February, 2003

Corporate Governance In Nigeria? Are There Laws & Principles?

Our February 2003 Newsletter is on the vexed and often ?secretly? avoided issue of what Corporate Governance principles should a company apply to its Business. We attempt in brief, a contemporary analysis that should enhance our understanding of the past and present principles. As usual, we expect it to be of immense benefit to you.

Introduction

One of the greatest marvels in the twenty-first century has been the victory of capitalism over communism, the diminishment of BIG GOVERNMENT in business enterprise and the emergence of big private corporations. Some fallacy with these developments however remain that human greed, which is a predominate propellant, has also been a counter productive force leading to massive corporate fraud and failures.

To meet the colossal negative challenge of human greed, corporate business continues to evolve various moral and ethical principles, which collectively are now referred to as ?Corporate Governance? principles. As one Author said in his article, ?Societies that impose high moral standards progress more geometrically and outlive others that do not?. This is more applicable to corporate and government business.

Unfortunately however, most enlightened directors and government perceive any insistence on good Corporate Governance principles as an excuse for conflicts from those who want to ?disturb the way things are usually done?.

What Is The Meaning Of Corporate Governance

Mr. Farrar in his Book Company Law (3 rd Edition, 1998) said, ?Corporate Governance is about the process of the direction of a company, the relationship between the Board of Directors and management. **It is also ultimately about regimes of accountability?.**

Corporate Governance In Nigeria

Contrary to the assertion of many personalities in the business community, a few Corporate Governance principles have always been a part of our Companies' Laws in Nigeria . The problem remains that no Director, Shareholder or other stakeholder has made any significant attempt to enforce or redress a breach of any of the rules because of the possible ignorance of those in control of the corporations who see any challenge as hostility from the ?enemy?.

Registered Corporations are a creation of statute and these statutes require **accountability** . Accountability in the context of Corporate Governance also raises the issue of FULL DISCLOSURE and controls. Examples of some of these legal provisions in the Companies and Allied Matters Act, 1990 (?CAMA?) include mandatory filings with the Corporate Affairs Commission (?CAC?) of any new business, full particulars with notice of any changes in any of the corporation's objects/business, directors, shareholders, authorised share capital, registered office, company secretary, external auditors, etc. There is also the mandatory requirement that all registered Corporations, whether private or public, must file/register their Annual Audited Accounts with the CAC. These filings are available for inspection to members of the public on application and payment of a nominal search fee.

Of further mention are the Corporation's internal records, which include its register of members, minute books, register of shares, financial statements and audited accounts, etc.

Also, Corporate Governance principles have gone beyond the Directors of a Corporation owing a duty of care only to its shareholders as they now also owe a duty of care to their employees and other stakeholders. See Section 279 (4) of CAMA.

CAMA further makes provisions in Sections 280 and 281 prohibiting Directors of a Corporation from having conflicts of duties and interest and multi conflicting Directorship in other Corporations. Sections 282 requires the Directors of a Corporation to exercise the highest duty of care whilst Section 283 makes them Trustees of all the Corporation's moneys, properties and powers. Sections 94 to 98 of CAMA makes regulations for disclosures in a public Corporation's majority shareholding whilst Section 544 states that a Director may be guilty of an offence if a false material statement is made in the Corporation's prospectus inviting members of the public to invest in the Corporation.

Modern Corporate Governance Principles

Many business personalities and organisations including the Business Roundtable, which is made up of the topmost Chief Executive Officers in the United States of America , have advocated and supported the following Corporate Governance guiding principles:

- The appointment of the members of the Board of a Corporation should be based on people with the requisite business and industry experience relevant to the Corporation's enterprise.
- Smaller Boards with the majority of the members being non-executive members are more cohesive and efficient. Also, the paramount duty of the Board, apart from directing the Corporation, is to appoint a well-qualified and ethical Chief Executive Officer (?CEO?) and oversee the CEO and the other senior management officers in a competent and ethically operational manner.
- The positions of the Chairman and the CEO should be separated. The Chairman should run the Board, its agenda, ensure cohesiveness and harmony amongst Board members, etc. The CEO should run the company. Also, there should be a separation of the Corporation's ownership from the roles of External Auditors and Company Secretary.
- Management, under the oversight of the Board and its Audit Committee, should produce the Financial Statements of the Corporation. The CEO and the Chief Financial Officer of the Corporation should under Oath affirm the correctness of the statements.
- Only independent Directors or a vast majority of them should sit on the Board Committees that oversees three (3) key functions; Audit, Compensation and Corporate Governance Committees. In America , most Corporations have established the latter two (2) committees and Nigerian businesses are encouraged to do the same. Note that the Compensation Committee oversees the overall compensation structure of the Corporation.
- The Chairman and a vast majority of the members of the Audit Committee should be non-executive Directors of the Corporation. It is also fundamental that Corporation should plan for succession and changes in a fair and equitable manner before they occur.
- It is the responsibility of the independent External Accounting Firm to ensure that it is in fact independent without any conflict of interest. The appointment process been delegated to an Independent Audit Committee can enhance this position. The Compensation Committee instead of the management should fix the remuneration of the Auditor and Company Secretary.
- From the ERON experience, the selection of the External Auditor should involve an annual due diligence process in which the Audit Committee reviews the Corporation's audit needs viz the qualifications, work product/performance or tract record and reputation

of the acting or proposed External Auditor. As a collateral point, Auditor staff and partners in charge of the Corporation's audit work MUST, as a matter of strategy, be rotated once every two (2) years in the hope of maintaining detachment and independence. Finally, there should be a ?cooling off? period between such appointment and the possible engagement of the same partners and or staff of the Audit Firm, as staff of the Corporation.

- In addition to other designated roles, the Corporate Governance Committee should consider whether it is appropriate to draw consulting advice from its external Auditors in the light of possible conflict of interest issues.
- Directors should, before accepting new directorship in other corporations, and as a part of avoiding conflict of interest issues, inform the Corporation or Corporations where they are already Directors, of such a new appointment.
- It is in the Corporation's best interest to treat its employees fairly, equitably and reasonably. Most Corporations now have Employee Co-operatives whose Trustees hold a nominal percentage of the Corporation's shares and whose members sit on the Audit and Compensation Committees. This way, there is adequate communication between the Corporation and its employees. This process also facilitates the employees alerting non-executive Directors of alleged misconduct without fear of retribution.

Conclusion

It is fundamental that for collective growth, government at all levels should also imbibe the above virtues in its business of governance. Also, the penalties for non-disclosure or late disclosure under CAMA are too nominal to discourage disobedience. There is the need for a general review.

^ Return to top

EHIJEAGBON O. OSEROGHO

February, 2003.