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CORPORATE GOVERNANCE – NEW CORPORATE MANTRA?

Intro

Corporate Governance is “*the system by which businesses are directed and controlled*”. It is also the set of instruments and mechanisms (contractual, legal and market) available to shareholders for influencing managers to maximize shareholders value ...”.

Corporate Governance applies to Board structure and membership, director's remuneration, financial controls, accountability and audit and relations with shareholders.

A perfect system of corporate governance would give managers all the right incentives to make value maximizing investment and financing decisions.

Ethics or Law?

Typically corporate governance codes are voluntary and based on self-regulation. In “comply or explain” jurisdictions, companies are required to report on compliance in their Annual and other Reports. The Cadbury Code, UK was a private Sector initiative, as were the subsequent Editions of the Code. In the U.S, the New York Stock Exchange and the Sarbanes-Oxley Act require publicly quoted companies to adopt and report on compliance with Codes of Corporate Governance on pain of sanctions.

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A Code of Best Practices

The Securities & Exchange Commission (SEC) and the Corporate Affairs Commission (CAC) jointly issued a Code of Best Practices in 2003. The SEC/CAC Code of Best Practices is in the same mould as a voluntary self – regulatory code.

CBN Steps In

The Central Bank of Nigeria (CBN) released a Code on Corporate Governance for Banks on March 1 2006 (effective April 3 2006). The CBN Code states the role of the Board to be to “retain full and effective control of the bank and monitor executive management”.

In 2003, only 40% of quoted companies in Nigeria (including banks) had recognized Codes of corporate governance in place. With the CBN Code, Corporate Governance has at last been given the importance it deserves in Nigeria's corporate discourse.

The CBN Code which has the force of law, prescribes a minimum standard which individual banks must meet. All banks are additionally required by the Code to adopt and enforce well articulated Codes of ethics and conduct for Directors, Management and Staff and to render periodic reports.

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Family Banks – Endangered Species?

The CBN Code prescribes that no individual should have unfettered powers of decision making and that no two members of the same extended family should be on the board of a bank at a time.

The domination of boards by a single individual has been fingered in jurisdictions across the world as a key source of bad corporate governance and the resultant corporate failures. Nevertheless, there are family banks (not just in Nigeria) that are run on sound business and corporate governance principles.

Some jurisdictions permit combination of board and management roles in an individual where there are other strong independent board members to balance the dominant individual.

Is this the end of family banks in Nigeria?

Quality of Board Members

Can the board of an average Nigerian Bank control its Managing Director? The CBN approves the appointment of board members and recognizes that gap in skills and conflict of interest issues have been responsible for the average board not living up to its mandate.

To solve this problem, the CBN Code recommends that there should be no conflict

of interest between the Board, Directors, Management and staff and provides that Board members should be “qualified individuals” that are conversant with their oversight functions who can lead and control the organization. This provision is supported by additional provisions empowering boards to determine their training needs and hire consultants at the company's expense.

Indeed the Board is required under the CBN Code to develop benchmarks for the appointment of its members; set performance targets for itself and secure independent appraisal of the Board and its members. Professional advice will also be required on the amendment of the Memorandum and Articles of Association of banks to reserve certain areas of responsibility for the board and to re-introduce tenure system.

Companies related to directors providing services to the company now have to be “disclosed” to CBN. Furthermore, board members with non-performing insider Credits for a period of one year should vacate their seats.

Sarbanes-Oxley Act 2002 (SOX) - Way To Go?

Under the SOX Act, a CEO and CFO (and other top executives performing those functions) are required to certify Annual Accounts. Failure to certify such accounts attracts a fine of 100,000 USD or 10years imprisonment. In Nigeria, failure of a CEO to certify Annual Accounts does not attract criminal penalty under the CBN Code.

On the appointment of Joint Auditors, the question is whether the combination of one

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Auditor and one "Reporting Accountant" will not be more effective than joint auditors.

Business Unusual?

The CBN Code recommends that there should be "responsive, responsible, and enlightened shareholders".

This requirement is not likely to be farfetched as the defined contributory pension regime in place since 2004 is poised to generate a new breed of shareholder – institutional investors with clout. Furthermore, during the Consolidation exercise, a new generation of shareholders invested in bank stocks. The quality of the average shareholder in banks today is higher than it has ever been.

The Annual General Meetings of the future will not be business as usual.

A Stitch in Time?

On the issue of Directors Remuneration, the Code provides that executive director's remuneration should be fixed by the Non Executive Directors and approved by the AGM. It does not define remuneration (to include stock options, pension plans and the like) unlike the SEC/CAC Code. This is probably due to the fact that the issue of executive remuneration is not yet considered to be excessively onerous on corporations.

Who Will Bell The Cat?

The Sarbanes-Oxley Act provides that staff should not be victimized because of whistle blowing. Aggrieved whistleblowers are to seek administrative relief from the Secretary of Labor or, failing that, from the regular courts.

The issue of whistle blowers and their role in corporate governance is always a hot potato in every jurisdiction. Petition writers in Nigeria have succeeded in bringing down banks but such persons understand that there can be no future for them in that organization.

In common law, employers cannot be forced to continue to employ any person they do not wish to employ. Employers need not give reasons for terminating an employee's position.

Why would anyone whistle blow if they can be fired without a reason? Who will employ a known whistleblower? It is inconceivable that CBN will ever go as far as SOX to provide for the re-employment of terminated whistleblowers.

The Future Begins Today?

CBN or SEC? Which will be the more important Corporate Regulator of the future? In the past, CBN's dominance was unquestioned (and it still is). However, all banks in Nigeria are now publicly quoted, shareholding is more diverse, and shareholders are more enlightened. Business is also becoming more sophisticated. The era of corporate raids, mergers and acquisitions and LBO's and such like has dawned. In the US, SEC is the primary Corporate Regulator and there exist very stringent reporting and disclosure requirements. Will SEC rise up to the challenge or will CBN continue to dominate?

Either way, Corporate Governance is here to stay and will become more relevant as the Nigerian economy develops.