AN EXAMINATION OF INVESTORS' PROTECTION UNDER NIGERIAN LAW

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SEPTEMBER, 2014

DECLARATION

I hereby declare that this work is original. It has not been presented or published anywhere. All quotations and references were acknowledged.

Anna, SHIBI

_____
Signature/Date

CERTIFICATION

This thesis titled: **AN EXAMINATION OF INVESTORS' PROTECTION UNDER NIGERIAN LAW"** by Anna SHIBI meets the regulations governing the award of the Degree of Master of Laws of Ahmadu Bello University and is approved for its contribution to academic knowledge and literary presentation.

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DEDICATION

I dedicate this work to my lord and savior Jesus Christ who has brought me this far.

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My profound gratitude goes to the Almighty God for his mercies and compassion. My appreciation also goes to my major supervisor Dr. A. R. Agom for his patience, time and guidance at all times. I also appreciate my second supervisor Dr. B. Babaji who despite his busy schedule could attend to me. May the Almighty God richly reward him. My appreciation also goes to Dr.A Akume , Prof. Sani Idris for their time, patience and close supervision, Barr. Usman Shehu for his support, Barr Mrs. Maryam Abdullahi a colleague and Dr. Mrs. Akande who is an embodiment of courage and strength, she are indeed a role model to women.

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v

ABSTRACT

A company has over time proven to be a very viable form of business, the company has grown tremendously in size and number of shareholders base making it necessary that a few people be selected to manage the company on behalf of the investors since all of them Laws are put in place to put a check on these managers to prevent corporate abuse and ensure that the company is managed with due care and skill to the benefit of the investors. This research has shown that the government lacks the will and determination for the prompt implementation of its laws despite all the efforts made in providing the law, there are also some loopholes can through which fraudulent and dishonest persons can take advantage of for their own personal gains thereby defeating the very essence of the laws which are investors protection. An examination of some of the laws provided to protect investors in Nigeria shows their inadequacies and the fact that it has become a mere academic exercise, ink on paper and is quite different from what is obtainable in practice. Doctrinal method of research was used in this research referring to statutory laws, textbooks, journals, newspapers and internet materials. The findings were that; there is the lack of will by the regulatory bodies to implement the law, company meetings have been provided as an important tool for investors' protection in Nigeria but that has been circumvented through late delivery of the notice of meetings or inefficiency of the postal system, the Companies and Allied Matters Act did not provide for qualifications for people to be appointed as members of the audit committee and the inspectors to investigate the affairs of a company and also in a bid for the provision of Section 63 of the Companies and Allied Matters Act to provide for division of powers among the board of directors and the shareholders it ended up bringing in terms as' good faith' and 'due diligence' which are subjective terms. It is therefore recommended that; The regulatory bodies should ensure prompt implementation of its laws and policies; it should be mandatory that companies should use the message alerts and emails in addition to the traditional form of notice to inform share holders of any company meeting; The Companies and Allied Matters Act should provide for people to be appointed as members of the audit committee should be people with knowledge in accounting, company law and vast experience and section 63(4)of the Companies and Allied Matters Act should be Expunged. In conclusion it can be said that investors' protection does not lie on the Government alone but on all stakeholders, it lies on the investors sought to be protected to be vigilant, exercise all their rights provided by law and for the regulatory bodies to live up to their role and enforce the provisions of the law when there is any violation.

TABLE OF CONTENTS

Title page……..……i

Declaration……ii

Certification……..iii

Dedication……iv

Acknowledgement……v

Abstract……..…vi

Table of content……vii

Table of cases……viii

Table of statute……...ix

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study……..…1

1.2 Statement of the problem…….....5

1.3 Aims and objectives of the study…….5

1.4 Justification……..……5

1.5 Scope of the study……..……..6

1.6 Research methodology……....6

1.7 Literature review……..……6

1.8 Organisational layout……..…….9

CHAPTER TWO

THE EVOLUTION OF CORPORATE FORM OF INVESTMENT……10

2.1 Introduction……...……10

2.2 The Evolution of Company……...11

2.2.1 The Joint Stock System……..13

2.2.2 The Beginning of Public Dealings……14

2. 2.3 The Companies Act of 1844……..…18

2.2.4 The Introduction of Limited Liability……...19
2.2.5 The Consolidation of Company law……..……..20
2.3 The Evolution of Company in Nigeria……..23
2.4 The Capital Market……27
2.5 The Stock Exchange……..29

CHAPTER THREE

THE LEGAL FRAMEWORK FOR INVESTORS' PROTECTION IN NIGERIA…….……...35
3.1 Introduction……...35
3.2 The Companies and Allied Matters Act 1990 (CAMA)……36
3.2.1 Division of corporate powers……37
3.2.2 Investigation of companies affairs…….....38
3.2.3 Disclosure……45
3.2.4 Company accounts…….……...48
3.2.5 Financial statement……...51
3.3 The Investment and Securities Act 2007……..66
3.3.1 Disclosure under the Investment and Securities Act 2007……..67
3.3.2 Public issue and the disclosure system…….,……70
3.3.3 Investigation under the Investment and Securities Act…….,,……..……74
3.3.4 Investors protection fund……,,……75
3.4 Nigerian Investment Promotion Commission Act 1995……..77
3.4.1 Investment Protection Assurances…….…..78
3.5 The Trustees Investment Act 1990…….....79

CHAPTER FOUR

CHALLENGES TO INVESTORS' PROTECTION IN NIGERIA……82
4.1 Introduction……..……82
4.2 Lack of effective corporate governance……...83

4.3 Corporate powers……..……...……..85
4.4 The poor performance of auditors and the audit committees……...88
4.5 The directors control of general meetings and shareholders apathy……93
4.6 Directors control of proxy instrument……...96
4.7 High illiteracy rate in Nigeria……97
4.8 The postal system in Nigeria……..….100
4.9 Corruption in Nigeria……..101

CHAPTER FIVE

SUMMARY, CONCLUSION, FINDINGS AND RECCOMMENDATIONS……105
5.1 Summary……..105
5.2 Conclusion…….....108
5.3 Findings……...110
5.4 Recommendations……...111

TABLE OF CASES **page**

1. A. G. Olisaemeka vs. Securities and Exchange Commission(2007) 2 Nigerian Investment and Securities Law Reports page 177 pt 178……..……33
2. Beta Consortium Ltd v. S.E.C(2007) 2 Nigerian Investment and Securities Law Reports page 35……..……....33
3. Cadbury Scam (2008) Journal of Nigerian Securities and Exchange Commission News, vol. 3 No.2 June…….....90
4. CSCS & 1Or vs. Bunkolans investments Ltd & 5 Ors (2007) 2 Nigerian Investment and Securities Law Reports page 95 pt 98.…….....33
5. Hamborough Company (1971) 1 CH CAS at 204 ……..…….....19
6. Molten Trust Limited and Mr. M.O Oduwolevs Investment and Securities Tribunal ((2007) 2 Nigerian Investment and Securities Law Reports page 137 pt ….....74
7. North West v. Secretary of State for Trade (1978) 3 ALL ER, 280……....39
8. Otong v. Mogal Nigeria Ltd (1978) FRCR at P. 80……..…...43
9. Samuel Osigwe vs. BPE(2007) 2 ,Nigerian Investment and Securities Law Report, page 201 pt 205……..……90
10. Trenco (Nig) ltd v. Real Estate ltd (1978) 1 LRN……..……...85
11. Unilever Nigeria Plc vs. International Standard Securities Ltd (2007) 2 Nigerian Investment and Securities Law Reports page 267…….……..74
12. Wallersteiner v. Moir (1974) 3 ALL ER 217 at 241……..……40

TABLE OF STATUTES

Page

1. COMPANIES AND ALLIED MATTERS ACT 1990, CAP.C 20 LFN 2004…….36

S. 1(1)(2)……..36

S. 63(1)…….37

S .63(4)……..38

S. 314……39

S. 314(1)……...42

S. 314(2)……...42

S. 548……45

S. 95(1)……..46

S. 275(1)……47

S. 33(1)……..49

S. 331(2) and 331(3)…….50

S. 331(4)……50

S. 334(1)……51

S. 344(4)……52

S. 344(1)……53

S. 332(2)…….....54

S. 334(1)……55

S. 335(1)(2)……59

S. 342……..……...61

S. 336(3) a-d……...……...62

S. 355(1)……...…….62

S. 359……...……..62

S. 355…….....63

S. 244…….....64

2. INVESTMENT AND SECURITIES ACT 2007……..……...…66

S. 11……..….67

S. 11(2)…….68

S. 28……..68

S. 36(1)……..68

S. 38……...69

S. 39(1)……..69

S. 67……..70

S. 71(1)……...71

S. 79……...71

S. 84……...72

S. 85(2)……...72

S. 100……73

S. 45……...74

3. NIGERIAN INVESTMENT PROMOTION ACT, 1995…….....77

S. 1 and 2……77

S. 20(1)……..……77

S. 21……77

S. 27……78

S. 25……79

4. THE TTRUSTEES INVESTMENT ACT 1990, CAP T22 LFN 2004...……..79

S. 2 and 3……....79

5. BANKS AND OTHER FINANCIAL INSTITUTIONS ACT CAP B3 LFN 2004……....65

S. 35(2)d ……65

6 CONSTITUTION FEDERAL REPUBLIC OF NIGERIA 1999(AS AMENDED) 2011……..…65

S. 44……..65

7. THE BILLS OF EXCHANGE ACT, CAP 35 L.F.N 2004.....87

S.90……...….87

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

An investor is a person who puts money into financial schemes, shares, or property with the expectation of making a profit.[1]An investor is someone who commits capital in order to gain financial returns or a person who commits money to investment products with the expectation of financial return. An investor is a person, company, or Organization who has money invested in a venture with a hope of returns especially one that holds stock in publicly owned corporation. Generally, the primary concern of an investor is to minimize risk while maximizing return. An investor can be a shareholder or a creditor. A person who buys shares or owns shares in a company becomes an investor in that company and a person, company or organization that lends money or supplies goods on credit to a company becomes a creditor of that company.

The company is a dominant feature in every facet of the Nigerian economy from banking to oil and gas, health to recreation, construction to agriculture just to mention a few. In every company there are investors. Gone are the days when sole proprietorship was the most preferable form of business wherein the capitalists invested and earned profits out of the business for themselves. Though sole proprietorships still exist, they are not the most common forms of business today. Taste of the consumers have changed, technology has advanced manifold and production at large scale. To meet these needs the company form of

[1] (2001)Oxford Dictionary of Current English Oxford University press, Great Clarendon Street Oxford, third edition, p. 478 to 479

business came into existence to accommodate the shift from traditional goods to capital goods and technological products which require huge amount of labour and capital, supply which was not possible for a person or handful of persons to readily make available by the sole proprietorship[2].

The company is a means whereby the wealth of innumerable individuals has been concentrated into huge aggregates and whereby control over this wealth has been surrendered to a unified direction. The power attendant upon such concentration has brought forth princes of industry whose position in the community is yet to be defined[3]. The surrender of control over their wealth by the investors has effectively broken the old property relationships and has raised the problem of defining these relationships anew. The direction of industry by persons other than those who have ventured their wealth has raised the question of the motive of such direction and the effective distribution of the returns from business enterprise.

The typical business unit of the 19th century owned by individuals or small groups; was managed by them or their appointees; and was, in the main, limited in size by the personal wealth of the individuals in control[4]. These units have been supplanted in ever greater measure by great aggregations in which tens and even hundreds of thousands of workers and property worth hundreds of millions of Naira, belonging to several

[2] Singh R. K Origin and evolution of the modern company law, Retrieved from http/www.legalservice .com on 10/3/2013 at 1pm.
[3]Berle A.A Means G.C(1963) the modern corporation and private property, the Macmillan nineteenth printing company, New York p.2
[4] Ibid

individuals, are combined through the corporate mechanism into a single producing organization under unified control and management[5].

As the ownership of corporate wealth has become more widely dispersed, ownership of that wealth and control over it has come to lie less and less in the same hand. In theory, the company is owned and controlled by its shareholders. Directors and managers should therefore conduct its affairs in the sole interest of those shareholders. The profit motive should prevail, in the sense that decisions on the future of the company should ultimately be determined by the search of the possible long- term return on capital, even if that means the liquidation of a particular company and the reinvestment of the capital in it [6]. The reality of course is very different, management has an obvious vested interest in the survival of the enterprise as a source of personal livelihood and may often regard the interest of shareholders as subordinate to those of the company itself as a continuing enterprise with duties to its customers, its suppliers, its employees and even to the public at large[7].

The cumulative effect of these patterns in corporate concentration, financing and shareholding is that as the size of company increases, so the degree of managerial independence grows. The process has been aptly described as the managerial revolution, as there is a good deal to it than the loss of direct shareholder control over large public companies[8].

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[5] Ibid
[6]Hadden .T. (1984) Company Law and Capitalism Weidenfied and Nicolson, London p.75
[7] Ibid. p.76
[8] Ibid

Instead of seeking exclusively to increase the net return on capital invested, those in control of company decisions may also be concerned with the preservation of the company and its business and of their own control over it, with growth and 'empire building' in order to increase the range and extent of their power and thus reduce the uncertainty of their operations[9].

There is also the temptation for managers to regard the company as essentially their own property and for them to look primarily to their own profit in conducting its affairs. Managers are often in a position to fix their own salaries in term of the company's profitability, and to arrange for themselves highly attractive pensions and insurance schemes, or options for share-purchase. In the event of take over bids, managers are in a strong position to secure for themselves undeserved advantages as a condition for their co-operation with the bidding company. All such practices which go beyond the confines of reasonable inducement to efficiency are condemnable.[10]

As a means of securing their independence of action, there is the tendency for managements to seek to finance their company's expansion otherwise than through the stock market. The most important method is by ploughing back the profits of the company and where it is not sufficient, management may often prefer to raise a large contractual loan by way of debenture from one major financial institutions rather than submit themselves to the public scrutiny of the stock market and the financial press by embarking on a public share issue[11]. The practical effect of this scenario is that shareholders have been

[9] Hadden .T. (1984) Company Law and Capitalism Op cit p.76
[10] Ibid.
[11] Ibid

reduced to mere lenders of capital and not owners of the enterprise. The problem now is how to protect the interest of the investors from dishonest managers or business men out to defraud unsuspecting investors and as a result, the government had to step in by provision of laws and establishment of regulatory bodies to guide and monitor the affairs of companies in the interest of investors. It is against this background that this work seeks to appraise the legal framework for Investors' protection Under Nigerian Law.

1.2 Statement of Research Problem

This Thesis proceeds on the assumption that there is the lack of will to implement and enforce the provisions of the laws provided for investors' protection by both the government and the regulatory bodies in Nigeria. And the laws provided for investors' protection in Nigeria has some lacunas which can be used to circumvent the essence of investors' protection.

1.3 Aims and Objectives of the Study

The aim is to examine some of the laws on investors' protection in Nigeria, to point out the inadequacies in them capable of discouraging genuine investors and to proffer some solutions in line with the existing realities.

1.4 Justification

This research is justified by the problems raised by the statement of the problems contained in section 1.3 of this work. The work is also justified by its relevance to law students, all stake holders and the general public.

1.5 Scope of the Study

The scope of this study is on shareholders as investors in public companies. It dwells on investors' protection under the Companies and Allied Matters Act, Investment and Securities Act, Nigerian Investment Promotion Commission Act and the Trustees Investment Act which are some of the major laws regulating corporate investments in Nigeria and the regulatory institutions created there under.

1.6 Research Methodology

This work is based on the doctrinal method of research conducted in libraries and the internet. The statement of the legal principles as well as their administration depends on this method of research, References are made to primary sources which are legislations and case laws and also to secondary sources which are books, journals articles, and other existing literature and where, necessary acknowledgements are made accordingly. Originality lies in identifying the defects in the law and practice and suggestions.

1.7 Literature Review

Some good literature on the subject is available though they deal with only one aspect or the other of this topic and not particularly centered on this research topic. Research had to be undertaken with recourse to various sources to bring about this work. Berle and Means,[12] writing on the topic "The Modern Corporation and Private Property",

[12]Berle A.A, Means G.C, (1963) The modern corporation and private property, the Macmillan Nineteenth printing company New York

focused on the property of the company and the control of the company. Although an invaluable literature, it does not cover adequately the subject of investors protection

Tom Hadden,[13] in "The development of Capitalism", focused on the Development of the company from the 15th century company to the modern company. The coverage of investors' protection is also very limited.

Sealy's [14] work on the topic "Company Law and Commercial Reality" focused on company laws and compared them with what is obtainable in practice. All these literatures are by foreign Authors which focused on what is obtainable in their jurisdictions devoid of the aspects peculiar to Nigeria's jurisdiction though lots of our laws were borrowed from such jurisdictions and so there are similarities.

We also have some Nigerian writers like, Orojo'[15]whose work on "Nigerian Company Law and Practice" deals with the history of the company, incorporation and winding up of a company, the stock market, it does not cover much on investors protection.

Soforowa's[16] work on the topic "Modern Nigerian Company Law" dwells more on the incorporation, management and winding up of a company. His work did not cover investors protection.

Bhadmus[17] work on the topic "Bhadmus on Corporate Law and Practice" covers a lot regarding Company Law, it also covers a little on investor's protection, but is stated the law as it is without comparism to what is obtainable in practice.

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[13] Hadden .T, (1972) The development of capitalism, Weidenfied and Nicolson, London.
[14] Sealy .L.S, (1984) Company Law and Commercial Reality, sweet &maxwel ltd Great Britian
[15] Orojo .O. (2006) Company law and Practice in Nigeria, LexisNexis, Butterworths 5th Edition.
[16] Soforowa .M.O (2002) Modern Nigerian Company Law, Christiana type house ltd 13 moshalashi st.shomolu & 8 Awosenyi st. Shomolu, Lagos, Nigeria.
[17] Bhadmus. Y.H (2009) Bhadmus on Corporate Law and Practice, Ghenglo ltd ,No.6,plot 1123 ECA, Moneke Crescent, corridor Layout, off Maryland, Enugu

Agom[18] on "The Place of Company Meetings in Corporate Governance" His contribution focused on the meetings of the company, distribution of powers in the company and the factors mitigating against members effective control of corporate governance. Investor's protection goes beyond these factors hence this work which is broader in perspective.

Recourse also was made to the writings of Ogiden[19] on "The Regulatory Challenge in Nigeria's stock market." This work dwells more on the Nigerian stock market and regulatory challenges. This literature is material to this research because a part of this research takes a glimpse at the Nigerian stock market as the market for companies' equities.

Gower [20] deals with the history, formation, management to winding up of a company. Being a foreign author, all his work focused on the English law and economy necessitating the Nigerian context which this study provides.

The works of all these authors touch on one aspect or the other of this research. This thesis is aimed at providing a more comprehensive coverage of various aspects of company law in Nigeria, dwelling on the problems peculiar to the Nigerian environment.

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[18]Agom .A.R,(2001) The Place of Company Meetings in Corporate Governance :Company Law and Practice, Modus international law and business quarterly.

[19]Ogidan .A. , (2009)The regulatory challenge in Nigeria's stock market. Retrieved Apr 20 2011 from www. Pontius .com

[20]Gower L.C.B, (1979) Gower's principles of modern company law, 4th edition, London: Stevens& sons,

1.8 Organizational Layout

The format of this research is organized into five (5) chapters. Chapter one dwells on the introduction of the topic of discussion which is "investors protection under the Nigerian Law." the background of the study is the summary of the whole research topic, it also cover the statement of research problem, aims and objectives, justification, scope of research, research methodology, literature review and the organization layout.

Chapter two discusses the evolution of the corporate form of investment, the modern day corporation, and the market as it relates to corporations in Nigeria

Chapter three dwells on investors' protection in Nigeria, The discussion is on some local legislations pertaining to investors protection such as the Companies and Allied Matters Act,[21]the Investment and Securities Act,[22]the Nigerian Investment Promotion Act,[23] and the Trustees Investment Act.[24]

Chapter Four dwells on the challenges to investors protection in Nigeria, issues to be discussed are poor corporate governance, directors Control of Proxy instrument, the poor performance of auditors and audit committees, mechanics of meetings, low investor education, lack of effective mail delivery system, inefficiency of the regulatory bodies, high illiteracy rate in Nigeria, high rate of corruption in Nigeria and Shareholders apathy.

Chapter Five being the last chapter of this research draws the curtain on the entire work. It deals with the Conclusion, Summary of Findings and then finally the Recommendations.

[21] Cap C20 LFN 2004
[22] No 29, 2007
[23] 1995, Cap N117 LFN 2004
[24] Cap T22 LFN 2004

CHAPTER TWO

THE EVOLUTION OF CORPORATE FORM OF INVESTMENT

2.1 Introduction

Corporate enterprise is not a new institution. From the days of the joint stock trading companies which built up the merchant empires in England and Holland in the seventeenth century the quasi-public corporation has been well known. Its entry into the field of industry, however, is traceable to the early Nineteenth century.[1]

The history of Nigerian company can be traced to the history of English Joint Stock Company. The European merchants struggled to establish forts and trading post on the West African coast from about the mid-1600s to the mid-1700s. This was part of the wider competition for trade and empire in the Atlantic. The British, like other newcomers to the slave trade, found they could compete with the Dutch in West Africa only by forming national trading companies.[2]

The first such effective English enterprise was the Company of the Royal Adventurers, chartered in 1660 and succeeded in 1672 by the Royal African Company. Only a monopoly company could afford to build and maintain forts considered essential to hold stock of slaves and trade goods. In the early eighteenth century, Britain and France destroyed the Dutch hold in West Africa trade, and by the end of the French Revolution

[1]Berle A.A and Means G.C (1963)The Modern Corporation and Private Property, the Macmillan Nineteenth printing company, New York p.10

[2] Nigeria Early British Imperialism: The colonial Legacy, Nigeria Index. Retrieved from www.photius.com/countries/Nigeria/e..... 10: am , 09/01/2012

and the subsequent Napoleonic wars (1799-1815), Britain had become the dominant commercial power in West Africa.[3]

2.2 The Evolution of Company

The idea of a commercial enterprise in which risk and profit are shared between financiers and traders as joint participants is as old as western civilization itself. Wealthy nobles and merchants in Greece and Rome and later in the Italian city states habitually contributed to the initial outlay and expenses of trading expeditions and ventures undertaken by ship owners and other traders in return for a share of eventual profit.[4] The legal rules of *commenda* perhaps the earliest formalized system of commercial joint enterprise, facilitated this type of transaction by allowing liability of the investor, who had no direct control over the conduct of the venture to be limited to the amount he had contributed. Apart from this, the ancient world did not produce any lasting form of permanent trading association.[5] But the Roman lawyers did develop the concept of an association of persons with legal rights and duties independent of its individual members which laid the foundation of the modern idea of the company as a separate legal entity.[6]

The structure of the modern trading company in Europe has been derived more or less directly from the concepts of the *commenda* and the *societas*. Its origin in England, as might be expected was more closely related to the historical institutions than legal theory. On the formal basis, the trading company was a direct development from the medieval

[3] Ibid.
[4] Hadden .T. (1984) Company Law and Capitalism Weidenfied and Nicolson, London page 9
[5] Ibid page 10
[6] ibid

guilds and companies formed by charter for the regulation of trading activities in the towns, and later of specific trades and skills of masters or governors and councilors with powers to make rules for conduct of trade concerned usually in return for some form of monopoly either locally or nationally. They also granted the right to hold property and to conduct litigation in the corporate name. But only those who were genuine masters of the trade or profession would be permitted to join: hence the complex apprenticeship. However, the actual trading was carried out by the individual members on their own account. The finances of the corporation as such, raised from entry subscriptions and levies and fines on members, would be spent only on maintaining some form of headquarters and a suitable business environment. The objective of this early charter was to regulate and control a particular branch of trade rather than to create any form of corporate association.[7]

As international trade grew in importance, charters were increasingly granted to groups of traders who directed their activities to particular regions. As in the case of the guilds, the principal object of the exercise was to provide for the regulation of the trade. In the grant of a charter to the merchants of Andalusia in 1530, for instance, provision was made for the appointment of councilors with full power and authority to levy impositions both on the traders in the region and on the goods imported or exported, and to make Statutes and Ordinances for their general wealth.[8]

[7] ibid
[8] Hadden .T. op cit page 10

2.2.1 The Joint Stock System

Foreign trade was particularly suitable for joint ventures in which several members of the company would pool their resources in a single expedition, and in time it came to be accepted practice for the company itself to organize the various ventures, for which members would be entitled or even expected to contribute money or goods. At the end of each voyage the profits would then be shared out pro rata with the amount invested. This type of venture came to be known as joint stock, since each, instead of trading with his own stock, agreed to pool it in a common enterprise. In the long and the dangerous voyages, as it was said of the trade to Russia for example, 'a joint stock was held necessary, for in that voyage one alone will not venture'.[9] Hence grew up a distinction between the 'regulated', or rather regulating companies in which each member was free to trade as he pleased, subject to the company's rules and the joint stock company in which individual trading might even be forbidden.[10]

The object of a grant of a charter was the mercantilist one of the restricting and regulating trade. Whether the trade was carried out by means of a joint stock or by individual traders was not a matter of crucial concern to the government and seems to have been left to the discretion of the individual companies.[11]

But it was not until the seventeenth century that the provisions for the assignment of shares began to appear in the company charters as a matter of course : as for example in that granted to the Royal Africa Company in 1660 giving power to grant or assign any

[9] Ibid page 11
[10] ibid
[11] ibid

share or shares to any other person whatsoever. By the middle of the seventeenth century, the ownership of a share had clearly come to be regarded as a matter of financial rather than personal participation. And by the end of the century there was a flourishing public market in London for the shares of all major companies. The formal problems relating to the raising of capital and the transfer of shares, though both were essential to the joint stock system were of concern primarily to Lawyers.[12]The importance of the system in economic terms was the encouragement it gave to overseas trade, and other new projects. A large proportion of the earliest trading companies was directly concerned either with the exploitation of new foreign markets or with the development of new industries dependent on the Navy for their prosperity.

The colonization of the later seventeenth century was also largely carried out under the lead of the joint stock companies[13].Through the joint stock company, it was now possible to raise large sum of capital for any profit making enterprise from persons who could not in any way be regarded as having any direct connection with the enterprise[14].

2.2.2 The Beginning of Public Dealings

The growth of a public market in shares was also of great importance to protect the company's enterprise from the withdrawal of capital by those who had interest in it. The market provided a means by which individual contributors could withdraw their money without injuring or interrupting the affairs of the company. The public market, in which

[12]Hadden .T. op cit page 12 and 13
[13] Ibid page 13
[14] ibid

shareholders could recoup their initial contribution when they wished, by selling off their shares to someone else who was prepared to tie up his surplus capital, was the simplest and most practical solution.[15]

In the early decades of the eighteenth century there was a continuing series of booms and slumps, marked by burst of floatation and failure respectively. A number of companies turned their attention to banking on joint stock basis, following the foundation of the bank of England in 1694, despite the fact that their charters made no provisions for operations of this type, and there was a sudden insurance boom in 1710. The failures in both fields also led to statutory intervention, a virtual monopoly of joint stock banking was given to the bank of England in 1708, and the formation of insurance societies was restricted in 1710 and 1711.[16] It was also becoming increasingly common for companies to be formed on a joint stock basis without formal legal incorporation of any kind, by charter or otherwise. The practice seems to have dated back to the mid- seventh century, when for various reasons the government was reluctant to grant formal charters to new enterprises.[17] From the lawyers point of view, there seems in fact to have been no strict need for a charter, except for the grant of special monopolistic rights or privileges, since all the necessary provisions for raising of a joint stock could be made by means of a deed of association which individual parties might join simply by signature. In consequence, the distinction between incorporated and unincorporated companies was of little practical significance.

[15] ibid
[16] Hadden .T. op cit p. 14 & 15
[17] Ibid p. 15

The Burble Act was enacted in 1720 as a result of the South Sea Company which was founded by statute in 1710 with the joint objective of exploiting the opportunities for trade with South America and serving as a means of relieving the government annuities in to stock, which would then serve as a 'fund of credit' for commercial trading operations which in their turn would provide for the interest due on the converted. The scheme was not a success. The company's trading venture were not particularly profitable, and the operation came to depend more on and more on the buoyancy of the stock market, which had at all cost to be maintained. The directors of the South Sea company resorted to spreading encouraging rumours, and eventually to supporting the price of its shares by lending the company's money on the security of its own shares. Others took the advantage of the speculative fever on which the South Sea company was dependent and a large number of new trading companies were formed, most of them without formal incorporation, and many of them patently unsound or even fraudulent. Eventually in 1720 came the 'burble burst'. The directors of the South Sea were summoned before parliament and fined for fraud and breach of trust the only effective way in which a breach of the terms of the statutory charter could be dealt with.[18] The so - called 'Burble Act' rushed through in 1720 as part of the final effort to shore up the market for South Sea shares by suppressing some of its competitors, made it a criminal offence to form any company presuming to be a corporate body or to raise transferable stocks without legal authority. But the net effect of the statute was naturally to reduce the number of persons who might safely

[18] Ibid p.16

pool their resources in a joint enterprise and so to discourage the aggregation of capital on a large scale.[19]

There were other more technical problems in the use of the simple partnership for joint stock trading. All formal transactions had in law to be carried on in the name of all the partners together, since the liability of each partner could be assessed only in respect of the period during which he was a member. There was no simple means by which disputes among partners could be resolved. And finally the death or withdrawal of any partner in theory determined the partnership, which could then in the strict law have to be reconstituted.[20] Means were eventually developed by the legal profession to avoid some of the most inconvenient of these technicalities. The property of the concern could be put into the hands of a small number of trustees to hold on behalf of all the partners and provision could be made for the transfer of shares without either dissolving the partnership or too obviously contravening the Bubble Act. The unincorporated partnership was thus developed throughout the eighteenth century as a standard form of commercial organization by way of substitute for the joint stock company. In fact many of the standard form of clauses developed by the lawyers for these associations were later to be crystallized in the early companies Acts in the mid - nineteenth century.[21]

As the century progressed, however, and commercial concerns grew larger and more numerous, the prohibitions on claims to corporate status and on the free transferability of shares became more and more inconvenient. The Burble Act (1970) was in consequence

[19]Hadden .T. op cit p. 16 & 17
[20] Ibid p. 17
[21] ibid

increasingly ignored, and full scale companies began to spring up again in the main commercial centres.[22] The attempt to resurrect the Burble Act achieved little. The judges were clearly reluctant to hold that all large unincorporated associations were illegal. The whole operation in fact did little more than highlight the absurdity of the old law. And eventually in 1825, probably as a result of the official embarrassment caused by a sudden spate of new unincorporated floatation's, the Act was repealed.[23] It was now increasingly clear that what was required was a form of corporate organization through which capital could be freely raised for new commercial projects and which would be readily available without prior government sanction. Official authorization of some kind was perhaps necessary for projects such as railway and canal companies, if only to grant the necessary powers of compulsory acquisition and to avoid totally uneconomic competition.[24]

2.2.3 The Companies Act 1844

The immediate motive for a legal legislation on Companies was the desire to control flagrant abuses of the existing system. Both in 1824 – 1825 and in 1834 – 1836 the commercial world was disrupted by periods of intensive activity in company floatations duly followed by large numbers of failures and consequential loss on the part of the less sophiscated investors. Most of the projects were probably genuine, but there was also undoubtedly a good deal of fraud and manipulation of the market.[25]

[22] ibid
[23] ibid
[24] Hadden .T. op cit p. 18
[25] Ibid p. 19

It was in fact a new outbreak of insurance and annuity frauds in the early 1840s which led directly to the appointment of the first comprehensive company law reform committee whose recommendation was directed primarily at producing a system in which frauds and malpractices would be less likely to occur and more easily dealt with when they did. The solution adopted was to provide a simple method of incorporation for all joint stock companies without any form of prior authorization but on terms which would minimize the incidence of malpractice and fraud. Provision was accordingly made in the companies Act of 1844 for the registration and publication of the details of the organization and membership of all newly incorporated companies, so that the public would have a means of knowing with whom they are dealing. Provision was also made for the holding of periodic meetings and the auditing of accounts in order to discourage mismanagement or abuse of trust in the conduct of companies affairs.[26]

2.2.4 The Introduction of Limited Liability

The one remaining issue to be settled was that of limited liability. It seems to have been assumed without formal provision that the liability of shareholders in the earliest chartered companies was limited to the amount of their subscribed contributions, though additional calls could be made in certain circumstances. Then in the Ham borough Company case in 1671,[27] it was finally established that the creditors of the company could look to the shareholders to be limited to the amount subscribed. The larger unincorporated companies in the early nineteenth century often petitioned for special rights in this respect

[26] ibid
[27](1971) 1 CH CAS at 204.

along with the rights to sue and be sued in the name of their trustees. In wholly unincorporated companies on the other hand, all shareholders, or partners were fully liable without limitation for all the debts of the partnership.[28]

The advantages of limited liability were in fact the principal subject of dispute in the mid-nineteenth century discussion on company law.[29]The system for liquidation with full liability for all shareholders which was adopted in 1844 however was soon shown to be virtually unworkable in the aftermath of a number of important failures in the later 1840s. Quite apart from the fact that it was often impossible to ascertain which shareholders would be personally responsible in the event of failure, since many of them were likely to have sold or bought their shares after the main loss had been incurred, the effect of maintaining full personal responsibility for shareholders was thought to discourage men of substance from buying shares in enterprises in which there was any degree of risk .[30]

2.2.5 The Consolidation of Company Law

With the passing of the consolidating companies Act of 1862, the broad structure of company law as we know it was firmly established. Within this framework the courts and text writers have built up an increasingly complex conceptual account of the respective rights and duties of shareholders and directors inside company and their relations with the company's creditors. The legislature has also intervened from time to time primarily to deal with particular abuses which have manifested themselves at various periods and to

[28]Hadden .T. op cit p.20
[29] ibid
[30] Ibid p. 21

increase the ambit and accuracy of statutory disclosure provisions.[31] The most significant of these statutory interventions were the introduction of a new and more effective system of liquidation in the 1880s and of more stringent rules governing prospectus issued by companies seeking to raise money from the public in 1901, the formal separation of public and private companies in 1907 and the prohibition of door to door or postal share - publishing in the 1930s. The principal additions to the disclosure rules were in 1907 when all public companies were required to disclose their annual balance sheets, in 1927 when this was extended to include annual trading accounts and in 1967 when the disclosure of accounts was extended to all companies, large companies were required to give additional information on directors fees, employment, turnover and exports.[32] There has also been progressive tightening of the informal controls exercised by the Stock Exchange over publicly quoted companies notably the administrative vetting of new applications for quotation in the early 1930s and the development of the City Code on Takeovers and Mergers in the late 1960s.[33]

The practical effect of the new corporate structures was thus limited in its initial stages to the narrow range of operations like the railway shipping companies which could probably not have been financed in any other way than through the public market for capital, at least on the scale which was actually attained. And it must not be forgotten that many of the early floatation's were anything but successful and that not a few were

[31] Ibid p.22
[32] Hadden .T. op cit p.22
[33] ibid

unsound or fraudulent from the start.[34] At a later stage however, corporate form did play a part in the increasing concentration of large firms in the leading commercial and industrial spheres, in what may be regarded as the second stage of industrial capitalism. In the 1890s, there was a spate of mergers of large existing mills and factories with a view to increasing their joint market power.[35] In some cases the resulting giant combines were unwieldy associations of relatively independent productive units.[36]

During the twentieth century the trend towards this kind of accumulation or concentration had greatly increased. Established and profitable companies were able to use the revenue which they had generated internally or capital which they were able to raise on the open market by the issue of new shares to buy their smaller competitors. In some cases the companies take over were simply being absorbed by their purchasers, but more often they have been left in existence as wholly owned subsidiaries.[37] A further sophistication which had arisen in the post - war period had been the acquisition of new subsidiaries merely by an increase in the share capital of the purchasing company which was then issued in exchange for the shares of the company being purchased, without any hard cash changing hands at all. The potential for this kind of operation within the framework of the law and the stock market was virtually unlimited.[38]

In theory one might predict the eventual absorption of all existing companies under the umbrella of one massive conglomerate giant by cumulative merger and take-overs.

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[34] Ibid p.23
[35] ibid
[36] ibid
[37] Ibid p. 24
[38] ibid

The combination of further industrial and commercial concentration and of individual profit which the techniques of stock market management and manipulation have made possible has been described as finance capitalism by some commentators.[39]

A second development has been an increasing separation between those who own the shares in large publicly quoted companies and those who control their operations and the allocation of the profit which is generated. Though this separation is inherent in the formal structures of company law with its clearly distinct roles for shareholders as owners and directors as managers, it has developed much further than the entrepreneurial factory masters and company promoters of the nineteenth century would have thought possible.[40] Few of the directors and managers of the largest modern corporations in industry or commerce own more than a tiny proportion of the shares in the companies which they control. Yet management in these companies is a self - perpetrating and increasingly autonomous group. This overall process is generally described as the managerial revolution.[41]

2.3 The Evolution of Company in Nigeria

Trading in Nigeria before the advent of Europeans was restricted to internal trade in rural economy although there were some tran-sahara trade contacts between the North Africa and the Northern parts of Nigeria. With the advent of Europeans, trade assumed an international importance, first with raw materials from Nigeria in exchange for manufactured goods and, secondly, because by the seventeenth century there was a rapid

[39] ibid
[40] Ibid p. 25
[41] ibid

growth in slave trade.[42]Since the establishment of British authority over Nigeria internal and external trade had became strongly entrenched, by European companies and Nigerians. But this development of the economy which started at the turn of the century was interrupted by World War I. There was a partial economic revival in the country after the war followed by the introduction of the Companies Act 1922. The World War II showed the economic importance of Nigeria, not only to the British government, but also to the allied powers to whose war efforts the agricultural produce of the country became of vital importance.[43]

By the end of the war, a comprehensive development programme had been formulated and the Ten-Year Development plan 1945-1955 was launched for the purpose of (a) reorganizing the handling and marketing of agriculture primary produce of the country and the improvement of social, welfare and economic facilities and (b) developing commerce and industry in the country. This led to the setting up during the period of public corporations and boards on the one hand and on the other, the encouragement of private enterprise through the provision of loans for industrial and commercial development.[44] The result of the latter was to create a new sense of awareness of the opportunities for private enterprise in the country.

Because of the obvious lack of individual capital, many people are bound to take advantage of the opportunities offered by the various government loan schemes. The schemes inevitably encouraged trade associations and, in particular, the formation of

[42]Orojo .O. J (1976) Nigerian Company Law and Practice,Sweet & Maxwell, London p. 11
[43] ibid
[44] Ibid p.12

companies since the government and even the banks were interested in ensuring adequate security for their loans and one of the surest ways is to take debenture of not only the fixed but also the floating assets of the company. Since the end of the Second World War and the economic revival, there has been a marked increase in the number of companies registered in Nigeria, a situation which has been accelerated by the rapid economic growth since the early '50s when some political power was conceded to the people and, in particular, since independence in 1960.[45]

With the promulgation of the Nigerian Enterprises Promotion Decree, 1972, a further impetus was given to the formation of companies. The Decree sought to reserve to Nigerians as from April 1, 1974 those areas of economic activity which Nigerians had the capital experience to run effectively while ensuring that in some other areas they were given an opportunity to participate in running the business. The enterprises affected were set out in Schedule 2 of that Decree.

The effect of the Decree was not only to prohibit non-Nigerians from starting certain new businesses after march 31, 1974, but also to compel them to sell to Nigerians not later than that date all their interests in any of the Enterprises included in schedule 1 and also those in Schedule 2 where the paid-up capital does not exceed ₦ 400,000 and the annual turnover does not exceed ₦1 million. Where the paid-up capital exceeds ₦400,000 or the annual turnover exceeds ₦1 million, at least 40 per cent of the interest must be transferred to Nigerians.[46]These non-Nigerian businesses were normally run as companies as the

[45]Orojo .O. J (1976) op cit p. 12
[46]Orojo .O. J (1976) op cit p.13

buyers would of course, wish to run them as such; there was inevitably a rush to incorporate new companies for this purpose. Thus, the Decree, coupled with the boost in the economy owing largely to revenue from oil caused a very sharp rise in the number of incorporated companies.[47]

In the 1980s the move of the government was to liberalize the Nigerian economy to encourage foreign investment in Nigeria. To invest freely foreign investors only needed to comply with the immigration laws and incorporation or investment requirements. The Nigerian Investment Promotion Commission Act[48] was enacted in 1995; this Act established the Nigerian Investment Promotion Commission (NIPC) whose function was to encourage and promote investment in the Nigerian economy and other matters connected. This Act removed all the limitations against alien participation and provides for registration with the Nigerian Investment Promotion Commission. From the 1990s to now the Nigerian economy is liberal enabling investors to come in and invest freely without the bottlenecks experienced in the past.

The trend now, is for a company to operate from one country to another. A company registered in another country can come into Nigeria and operate here on complying with our laws relating to foreign companies. The twenty first century company has grown tremendously into an institution of its own, with branches in most countries of the world, with capital much more than the Gross Domestic Products (GDP) of some countries, capable of affecting economies of nations by their activities negatively or

[47] ibid
[48] Cap. N1, LFN 2004

positively. With globalization, companies have broken all boundaries and barriers and operate from one country to another.

Corporations have ceased to be merely legal devices through which the private business transactions of individuals may be carried on. Though much used for this purpose, the corporate form has acquired a larger significance. The corporation has, in fact, become both a method of property tenure and a means of organizing economic life. Grown to tremendous proportion, there may be said to evolve a "corporate system" as there was once a feudal system which had attracted to itself a combination of attributes and powers, and had attained a degree of prominence entitling it to be dealt with as a major social institution.[49]

2.4 The Capital Market

A capital market is the financial market where "long term securities are bought and sold[50]. A capital market is a financial market for long-term maturity financial assets such as government bonds, corporate bonds and equity, unlike the money market which functions to provide short-term funds. It is a network of financial institutions that in various ways brings together suppliers and users of capital, facilitating the issuance of secondary and long-term.[51]The capital market exists largely to deal with the securities of companies and therefore, is an important and, in modern economies, a crucial tool for national economic development.[52] Every economy in the world targets optimal resources channelization for

[49]Berle A.A and Means G.C (1963) The modern corporation and private property, the Macmillan Nineteenth printing company New York p.1
[50] Black's Law Dictionary, 6th Edition, page.209
[51]Orojo J. O. (2006) Company law and Practice in Nigeria, LexisNexis, Butterworths 5th Edition. P.361
[52] ibid

growth. Finance is the key to investment and hence the growth. Efficient financial systems help countries to grow partly by mobilizing additional financial systems resources to best uses. As countries develop, so must the financial system serve them. There is therefore a two relationship between a well functioning economy and a well functioning financial system.[53]

The financial system is served by two sub-sectors, the money market sub-sector and the capital market sub-sector. These are also called the financial market because of the nature of the financial services rendered. The money market provides facilities for raising short term funds and regulated mainly by the provisions of the Central Bank Act,[54]and the bank and other financial institutions Act.[55] The capital market on the other hand provides facilities for raising medium and long-term funds. Since fundamental developments are long- term in nature, the capital market occupies a place of pride in all economies of the world. In its nature, the capital market is a complex of institutions and mechanism through which intermediate and long- term funds are pooled and made available to business and government.[56]

Functionally, the market in any economy develops at the behest of two major imperatives. Firstly, the expansion of industries and commerce, and the increasing social responsibilities of government necessitated discovery of new sources of funds outside the

[53]Agom, A. R (2002).A History of the Nigerian Capital Market Regulation in Nigeria. A.B.U Journal of Commercial Law vol 1, September,
[54] No. 29 of 2007
[55] Cap. B3 LFN 2004
[56] ibid

commercial banking sector; secondly, it enables the liquidation of securities.[57]The Nigerian capital market is segmented into primary, which provides a vehicle for government and corporate entities to raise fresh capital (funds) through the issuance of new securities and the secondary market known as the vehicle for providing liquidity to investors' after the initial raising of capital was made in the primary market.[58] The secondary market transactions are done on the stock exchange and over the counter.

2.5 The Stock Exchange

A Stock Exchange is an organized market for buying and selling financial instruments known as securities, which include stocks, bonds, options, and futures. Most stock exchanges have specific locations where the trades are completed. The Investment and Securities Act[59]does not define a stock exchange but it is included in the term "securities exchange."In practice, however a stock exchange is a market for the sale and purchase of securities.[60] Stock Exchange business in Nigeria started in 1960 with the Establishment of the Lagos Stock Exchange which was incorporated in September, 1960 as a private Company limited by guarantee but having a share capital and permitted under Section 20 of the Companies Act[61]to dispense with the use if the word "Limited" as the last word in its name. It started with an authorized share capital of five thousand pounds. In

[57]Ajayi, O.(1984) Financial and Legal Implications of the Nigerian Capital Market Regulation in Nigeria. (Evans Brothers) Ibadan, p.26
[58] ibid
[59] No. 29 of 2007
[60]Orojo J.O.(2006) Company Law and Practice in Nigeria, LexiNexis, Butterworths ,Page. 370
[61] Cap 17, L. F. N 1958 Edition

1961, the Lagos Stock Exchange Act was enacted. Section 3 of the Act provided as follows:

"… the business of stock broking in Nigeria in relation to stocks, shares, and other securities for the time being granted a quotation by the exchange shall be undertaken only by members of the exchange."

The Lagos Stock Exchange was transformed into the Nigerian Stock in December, 1977 following the recommendations in the report of the Okigbo Committee. The Stock Exchange established branches in Port Harcourt, 1979, Kaduna, 1978, Kano, 1989, Onitsha, 1990 and Yola, 2002.[62]

The Lagos Stock Exchange Act however continued to exist on the statute books and was only repealed in 1999 by Section 263 of the investment and Securities Act, 1999.[63] In addition to the above branches, a separate Abuja Stock Exchange was incorporated as a public liability company on June 17, 1998.[64]For the stock of a company to be traded at these exchanges, it must be listed, and to be listed, the company must satisfy certain requirements. But not all stocks are bought and sold at a specific site. Such stocks are referred to as unlisted. Many of these stocks are traded over the counter that is, by telephone or by computer**.**[65]

Stock exchange transactions involve the activities of brokers and dealers. These individuals facilitate the buying and selling of financial assets. Brokers execute trades on behalf of clients and receive commissions and fees in exchange for matching buyers and

[62] Orojo J.O. Op cit P 371
[63] Cap 24 L. F. N, 2004
[64]Orojo J.O. Op cit P. 371
[65]Bonello, Frank J.(2009) "Stock Exchange." Microsoft® Encarta® [DVD]. Redmond, WA ```Microsoft Corporation, 2008.

sellers. Dealers, on the other hand, buy and sell from their own collection (inventories of securities). Dealers earn income by selling a financial instrument at a price that is greater than the price the dealer paid for the instrument. Some exchange participants perform both roles. These dealer-brokers sometimes act purely as a client's agent and at other times buy and sell from their own inventory of financial assets. Stock exchanges perform important roles in national economies. Most importantly, they encourage investment by providing places for buyers and sellers to trade securities. This investment, in turn, enables corporations to obtain funds to expand their businesses.[66]

Corporations issue new securities in what is known as the primary market, usually with the help of investment bankers. The investment bank acquires the initial issue of the new securities from the corporation at a negotiated price and then makes the securities available for its clients and other investors' in an initial public offering (IPO). In this primary market, corporations receive the proceeds of security sales. After this initial offering the securities are bought and sold in the secondary market. The corporation is not usually involved in the trading of its stock in the secondary market. Stock exchanges essentially function as secondary markets. By providing investors the opportunity to trade financial instruments, the stock exchanges support the performance of the primary markets. This arrangement makes it easier for corporations to raise the funds that they need to build and expand their businesses. Although corporations do not directly benefit from secondary market transactions, the managers of a corporation closely monitor the price of the corporation's stock in secondary markets. One reason for this concern involves the cost of

[66] ibid

raising new funds for further business expansion. The price of a company's stock in the secondary market influences the amount of funds that can be raised by issuing additional stock in the primary market.[67]

Corporate managers also pay attention to the price of the company's stock in secondary markets because it affects the financial wealth of the corporation's owners (the stockholders). If the price of the stock rises, then the stockholders become wealthier. This is likely to make them happy with the company's management.

Stock exchanges encourage investment by providing this secondary market. Stock exchanges also encourage investment in other ways. They protect investors by upholding rules and regulations that ensure buyers will be treated fairly.[68]

The importance of the capital market to the company and an economy as a whole cannot be over emphasized, Public companies deal with shares the amount of interest of an investor in a company is measured by stocks which can be traded at the stock exchange because of the delicate nature of merchandise dealt with in these market there is likelihood of abuses and fraud in the market which has to be checked by the relevant regulatory bodies set up to provide rules and protect investors'. Also managers of the Company can mismanage company funds and give false Account statements thereby misleading innocent and unsuspecting investors who end up bearing the loss. This made it necessary that Statutory and regulatory bodies be set up to protect investment and ensure compliance with laid down laws.

[67]Bonello, Frank J.(2009) "Stock Exchange." Microsoft® Encarta® [DVD]. Redmond, WA:1 ```Microsoft Corporation, 2008.
[68] bid

An example of such mismanagement is the scandal that took place in the Enron company which came to light between 2001 to 2006 in the United States of America. In the Month of July 2002, there was a reported biggest accounting fraud in the United States history. The chief financial officer of the World Cum, Scott Sullivan was accused to have boosted the company's profit artificially by $3.8 billion to help the company sustain its apparently smooth and rapid earnings growth and a rising share price.[69]

Here in Nigeria we have similar scandals, an example is that of Nestle Plc that came to light in 2002, In the case of **CSCS & 1Or vs. Bunkolans investments Ltd & 5 Ors**. [70] it was discovered that some share certificates including 3,130,469 units of Nestle Plc shares were deposited into the 1st Applicant's depository, cleared and sold. Upon this discovery, the 1st Applicant alerted the 2nd Applicant who then carried out an in-house inquiry into the incident at the end of which it was discovered that the 1st Respondent through the 2nd Respondent was responsible for the fraudulent sale of the shares. As soon as the house that initiated and executed the fraud was ascertained, the matter was reporte3d to the police following which, those suspected to be connected with the fraud were arrested. The 2nd Respondent however absconded. The case was reported to the 4th Respondent who invited the 1st Applicant and others found to be involved in the fraudulent sale of the shares. At the APC, it was further found out that the fraud was able to scale through the 1st Applicant's framework because of the collusion from the staff of the 1st Applicant who fraudulently introduced those shares into the CSCS system by entering them into its

[69] Business day, (2002):**World Com** Whiz **Kid:** p.4.

[70] (2007) Nigerian Investment and Securities Law Reports page 95 pt 98. See also A. G. Olisaemeka vs. Securities and exchange Commission(2007) Nigerian Investment and Securities Law Reports page 177 pt 178 and Beta Consortium Ltd v. S.E.C(2007) Nigerian Investment and Securities Law Reports page 35

depository. At the APC, it was held among others that the chief executive principal officers neglected/failed to effectively exercise due care and supervision over the activities and staff of the company which facilitated the introduction of the forged certificates into the Central Securities Clearing System. And that the Central Securities Clearing System and UBN Registrars having been found to be primarily liable shall jointly restore the affected investors to their original position before the scam in respect of the Nestle shares.

In the case of Oceanic Bank former group managing director, Cecilia Ibru, was alleged to have given out depositors' funds worth over ₦150 billion as loan to friends and relatives without collateral; including her nanny who got ₦13 billion loan to carter for personal needs.[71]

[71]Kayode .I.why the rising business failure in Nigeria? FinIntell: The Doing Business Magazine.

CHAPTER THREE

INVESTORS' PROTECTION IN NIGERIA

3.1 Introduction

With property gathered under the corporate system, and control increasingly concentrated, the power of control in the corporate system has steadily widened. Briefly, the past century has seen the corporate mechanism evolve from an arrangement under which an association of owners controlled their property on terms closely supervised by the state to an arrangement by which many men have delivered contributions of capital into the hands of a centralized control.[1]

Those in control of the affairs of the company can use such powers and information about the company to their advantage and to the disadvantage of the investors'. The corporate stockholder (investor) has certain well defined interest in the operation of the company, in the distribution of the income, and in the public securities market.[2] In general it is to his interest that, the company should be made to earn the maximum profit compatible with a reasonable degree of risk; second that as large a proportion of these profits should be distributed as the best interest of the business permits, and that nothing should happen to impair his right to receive his equitable share of those profits which are distributed; and finally, that his stock should remain freely marketable at a fair price.[3]Joint stock company from time, to time has proven to be a viable means of trading where individual trading would not have been possible. Since it is very lucrative, it quite naturally

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[1] Sealy .L.S.(1984) Company Law and Commercial Reality, sweet &maxwel ltd. Great Britian p. 127
[2] Ibid p. 121
ibid

brought in its wake exploitation, perpetrated by promoters and officers of companies who are ready to use it as a means of amassing wealth at the expense of the unsuspecting public.[4] It is one area where the law should be commended for responding to check the abuses and excesses inherent in its operations. One of such law is the Companies and Allied matters Act 1990[5] which has made provisions to that effect.

3.2 The Companies and Allied Matters Act 1990 (CAMA).

The Companies and Allied Matters Act 1990,[6]is a legislation regulating the formation and conduct of the affairs of companies and related institutions in Nigeria.[7]The companies and Allied Matters Act,[8] is divided into three parts. Part A deals with companies, part B is on business names and part C covers Incorporated Trustees. One very important highlight of this Act is the establishment of the Corporate Affairs Commission. Sections 1(1) & 2[9] established the Corporate and Affairs Commission as a body Corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and capable of acquiring, holding or disposing of any property moveable or

[4]Sofoora .M. O.(1992) Modern Nigerian Company Law, Christiana type house ltd 13 moshalashi st.shomolu& 8, Awosenyist.Shomolu, Lagos, Nigeria.p.5

[5] Cap C20 L.F.N 2004.

[6] Ibid.

[7]The Act is based on the draft Decree prepared by the Nigerian Law Reform Commission in an effort to reform the Companies Act of 1968, which could no longer keep pace with the tremendous industrial and commercial development engendered by the sudden boom of petroleum oil wealth between 1970-1979. In order to ensure wide acceptance of the draft Decree by all sections of the society intimately involved with Company matters, the Attorney- General of the Federation and the Minister of Justice set up a body called Consultative Assembly on the drafts Company Decree which retouched the draft Decree before it was promulgated into Law on the 2nd January 1990 as its commencement date. Unfortunately, the machinery for implementation of the Decree could not be established in time and the date for commencement of the Decree had to be changed to 31st December 1990. Meanwhile the Decree has been amended by the Companies and Allied Matters Act (Amendment) Decree No. 32 of 1990, No. 46 of 1991 and No. 40 of 1992. Part XVII- Dealings in Securities was transferred to the Investments and Securities Act, 1999.

[8] Cap C20 L.F.N 2004

[9] Ibid.

immovable for the purpose of carrying out its functions. The headquarters of the Commission is located at Abuja with branch offices to be established in each state of the Federation. The Commission is empowered to enforce the provisions of the Companies and Allied Matters Act,[10] and to supervise the activities of companies and other registered businesses in Nigeria. This Act has made provisions for the incorporation, management and the winding up of companies in Nigeria which is aimed at providing investors protection and a friendly environment.

3.2.1 Division of Corporate Powers

The Companies and Allied Matters Act has also made provision on the division of powers of a company which is an attempt to distribute powers among the company members and the directors of the company and to enable all parties participate in the running of the affairs of the company. Section **63(1)** of the Act provides thus:

"A Company shall act through its members in general meeting, or its board of directors, or through officers or agents, appointed by, or under authority derived from the members in the general meeting, or the board of directors".

The division of powers in a company is very important to investors' protection as it determines the role of each organ and guards against conflict as to the management and decision making in the company. This provision seems to be an attempt by the law to provide division of powers between those in control of the company and the investors' (the general meeting) to forestall any conflict of interest and enable the investors have a say in

[10] Cap C 20 L.F.N 2004

the decisions of the company. The obvious intention is to avoid a situation of one side taking control of the company and the relegation of the other party to the background. But this has remained a mere academic exercise as the affairs of the company are controlled by the directors in the company. Even the conduct of the activities of the general meeting is done by the board of directors thereby controlling the outcome of the general meeting. Section 63(4) states that:

" Unless the articles shall otherwise provide the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in the general meeting: provided the directors acted in good faith and with due diligence."

With this provision, the directors can still go ahead to act on a decision even if the shareholders don't agree as long as the directors are acting within their powers and in "good faith." Decisions of company taken in a company's general meeting is done by way of majority votes, one can go to a company and discover that a few persons even directors are the majority shareholders, in this case the other shareholders are left powerless. This no doubt is a serious blow to investor's protection. Unless shareholders are unified and active in the governance of the company, this distribution of powers will be of very little use to them as protection device.

3.2.2 Investigation of Company's Affairs

Another very important shield to investors' is the provisions on Investigation of the company by the Corporate Affairs Commission as provided by Companies and Allied

Matters Act.[11]As part of the scheme to ensure proper administration and management of the company, provisions are made for the investigation of the affairs. Sections 314 to 320 provided for the circumstances under which inspectors may be appointed, their powers, procedure and report. Inspectors may be appointed to investigate a company in the following circumstances suggesting that:[12]

a) The company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some parts of its members; or
b) Any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose or;
c) Persons concerned with the company's formation or the management of its affairs have a connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members ; or
d) The company's members have not been given all the information with respect to its affairs which they might reasonably expect.

The background for the appointment of inspectors under Section 165[13]was given in **Northwest V. Secretary of State for Trade[14]** where Lord Denning observed, inter alia:

> It is important to know the background of the legislation. It sometimes happens that public Companies are conducted in a

[11] Companies and Allied Matters Act, Cap C 20 L.F.N 2004
[12] Section 314(2)a-d Companies and Allied Matters Act cap C20 LFN 2004
[13] 0f the United Kingdom Companies Act, 1948 On which Section 167 of the Companies Act, 1968 and Section 314 of the 1990 Act were based.
[14](1978) 3 ALL ER, 280.

> way that is beyond the control of the ordinary shareholders. The majority of the shares are in the hands of two or three individuals. These have control of the Company's affairs. The other shareholders know little and are told little.They receive the glossy annual reports. Most of them throwthem into wastepaper basket. There is annual general meeting but few of the shareholders attend. The whole management and control is in the hands of the directors. They are as self-perpetuating oligarchy; and are virtually unaccountable.Seeing that the directors are the guardians of the Company,The question is asked: quis custudiet ipsos custodes? Who will guard the guards themselves?"After referring to what happened in **Wallersteiner V. Moir**[15],

he continued:

"It is because companies are beyond the reach of the ordinary Individuals that this legislation has been passed so as to enable the Department of Trade to appoint inspectors to investigate the affairs of the company."[16] With regard to complaints which are often made against such enquiry, His lordship observed:[17]

> We do know that, when these inquiries are held, these persons who are subject to them complain about them. They say that the machinery operates unfairly against them. Such complaints are usually unfounded. They are made so as to delay the inquiry or lessen the effects of the report of the inspectors. But whether well founded or unfounded, it is no reason for abandoning this machinery. It is the only means given to the public by which the conduct of companies can be investigated. Parliament has clearly enacted that there should be power under the control of the Board of Trade, on behalf of the public at large, for an inquiry to be made into the conduct of the affairs of the company if there are circumstances which appear to the Secretary of State to suggest 'fraud, misfeasance or the misconduct.' I do not think

[15] (1974)3 ALL ER 217 at 241
[16] Ibid at page 292
[17] Ibid at page 293

> we should encourage or suggest any attempt to delay or hold up the inquiry.

It is only necessary to add that the protection is even more necessary and justified in a largely illiterate society like Nigeria.[18] All the reasons for the investigation as provided by these English cases are no different from the situation here in Nigeria where the majority can just be a few people in the company, and in control of the company. With shareholders reluctance to attend meetings as a result of long distance to the venue, late receipt of notice or nonchalant attitude of some Nigerians, this makes the power of investigation very important in order to protect investors who don't know their rights or are ignorant concerning company management.

The affairs of a company can be investigated by an inspector appointed by the Commission. No specific qualification is required for appointment provided the appointee is generally competent. This is a short coming of CAMA. As it stands it means anybody can be appointed as an inspector even if ignorant of company law or accounting. As long as the Commission considers the investigator competent he can then be appointed. This subjective standard may work against investors' protection as a shoddy investigation may not reveal the wrong doing by clever directors resorting to complex legal and accounting schemes to hide their wrongs.

[18] OROJO .O. J (2006) Nigerian Company Law and Practice,LexisNexis, Butterworths, 5th Edition p. 221

Section 314(1) provides that the Commission may appoint one or more competent Inspectors to investigate the affairs of a company and to report to them in such manner as it may direct. The appointment may maybe made by the Commission-

(a) On the application of the company and its members;

(b) On the declaration of the Court that a company be investigated; and

(c) On the Commission's own motion.

Each of this instances where investigation of the affairs of a company can be made will now be considered in more details

(a) **On Application Of the Company Or Its Members**

In the case of a company having a share capital, the application may be made by members holding not less than one-quarter of the class of shares issued,[19]and in the case of a company not having a share capital, by not less than one-quarter in number of the persons on the company's register of members.[20]

Paragraph (c) of Section 314(2) provides that in any other case, the application may be made by the Company.

(b) **Under the Order of Court**

The Commission must appoint an inspector to investigate the affairs of a company if the Court by order declares that its affairs ought to be so investigated. An application for such an order may presumably be made during an action or as a substantive action, and the court may in its discretionary jurisdiction make such an order. The order for investigation

[19] Section 314(2)(b), Companies and Allied Matters Act, cap C 20 L.F.N 2004
[20] Ibid Section 312(2)(g)

is one of those which the Court may make if it is satisfied that an application for relief on the grounds that the affairs are being conducted in an illegal or oppressive manner is well founded[21].

At common law, the court has discretion as to when to make an appointment in the interest of the good management of the company and on the shareholders. An example of such circumstances occurred in **Otong** v. **Mogal Nigeria Ltd**[22]where it was alleged that annual reports had never been filed, the Company had not been paying tax since its incorporation in 1972, had been run illegally, had not filed any annual returns, had never held annual general meetings and kept no minutes of any meetings and no books of account. In that case, the court had no hesitation in directing the registrar to appoint inspectors "for the thorough investigation of the affairs" of the company.[23]

(c) **On The Commission's Own Motion**

The Commission may appoint an inspector to investigate the affairs of a Company if it appears to it that there are circumstances suggesting any of the following.[24]

(a) That the Company's Affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person or in a manner which is unfairly prejudicial to some part of its members; or

(b) That any actual or proposed act or omission of the Company (including an act or omission on its behalf) is or would be so prejudicial, or that the Company was formed for any fraudulent purpose; or

[21] Section 312(2)(g)
[22](1978) FRCR. 80.
[23] Orojo .O.J Op cit. page 222
[24] Section 315(2) Companies and Allied Matters Act, cap C20 L.F.N 2004.

(c) That persons concerned with the company's formation or management of its affairs have, in connection with it, been guilty of fraud, misfeasance or other misconduct towards its members; or

(d) That the company members have not been given all the information with respect to its affairs which they might reasonably expect. The members include the personal representative of deceased member and any person to whom shares have been transferred or transmitted by operation of law.

Where it appears to the Corporate Affairs Commission that there is good reason to investigate the membership of a company, it may appoint one or more competent inspectors to investigate and report on the membership of the company for the purpose of determining the true persons who are or have been financially interested in the success or failure of the company or able to control or materially to influence the policy of the company.[25]

Investigation is a very powerful tool that if used frequently by the Corporate Affairs Commission will drastically reduce the cases of incessant collapse of companies in Nigeria because in the process, all the fraud, abuse of Code of Corporate Governance will be uncovered and addressed before it spirals out of control. Most times it is after a company collapses that stories begin to come out on how the company's funds were mismanaged and embezzled by the management of the company.

[25] Section 326 (1) Companies and Allied Matters Act,Cap.C20 LFN 2004.

3.2.3 Disclosure

Disclosure is the requirement for an individual or a company to reveal factual information to the public or an entity, pursuant to disclosure laws, individuals or companies may be compelled to divulge what was previously considered private information. The amount of information that a company is required to disclose depends on whether it is a private or public company. Public companies are usually required to provide more information than private companies. Smaller, privately owned companies may, however, be subject to additional disclosure regulations if they sell shares to investors' in order to raise capital.

Disclosure laws are designed to protect investors through the disclosure of business and financial information that could be considered relevant to making investment decision. Since private companies do not raise money from the investing public, they are not subject to the same disclosure laws as public companies. Investors' in private companies are considered to be sufficiently well informed about their investment decisions so are not to require protection by disclosure laws.

Disclosure under the Companies and Allied Matters Act (CAMA)

The Companies and Allied Matters Act 1[26]made elaborate provisions on disclosure of some information regarding the company and its management.

Sections 548 of the Companies and Allied Matters Act[27] provides thus;

(1) Every company, after incorporation shall;

[26] Cap C20 LFN 2004.
[27] ibid

(a) Paint or affix, and keep painted or affixed its name and registration number on the outside position, in letters easily legible;

(b) have its name engraved in legible characters on its seals, and

(c) have its name and registration number mentioned in legible characters in all business letters of the company and in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills or parcels, invoices, receipts, and letters of credit of the company.

This provision is a move by CAMA to mandate companies to reveal their true name and identity. This disclosure requirement is a spirited effort to ensure the authenticity of correspondence by genuine companies and, as much as possible, to check the activities of fake and non-existing companies. Failure to disclose this information's attract both criminal and civil consequences on the part of the company and on the part of an officer of the company. In addition, the law requires companies to display their certificate of incorporation in conspicuous positions at their principal place of business and branch offices. This is to ensure that the company is duly registered and by displaying the certificate of registration, anybody that walks into the company is guaranteed that the company is registered.

Section 95 (1) of the Companies and Allied Matters Act[28] provides thus;

[28] ibid

"A person who is a substantial shareholder in a public company shall give notice in writing to the company stating his name and address and give full particulars of the shares held by him or his nominee naming the nominee by virtue of which he is a substantial shareholder."

This section mandates a majority shareholder to disclose certain fact and information which will enable any shareholder and prospective investor to be aware of those who are the majority shareholders, in practice majority shareholders are most times in control of decision making when it comes to voting rights. Through such disclosure, a prospective investor is informed and gets to know who are likely or actually in control of decision making and make informed decision.

Section 275 (1)[29] also provides that;

"Every company shall keep a register showing as respect each director of the company (not being its holding company) the number, description and amount any shares or debentures of the company, or any other body corporate being the company's subsidiary or holding company, which is held by or in trust for him or of which he has any right to become the holder or of which he has any right to become the holder (whether on payment or not)"

This provision makes it mandatory for every company director to disclose the number, description and amount of shares or debentures they hold the company. As a shareholder, a director takes part in the decision making and can control the company as a majority shareholder and as a debenture holder the company is indebted to him and he is a

[29] ibid

creditor of the company. This informs a prospective investor so as to make an informed decision. The Companies and Allied Matters Act,[30]also made an elaborate provision on the keeping and publication of proper accounts to encourage accountability and diligent management of company finances.

3.2.3(a) Company Accounts

Compulsory disclosure of company account which the law mandates is a method of providing information about companies to prospective investors both within and outside companies.[31]In England it was not until 1908 when companies were compelled to publish their balance sheets. In 1929, they were compelled to circulate the profit and loss account to their members. In 1948, the law made a serious attempt to stipulate how balance sheets and profit and loss account were to be prepared while the companies Act of 1967 made available the documents to the public for inspection in respect of all limited companies.[32]In Nigeria, the first time a comparative broad provision was made vis-à-vis the keeping of accounting records by companies was in the companies Act of 1968.[33] However, Companies and Allied Matters Act[34] provision on companies' audit and accounts is more elaborate. The importance of keeping accounting records by companies cannot be over emphasized. If the records are well kept according to the provisions of the Law, fraud, misrepresentation, mismanagement and conspiratorial attitudes usually associated with

[30] ibid
[31]Olusoga O. (2000) Company Law and Practice, Modern Practice Journal of Finance And Investment Law. vol.4 P.273
[32] ibid
[33] ibid
[34] Cap C 20 L. F. N 2004

companies' finances will no doubt be widely curtailed.[35] This will in turn create public confidence in corporate management and finance and thus give investors' a lot of confidence whenever they want to invest in companies.[36]

Account is a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relationship[37]. Account is defined as a precise list or enumeration of monetary transaction, a business relationship involving the exchange of money or credit[38]. According to Section 331(1) of the CAMA,[39] it is mandatory on the part of every company to keep accounting records which shall be kept at the registered office or other place in Nigeria as the directors think. The records shall at all times be opened to inspection by the officers of the company and shall:

a. Contain daily entries of the sum of money received and expended by the company, and matters in respect of which the receipt and expenditure takes place.[40]
b. Contain a record of the assets and liabilities of the company.[41]

If the business of the company involves dealing in goods, the accounting records must contain:

i. Statement of stock on yearly basis and stocktaking's and:
ii. Except retail goods, statement of all goods sold and purchased, showing the goods and the buyer and seller in sufficient detail.[42]

[35]Olusoga O. OP cit P 274
[36] Ibid.
[37] Black's Law Dictionary (1979) 5th edition, West publishing Co.st.Paul Minn at Page 17.
[38] American Heritage Dictionary of the English language, New College Edition, Houghton muffin Company, Boston, 1982 at Page 9.
[39] Cap C20 L. F. N 2004
[40] Section 331(3)(a) CAMA Cap C20 L. F. N 2004.
[41] Section 331(3)(b) ibid

Section 331(2) and 331(3) of the Act,[43] state that the accounting records must be sufficient to show the company's transaction and disclose with reasonable precision or accuracy the financial position of the company.

The above provision definitely will be meaningless if adequate provision is not made by the law for a strict compliance under Section 333.[44] Failure to comply with Section 331 and 332[45] attracts punishment.[46] Every officer of the company who is in default shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding 6 months or to a fine of ₦ 500 unless he shows that he acted honestly and that the default was excusable given circumstances in which the company's business was conducted.[47]

The provision of account keeping by a company is meant to reveal the financial standing of the company, through that the financial position of the company can be seen to determine its solvency or otherwise.

In addition to the provision above, The Act further stipulates how the accounting records will be by the company in question. They are to be kept in the various types of books like the profit and loss account and balance sheet.[48]

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[42] Section 331(4)(a) ibid
[43] CAMA
[44] ibid
[45] ibid
[46] Olusoga. O. Op cit
[47] CAMA ibid.
[48] Olusoga. O. Ops cit

3.2.3.(b) Financial Statement

After the accounting records have been kept, Section 334(1)[49] enjoins the directors of every company to prepare financial statements for each year of the company. A financial statement (or financial report) is a formal record of the financial activities of a business, person, or other entity. Relevant financial information is presented in a structured manner and in a form easy to understand. They typically include basic financial statements accompanied by a management discussion and analysis.

The financial statement shall include:

(a) A statement of accounting policies,

(b) A balance sheet as at the last day of the year,

(c) Profit and loss account or in the case of a company not trading for profit, an income and expenditure account for the year,

(d) Notes on the account,

(e) The auditors' report,

(f) The directors' report'

(g) a statement of the source and application of funds,

(h) a value added statement of the year,

(i) a five year financial summary, and

(j) in the case of holding company, the group financial statement.

[49]CAMA, ibid.

However, a private company is excluded from complying with paragraph (a), (g), (h), and (i).[50]After the expiration of the financial statement, the directors of the company must fix a particular day in each year when the statement will be laid before the company in a general meeting in relation to every year.[51] This should be done not later than eighteen months after incorporation. Subsequent discussion on the statement must occur at least in every year on a date not exceeding nine months prior to the date of the meeting.[52]

The objective of financial statements is to provide information about the financial position, performance and changes in financial position of an enterprise that is useful to a wide range of users making economic decisions. Financial statements should be understandable, relevant, reliable and comparable. Reported assets, liabilities, equity, income and expenses are directly related to an organization's financial position. Financial statements are intended to be understandable by readers who have reasonable knowledge of business, economic activities and accounting and who are willing to study the information diligently. A copy of the company's financial statement for a year, shall not be circulated less than 21 days before the date of the meeting at which they are to be presented be sent to each of the following people:

(a) every member of the company (whether or not entitled to receive notices of general meetings) and,

(b) all persons other than members and debenture holders being persons so entitled,

[50] Section 334(3) CAMA ibid
[51] Section 334(4) CAMA ibid
[52] Section 345(1) ibid

A company owes no obligation in relation to sending copies of the financial statement to any member or debenture holder who is not entitled to receive notices of general meeting and of whose address the company is unaware nor to more than one joint holder of any share or debenture none of whom are entitled to receive notices of general meeting.[53]According to Section 344(4),[54]a company that does not have a share capital need not send copies of the financial statement to a member of the company or debenture holder who is not entitled to receive notices of general meeting of the company. Non compliance with Section 344(1)[55] renders the company and every officer of it who defaults is guilty of an offence and so liable to a fine of ₦250.As soon as a person becomes a member of a company, he should be furnished on demand and at no cost with a copy of the company's last financial statements. It is immaterial that the person is not so entitled under existing rules. If any default is made in complying with the above provision within 7 days after the demand is made, the defaulter is liable to a daily fine of ₦100.00.[56]

Section 332(2)[57] requires a company to preserve its accounting records for a period of six years subject to any directive which may be given when the company is being wound up. Any officer of a company who fails to comply with this provision shall be guilty of an offence and shall be liable to imprisonment for a period of not exceeding 6 months or to a fine of ₦500. However, liability will be excluded if it can be proved by the officer

[53] Section 344(1) – (4) ibid
[54] ibid
[55] ibid
[56] Section 394(1) and(2) ibid
[57] ibid

concerned that he acted honestly and that in the circumstances in which the business was carried out, the default was excusable.[58]

3.2.3(c) Form and Content of Individual Financial Statements

The financial statement of a company is likened to its bill of health. Section 334(1) of the Companies and Allied Matters Act,[59]mandates the directors to every company to prepare financial statements in relation to every year of the company. While it is true, that the form and content of individual financial statement and group financial statement are almost the same, yet the distinction exists in the sense that the later statement contains a more elaborate information than the former.[60]

Apart from complying with the requirements of schedule 2 of CAMA[61](as far as applicable) in relation to their form and content, this type of financial statement must also comply with the provision of the Accounting standard Board.[62] The board which was set up in 1982 was established to provide guidelines for the preparation and use of the company's financial statements.[63] The board consists of representatives from the Central Bank of Nigeria, the Federal Ministry of Finance, Nigerian Institute of Chartered Accountants of Nigeria, among others.[64] According to part 1 of the Schedule, the financial statements must disclose all accounting information that will assist to assess profitability, viability and

[58] Sections 333(1) and (3) ibid
[59] Cap C20 L.F.N 2004
[60]Olusoga. O. Op cit Page 277
[61] Cap C20 L.F.N 2004
[62] See Section335 Companies and Allied Matters Act ibid
[63] ibid
[64]Olusoga. O Op cit Ibid Page 277

financial liquidity of the company. It further states that this information should be presented logically, clearly and in a manner that will be understandable.[65]

The same schedule states that the following shall be the content of a financial statement:

(a) The name of the company,

(b) The period of time covered,

(c) A brief description of its activities,

(d) Its legal form,

(e) Its relationship with its overseas suppliers (if any) including immediate and ultimate parent, associated or affiliated company,

(f) Statement of accounting policies,

(g) Balance sheet,

(h) Profit and loss account or income statement,

(i) Notes on the account,

(j) Statement of source and application of funds,

(k) Value added statement,

(l) Five year financial summary

We now turn to the examination of the contents of the financial statement;

a) The Name of the Company

The registered name of the company is expected to be written in full on the financial statement of the company. At a glance, a person should be able to know the company the

[65] Ibid Page 278

financial statement belongs to, which guarantees its genuineness and the fact that the persons responsible for the financial statement are open about the management of the company's resources.

b) The Period of Time Covered

A company's financial statement is expected to indicate the period of time it covered. It is expected to state the specific months or year it was meant to cover.

c) A Brief Description of its Activities

A financial statement should give a brief description of the company's activities. This states the company's cash flow activities and its operating, investing and financing activities.

d) Its Legal Form

The financial statement must disclose the legal form of the company. In the case of a public company, it is to be indicated if it is a public company limited by shares or unlimited. And if it is any other form of company the type should also be disclosed.

e) Its Relationship with its Overseas Suppliers (If Any) Including Immediate and Ultimate Parent, Associated Or Affiliated Company

If any of these relationships exists, a company is expected to disclose this fact in its financial statement. This information is very vital even for investors' protection because the good will of a company can rub off on any company that has such a relationship with the company and so does the bad image of a company. Since the essence of the financial statement is disclosure, it is very important that such relationships be revealed.

f) Accounting Policies

This states the accounting policies that were used to prepare the financial statement, it maybe alternative accounting rules[66]or historical accounting. Companies must describe the accounting policies they use in preparing financial statements. Companies have a choice of accounting policies in many areas such as foreign currencies, goodwill, pensions, sales and stocks. As different accounting policies will result in different figures, it is necessary to state the policy that was used so that the readers of the accounts can make an informed judgement about performance. It is also important to state the effect of any changes in accounting policies restating prior year numbers where this is materially significant.

g) The Balance Sheet

A balance sheet also referred to as "statement of financial position" reports on a company's assets and liabilities and ownership equity at a given point in time. The balance sheet should give true and fair view of the company's statement of affairs as at the end of the year.[67] The balance sheet of affairs of a company at any point in time states the assets and liabilities of a company at the end of a financial year. One important aspect of the balance sheet is that it shows the liquid position of a company by stating the assets that are immediately or readily available to meet claims upon it. It also prevents problem emanating from the cash flow.[68] Some of the other information that should be contained in a balance sheet is loan capital, fixed assets, reserves, share capital, current assets,

[66] See part 2 of schedule 2 of CAMA ibid
[67] See Section 335(20 CAMA ibid
[68]Olusoga O. Op cit Page 279.

investments, working capital and current liabilities.[69] The Companies and Allied Matters Act,[70] requires that the balance sheet of a company, including every copy produced from it, must have been signed on behalf of the board of directors by at least two of the directors.[71]

h) Profit and Loss Account

The profit and loss account should give a true and fair view of the profit or loss of a company for the year in question. However, if the company was formed for a charitable or philanthropic purpose, that is a company limited by guarantee, it must prepare a statement of income and expenditure.[72]In theory, the profit and loss account is known through the difference between the net value of the assets at the beginning and the end of the accounting period. But practically, the calculation is done by comparing the company's earning during that period with the expenditure that was incurred in earning them.[73]In the corporate world of today, the profit and loss account usually starts with the amount of turnover, this will be followed by profit before taxation, profit after taxation, proposed dividend, retained profit for the year together with the profit brought forward, carried forward or transferred to general reserve.[74]

Other information that should be contained in a profit and loss account are remuneration of Auditors (in case it has not been fixed by the directors, in the general meeting) pensions and payments for loss of office. The profit and loss account must be annexed to the balance sheet. If the profit and loss account would not provide sufficient

[69] See schedule 2 in relation to format of items that should be contained in the balance sheet.
[70] Cap C 20 L.F.N 2004
[71] Section 355 CAMA ibid
[72] Section 334(2) (c) ibid
[73]Olusoga. O. Op cit
[74] ibid

information in accordance with Sub-sections 1and 2 of Section 335[75] above, any necessary additional information shall be provided in the profit and loss account balance sheet or in a note to the accounts.[76]

i) Notes on the Accounts

Notes to financial statements (notes) are additional information added to the end of financial statements that help explain specific items in the statements as well as provide a more comprehensive assessment of a company's financial condition. These notes shall contain additional information on the balance sheet and profit and loss account. They constitute part of the accounts and may be contained in the accounts stated in a separate document which is annexed to the accounts.[77] Some of the information that must be contained in the notes to the account is as follows: Loans, current liabilities, debenture, share capital, taxation, additional information fixed and current assets etc.[78]

j) Statement of Source and Application of Funds

This statement provides information in relation to the generation as well as utilization of funds by the company during the year.[79] In order to encourage proper accountability by managers of a company the source of income and expenditure is to be provided through this statement to determine the solvency or otherwise of that company.

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[75] Cap C 20 L.F.N 2004
[76] Section 335(7) ibid
[77] Section 334 (2)(d) ibid
[78] Olusoga O. Op cit. Page 280
[79] Section 335(3) ibid

J) Value Added Statement

This states the wealth created by the company during the year and how it is distributed among competing interest groups like the creditors, government, employees, proprietors, and the company.[80] The value added statement helps in assessing the management of the company's finances to encourage prudent management which can be seen on perusal of the value added statement of a company.

k) Financial Summary

This provides a report for comparism over a period of five years or more vital financial information.[81]This financial summary will enable any person who peruses through the statement see how the company has fared through that period to determine if its value is appreciating or depreciating.

The Directors Report

Its principal objective is to supplement the financial information with other information consider necessary for a full appreciation of the companies activities. The directors of every company shall prepare yearly report in respect of the following:

(a) A report containing fair view of the development of the business of the company and its subsidiaries during the year and of their position at the end of it .

(b) The amount of dividend that should be paid and carried to the reserves.

[80] Section 335(4) ibid
[81] Section 335(5) ibid

(c) The names of the persons who at any time during the year were directors of the company and the principal activities of the company and its subsidiaries in the course of the year and any significant change in those activities in the year.

(d) Any amount of money (if any) given for the charitable purposes, employment of disabled persons (if any) a statement of company's policy on employees health, welfare and safety, among other things. Sub-section 6[82] stipulates a term of imprisonment for not more than 6 months or fine of ₦500 for default under Section 342.[83]

Group Financial Statement

A company that has subsidiaries must at the end of the year through its directors, prepare group financial statement and must deal with the state of affairs and profit and loss account of a company and its subsidiaries.[84]Just like an individual financial statement, a group financial statement in its content and form must also comply with the formats provided under schedule 2.[85]However, a group financial statement shall consist of:

(a) Balance sheet that deals with the state of affairs of the company and all the subsidiaries of the company.

(b) Profit and loss account of the company and its subsidiaries

(c) More than one set of consolidated financial statements dealing respectively with the company and the group of subsidiaries,

(d) Statements containing expended information about the subsidiaries.

[82] Section 342 CAMA, Cap C20 L.F.N 2004
[83] ibid
[84] Section 336(3) ibid
[85] ibid

The group financial statement in addition to any notes thereon shall give a true and fair view of the state of affairs of the company. It will also give the profit and loss of the company and the subsidiaries dealt with by the statement as a whole.[86]

Section 336(3)(a) to (d)[87] provides for instances where a company may not take a subsidiary into consideration. A company owes it an obligation to deliver to the Corporate Affairs Commission every year, an annual return which must contain a copy of the balance sheet, the profit and loss account and notes on the statements which are laid before the general meeting.[88]

Under Section 355(1),[89] a company shall publish an abridged financial statement, that is, a balance sheet and profit and loss account. However, if the abridged version of the financial statement is published, the company shall also publish the following statements:

(a) That the statements are not full financial statements.

(b) Whether the company had delivered both the abridged and non-abridged financial statement to the Corporate Affairs Commission, or if it is an unlimited company, a statement to the effect that it is exempted from delivering a financial statement.

(c) Whether the company's Auditors have made a report under section 359.[90]

(d) Whether the Auditor's report was qualified (that is report without qualification) to the effect that in the opinion of the person making it, the company's financial

[86] Olusoga. O. Op cit Page 282
[87] Companies and Allied Matters Act 2004. Op cit.
[88] Olusoga .O. Op cit
[89] Companies and Allied Matters Act 2004. Op cit
[90] Ibid. This provision is on Auditors report.

statement had been properly prepared. The penalty for contravention of Section 355[91] is a daily default fine of ₦100.

The importance of disclosure in a public company cannot be over emphasized as it is all aimed at investors' protection these provisions above made by the CAMA are on disclosure of the finances of a company and its management. Disclosure is a vital tool of investor protection and also for the regulatory bodies to detect any signs of insolvency and mismanagement in a company, by making disclosure as provided by CAMA; a prospective investor who is vigilant can make an informed decision. As important and commendable as the provision of disclosure is, it still rests on the auditors and audit committee to ensure that the accounts filed with the Commission are accurate and not inflated. Where this is not done the essence of all these becomes mere ink on paper.

The Companies and Allied Matters Act has made provisions to govern every company or business registered under it, it therefore means that no law or directive should contravene any existing section of the Act. The sacking of the board of Spring Bank Plc by the Central Bank of Nigeria and its immediate reconstitution has raised debate on the powers of the Central Bank over corporate boards in the financial industry vis-à-vis the right of shareholders of those companies to choose who may run their business. On 5th June 2007, the Central Bank of Nigeria Governor removed certain directors of Spring Bank Plc upon being satisfied that the bank was in a grave situation having become insolvent with negative shareholders fund. However, by subsequent press release, the Governor of the Central Bank of Nigeria indicated that they cannot rely on the board chosen (or to be

[91] ibid

chosen by the shareholders) to be able to move the bank forward and consequently constituted a new board for the bank 7 days later. Spring bank was formed in the last days of the recapitalization exercise ordered by the Central Bank in 2004. She emerged from a merger of Guardian Express Bank, Citizens Bank Plc, Omega Bank Plc, Fountain Trust Bank Plc and African Continental Bank Plc.

In as much as one does not dispute the duty of the Central Bank of Nigeria or the Governor to protect the public from failed or failing banks, it appears that the sacking of the board of directors of a limited liability company and its reconstitution in order to achieve the otherwise worthy goal may be powers improperly exercised by the Central Bank of Nigeria in view of the provisions of the Companies and Allied Matters Act and the 1999 Constitution. Section 35 (2) (d) of the Banks and Other Financial Institutions Act,[92] provides that notwithstanding the provisions of any written law or the memorandum and articles of association, the Governor of the Central Bank of Nigeria has the power to remove or appoint anyone from or to office as director of a bank in certain situations. These situations occur when the Governor is satisfied that a bank is in a grave situation as regards her assets or the public interest, or the manner of carrying on business vis-à-vis her depositors and creditors or is in contravention of the Banks and other Financial Institutions Act.

By contrast Section 244[93]provides that directors of a company are persons duly appointed by the company to mange and direct her business. Appointment or removals of

[92] Cap B 3 LFN 2004
[93] Companies and Allied Matters Act 1990

directors of a company are matters typically reserved for the company in general meeting[94] It is a right attached to each share in the company and is exercisable only by members[95]save in the case of casual vacancies on the board[96]The view that the Central Bank of Nigeria exercises[97] the above powers improperly is backed by Section 44 of the Constitution. That section prohibits the compulsory acquisition of any moveable or immoveable property or any right or interest therein without, amongst other things, prompt payment of compensation. The Banks and other Financial Institutions Act does not provide payment of compensation in circumstances where the Central Bank of Nigeria acts like it did with Spring Bank. No compensation has been offered to the shareholders of Spring Bank or the bank itself for the infraction of their rights. The argument goes therefore that Section 35 (2) (d) of the Banks and other Financial Institutions Act being inconsistent with the Constitution is null and void.

All the laws provided to regulate companies in Nigeria are meant to protect investors' but in a situation where the same laws provides loopholes for the right of the shareholder to be violated then it becomes necessary that amendment be made to reconcile the laws to complement each other and not to contradict each other so that the essence of investors' protection in Nigeria will not be defeated.

[94] Section 214, 247, and 248, Companies and Allied Matters Act 1990
[95] Section 81, 114 ibid
[96] Section 249 ibid
[97] 1999 (as amended 2011)

3.3 The Investment and Securities Act 2007

This Act is a very important step towards investor protection in Nigeria. The Investment and Securities Act of 2007 came into effect on the 25th of June, 2007 as the main securities law in Nigeria. It provides the legal and institutional framework for the regulation of the Nigerian capital market. The legislation is made up of 314 Sections divided into 18 parts and 4 schedules. This Act[98] is very fundamental to investment in Nigeria. The aims and objectives of Securities Regulation is to ensure, that when securities are created and offered to the public, investors are given an accurate idea about the thing in respect of which securities have been created. The second aim is to ensure that that there is a continuous information about the company or the entity whose securities are traded so that holders of such securities are armed with such information whenever they are being called upon to vote or take certain decisions with respect to securities held by them.[99] The securities market is one that is susceptible to double dealings, manipulative and deceptive practices. There is therefore a greater need to not only monitor trading in the market but also prohibit misrepresentation and other fraudulent acts and practices.[100] Another objective of regulation is to prevent individual companies engaged in the securities business from taking undue advantage of their superior knowledge, experience and access to information over their less fortunate, non-professional customers.

[98] Investment and Securities Act, no 29, 2007
[99] Fatula .O. (2003-2005) Examining the Regulatory & institutional Framework for companies securities in Nigeria, ABU journal of commercial Law vol 2 no.1, p.112
[100] ibid

It is also the objective of securities regulation to penalize violation of the law and provide remedies to the persons injured through such violations.[101]The duties of the Securities and Exchange Commissions involve inspection, surveillance and investigations. Securities and Exchange Commissions inspections could either be routine inspections, off-site and on-site inspections. It is on-site where there is a physical examination of the office of the market operators, while off-site inspection involves the call by the Securities and Exchange Commission of specific documents to be brought to it for inspection.

3.3.1 Disclosure under the Investment and Securities Act 2007

Disclosure requirement is a very important tool for investor's protection which necessitated the law making provisions on disclosure. The Investment and Securities Act[102]provides for disclosure of certain information regarding a company. Section 11[103] of the ISA provides for the disclosure by a member of the board of the commission who is directly or indirectly interested in:

(a) The affairs of the company or enterprise being deliberated upon by the board of the commission; or

(b) Any contract made or proposed to be made by the board of the commission shall, as soon as possible after relevant facts have come to his knowledge, disclose the nature of his interest to the commission at the meeting of the board of the commission.

[101] Ibid.
[102] no. 29 2007
[103] Investment and Securities Act, ibid.

By virtue of 11(2),[104] such a director will be excluded from participating in deliberations or decisions regarding the subject matter in which he has and is interested and will be excluded for the purpose of constituting a quorum of the board from deliberation or decision on the subject matter.

These provisions above are aimed at preventing a situation whereby the interest of a board member will conflict with his duties as a member of the board of the commission. The board can only be able to discharge its duties efficiently and effectively, if the board members have no personal interest to protect in the course of performing their functions. This way they can discharge these duties without any favour or reservations.

Section 28 of the Investment and Securities Act[105]makes it mandatory for every securities trade points to register with the Securities and Exchange Commission before it commences operation. Before registration, a company is required to give certain information to the commission and even in the curse of operation it updates the commission with information on its operations. This will enable the commission decide weather to register the trade point or allow it continue operating. When a trade point is registered by the commission, it is presumed to be genuine and legal.

Section 36(1) of the Act[106]provides thus:

"Where the commission deems it necessary for the protection of persons buying or selling particular securities made available by a body corporate on a securities exchange, capital trade point or self regulatory organization, it may suspend or prohibit further

[104] Section 11 Companies and Allied Matters Act Op cit.
[105] No. 29 0f 2007
[106] ibid

trading in the securities and give notice in writing to the securities exchange, capital trade point or self regulatory organization" This provision empowers the commission to serve as a watchdog and to ensure compliance with practice and procedure in order to protect investors and also to penalize any corporate body, securities exchange or capital trade point that does not obey the provision of the law. It then means that, the commission on its own can decide when it sees it as necessary decide to act for the protection of the investors.

Section 38 of the Act[107]makes it mandatory for any person seeking to operate in the capital market as an expert or professional or any other capacity to be registered with the Securities and Exchange Commission and such an operator is to keep record such as accounting and other records[108]. This section aims at ensuring that only genuine and authorized persons operate in the securities market to prevent fraud and ensure transparency of their dealings through disclosure by way of accounting and other records. Section 39(1) provides thus:

"A capital market operator shall keep or cause to be kept such accounting and other records:

(a) As shall sufficiently show and explain the transactions and financial position of his business and balance sheet to be prepared, regularly; and

(b) In a manner that will enable them to be conveniently and properly audited.

[107] Ibid
[108] Ibid Section 39

This provision is on the disclosure rule thereby revealing information which can be seen by the Commission enabling them supervise the activities of the capital market operator.

Section 67 of the investment and securities Act[109] provides that only a public company that has complied with the provisions of Section 71 to 87[110] or a statutory body or bank established by an Act of the national assembly can invite the public to buy its shares. The public company making the invitation must obtain the written consent of the Corporate Affairs Commission which has the discretion to grant or withhold the consent[111]This provision Provides limit to persons who can issue shares to the public in order to ensure that only known and approved bodies by the commission do so to guard against dishonest offers aimed at personal gains to the detriment of investors'.

3.3(ii) Public Issue and the Disclosure System

The basis of formal legal control over public issue is the familiar area of disclosure backed by criminal and civil sanctions. The key item in the system is the prospectus which must accompany any invitation to the public to subscribe for or purchase shares or debentures in a company. The rules governing the prospectus however, were developed in the nineteenth century to deal primarily with the floatation of entirely new companies when it was standard practice for capital to be raised by a direct offer of new shares for subscription on the open market. This is no longer the case, most public issue are now of

[109] ibid
[110]This provisions are on the mandatory provision of prospectus by the issuer.
[111] Section 68(1)& (2) ibid.

shares in companies which have existed for sometime and which have existed for one reason or another have decided or have been forced to go public, or in established quoted companies seeking additional capital. This has led to increasing complexity in the statutory requirements for prospectus, which can only be unraveled in light of current practice in the issue market.[112]

Section 71(1)[113] makes it mandatory for the issuing body to issue the form with prospectus. A prospectus is a formal written document to sell securities that describes the plan for a proposed business enterprise or the facts concerning an existing one that an investor needs to make an informed decision. A prospectus provides all the information regarding a company from incorporation to its present state. A prospectus is very vital as it helps a prospective investor to decide on whether invest in a company or not. The prospectus is also required by the law to be dated.[114] Section 79[115] provides for the requirements of a prospectus and must contain matters specified in part 1 of the third schedule to the Act[116] and set out the report specified in part 2 of the same schedule. Part 1 of the third schedule to the Act[117] requires a prospectus to contain detailed particulars of the following information:

i. Company's proprietorship, management and capital requirements.
ii. Details relating to the offer;
iii. Property acquired or to be acquired by the company;

[112]Hadden T. Op cit P.298
[113] ibid
[114] I. S. A no. 29 2007
[115] ibid
[116] ibid
[117] ibid

iv. Commissions, preliminary expenses etc;

v. Contracts;

vi. Auditors;

vii. Interests of directors etc.

The prospectus that is to be issued to the public must be signed by the directors of the company or agent authorized in writing endorses on it and then it must be registered with the Securities and Exchange Commission.[118]

Section 84 of the Act[119] provides for a statement in lieu of prospectus and provides for the form and contents of the statement in lieu of prospectus in part 1 of the fourth schedule. This statement is required to be provided in the absence of the formal prospectus provided by law.

Where persons subscribe to shares or debentures of a company, relying on the prospectus and suffer any loss or damage as a result of any untrue statement or mis-statement included in it, then the person referred to in sub-section (2) of this Section[120] shall be liable to pay compensation to all the persons.

Section 85 (2) provides thus:

'A person liable to pay compensation under sub-section (1) of this section includes:

(a) Any director of the company at the time of the issue of the prospectus;

(b) Any person who consented to be named in the prospectus as a director or as having agreed to become director either immediately or after an interval of time;

[118] Section 80 ibid
[119] Investment and Securities no 29 of 2007
[120] Section 85 I. S. A ibid

(c) Any employee of the company who participated in or facilitated the production of the prospectus; and

(d) The issuing house and its principal officers.''

Where a prospectus contains any untrue statement or mis-statement, any director or officer who authorized the issue of the prospectus commits an offence and is liable on conviction to affine of not less than ₦1000, 000.00 or term not exceeding three years or both.[121] The same applies where it is an untrue statement in lieu of prospectus the fine and prison term are the same as that of prospectus.[122]The idea of sanction is to serve as a deterrent to any issuer who might be aimed at misleading unsuspecting investors for his own personal gains.

Section 100 of the Act requires a securities dealer, investment adviser, underwriter or their associated person to them to disclose any interest in respect of securities in a legible form and the nature of interest he holds.[123]The Investment and Securities Act is a legislation aimed at regulating Securities dealings and also protecting investors. The need for disclosure in relation to public offer cannot be over emphasized. The lack of specific disclosures about such offers can be misleading to investors and creditors .Disclosure as a tool to investor protection is very important in giving investors confidence in the economy and to encourage investment in an economy because the investors are guaranteed the security of their investment.

[121] Section 86 ibid.
[122] Section 87 ibid.

3.3.3 Investigation under the Investment and Securities Act

Section 45 of the investment and securities act[124], empowers the commission to conduct routine and special investigation of capital market operators. Because of the delicate nature of commodities transacted in such market, the commission is empowered to inspect and investigate the activities of those who operate in the market. The power to investigate is very important, as sometimes investors' can be ignorant, careless or even illiterates in that field and therefore becomes the duty of the of a professional to act on their behalf **.** The importance of investigation cannot be overemphasized as can be seen in the case of **Molten Trust Limited and Mr. M.O Oduwole vs Investment and Securities Tribunal.**[125]Sometime in 2002, the Respondent got information about an alleged fraud at the office of UAC Nigeria Plc (Registrars Department). Following the allegation, the Respondent in December 2003 directed that a target inspection be conducted at UAC Nigeria Plc (Registrars Department) with the object of ascertaining how the fraud was perpetrated and those involved. The Respondent also conducted a preliminary investigation. At the conclusion of the inspection and investigation, it was discovered that the fraud was perpetrated in respect of UAC Nigeria Plc shares, by one of the companies on behalf of which UAC Registrar's Department maintained a register. It was discovered that the fraud was allegedly perpetrated by one Mr. Michael Adegbusi, the Assistant Registrar of UAC Nigeria Plc with the connivance of the following three Stockbroking

[124] ibid

[125] (2007) 2 Nigerian Investment and Securities Law Reports page 137 p. See also Unilever Nigeria Plc vs. International Standard Securities Ltd (2007) 2 Nigerian Investment and Securities Law Reports page 267

houses, Apex Securities Limited, the 1st Appellant and Newdevco Finance Services Company Limited.

3.3.4 Investors' Protection Fund

Another important provision made by the Investment and Securities Act, is the provision for Investors Protection Fund[126] by part XIV of the Investment and Securities Act 2007 which requires the stock exchange to establish and maintain an Investors' Protection Fund to be managed by the board of Trustees composing of nine members.[127] The objective of the fund is to compensate investors who suffer pecuniary loss arising from the insolvency, bankruptcy or negligence of a dealing member firm of a securities exchange or capital trade point and mismanagement committed by a capital market operator.[128]

The recent inauguration of Dr. Gamaliel Onosode led Board of Trustees of the Investors Protection Fund by the Nigerian Stock Exchange will not only rekindle investors confidence in the nation's capital market, it also filled the lacunae created by the absence of the fund five years after the take- off of the Investment and Securities Act on June 25, 2007.[129]

Recovering from the recent crisis that rattled both institutional and local players in the nation's capital market, the management of the Nigerian Stock Exchange (NSE)

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[126] Section 197 to 220 ibid

[127] A representative from the dealing member firms, a representative from the securities exchange or capital trade point, a representative from the central securities clearing system ltd, a representative from the securities and exchange commission, a representative of institutional investors, representative of association of capital market registrars, a person with proven integrity and knowledgeable in the capital market matters, a representative of registered shareholders association and a legal practitioner knowledgeable in capital market matters.
Section 199 of the Investment and Securities Act 2007 ibid

[128] Section 198 ibid

[129] Akanbi, F (2012) At last Investors Protection Fund takes off, retrieved from www. Thisdaylive.com, on the 14th march .

appears to be rising to the occasion these days with a number of initiatives being introduced in an apparent bid to restore the capital market. The 2008 market humiliating failure which set the stage for investor's apathy to equities and the attendant fall in market capitalization of the Nigerian Stock Exchange, was worsened by the management crisis which culminated in a change of baton at the Nigerian Stock Exchange. Among the series of policies that emerged was the collaboration between the Securities and Exchange Commission, Nigerian Stock Exchange move towards providing unparalleled global data, news and analysis in one comprehensive solution.[130]

The aim is to make the market very attractive and competitive in line with global standards. However apart from looking for the internationalization of the Nigerian capital market, the exchange appears set to lure local investors back to the stock market by reconstituting the Board of Trustees of the Investors Protection Fund headed by foremost industrialist, Dr. Gamaliel Onasode. The Investors Protection Fund is meant to give investors a statutorily backed avenue for reducing the losses they suffer as a result of the bankruptcy, insolvency, negligence or wrongdoing of dealing members.[131]

It is the opinion of this writer that the provision of Investors Protection Fund is a very good initiative with good intentions, to boost investors' confidence in the market and encourage increase in investment. But on whether this will be achieved, it is a bit early to say as only time shall tell if there will be any need for amendment to the provisions or areas to make adjustment on the part of the market operators.

[130] ibid
[131] ibid

3.4 Nigerian Investment Promotion Act

The Nigerian Investment Promotion Act[132]established the Nigerian Investment Promotion Commission as a body corporate with perpetual succession, a common seal and capable of being sued and suing in its corporate name. Sections 1and 2 provides for the functions of the Commission which are to encourage, promote and co-ordinate investment in the Nigerian economy among others.[133]

The aim of this Act is to liberalize the economy and allow the free flow of foreign investment into Nigeria by abolishing any restrictions in respect of the limits of shareholding in Nigeria. A non- Nigerian may now invest and participate in the operation of any enterprise in Nigerians except in any of the items stated in the negative list.[134] Section 19 of the Act mandates the enterprise in which foreign participation is permitted to be incorporated or registered under the Companies and Allied Matters Act.[135] By the provisions of Section 20(1) such Company is also required to register with the Nigerian Investment Promotion Commission after incorporation[136]. Section 21 of the Act allows a foreign enterprise to buy the shares of any Nigerian enterprise in any convertible foreign currency and is also guaranteed unconditional transferability of funds through an

[132] Decree No. 16 of 1995, Cap N117 LFN 2004
[133] Section 4 a-m ibid
[134] This sectors of investment are prohibited to both foreign and Nigerian investors which are; production and dealing in narcotic drugs and psychotropic substances, production of military and Para- military wears and accoutrement, including those of the Police and the Customs, Immigration and Prison services; and such other items as the Federal Executive Council may, from time to time determine.
[135] Cap C20 LFN 2004
[136] Except for those exceptions provided under Section 56 of the Companies and Allied Matters Act which are; Foreign companies invited to Nigeria by or with the approval of the Federal Government to execute any specific individual project, foreign companies which are in Nigeria for the execution of specific individual loan project on behalf of a donor country or international organization; foreign government owned companies engaged solely in export promotion activities; and engineering consultants and technical experts on any individual specialists project under contract with any of the governments in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal government.

authorized dealer in freely convertible currency.[137] A foreign investor is also permitted the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment and total repatriation of capital should the investor choose to relocate elsewhere.

The Nigerian Investment Promotion Commission provides an enterprise with such assistance and guidance as the enterprise may require and acts as a liaison between the enterprise and the relevant Government Departments, Agencies and any other public authority.[138]

3.4.1 Investment Protection Assurances

In other to boost the confidence of the foreign investors' to promote a secure business environment for the investors', the Act went further to provide for investment assurances which are;

1. No enterprise shall be nationalized or expropriated by any Government of the Federation
2. No person who owns whether wholly or in part the capital of any enterprise shall be compelled by law to surrender his interest or for a public purpose under the law which makes provision for:
   a) Payment of fair and adequate compensation, and

[137] Section 24 ibid Be it dividends or profit (net of taxes) attributable to the investment or payments in respect of loan servicing where a foreign loan has been obtained
[138] Section 27 Nigerian Investment Promotion Act Op cit.

b) A right of access to the courts for the determination of the investor's interest of right and the amount of compensation to which he is entitled.

3. Compensation shall be paid without undue delay and authorization given for its repatriation in convertible currency where applicable[139].

Foreign investors are also allowed to execute and enter into bilateral Investment Promotion and Protection Agreements (IPPA) with the Nigerian Government.

Looking at all the provisions of the Act, one will see that there is a lot of protection for the Foreign Investor coming into Nigeria to invest by way of direct investment. But these is not adequate to encourage foreign investment many things need to be in place for foreign investors to be attracted like infrastructure and very importantly security of lives and property without which there can be no investment.

3.5 The Trustees Investment Act

Trust is the right enforceable solely in equity, to the beneficial enjoyment of property to which another person (the trustee) at the request of another (the settler) for the benefit of a third party (the beneficiary).[140]A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence place in a trustee, together with the trustee's obligation towards the property and the beneficiary. A trust arises as a result of a manifestation of an

[139]Section 25 Nigerian Investment Promotion Act Op cit.
[140] Black's Law Dictionary,(2009) Ninth Edition, West Publishing Co. Thompson Reuters 610 Opperman Drive, St. Paul, MN55123.

intention to create it.[141]The relationship between the shareholders and directors in a company can be described as a trust relationship. The directors are the trustees while the shareholders are the beneficiaries and therefore the duties of trustees apply in this case.

The Trustee investment Act 1990[142] is a short Act with 5 sections and 1 schedule. The Act has an ancestral linkage to the Trustee Investment Act of 1957[143]This Act was passed to facilitate the investment of trust fund and other funds in Nigeria in locally issued securities and for the purpose therewith. Ordinarily with reference to the general principles of trust, trustees are not expected to take risk with the trust property.[144]In order to guarantee trustees from imminent losses states clearly by its provisions of Section 2 and 3 the securities to which the Act applies and those in which a trustee may invest trust fund. The securities in which the trustee may invest in are those created by the federal and state government and those of incorporated companies under the Companies Allied Matters Act 1990[145] or its predecessor in title.[146] The incorporations in whose securities are covered by the Act are those of the Nigerian Coal Corporation, National electric power authority, the Nigerian railway corporation and the Nigerian ports Authority.[147]

This Act is aimed at protecting investors who pool their funds together for investment. This is a step at protecting such investors from dishonest persons who may want to invest the trust funds for their personal gains, by providing the securities in which such trust funds can be invested in and is also meant to guide the trustee when investing the

[141] ibid
[142] Cap T 22
[143] Trustee Investment Act No.16 of 1957
[144]Keeton .G.W. (1972) The law of trust, 10th edition , professional book ltd p. 249.
[145] Cap C 20 L.F.N 2004
[146] CAMA 1968
[147] Section 2(1)(c) Trustee Investment Act cap T22 L.F.N 2004

trust funds.[148]The Act is a bold attempt to protect such investors' and to prevent a trustee from investing trust funds recklessly to the detriment of the investors'. With the high rate of poverty in Nigeria this Act provides avenue for the low income earners to come together and put their resources together for investment by entrusting their funds into a trustee who will be responsible for its management. This Act imposes a duty of care and skill on the trustee handling the trust funds with utmost diligence.

After the examination of investors protection under the Companies and Allied Matters Act,[149] the Investment and Securities Act,[150]the Nigerian Investment Promotion Act [151]and the Trustees Investment Act,[152] it is note worthy that the enactments on disclosure do not guarantee proper conduct, rather they provide platforms and avenues from which shareholders and prospective investors can hopefully access sufficient information and early warning signals about the state of a company. The Companies and Allied Matters Act, Investment and Securities Act, The Nigerian Investment Promotion Act[153] and the Trustees Investment Act are all aimed at investors' protection in Nigeria. But despite all this effort, there have been lots of challenges on the part of the government, regulatory agencies, and lacunae on the part of the law which some dishonest business men can capitalize on for personal gains to the detriment of innocent or naïve investors'.

[148] Section 3(1) and (2) ibid
[149] Cap. C 20 L.F.N 2004
[150] Cap. T117 L.F.N 2004
[151] Decree No. 16 of 1995.
[152] Cap. T22 L.F.N 2004
[153] Cap. N117 LFN 2004

CHAPTER FOUR

CHALLENGES TO INVESTORS' PROTECTION IN NIGERIA

4.1 Introduction

Companies can raise capital by issuing new shares or debentures and inviting the general public to subscribe to them, as a result of this, the subscribers become investors with interest in the company .Securities represent "intricate merchandise" in the sustenance of private capital enterprise. Unlike tangible merchandise that can easily be touched, smelt and evaluated in comparism with the other brands on physical examination by the consumer, it is not the case with securities.[1] The worth of a security depends on the worth of the issuing entity. Knowledge of the entity's operations is therefore necessary to evaluate its worth. This is ordinarily beyond the consumers reach. The consumer is invariably constrained to depend on the credibility of the issuer and believe his claim about the enterprise.[2]

In Nigeria, laws have been provided to protect such unwary investors' against unscrupulous issuing entities by affording investors adequate information upon which to assess the worth of the securities offered in order to arrive at a wise business decision.[3]But despite all these efforts to protect the investor through avenues of regulation and the disclosure principles, there are many challenges to effective investors' protection in Nigeria.

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[1] Ali H .L. (2005/2006) A case of corporate liability for insider trading offences in Nigeria, Ahmadu Bello University Law Journal p.150

[2] ibid

[3] ibid

4.2 Lack of Effective Corporate Governance

Corporate governance is the principles and values that guide a Company in the conduct of its day-to-day business and how stakeholders interrelate among one another.[4] There has been renewed interest in corporate governance globally and its clamour has become even louder given the high profile collapses of a number of large United State's firms such as Enron and MCI Inc. (formally WorldCom). Corporate Governance is a new concept in Nigeria, despite all efforts by stakeholders to institute sound corporate governance practices, Nigeria has continuously faired poorly in this regard.[5]

Lack of an effective corporate governance framework in Nigeria has been exploited by management of Companies at the expense of shareholders. More staggering is the recent unraveling of bad corporate governance by senior management of banks. More so, the recent downturn on the Nigerian Stock Exchange also brought to fore some of these practices by capital market operators as well.[6]

The development of the Code of corporate governance practices in 2003 was a welcomed development. The code laid emphasis on the role of the board of directors and management, shareholders' rights and privileges, and the audit committee in the corporate governance process. Before the development of the Code of Corporate Governance practices in Nigeria, The Companies and Allied Matters Act had been in existence and it regulated the relationship among the board, shareholders and the management, including

[4] Ilori. B.(2012) Corporate Governance in Nigeria, what we need to do.The Punch newspaper, 18th September.Retrieved from www. Punchng.com/bu:
[5] ibid
[6] ibid

other stakeholders. There is no gainsaying that the Companies and Allied Matters Act[7] has not achieved much in fostering sound corporate governance practice in Nigeria.[8] The Securities and Exchange Commission (SEC) in September 2008 inaugurated a committee for the review of the 2003 Code of Corporate Governance for Public Companies in Nigeria to address its weakness and to improve the mechanism for its enforceability.

The outcome is the Code of Corporate Governance 2011 which became effective on 1st April, 2011. But despite the effort to make the 2011 Code a much more comprehensive and enforceable Code, it still has some limitations one of which is, this new Code of Corporate Governance states that unlike the previous Code, it is intended to be fully enforceable by the Securities and Exchange Commission. This is very ambiguous and does not clearly state if the Code is a mandatory Rule or still persuasive principles, How does the Securities and Exchange Commission plan to enforce its provisions? And what are the penalties for errant Companies?[9]

It is clear that the Code of Corporate Governance 2011 just like that of 2003 is a Principle that guides the relationship between stakeholders in the Company and how the Company business are Conducted. As a result of lack of sanction Managers capitalize on the weakness to commit fraud at the expense of Shareholders. Although there has been an improvement compared to the 2003 Code, there still need for amendment.

[7] Cap C 20, L.F. N, 2004
[8] ibid
[9] Adegbite E. (2011) A Review of the Revised Code of Corporate Governance in Nigeria. Retrieved on 3/11/2011 from www.http://businessdayonline.com

4.3 Corporate Powers

The distribution of the powers of the company is very important to prevent conflict of interest among the organs of the company. The legal model of a company is a closed system of power and control to be possessed and exercised by human personalities, **Aniagolu J.S.C,** vividly captured this in **Trenco (NIG) ltd v. African Real Estate ltd,**[10]Where he aptly summed up that "A company, although having a corporate personality is deemed to have human personality through its officers and agents."[11] It is in these human personalities that corporate powers are vested. Aside from the specific allocation of power by law, the distribution of corporate powers is still a matter for the corporators to decide in the Articles of association[12].

In Nigeria, Section 63 of the Companies Act provides:-

1. A company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors.
2. Subject to the provision of this Act, the respective power of the members in general meeting and the board of directors shall be determined by the company's Articles
3. Except as otherwise provided in the company's Articles, the business of the company shall be managed by the directors who may exercise all such powers of

[10] (1978) 1 L R N p.146
[11] Ibid p.153
[12]Agom, A. R.(2001) The place of company meetings in corporate governance :company law and practice, Modus international law and business quarterly. P.14

the company as are not by this Act or the Articles required to be exercised by the members in general meeting.

4. Unless the Articles shall otherwise provide, the board of directors when acting upon the powers conferred upon them by this Act or the Articles shall not be bound to obey the directions or instructions of the members in general meeting: provided that the directors acted in good faith and with due diligence.

At first glance, this provision will appear to have finally settled the controversy as to who controls the company, since the board of directors is now to manage the business of the company in the absence of contrary provisions in the Articles. Only an alteration of the Articles of Association can affect the director's exercise of powers.[13]

The problem with this provision is that; Firstly, the board's role in practice is usually, at best, supervisory rather than managerial. The day to day running of the Company is done by the management team to whom extensive powers are delegated. The law has largely ignored this body which has in fact assumed control of companies' structure of the two primary organs.

Secondly, the division of powers between the general meeting and the board of directors is often inappropriate in small private companies where the same persons are usually shareholders and directors. To such enterprises, this distribution of powers is purely legalistic. The law as it stands appears ignorant of this reality.[14]

[13] ibid
[14] ibid

Thirdly, this Section unwittingly endorsed legally enhanced status for directors as the general meeting is completely deprived of any power to interfere in management matters except in limited cases under Sub-Section (5).[15] It is quite an irony that members of the general meeting who can dismiss the entire board of directors by an ordinary resolution cannot take a less drastic step of directing or instructing the directors to do or abstain from doing an act by a special resolution.

Fourthly, the proviso to Section 63(4) of the Companies and Allied Matters Act introduces nebulous (unclear) concepts to the interpretation of the Section. These are "good faith" and "due diligence". The Companies Act has not defined what is meant by good faith and due diligence. According to the Bills of Exchange Act,[16] a thing is deemed to have been done in good faith where, it is in fact done honestly whether it is done negligently or not. This definition is scarcely helpful as lack of due diligence will seem to negate the existence of good faith this is so, especially in the context of the objective standard of care and skill introduced into directorial duties by Section 282 of the Companies and Allied Matters Act yet unless directors are seen to have acted in good faith and with due diligence, they shall be bound to obey the directions and instructions of the general meeting.[17]

5. This amongst others makes the reading and comprehension of the entire Section illogical and incoherent. Section 137 of the Ghana's Companies Act[18] from where this entire

[15] Where the directors are disqualified from acting or are unable to act because of dead lock or where the directors refuse or neglect to institute legal proceedings to remedy wrongs done to the company.
[16] Section 90,cap 35 L.F.N 1990
[17] Agom A. R. The place of company meetings in corporate governance :company law and practice, Opcit p.16
[18] No. 179, 1963

Section appears to have been substantially drawn is devoid of these nebulous concepts. The need for an urgent legislative amendment of this Section cannot now be overemphasized. Even though Section 63(3) of the Companies Act has vested the management of the Company's business in the board of directors in the absence of contrary provisions in the Articles, there are certain unusual situations where the members in the general meeting are authorized to assume the executive powers of the board to manage the corporation. This is the residual executive power of the General meeting.[19]

It is obvious that the intention of the CAMA is to distribute the powers among the organs of the company but in the process section 63 (4) has robbed the general meeting of any powers since the board of directors are not bound to obey the directions or instructions of the members in general meeting provided that the directors acted in good faith and with due diligence. Good faith and due diligence is subjective and there is no hard and fast rule to determine it. What the directors may call good faith and due diligence may not be seen that way by the general meeting but they will have no choice but to accept it. This provision only encourages the

4.4 The Poor Performance of Auditors and Audit Committees

An Auditor is somebody who checks accounts or conducts an audit for an organization.[20] To audit means formal examination, correction and official endorsing of financial accounts, especially those of business, undertaken annually by an accountant[21].

[19] Agom A.R. The place of company meetings in corporate governance :company law and practice, Op cit p.16

[20] Enron: one of the largest scandals and collapse in business history, retrieved from www.cnbc. Com/id/3583/6210/ on 05/8/2012
The Enron Scandal, what really happened, retrieved from www.com/../enron.html on 05/8/2012

Private businesses and all levels of government conduct internal audits of accounting records and procedures. Internal audits are conducted by a company's own personnel to uncover bookkeeping errors and also to check the honesty of employees. In large companies, internal auditing is an ongoing procedure. A company that trades stock on a registered stock exchange or is preparing to issue new shares of stock must submit to an external audit. These companies are known as publicly traded companies.

An external audit is used to give the public a true statement of a company's financial position. It is made at least once a year by public accountants who are not regular employees of the company. The auditors make sure that the company has followed proper accounting procedures in its financial records and statements. They compare the current financial statements with those of the previous year to determine whether the statements are calculated consistently. If they are not, they present a distorted picture of the company's financial position. The auditors also inspect real estate, buildings, and other assets to see if their value is overstated. Debts and other liabilities are checked to see if they have been understated.[22]

The origin of Auditing is the outcome of the separation of ownership from control in business enterprise. Because of this separation, it becomes necessary for managers entrusted with the financial and economic resources of others to present their stewardship report to their employers. The report presented may contain errors, omissions, fraud or misleading information. To prevent this and to maintain the integrity of the managers, it

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[21] Ibid

[22] **Microsoft ® Encarta ® 2009. © 1993-2008 Microsoft Corporation. All rights reserved.**

becomes necessary to invite an independent party to examine the report and to express an opinion on its correctness.[23]

To many investors', the company's financial statement couched in technical accounting terms may appear as cryptograms needing to be decoded, thus the need for an expert examination of these statements and a simplified report there on made to the members in the general meeting, these experts are known as auditors. The companies Act remains mute on the qualification of members of the audit committee. It is therefore, possible to have as members or even chairman of the committee, illustrates who can neither understand nor analyze the company's financial statements.

The common occurrence in Nigeria tends to defeat the very essence for the institution of this protection device[24] as can be seen in the case of **Cadbury Nigeria**[25] which was founded in 1965 as a subsidiary of Cadbury Schweppes, a major global player in confectionary and beverage markets which operated in 200 countries and employs 40,000 employees. But the company was caught in a scandal on October 2006, and was also called the Nigerian version of Enron Corporation scandal case.[26] It was discovered that Cadbury Nigeria's former chief executive officer (CEO), Bunmi Oni known as Nigeria's most respected chief executive officer and former executive director, Mr Ayo

[23]Agom A. R The place of company meetings in corporate governance (company law and practice) p. 21.
[24] Ibid
[25] Cadbury Scam (2008) Nigerian Securities and Exchange Commission News, vol.3, No.2 June, see also Samuel Osidwe v. BPE (2007) 2, Nigerian Investment and Securities Law Report, page 201 pt.205.
[26] Ibid

Akadiri had deliberately overstated the company's financial position over number of years to the tune of between ₦13 billion to ₦15.[27]

Since year 2002, the sale and stock buy backs were used as well as false stock certificates schemes issued by both the CEO and the executive director. They overstated profits, misrepresented sales figures, besides false supplies certificates to control its financial account that were issued to the public and filed with the commission. Besides, the heads of accounts, internal audit and sales operation were also participating in the preparation of the false report generated untrue data and statement filed by the company with the commission. The Audit committee, members of Cadbury Nigeria failed to discharge their statutory duties. They did not follow up available leads which ought to put them on enquiry in respect of the company's accounts. The Akintola Williams Deloitte, which is a registered and leading accounting firm in Nigeria were the external auditors to the company. It failed to handle the company's financial reports with high professional level and diligence.[28]The audit committee which consists of some members of the board of directors and shareholders who are also supposed to cross check the accounts for verification to prevent any cooking of the books did not see any discrepancies or irregularities.

Because of the problem of incessant company collapses, it would appear that the three systems i.e. the board, audit committee and the external auditors, upon which the veracity of company finances rest, see no evil when executives management mismanage

[27] U.K essays: Cadbury Nigeria actions taken to overcome the scandal in accordance with corporate governance..Retrieved February 5 2013 from. http//www.ukessays.com
[28] ibid

the company and do fail to raise any queries. Nothing emphasizes the weakness of shareholders governance than scandals because of the opaque nature of business and the paucity of information arising there from, he knows so little, and can do so little more often than not before the burble bursts.[29] Even a developed society such as America had the same situation. An example is that of the Enron Energy Company which rocked the United States of America in 2001.

Enron was formed in 1985 by the merger of Inter North, a gas pipeline company based in Omaha, Nebraska, and Houston Natural Gas, a Texas-based gas pipeline company. The merger created the largest natural gas pipeline system in the United States. By March 2000 Enron was regarded as the sixth-largest energy company in the world. But by 2001 to 2006 it collapsed completely. The collapse was something that started over a long period of time but no one seemed to notice except the officers of the company who covered it up.[30]

Enron's audit committee and its external auditing firm,Arthur Andersen LLP are bodies that were responsible for assuring investors and the public that the firm's financial statements were full and accurate. Apparently, the company's audit committee in particular and the company's board of directors in general failed to meet their responsibility because they lacked enough information about Enron's complicated financial maneuvers. Moreover, they had close ties to management and received ample compensation for their service, so they apparently felt little incentive to ask difficult

[29]SolankeO.O..(2008) Corporate governance issues in financial reporting-The Cadbury challenge. Retrieved 10 January 2013 from http:// nigeriavillagesqure.com/……..

[30]

questions.[31]The external auditing firm, Arthur Andersen, failed to act in part because it made more money providing consulting services for Enron than it did providing auditing services. When challenged by the federal government in court, Andersen claimed it was not responsible because it could only work with the numbers provided by the company. However, a jury found the firm guilty of obstructing justice in June 2002 for destroying documents in anticipation of a SEC investigation.

Andersen was one of the earliest casualties of the Enron scandal, as it lost its major accounts and ceased to be one of the world's five largest accounting firms.[32] In a situation such as these where the Auditors and Audit committees fail in their duty and connive with directors in the company, they can cover up false accounts and misstatements.

4.5 The Directors Control of General Meetings and Shareholders Apathy

Sections 211, 213, and 215 of the Companies and Allied Matters Act[33] provides for the meetings of the company. By virtue of the provisions of Section 211[34], every public company is expected to hold a general meeting within six months from the date of its incorporation. This meeting is known as the statutory meeting. At this meeting, the statutory report is presented to the members it covers everything that has to the with the incorporation of the company including all incorporation contracts, shares allotted, cash received by the company for allotment of shares, names addresses and the description of

[31] Enron: one of the largest scandals and collapse in business history, retrieved from www.cnbc. Com/id/3583/6210/ on 05/8/2012
The Enron Scandal, what really happened, retrieved from www.com/../enron.html on 05/8/2012

[32] ibid
[33] Cap C 20 L.F.N 2004
[34] ibid

the directors, auditors, managers, and secretaries of the company etc. Everything relating to the floatation of the company is considered at this meeting.

Section 213 of the Act [35]provides for the Annual general meeting of the company. This meeting is expected to be held each year and not more than 15 months is to elapse between the date of one Annual general meeting to the other but the first meeting can be held eighteen months from the first meeting. At annual general meetings business transacted is deemed special business except declaration of dividend, the presentation of financial statement. the reports of directors and auditors, the election of directors, the appointment and fixing of the remuneration of the auditors and the appointment of the members of the audit committee which are considered ordinary business. Section 215[36] of the Act provides for extraordinary general meeting which a company can convene at any place or time even outside the country as long as there is quorum. This meeting can be called in situation of urgency and emergency.

All these meetings provided for by the Act is an avenue through which investors can get information regarding stewardship from those who manage their investment, to also contribute their own advice to the progress of the company and voice out their concerns on the management or progress of the company. These meetings as provided by the Act is meant to empower the shareholders to take part in decision making of the company, although in practice in most cases, this is not achieved because, the board of directors have effective control over the proceedings at the general meeting.

[35] ibid
[36] ibid

The rules on meetings are drawn up in such a way that directors have a wide discretion in a way as regards to the agenda for deliberation. At general meetings, the chairman of the board who doubles as the chairman of the meeting conducts the deliberations. Questions are preferred from praise-singers and planted surrogates with little or no room for critics. There is hardly anyway a dissatisfied shareholder can insist on being heard.[37]

On this trend, **Hadden** observed;[38]

> There is no way in which a dissatisfied shareholder may insist on satisfactory answer, or indeed an answer at all to a question, which he wishes to raise and discuss. There is no legal obligation on directors to answer questions; though they will normally seek to give at least the appearance of doing so. Where a shareholder wishes to pursue an issue in depth however, they will usually take refuge in the overall principle that the day-to-day administration of the company's affairs is a matter for the directors and not the shareholders. Alternatively, the chairman may rule that discussion of an issue which is not directly relevant to a resolution which has been duly circulated is out of order. It is only where a majority of shareholders present wish to pursue an issue that there is an effective pressure on the directors to deal with it in detail. Even then the directors may refuse to reveal the facts on the grounds of confidentiality or on the absence of any legal obligation to do so.

An important item of the Annual general meeting is to elect new directors to replace retiring directors, but the board of directors can arrange to sabotage it to their advantage. To circumvent the members power of appointment at general meetings, the board of directors would arrange for any retiring director to resign mid-term (of course with a golden hand shake) and using the board's power to fill casual vacancy, the directors will

[37]Agom A. R. Op cit, page 18
[38]Hadden T. company law and capitalism Op cit p.326

then proceed to co-opt a new director of their choice on the board, and who at the next annual general meeting is presented to the members for confirmation.[39] This way the powers of the general meeting are circumscribed.

Members are often met with a fait accompli on matters that should ordinarily fall for deliberation at their meetings consequently, the members have developed apathy and nonchalance to their company's affairs because of the realities within the corporate set up. Some shareholders prefer to frame their share certificates and put them on display in their homes caring very little about the company's affairs and even as regards the dividends declared.[40]

4.6 Directors Control of Proxy Instrument

The proxy instrument was conceived to give members of a company the opportunity to participate in decision making at general meetings even when they are absent.[41] Any member of a company entitled to attend and vote at then general meetings of the company shall be entitled to appoint another person whether a member or not, as his proxy to attend and vote on his behalf.[42]A proxy so appointed shall have the same rights as the appointer to speak at the meeting. In the notice of meeting, a reminder of the right to appoint a proxy shall appear with reasonable prominence.[43] Any provision in the company's Articles

[39]Agom A. R. op cit page 19
[40] ibid
[41]Agom A. R. Ibid page 19
[42] Section 230(1) Companies and Allied Matters Act, Cap C.20 L.F.N 2004
[43] Section 230(2) ibid

requiring the proxy instrument to be received by the company more than forty-eight hours before the meeting shall be void.[44]

In reality, individual members seldom meaningfully utilize the proxy instrument for their benefits.[45] The management of the company is in a position to utilize the provisions for the proxy voting to consolidate its position. It is standard practice for management to send all shareholders open proxy cards offering themselves as proxies.[46] But management can usually count on sufficient number of general proxies authorizing them to act on their discretion to counteract any attempt by an opposing group of shareholders to dispute any important resolution. Thus, even if an opposing group does exercise its right to propose critical resolutions, the well-established inertia of ordinary shareholders when faced with a request for actual involvement in the affairs of their companies by exercising their votes in a specific way removes any serious threat to the position of management.[47] This practice gives directors an edge even at the general meetings of the company with the result that members in the general meeting cannot constitute any serious check on management.[48]

4.7 High Illiteracy Rate in Nigeria

The problem of the high rate of illiteracy in Nigeria is another challenge to investors' protection. Nigeria is a country of high illiteracy rate. A proof of this is her ranking among nine countries with the highest population of illiterates in the world. The

[44] Section 230(3) ibid
[45] Agom A. R.ibid
[46] Hadden T. ibid Page 325
[47] ibid
[48] Agom A. R ibid Page 19

group, otherwise known as the E9 Countries, comprises of Bangladesh, Brazil, China, Egypt, India, Indonesia, Mexico, Nigeria and Pakistan. These nations also account for more than 50 per cent of the world's population.[49]With all the efforts made to address the challenges of illiteracy in the country, In the 1950s, the Northern regional government launched its own mass literacy campaign popularly known as Yaki Da Jahilchi, following the example of the Universal Basic Education (U.P.E) in the western and eastern regions. In 1977, the National policy on education contained provisions for literacy programme for all Nigerians. In 1982, a ten- year national mass literacy campaign was launched by president Shehu Shagari with the aim of eradicating illiteracy among then 50-55 million Nigerian adults by 1992, but was cut short at the coming of the military. However, the government having realized the illiteracy rate in the country inv1987, sought to include mass literacy in its overall social and rural development programme .The Directorate of Food, Roads and Rural Infrastructure (DFFRI) and the Directorate for mass Mobilization (MAMSER) were therefore directed to assist the state agencies in implementing the campaign.

The creation of these and other directorates for public education and enlightenment such as the National Directorate of Employment (N.D.E), War against Indiscipline (W.A.I) Better Life for Rural Women and the Family Support Programme did have some commendable impact on literacy education in the Country. Kano state in 1980 became the first to set up an autonomous agency responsible for adult and non-formal education which

[49]Noboh. S. N (2012)**Eradicating illiteracy in Nigeria** . RetrievedSeptember 30, 2012 from www.blueprinting.com/2012/02/eradicating……

made such a great impression that it won a UNESCO award for literacy in 1983 which spurred other states to establish their mass literacy agencies and by 1992, more than 27 states (of the then 30) had established their agency. Presently all of the 36 states including the Federal capital territory have an agency for adult and non-formal education.

There is no doubt that some considerable successes have been recorded. Even then, the challenges are still enormous. According to the United Nations Educational, Scientific and Cultural Organization (NESCO), Nigeria might still miss the 2015 target date of reducing its illiteracy rate by 50 per cent under the Education for All (EFA) declaration made in Jomtien, Thailand in March, 1990.[50] The first real attempt to address the problem of illiteracy in the country was in 1944 when the British colonial Government mobilized experts to give talks or write articles for effective communication in simple language on various topics. Illiteracy rate at that time was over 95 per cent.[51]

At the moment, Nigeria has over 50 million illiterate citizens. There is no gain saying that this has impacted negatively on all the facets of her developmental efforts and goals. With this rate of illiteracy, it will not be far from the truth to say that a lot of the investors we have in Nigeria are illiterate and are ignorant of the Laws provided by the Government to protect them. They are also not even aware of their rights as shareholders talk more of where to go and what to do when these rights are breached. Such investors invest in shares, wait for dividends, but have no interest in the management of their funds, and can decide to sell the shares when they loose confidence in the company. That is all

[50] ibid
[51] ibid

they know as far as their shares are concerned. Some of them see the company as a place they can just put in their money and go to sleep leaving the investment to grow.

The Regulatory Agencies cannot do all the work of protecting the investor all alone, the investors have a role to play by putting pressure on management and also approach the appropriate authorities in situations the regulatory agencies don't see when their rights are denied. What is apparent from this is that the eradication of illiteracy is a continuing challenge for Nigeria and more has to be done, however funding has always been a major constraint to the performance of the Commission, the little the government provides for adult education is hardly released.

4.8 The Postal System in Nigeria

Section 219(1) of the Companies and Allied Matters Act[52] provides that a company shall send Notices of meeting to the people provided for by the Act. Failure of a Company to send notice to any of the persons provided in the Section can invalidate the meeting[53]. These notices are normally sent by mail in Nigeria but there are problems associated with effective mail delivery system in Nigeria, as postal agencies can not cope with the upsurge, thereby resulting in none or late delivery of notices. Sometimes it is even seen as a deliberate act by the management thereby sending the notices late to ensure the recipients receive it late or even after the indicated date of the meeting has elapsed to prevent investors from attending such meetings so as not to raise questions on the management of

[52] Cap C20 L.F N 2004
[53] Section 221 C.A.M.A cap C 20 L.F.N 2004.

the Company. This attitude of management and our mail delivery system is a big challenge to investor protection in Nigeria.

4.9 Corruption in Nigeria

Nigeria is the most populous Nation in Africa and offers investors abundant natural resources, a low-cost labour pool, and a potentially large domestic market. For many years, Nigeria has had reputation for being among the most corrupt countries in the world, but the problem has received increasing national and international attention in recent years. Although measures have been taken against both public and private corruption, several business surveys indicate that petty corruption is still widespread and constitutes major obstacle for Companies operating in Nigeria.[54]

The problem of corruption extends into the agencies set up to regulate Companies and to protect the investors most especially the Securities and Exchange Commission. Sometimes the fraudsters work in connivance with some staff of the Commission and some members of the professional bodies acting in the Capital market, which negatively impact on the success of public quoted Companies and erode investor confidence. Instances abound such as Enron Company in America and African Petroleum (AP) in Nigeria, where the accounting report of public quoted Companies painted the Company as doing very well, whereas the opposite is the case, prompting the collapse of an erstwhile successful Company.[55]

[54]businessanticorruption /Snapshot . 25/8/2012 at 7. pm

[55]Okechukwu I.A,Regulation and Adjudication of Disputes in the Securities business: A case against statutory constraints in Nigeria, Ahmadu Bello University Journal. 2006/2007 P.104

An instance is that of Bonkolans Scam which Nestle Plc. Shares had been fraudulently brought to its depository by some stockbrokers (stock broking firms) most of which the Appellant had cleared and had sold. The staff acted in concert with the Fraud syndicate to introduce the forged shares into the CSCS[56] (Central Securities Clearing System). T

his issue of corruption is a huge challenge that even the same body as the Securities and Exchange Commission Saddled with the responsibility of investor protection at the stock market is not immune as can be seen by the scandals over the years and the most recent of which involves the Director General of the Securities and Exchange Commission M.s Aruma Oteh who took over as Director General in January 2010 and resumed in January 2012 after her predecessor, Musa Al-Faki resigned on the heels of another financial scandal involving the Commission on the Sale of AP Stocks in may 2009. The board of the Commission wanted a probe into the allegations of financial impropriety especially concerning the S.E.C project 50 to mark the Regulator's 50years of existence in Nigeria and disharmony in the Regulator of Nigeria's Capital market which led to the probe of the Capital market by the House of Representatives[57].

There were a lot of allegations against the Director General which were Gross incompetence, lack of organization and unnecessary delays in handling operations activities of the Commission. One allegation that should be of concern as regarding investor protection is that of Investigation of failed Banks and the abrupt stoppage of the

[56] (supra) page 98
[57] Corruption Allegations, htt:www.information Nigeria.org 25/8/2012 at 7. pm

APC hearing. The Commission in August 2008 was involved in the investigation of the five failed Banks i.e. Afribank plc, Finbank plc, Oceanic Bank plc, and Union Bank plc. The Commission carried out the investigation in collaboration with the EFCC(Economic and Financial Crimes Commission), CBN (Central Bank of Nigeria) and SSS (Secret Security Service). The essence was to determine how the recklessness of the Banks contributed in making the shareholders loose their investments and who the key culprits were. At the end of the investigation, a comprehensive report was submitted to the then Director General of the Commission (Mallam Musa Alfaki) and he gave a directive for an administrative proceedings on the matter to take a civil decision on those capital market operators involved[58].

While the APC (Administrative Proceeding Committee) proceedings was going on, Mallam Musa Alfaki left the service of the Commission and Ms. Aruma was appointed, when she assumed duty she was advised by one Mr. Simon Obadir, who was appointed by her to revisit the investigation and some new set of staff were commissioned to carry out the same investigation.

The second investigation did not bring out anything new, but the administrative proceeding was abruptly brought to an end on the day the decision was to be made on the matter. The next thing that was heard was the transfer of the cases to the Investment and Securities Tribunal (IST). It is only when a decision has been taken by the Commission and some parties are not satisfied, that they should appeal to the IST for a second hearing. The Commission does not on its own transfer a matter before it to the IST. It therefore was a

[58] ibid

surprise when the Commission took such a decision. Since the matter was sent to the IST, nothing has been done on it. Today, the shareholders of these banks have lost their investments, as the Banks have been taken over by the NDIC (Nigerian Depositors Insurance Corporation) and core investors were invited to buy into them. This development has a negative effect on investors' confidence, as people no longer put their investment in those banks[59].

These amongst so many are the challenges facing investors' in Nigeria. Consequently, there is the need to study and advance ways out of this problem and this work is one of such ways. While some of the problems lie with the regulatory bodies, some also lie with the investors sought to be protected. It is true that no system can ever be perfect but attempt must be made to bring as near perfection as possible the activities, institutions and operators in the market.

[59] ibid

CHAPTER FIVE

SUMMARY, CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1 Summary

Right from the era of the joint stock company, and the activities of the Medici's[1] in Florentian Italy, the aggregation of capital by individual private investors required state licence and protection for the enhancement of their search for profit, fame and influence. Now, the permit of state to create artificial entities, possessing names different from those of their promoters and vested with capacity to possess a common seal, own property, sue and be sued and endowed with perpetual succession, no doubt accelerated the growth and development of capitalism. The fact has to be admitted that limited liability of the companies established by private persons hiding behind the corporate veil helped to advance the cause and fortunes of investors' for as long as the companies established did not contravene their charters or acted in any way considered inimical to the interest of the state or the public good.[2]

In other words, company charters did not envisage unlimited or unrestricted power to make money. If and when ever a company acted contrary to the public interest or, for instance traded with the enemy in times of war, the granting authority could always pierce the corporate veil or revoke the licence and thereby put an end to its activities.[3] The typical business unit of the 19th century was owned by individuals or small groups; was managed by them or their appointees; and was, in the main, limited in size by the personal wealth of

[1]Italian banking and political family that ruled Florence for almost three centuries.
[2]Oyebode A. (2009) The Imperative of Corporate governance in Nigeria. Retrieved January 10th 2013 from http: www. Nigeriavillagesqure…….
[3] ibid

the individuals in control[4]. These units have been supplanted in ever greater measure by great aggregations in which tens and even hundreds of thousands of workers and property worth hundreds of millions Naira, belonging to tens of hundreds of thousands of individuals, are combined through the corporate mechanism into a single producing organization under unified control and management[5].Modern corporation has grown to tremendous proportions, there may be said to have evolved a "corporate system" which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution.[6]

In its new aspect the corporation is a means whereby the wealth of innumerable individuals have been concentrated into huge aggregates whereby control over this wealth has been surrendered to a unified direction. The power attendant upon such concentration has brought forth princes of industry, whose position in the community is yet to be defined. The surrender of control over their wealth by investors has effectively broken the old property relationship and has raised the problem of defining these relationships anew. The direction of industries by persons other than those who have ventured their wealth has raised the question of the motive force of such direction and the effective distribution of the return.[7] The corporate system has given rise to a large measure of separation of ownership control through multiplication of owners resulting in the size and public market for its securities. The capital is sourced from more than the individuals who may be in control.

[4] Ibid
[5]Berle A.A, Means G.C, (1963) The modern corporation and private property, the Macmillan Nineteenth printing company New York p.2
[6] Ibid. P.1-2
[7] Ibid. p. 2

These individuals are referred to as investing public through direct purchase by individuals of stocks or bonds, or indirectly as insurance companies, banks etc.[8]

The initial capital with which the company commences its business is generally through contributions made by the investors' with the sole aim, in most cases, of getting some returns in form of profits on their investment. But it is not all the investors that can participate actively, if at all, in the management of their investments, especially where there are so many of them. Large number of cases, management is vested in the hands of salaried experts who may not have contributed much to the capital of the company. This raises the question of effective supervision of the managers themselves. In other words, what should be done to prevent those in the management position from siphoning away the company's fund and to ensure efficient management which will enable the investors to realise their aim for investing in the company? This is one of the problems to which the company legislation over the years sought to find solutions.[9]

The Government had to provide relevant laws and regulatory bodies to regulate the activities of companies in Nigeria in other to provide security of investment and encourage investment in the country. Some of these laws are on disclosure of certain information regarding companies as a way of making the investors aware of the financial standing, the prospects and achievements of the company for informed decisions and also for the regulatory Institutions to be aware of the operations of the companies and keep them in check.

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[8] Ibid p. 3

[9] Nwafor, A.O (2000) Investment Protection under Nigerian Company Law , Department of Commercial Law, University of Jos. Retrieved on the 10/6/2013 at 10am from http://dspace.unijos.edu.ng/handle/10485/1558

One major contribution that the Companies and Allied Matters Act[10] and the Investment and Securities Act[11] have made in this area is to recognize that what is needed is a watchdog empowered to take action on behalf of the investors' by investigation, inspections and the institution of civil and criminal proceedings. Some of these watchdogs are the Corporate Affairs Commission and the Securities and Exchange Commission. But despite this effort there have been series of challenges preventing the achievement of the desired investor friendly atmosphere in Nigeria.

5.2 Conclusion

While the Companies and Allied Matters Act[12] envisages good corporate governance by specifying the structure of companies, the powers and the role of the boards of directors, management and shareholders; the reality of the situation is that all this has become largely academic on account of impotent and moribund regulatory agencies. More often than not, non-executive directors are not totally up to the task they are supposed to perform having been largely nominated by the managing directors themselves. Even the chairmen are usually drafted onto the boards from the ranks of retired civil servants, senior military officers or traditional rulers who albeit might have high public profiles but are largely lacking in the skill or expertise required for the supervision and control of the companies.[13]

[10] Cap C 20 L.F.N 2004
[11] 2007
[12] Cap C 20 L.F.N 2004
[13] Oyebode O, (2009) The Imperative of Corporate Governance in Nigeria. retrieved October 11, 2012 from http:// www.nigeriavillagesqure.

People who might be unable to correctly read or interpret statements of accounts and are incapacitated in censuring erring chief executive or, in fact firing him are usually the type of people found on the boards of many companies. Frequently, there is little compliance with mandatory dispatch of notices of meetings to shareholders while the venues of important meetings are deliberately fixed in distant locations in a bid to ensure the absence of shareholders. More important, members of the audit committees do not generally possess the requisite skill to perform their statutory functions. There is also corruption that goes on in pre- annual general meetings fora in order to compromise shareholders or the deliberate recognition of 'settled' shareholders at meetings to chorus and celebrate the success of the board when the annual report is being discussed at the annual general meeting.[14]

Thus, the critical role of the audit committees and the shareholders as a check on the management has all evaporated as a result of the crave for personal gains and enrichment. It will seem that for as long as companies and especially, the banks in Nigeria are able to act within a layer of secrecy, the presumption is that everything is alright. The disclosures of massive fraud have robbed companies and banks of the trust of the public. The immediate consequence of the loss of faith and confidence of the public has been the current lukewarm attitude of many Nigerians in the stock market. All these problems are hinged on lack of proper disclosure as required by law and also lack of good corporate governance by managers in running the affairs of the company.

[14] ibid

5.2 Findings

1. The government and the regulatory bodies lack the will in the implementation of its laws. An example is the establishment of the Investors' Protection Funds which came to effect five years after the take off of the Investment and Securities Act 2007. This means through out that period all the loss and hardship suffered by investors' went without compensation since the body saddled with that responsibility was yet to be established to compensate them.
2. The Companies and Allied matters Act has provided for meetings as an avenue for investors to take part in decision making of the company. The notice of meeting sometimes reaches the members after the meeting date as a result of delay in the postal service or even a deliberate act on the part of the directors.
3. The Companies and Allied Matters Act is silent on the qualification of members of the audit committee upon whom the veracity of the company's accounts rest and so far in Nigeria we have never heard of any company where the audit committee were able to uncover the cooking of the company's books. It is therefore, possible to have as members or even chairman of the committee, illiterates who can neither understand nor analyze the company's financial statements to be able to identify fraud in the company's accounts. The Companies and Allied Matters Act did not specify the qualification for persons to be appointed as Inspectors to investigate the affairs of a company which is a short coming that can negate the very essence of this provision as the commission can appoint a person who is not knowledgeable in accounting or company law to investigate a company.

4. There is an attempt to provide investors' protection in Nigeria, through division of powers between the board of directors and the general meeting. But in an attempt to do so the law brought in some terms that are subjective like "good faith' and due diligence. This can be seen under Section 63 (4) of the Companies and Allied Matters Act. These terms are subjective and what might be regarded as good faith to one person might not be regarded as good faith to the other. That Section has taken away the powers it gave the general meeting in Section 63(1) to take part in decision making of the company.

5.3 Recommendations

1. The Government and Regulators should ensure prompt implementation of their laws and policies.
2. It should be made mandatory that companies should start using messages alerts and e-mails for mobile phones to send notices of meeting in addition to the traditional notice to ensure that shareholders get notice. Since there is so much technological advancement now and banks are using alert messages to customers informing them of every transaction relating to their accounts this method can also be introduced for notices of meetings in addition to the normal notice of meeting.
3. Under Companies and Allied Matters Act, qualification should be provided for people to be appointed as auditors and members of the audit committee. Only people with knowledge in accounting, company law and vast experience should be appointed so that people will not be appointed based on sentiments or their influence

in a company. The Companies and Allied Matters Act and the Investment and Securities Act should also be amended to provide for qualification of persons to be appointed as inspectors to investigate the affairs of a Company to be people experienced in accounting and company law.

4. Section 63(4) of the Companies and Allied matters Act needs to be expunged as it ended up giving the directors power take certain decisions even if the general meeting does not agree with the decision taken by the board

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