes provided that such accounting standards do not conflict with the provisions of this Act.

According to the section 2 of the NASB Act,¹²⁷ the National Accounting Standard Board (NASB) was constituted with the following members:

- Central Bank of Nigeria (CBN)
- Corporate Affairs Commission (CAC)
- Federal Board of Inland Revenue (FIRS)
- Federal Ministry of Commerce (FMC)
- Federal Ministry of Finance (FMF)
- Nigerian Accounting Teachers Association (NATA)
- Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture (NACCIMMA)
- Nigeria Deposit Insurance Corporation (NDIC)
- Securities and Exchange Commission (SEC)
- Auditor-General for the Federation
- Accountant-General of the Federation
- Association of National Accountants of Nigeria (ANAN)
- Chartered Institute of Taxation (CITN)
- The Institute of Chartered Accountants of Nigeria (ICAN)

The NASB Act seeks to vest NASB with the responsibility for developing and publishing accounting standards to be observed in the preparation of financial statements, promote and enforce compliance with the accounting standards developed or reviewed by the Board and provide penalties for non-compliance with its provisions.

In pursuance to the above The Board has been issuing from time to time Statements of Accounting Standards (SAS) as well as guidelines/regulations for NASB inspectorate unit, 2005. By these NASB is actively seeking to provide a guide for policies and accounting methods that should be followed by companies in the preparation of their financial statements relative to income recognition, loss recognition, balance sheet classification and many other provisions. NASB's official website, not unlike its American counterpart (The Public Company Accounting Oversight Board, or PCAOB, a quasi public agency created under the Sarbox which is charged with overseeing, regulating, inspecting, and disciplining accounting firms in their roles as auditors of public companies, has also created an interactive feedback forum on its websites in order to receive continually inputs and comments from relevant stakeholders and professionals which would serve as primary database and assist NASB in evolving adequate and effective standards suitable to the specific dynamics of growth of the Nigerian accounting profession.

NASB prides itself as the only recognized independent body in Nigeria responsible for the development and issuance of Statements of Accounting Standards for users and preparers of financial statements, investors, commercial enterprises and regulatory agencies of government¹²⁸. There is no doubt that formal compliance with SAS issued by NASB can assist companies with good corporate governance. In addition, apart from the NASB as pointed out

¹²⁷ See also Central Bank of Nigeria official website.

¹²⁸ See their website www.nig-asb.org. Accessed 04 January 2014.

earlier, there are many other independent institutions that have been playing varying roles in the enthronement of good corporate governance.

For instance, the issuance by CBN in 2003 of a Code of Corporate Governance for Banks and its provisions/guidelines on audit committee or the efforts of the SEC / CAC to entrench good corporate governance for public companies as earlier mentioned. It nevertheless seems that mere compliance with rules alone is not sufficient to guarantee good corporate governance. So some self regulators have gone a step further and have set standards of compliance that are personal to managers of regulated companies. For instance, the Nigeria Stock Exchange has a rule that a manager of a quoted company who has a problem with his company would not be allowed to manage another company. Application of this rule resulted in the removal of Mr. Bernard Longe as Managing Director of Transcorp as soon as they were quoted because of his previous travail in First Bank. Again the NSE has blacklisted previous managers of Cadbury Nigeria PLC including Bunmi Oni the erstwhile Managing Director.

The paper opined that there is now a paradigm shift in corporate governance concept. Good corporate governance is now about the integrity of the managers of companies and not necessarily about compliance with rules. In the words of Idigbe¹²⁹:

It seems that the integrity of the corporate manager is now perhaps, more important than his financial statements. To put it another way, the financial statements of a company or its level of compliance with the principles of corporate governance cannot be higher than the integrity of the managers of the company. Consequently, investors, shareholders and other outside suppliers of capital or service now scrutinize more closely the integrity of the insiders who have to manage the capital supplied. So, instead of, or in addition to, financial statements, outsiders now demand for the past records of top management and the experience and reputation of the board, as indices for determining the level of compliance with the principles of good corporate governance.

Whilst good corporate governance has moved towards the integrity of individual managers, there is no doubt that the rules and enforcement of those would continue to play a significant role in persuading managers to adopt and internalize good corporate governance because the consequence of failure to comply could be personally grievous for the corporate manager. In this regard, the paper also lauds once again the efforts of the NASB and its Inspectorate division with regards to compliance to its SAS within such a short period of establishment. The era of hiding under the shield of separate legal personality to run down companies should now be circumscribed. It is in this light that the paper believes that law reform in corporate governance should focus on some of the following issues:

a) Audit Committee

Making boards effective requires policies that impact on both 'the carrot and the stick.' There should be qualification for membership of Audit Committee but not necessarily accounting qualification. There should also be mechanisms put in place for continuous education of members of audit committees (especially non-executive directors) in order that they may have sufficient literacy in financial matters and be able to monitor more effectively the management, thereby reducing the risk associated with dissociation of ownership rights and management rights in a company. The Internal Auditor or Risk Management Manager should report directly to the Audit Committee in addition to any other reporting line. Both the Managing Director and the Chairman of the Company should not be members of the Audit

¹²⁹ Anthony I Idigbe *Legal Aspects of Capital Market Operations in Nigeria 2007.*

Committee. The Executive Director in charge of Finance should only be in attendance and not a member, and members who are shareholder representatives should have term limits.

b) Auditors

The current international best practice to the effect that an auditor should not act as a consultant to the same company should be elevated to the position of enforceable law. Even then the same partner and or associate in a firm should not audit the same company for more than five (5) years. There should be liability for breach. Indeed, one may say that this rule of periodic rotation of auditors of the company is what fast-tracked the Parmalat accounting scandal in Italy (one of Europe's largest and most global company employing more than 36,000 employees in 30 countries), as the Company was statutorily forced to substitute its auditors from Grand Thornton to Deloitte Touche Tohmatsu. It is indeed on record that sporadic alarms were raised by an auditor employed by Deloitte Italy twice as far back as March 2001 and again in 2002. A minor shareholder and fund management group known as Hermes is also suing Deloitte on account of not following up properly through thorough investigation on its whistle blowing in December 2002.

c) The National Accounting Standard Board

The paper thinks that it is time that the NASB is elevated to a full Commission or is merged with either CAC or SEC. This way its standards may be better enforced with the resultant beneficial effect of corporate governance. Indeed, the above will assist our government in harmonizing its efforts in policing and entrenching corporate governance in Nigeria as there is on the other extreme the danger of over-regulation or conflict or regulations and regulators leading to strangulation and stunted growth in the economy, I have had the opportunity of addressing these issues in an in-depth manner in my MBA on regulation of the advertising practice in Nigeria. The paper suggests that *the SEC / CAC Code* be reviewed and then made enforceable.

6.5 A FASTER PROCESS OF ENFORCEMENT OF SECURITIES

The pattern of financing (financial structure of a company) affects the kinds of securities issued. The securities are not simply claims on cash flow; they confer certain rights on decision making and control (i.e., They define alternative governance models). Thus, debt governance works out of rules, while equity governance allows much greater discretion. Equities typically confer on the holders, the right to elect directors through voting, whereas debt entitles the holders to repossess collateral when the company defaults on promised payments. Good corporate governance as earlier said is a means of returning value to various stakeholders (employees) and investors (shareholders, secured creditors). The rights attached to securities and their enforcement become critical when managers of the companies act in self-interest. It may also be the only mean by which the interests of employees are paradoxically best protected. Collectively, these rules measure the ease with which investors can exercise their powers against management, and hence shed some light on the quality (or potential thereof) of corporate accountability.

It is easy therefore to understand how securities become rights of decision making and control of a company by the debt capital suppliers. These rights are in turn predicated on the legal environment in which the securities are operative. And since the procedure is of the essence, as is usually the case under systems that rely on institutions, there is a need for an urgent reform in that area of the law too. It is in view of the above that my law firm has been actively involved with Business Recovery and Insolvency Practitioners Association (BRIPAN) to push for a reform of the Insolvency laws of Nigeria through the promulgation of an

Insolvency Act. In addition to the reforms suggested and a development of a litigation steered towards holding auditors as well as directors of companies more liable, the paper believes this will propel more positive dividends from the entrenchment of corporate governance rules.

6.6 STATUTORY CREATION OF THE OFFICE OF COMPLIANCE OFFICER FOR PUBLIC COMPANIES

Under the reforms witnessed in the United States of America with the Sarbox features, the entrenchment of compliance officers who are basically professionals such as qualified accountants/auditors or Legal practitioners with a bias in finance to act as corporate watchdogs reminding the management on the need to comply with rules of disclosure, accountability, will go a long way to promoting corporate governance thereby reducing fraud in the corporation. These professionals are naturally also potential whistleblowers. The question may arise about the practical loyalty of these officers i.e. Whether the integrity of these compliance officers will not be affected by their mode of appointment. In this regard, we believe that the establishment of statutory duties to report to their relevant regulatory bodies may assist in this regard. With respect to publicly quoted companies, we have had the opportunity to advance this idea while working on the SEC's Code of Conduct for Capital Market Operators and their Employees.

6.7 STATUTORY PROTECTION OF WHISTLEBLOWERS

One other fundamental area that needs to be very quickly addressed in the development of corporate governance in an emerging economy such as Nigeria is the protection of whistleblowers. Till date, there are no specific statutory incentives to employees and other insider officers of a company to raise alarms over scheme to defraud the company and other stakeholders by directors or selfish managers. This is not in line with best international practices. In concluding it is to be observed that on paper, Nigeria has elaborate provision for the disclosure and corporate governance. However, it would seem that most of them are not properly enforced. Even then mere compliance with disclosure or corporate governance rules may not guarantee good corporate governance. It follows therefore, that whilst there is still need to improve the level of corporate governance and disclosure, ultimately good corporate governance is personal to corporate managers consequently effort must be may increase integrity of these managers through enforceable rules as a panacea to the dearth of good corporate managers.

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