

SCHOOL OF ADVANCED LEGAL STUDIES- FACULTY OF LAW

UNIVERSITY OF CAPE TOWN

**AN EVALUATION OF CORPORATE GOVERNANCE LEGAL FRAMEWORKS IN
NIGERIA: LESSONS FROM INTERNATIONAL ORGANISATIONS AND OTHER
JURISDICTIONS**

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DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

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EGBE ENORENSE IGUODALA

DEDICATION

I dedicate this work to the almighty God for his grace, strength and provision for me throughout the duration of my LLM programme and to my loving parents, Dr W.A and Mrs J.E Iguodala, you are the best.

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ABBREVIATIONS

CAC:	Corporate Affairs Commission
CACG:	Commonwealth Association of Corporate Governance
CBN:	Central bank of Nigeria
FRCN:	Federal Reporting Council of Nigeria
ISAR:	International Standards of Accounting and Reporting
MMC:	Ministerial Management Committee
NAICOM:	National Insurance Commission
NCC:	Nigerian Communication Commission
NDIC:	Nigerian Deposit Insurance Corporation
NFPO:	Not for Profit Organisation
OECD:	Organisation for Economic Co-operation and Development
PCAOB:	Public Company Accounting Oversight Board
PEC:	Public Entity Committee
PenCom:	Pension Commission
SEC:	Securities and Exchange Commission
SOX:	Sarbanes Oxley Act
UN:	United Nations
UNCTAD:	United Nations Conference on Trade and Development

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CHAPTER ONE- INTRODUCTION

1.1 Introduction

In acknowledgement of the vital role of the modern corporation in the economic development of any nation, and the need to ensure good governance of these corporations, there is an upsurge in global initiatives for their effective management and control. ¹ Thus, given the far reaching impact of companies' operations on the wealth of nations and the distribution of economic well-being, it has become increasingly obvious that 'the governance of companies, corporations, family owned businesses, small and medium scale enterprises and business associations must matter as does political governance'.² In view of this, there have been efforts by company law for years, to capture the concept of corporate governance, to solve its problem of separation of ownership and control and to promote the effective implementation of good corporate governance.³ However, this has not had much success as evidenced by the global stock market crashes. The collapse of corporate giants like the Enron Corporation in the United States and Polly Peck in the United Kingdom in the 1980s has brought to the fore the need to change from Company Law to corporate governance codes. ⁴ Hence, the emergence of corporate governance legislations and guidelines by international organizations (like the United Nations and the Organisation for Economic Co-operation and Development) and foreign jurisdictions (like the United States of America) ⁵ which are centred on timeless values and principles. These principles include amongst others, discipline, transparency, responsibility, accountability, fairness, integrity and ethical leadership⁶ and have been identified and described by the King Report on Corporate Governance (2002) and the Australian Stock Exchange (ASX) Corporate Governance Council's principles of good corporate governance and best practice

¹ EN Okike 'Corporate Governance in Nigeria: The Status Quo' (2007) in *Corporate Governance: An International Review* Vol 15, Issue 2, 173-193 available at <http://dx.doi.org/10.1111/j.1467-8683.2007.00553.x> , accessed on 24 July 2015.

² D Adekunle, L Fashola et al 'Development in Business Law' *A compilation of papers presented at the Nigerian Bar Association conference, section on Business Law* (2010) at 263.

³ Ibid.

⁴ The United Nations Editorial 'Corporate Governance – The Global State of the Art' *Corporate Governance: An International Review*, (1999) 7(2), 117-122 as cited in BM Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1 available at www.sciedu.ca/ijba accessed on 8 October 2015.

⁵ M Davies, B Schlitzer 'The Impracticability of an International "One Size Fits All" Corporate Governance Code of Best Practice' (2008) 532 *Managerial Auditing Journal*, Vol. 23(6), 54 available at <http://www.emeraldinsight.com/doi/full/10.1108/02686900810882093>, accessed on 24 November 2015.

⁶ J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007) 7-8.

recommendations as the characteristics and essential principles of good corporate governance respectively.⁷

In Nigeria, following the corporate failures and near collapse of some financial institutions like the banks and the capital market in the late 1900s and early 2000s which was deemed to have been as a result of poor corporate governance practices,⁸ and the inability of the Company legislation⁹ to adequately address emerging issues and challenges in relation to corporate governance,¹⁰ some regulations were developed by the regulators in these sectors to not only complement the Company legislation,¹¹ but to also promote corporate governance practices in these industries.¹² These regulations include the Securities and Exchange Commission's Code of Best Practice¹³ for publicly listed companies in Nigeria; the Central Bank of Nigeria's (CBN) Code of Corporate Governance,¹⁴ the Pension Commission's (PenCom) Code of Corporate Governance;¹⁵ the National Insurance Commission's (NAICOM) Code of Corporate Governance;¹⁶ the Securities and Exchange Commission's Code of Corporate Governance for public companies;¹⁷ the CBN and Nigeria Deposit Insurance Corporation Code of corporate governance¹⁸ and the Nigerian Communications Commission's Code of corporate governance.¹⁹

However, following the fact that first, these regulations are industry specific and do not apply to all companies registered in Nigeria,²⁰ there are some companies operating outside the

⁷ Ibid at 8-10.

⁸BS Olowoyin 'Corporate Governance in Nigeria: The Ethical & Behavioural Imperatives' (2014) *presentation at the International Conference on Arts, Economics & Management* (ICAEM) Dubai(UAE) available at <http://icehm.org/siteadmin/upload/9731ED0314025.pdf>, accessed on 8 October 2015.

⁹ Chapter 59, Laws of the Federal Republic of Nigeria (LFN) 1990.

¹⁰ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3), 53 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 16 November 2015.

¹¹ K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 5 December 2015.

¹² Ibid.

¹³ The Code of Best Practices on Corporate Governance of 2003.

¹⁴ The Central Bank of Nigeria (CBN) Code of corporate Governance for Banks in Nigeria post Consolidation of 2006.

¹⁵ The Code of Corporate Governance for Licensed Pension Operators of 2008.

¹⁶ The Code of Corporate Governance for the Insurance Industry of 2009.

¹⁷ The Code of Corporate Governance for Public Companies of 2011 amended in 2014.

¹⁸ The Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry of 2014.

¹⁹ The National Code of Corporate Governance for the Telecommunication Industry of 2014.

²⁰K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization* Vol. 38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 5 December 2015.

guidelines of a corporate governance regulation.²¹ Secondly, because of the fact that the ownership structure of private businesses in Nigeria is one where most businesses (companies) in the formal sector are not publicly listed²² and the nature of the ownership of most companies is informal,²³ the ownership of companies is usually vested in persons involved in the day to day running of the company thereby posing challenges to the practice of corporate governance.²⁴ By this practice of vesting ownership and control of companies in one and the same person, the underlying concept of corporate governance, which is to separate the ownership of a company from the control of the company, is being contravened. Lastly, the scope of corporate governance includes, amongst others, the relationship between the shareholders and the company, the exercise of corporate power by the main organs of the company, transparency and credible disclosure standards, the composition of its board of directors, and independent auditors,²⁵ but in practice, the annual submission of the audited financial statements of accounts by most companies (usually facilitated by the annual financial reporting requirements of the Companies and Allied Matters Act (CAMA), the Corporate Affairs Commission (CAC), and the Federal Reporting Council of Nigeria)²⁶ appears to be the only corporate governance practice carried out by most companies. Consequently, Nigeria has of recent, released a draft National Corporate Governance Code which will specifically address the issues of corporate governance and will be applicable to all companies registered in Nigeria.²⁷

During the course of this study, the new draft code which will serve as a baseline standard of corporate governance to all companies in Nigeria will be examined in order to assess its compliance or otherwise with international best practices of corporate governance.

²¹ TA Oyejide, A Soyibo 'Corporate Governance in Nigeria' (2001) presentation at the conference on Corporate Governance, Accra, Ghana available at <http://www.nigerianlawguru.com/articles/company%20law/CORPORATE%20GOVERNANCE%20IN%20NIGERIA.pdf>, accessed on 6 December 2015.

²² Op cit note (n15) at 6.

²³ K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization* Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 5 December 2015.

²⁴ Ibid.

²⁵ D Adekunle, L Fashola et al 'Development in Business Law' (2010) *A compilation of papers presented at the Nigerian Bar Association section on Business Law Conferences* at 263.

²⁶ J B Marshall 'Corporate Governance Practices: An overview of the evolution of corporate governance codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 53 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf> accessed on 5th November 2015.

²⁷ Op cit note (n 10) 53.

1.2 Objective of the Research.

The objective of this study is to examine the existing corporate governance legal frameworks in Nigeria in order to assess their conformity or otherwise with the international best practices of corporate governance. Furthermore, during the course of this study, the new draft national corporate governance code in Nigeria will be examined and also compared with the corporate governance code in the United States and international models and regulations on corporate governance. However, the comparison of the draft code with its international counterparts is limited in extent. It is not a comprehensive comparison of all aspects as this would be impossible to accomplish in a thesis of this length.

1.3 Research Questions

My research question is: To what extent do existing legal frameworks on Corporate Governance in Nigeria foster international best practices of corporate governance?

To answer this question, the following sub-questions shall be explored:

1. Do existing legal frameworks on corporate governance conform to international best practices?
2. Will the new draft overarching Corporate Governance Code improve corporate governance in Nigeria and ensure its conformity to international best practices?

1.4 Methodology

The proposed study is desktop based. It proposes to examine the domestic laws on corporate governance in Nigeria and to also compare them with those in the U.S, and the corporate governance guidelines by international organizations.

1.5 Theoretical Framework

This literature will look at the various theories of corporate governance in order to understand the underlying philosophy and debates of the same.

1.6 Legal Framework

This study will examine corporate governance legislations in Nigeria and compare them with corporate governance legislation the United States of America. This comparison will highlight the various approaches to the regulation of corporate governance in Nigeria, the United States of America as well as by international organizations. During the course of evaluation, whether these regulations are mandatory or voluntary; the underlying principles and the theories on which these regulations are based will be considered.

1.7 Structure of Research

Chapter 1- Introduction

This chapter introduces the thesis as a whole and comprises of, amongst other things, the objectives and the research question.

Chapter 2 – The Meaning, Background and Theories of Corporate Governance

This section of the thesis deals with the meaning of the term ‘corporate governance’, its historical development and background as well as the various theories of corporate governance.

Chapter 3- Regulatory Frameworks for Corporate Governance in Nigeria

This chapter looks at the existing legal frameworks in Nigeria as well as the new draft corporate governance code in order to ascertain its compliance with international best practices with regards to the promotion and implementation of corporate governance in Nigeria.

Chapter 4- Specific National and International Legal Regimes on Corporate Governance

In this chapter, there shall be an evaluation of the corporate governance guidelines proffered by international organizations like the United Nations, the Commonwealth and the Organisation for Economic Co-operation and Development (OECD) and the legislation by foreign jurisdictions like the United States of America.

Chapter Five – Comparative Analysis

In this chapter, a comparative analysis between the draft National Corporate Governance Code in Nigeria and the legal instruments by international organizations and the U.S will be carried out in order to ascertain its conformity or otherwise with international best practices.

2 CHAPTER TWO- THE MEANING, BACKGROUND AND THEORIES OF CORPORATE GOVERNANCE

2.1 Definition of Terms

Due to the current failures of major corporations all over the world, questions have arisen with regards to corporations: who they are, to whom they owe their obligations, how best they can be governed, and the role of governments in regulating them.²⁸ Thus there is the need to look at the meaning of a corporation or company, governance and the term ‘corporate governance’ before discussing further.

2.1.1 Meaning of a Company/ Corporation

For the purpose of this essay, the words ‘company’ and ‘corporation’ shall be used interchangeably.

According to Gower,²⁹ the word ‘company’ may not have an all exclusive legal meaning. It connotes an association of a number of people for some common object(s) solely for economic reasons. A company is also defined by Osborn’s Concise Law Dictionary as ‘an association of persons formed for the purpose of some business or undertaking carried on in the name of the association each having the resort of assigning his shares subject to the regulation of the company’.³⁰ A corporation has been said to be a legal entity with perpetual succession which is independent from its employees, directors, investors or its customers.³¹

2.1.2 Meaning of Governance

According to Business Dictionary, governance is the establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organization. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of

²⁸ A Crane, D Matten *Business Ethics* 3ed (2010)46.

²⁹ LCB Gower *Principles of Modern Company Law* 5ed (1998) 3.

³⁰ Burke, John Osborn’s *Concise Law Dictionary* 6ed (1976) 83.

³¹ A Crane, D Matten *Business Ethics* 3ed (2010)46.

the organization.³² And, for governance to be termed good governance, it must be characterised by participation, transparency, accountability, rule of law, effectiveness, equity, etc.

2.1.3 Meaning of Corporate Governance

There is apparently no specific definition of the meaning of corporate governance. Many have attempted to lay down a general definition of corporate governance yet one definition varies from another.³³

Simply put, corporate governance has been defined by the UK Cadbury report³⁴ and the King Code,³⁵ as the system by which companies are directed and controlled. It has also been described by the Australian Stock Exchange (ASX) as the system by which companies are directed and managed.³⁶ At its broadest, Justice Owen has defined corporate governance as ‘... the legal and organisational framework within which and the principles and processes by which corporations are governed and³⁷...the governance of corporate entities which comprehends the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations...’³⁸

However, the most widely accepted definition of corporate governance is that proffered by the Organisation for Economic Co-operation and Development (OECD). It defines corporate governance as;

‘...involving a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined...’³⁹

³² Business Dictionary available at <http://www.businessdictionary.com/definition/governance.html> accessed on 8 October 2015.

³³ J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007) 2.

³⁴ AO Adeyeye *Corporate Social Responsibility of multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (2012)169.

³⁵ J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007)1-3.

³⁶ Ibid.

³⁷ Background paper by the HHRoyal commission as cited in J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007)2.

³⁸ Report of HHRoyal commission (2003) as cited in J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007)2.

³⁹ OECD principles of corporate Governance, revised April 2004 as cited in SO Ofuani’s ‘Free Trade Zone and Corporate Governance in Nigeria’ in E Azinge and S M Omo’s *Legal regime of Free Trade Zones* (2013) Nigerian Institute of Advanced Legal Studies.

2.2 Theories of Corporate Governance

There are various theories of corporate governance such as the agency theory, the shareholder theory, the stakeholder theory, the stewardship theory and the transaction–cost economist theory. These theories can also be categorized based on the approach to corporate governance on grounds of the expected behaviour of those who manage assets not belonging to them such as the stewardship and the agency theories of corporate governance and on the basis of whose interests should be considered when making corporate decisions such as the shareholder primacy and the stakeholder inclusive approaches.⁴⁰ However, for the purpose of this literature, focus will be on four of the theories which are the agency, shareholder, stewardship, and stakeholder inclusive theoretical approaches.

2.2.1 The Agency Theory

It has been proposed by some writers that the theoretical basis for corporate governance is anchored on the agency theory.⁴¹ This theory proposes that the relationship between the manager of a company and the shareholder is one of agency. That is, that the manager of a company is mandated to act as agent in the interest of the shareholders for compensation.⁴² The initial proponents of this theory, Berle and Means⁴³ recognized the need to separate the issue of control and ownership and called for more transparency, voting rights and accountability. Hence, this became the basis of the principal-agent theory which tries to explain the conflict arising from the varying interest of the principal (owners) and the agent (managers).⁴⁴ Jensen and Meckling⁴⁵ and Fama and Jensen⁴⁶ explained this relationship in terms of legal contracts and the mechanisms

⁴⁰ A Romalho ‘Corporate Governance and the Call for Stakeholder Inclusivity: Do Stakeholders Lose Out?’ *The Corporate Report*.

⁴¹ AA Berle, GC Means ‘The Modern Corporation and Private Property’ (1932) (*New York: Harcourt, Brace & World, [1932] 1968*).

⁴² A Romalho ‘Corporate Governance and the Call for Stakeholder Inclusivity: Do Stakeholders Lose Out?’ *The Corporate Report*.

⁴³ AA Berle, GC Means ‘The Modern Corporation and Private Property’ (1932) (*New York: Harcourt, Brace & World, [1932] 1968*).

⁴⁴ CE Irving ‘An Overview of Corporate Governance’ (2013) *presentation at the Cave Hill school of Business UWI, Barbados* available at <http://www.slideshare.net/chunchirving/an-overview-of-corporate-governance>, accessed on 7 October 2015.

⁴⁵ M Jensen, WH Meckling ‘Theory of the Firm: Managerial Behavior, Agency Costs And Ownership Structure’(1976) as cited in CE Irving ‘An Overview Of Corporate Governance’(2013) *Presentation at the Cave Hill School of Business, UWI, Barbados* available at <http://www.slideshare.net/chunchirving/an-overview-of-corporate-governance>, accessed on 7 October 2015.

⁴⁶ EF Fama, MC Jensen ‘Agency Problems and residual Claims’ (1983) *The Journal of Law Economics* Vol. 26, No. 2, ‘Corporations and Private Property’ *At a Conference Sponsored by the Hoover Institution* 327-349 available at <http://www.jstor.org/stable/725105>, accessed on 7 October 2015.

that are needed to maintain this relationship, Eisenhardt⁴⁷ examined two streams of agency theory: positivist agency theory and principal-agent relationship approach.⁴⁸ The former stream generally is focused on the owner/CEO relationship in large corporations while the latter is more general and can be applied to family run companies.⁴⁹ Although this theory embraces the corporate governance concept of separation of ownership (by the investor) and control (by management), it has been alleged that it poses a risk to shareholders (agency risk) since the investment of the owners could be misappropriated by the management.⁵⁰

2.2.2 *The Stewardship Theory*

The proponents of this view propose that the management of a company acts as an agent for both the company and its shareholders. They propose that since agents are stewards for the company's assets and not agents of owners, managers have a fiduciary duty to their shareholders to be stewards instead of being merely agents for their interests.⁵¹ Thus, proponents like Donaldson and Davis argue that no principal-agent problem exists as left alone; management will act in the best interest of firms and shareholders.⁵² This is because according to Ghoshal and Moran, they do not believe in the pessimistic view of human nature with regard to self-interest which reinforces and influences such negative behaviour.⁵³

2.2.3 *The Shareholder (Primacy) Theory*

The shareholder theory proposes that the corporation should serve the interests of shareholders only.⁵⁴ Grounded in the agency theory, the shareholder theory is aligned with the agency theory as both view the relationship between the principal and agent as paramount and that the

⁴⁷ KM Eisenhardt 'Agency Theory: An Assessment And Review' (1989) *Academy of Management Review Vol. 14, No. 1, 57-74* available at <http://amr.aom.org/content/14/1/57>, accessed on 8 October 2015.

⁴⁸ C E Irving 'An Overview of Corporate Governance' (2013) *Presentation by the Cave Hill school of Business UWI, Barbados Business* available at <http://www.slideshare.net/churchirving/an-overview-of-corporate-governance>, accessed on 7 October 2015.

⁴⁹ Ibid.

⁵⁰ A Romalho Corporate Governance and the Call for Stakeholder Inclusivity: Do Stakeholders Lose Out? *The Corporate Report*.

⁵¹ Ibid.

⁵² L Donaldson, Davis 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) *Australian Journal of Management*, 16(1): 49-64 J. H available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.335.9363&rep=rep1&type=pdf>, accessed on 10 October 2015.

⁵³ S Goshal, P Moran 'Bad for Practice: A Critique of the Transaction Cost Theory' (1996) *Academy of Management Review Vol. 21, No. 1, 13-47* available at <http://www.jstor.org/stable/258627>, accessed on 10 October 2015.

⁵⁴ AB Carroll, AK Buchholtz *Business and Society: Ethics and Stakeholder Management* (2009) 7ed 832-85.

responsibility of management is to maximize profits for the shareholders.⁵⁵ This view is based on the underlying idea that shareholders differ from other constituencies by virtue of being residual risk-bearers, and as such should exercise control over the firm.⁵⁶

The theory further asserts that, as residual risk-bearers, shareholders are in the best position to ensure that firms operate efficiently and focus on profit maximization.⁵⁷ Thus, corporate managers should answer only to shareholders and act only with the interests of shareholders in mind.⁵⁸

2.2.4 *The Stakeholder Theory*

Although the word ‘stakeholder’ was first used in business in the 1960s, the theoretical approach was proposed by Edward Freeman when he said that since businesses serve the larger society; managers must be responsive to a broad constellation of constituencies both within and outside of the firm.⁵⁹ The stakeholder theory is premised on the notion that corporations are not managed in the interests of their shareholders alone since there are a range of shareholders who have a legitimate interest in the corporation as well.⁶⁰

However, over time the question of who a stakeholder is has been asked. There are numerous definitions of who a stakeholder is. Simply put, a stakeholder can be said to be basically any individual or group on which the activities of the company have an impact.⁶¹ According to Freeman, a stakeholder was defined in the eighties as one ‘who can affect and be

⁵⁵ CE Irving ‘An Overview of Corporate Governance’ (2013) *Presentation at the Cave Hill school of Business* available at <http://www.slideshare.net/churchirving/an-overview-of-corporate-governance>, accessed on 7 October 2015.

⁵⁶ A Romalho ‘Corporate Governance and the Call for Stakeholder Inclusivity: Do Stakeholders Lose Out?’ *The Corporate Report*.

⁵⁷ C E Irving ‘An Overview of Corporate Governance’ (2013) *presentation at the Cave Hill school of Business* available at <http://www.slideshare.net/churchirving/an-overview-of-corporate-governance>, accessed on 7 October 2015.

⁵⁸ M Friedman *Capitalism and Freedom* (1962) University of Chicago Press, 133 as cited in A Crane, D Matten *Business Ethics* 3ed(2010) 61.

⁵⁹ RE Freeman *Strategic Management: A stakeholder approach* (1984) Boston: Pitman as cited in T Donaldson, LE Preston ‘the Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications’ (1995), *The Academy of Management Review*, Vol. 20, No. 1, 65-91. Published by: Academy of Management available at <http://faculty.wvu.edu/dunnc3/rprnts.stakeholdertheoryofcorporation.pdf>, accessed on 15 September 2015.

⁶⁰ A Crane, D Matten *Business Ethics* 3ed (2010) 61.

⁶¹ C Mallin *Corporate Governance* (2004) Oxford, Oxford University press 43 as cited in J J du Plessis et al *Principles of Contemporary Corporate Governance* (2007) 16.

affected by the achievement of an Organization's objectives'⁶² and in the nineties as 'those who benefit from or are harmed by, and whose rights are violated or respected by corporate actions'.⁶³

Nevertheless, in addition to the popular theories discussed above, there is an innovative enlightened shareholder approach which I believe, appears to be more tenable especially in jurisdictions currently practising the shareholder approach. It is a move from the shareholder approach which is focused on shareholder primacy towards the more idealistic stakeholder approach. It is hinged on the premise that the decisions of a company will take into account the interests of its stakeholders to the extent that such decisions benefit the shareholders.⁶⁴ Jensen describes it as an enlightened value maximization approach which utilizes much of the structure of stakeholder theory but accepts maximization of the long-term value of the firm as criterion for making requisite trade-offs among its stakeholders and therefore solves the problems that arise from multiple objectives that accompany the traditional stakeholder theory.⁶⁵

2.3 Background of Corporate Governance

The question of how and when corporate governance and its underlying issue of separation of ownership and control came about is debatable. And, although the most popular belief is that academic studies on corporate governance stem from Berle & Means' *The Modern Corporation and Private Property*' in 1932,⁶⁶ according to writers like Wells, the concept of separation of ownership and control had existed earlier as far back as in the 20th century, when there had begun the first stirrings of the popular idea that ownership and control were being separated in the modern corporations.⁶⁷ To him, this came about following the emergence of large scale business organizations at the turn of the 20th century and the explosion in stock ownership by

⁶² RE Freeman *Strategic Management: A Stakeholder's Approach* (1884) as cited in A Crane, D Matten *Business Ethics* 3ed(2010) 61.

⁶³ A Crane, D Matten *Business Ethics* 3ed (2010) 61.

⁶⁴ VE Harper Ho 'Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder' (2010) *Divide Journal of Corporation Law*, Vol. 36, 7 available at http://heinonline.org/HOL/Page?handle=hein.journals/jcorl36&div=5&g_sent=1&collection=journals, accessed on 17 November 2015.

⁶⁵ MC Jensen 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) *Journal of Applied Corporate Finance*, Vol. 14, Issue 3, 8-21 available at http://www.hbs.edu/faculty/Publication%20Files/00-058_f2896ba9-f272-40ca-aa8d-a7645f43a3a9.pdf accessed on 17 November 2015.

⁶⁶ C Kang 'Market Economy and Corporate Governance; Fairness and Transparency for Sustainable Growth' (2005) available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020075.pdf>, accessed on 17 November 2015.

⁶⁷ H Wells, 'The Birth of Corporate Governance' (2010) *Seattle University Law Review*, Vol. 33, No. 4, 1247, *Temple University Legal Studies Research Paper*, No. 2010-12 available at SSRN: <http://ssrn.com/abstract=15814> accessed on 8 October 2015.

millions of Americans in the 1920s. These developments led to the growth of small shareholders and a rise of managers with little ownership in corporations thereby resulting in the concept of separation of ownership and control.⁶⁸ The implication and discourse of this concept was, according to Wells, identified and addressed in the early 20th century by Louis Brandeis, Walter Lippmann and Thorstein Veblen, though in a variety of conflicting forms,⁶⁹ and later critically and controversially propounded in the mid-1920s by William Ripley in his landmark book titled ‘*Main Street and Wall Street*’ which drove home the modern problem of corporate governance separation.⁷⁰

However, irrespective of the claims of writers like Wells that the ‘*The Modern Corporation and Private Property*’ owes its origin to Ripley, the traditional view still remains that Berle & Means’ ‘*The Modern Corporation*’ ‘began the modern debate on corporate governance,’⁷¹ was the first to have identified the ‘fundamental problem in the United States of America corporate governance,’⁷² and was seen to be the first work to have ‘described corporate governance as a problematic separation of ownership and control,’⁷³ as it established the separation of ownership and control as the central issue of modern corporate governance.⁷⁴

In conclusion therefore, it has been posited by some that the term ‘corporate governance’ began to be used and spoken about more commonly in the 1920s.⁷⁵ To some others, the concept of corporate governance gained prominence in the 1980s because this period was characterised by stock market crashes in different parts of the world and failure of some corporations due to

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ LS O’Melinn ‘Neither Contract nor Concession’ (2006) 74 *Geo. Wash. L. Rev.* 201 as cited in H Wells, ‘The Birth of Corporate Governance’ (2010) *Seattle University Law Review*, Vol. 33, No. 4, 1247, (2010) *Temple University Legal Studies Research Paper*, No. 2010-12 available at SSRN: <http://ssrn.com/abstract=15814>, accessed on 17 November 2015.

⁷² J Fried ‘Options Backdating and Its Implications’ (2008) 65 *Wash. & Lee L. Rev.* 853, 884 as cited in H Wells, ‘The Birth of Corporate Governance’ (2010) *Seattle University Law Review*, Vol. 33, No. 4, 1247, (2010) *Temple University Legal Studies Research Paper*, No. 2010-12 available at SSRN: <http://ssrn.com/abstract=15814>, accessed on 17 November 2015.

⁷³ W Bratton, ‘Hedge Funds and Governance Targets’ (2007) 95 *Geo. Law Journal* 1375, 1381 as cited in H Wells ‘The Birth of Corporate Governance’ (2010) *Seattle University Law Review*, Vol. 33, No. 4, 1247, (2010) *Temple University Legal Studies Research Paper*, No. 2010-12 available at SSRN: <http://ssrn.com/abstract=15814>, accessed on 17 November 2015.

⁷⁴ H Wells ‘The Birth of Corporate Governance’ (2010) *Seattle University Law Review*, Vol. 33, No. 4, 1247, (2010) *Temple University Legal Studies Research Paper*, No. 2010-12 available at SSRN: <http://ssrn.com/abstract=15814>, accessed on 17 November 2015.

⁷⁵ H Parker ‘Re-Empowering the Board: An Agenda for Action’ (1996) as cited in RAG Monks & N Minow (Eds.), *Watching the Watchers: Corporate Governance for the 21st century*, (rev ed.)

poor governance practices.⁷⁶ Still others posit that corporate governance emerged as a result of the collapse of corporate entities in different parts of the world in the 1980s which led to a change of attitude with higher performance expectations being placed on management boards of firms and a growing realization that managers are to run firms while boards are to ensure that firms are run effectively in the right direction.⁷⁷ One thing is certain though: despite the various views on how or when corporate governance came to the fore and notwithstanding the different perceptions of the meaning, background and theories on corporate governance; corporate governance, business and investment are undeniably related.⁷⁸ This is because it appears that the concept of corporate governance has been in existence in one form or the other since the inception of the modern corporation. Hence, the global efforts by the international community, within countries, and within corporate organizations to put in place corporate governance mechanisms to foster economic growth and sustainability.⁷⁹

⁷⁶ RD Francis *Ethics and Corporate Governance: An Australian handbook* (2000) Sydney: UNSW Press as cited in B. M Mulili, P Wong ‘Corporate Governance Practices in Developing Countries: The Case for Kenya International’(2011) *Journal of Business Administration* Vol. 2, No. 1, 15 available at www.sciedu.ca/ijba, accessed on 8 October 2015.

⁷⁷MA Adams ‘The Convergence of International Corporate Systems – Where Is Australia Heading?’(Part 1) (2002) *Keeping Good Companies Journal*, 54(1), 14-21 as cited in BM Mulili, P Wong ‘Corporate Governance Practices in Developing Countries: The Case for Kenya International’(2011)*Journal of Business Administration* Vol. 2, No. 1 available at www.sciedu.ca/ijba, accessed on 8 October 2015.

⁷⁸ EN Okike ‘Corporate Governance in Nigeria: The Status Quo’ (2007) *Corporate Governance: An International Review* Vol. 15, Issue 2, 173-193 available at <http://www.researchgate.net/publication/4989156>, accessed on 24 July 2015.

⁷⁹ BS Olawoyin ‘Corporate Governance in Nigeria: The Ethical and Behavioural Imperatives’(2014) *presentation at the International Conference on Art, Economics and Management (ICAEM)* Dubai(UAE) available at <http://icehm.org/siteadmin/upload/9731ED0314025.pdf>, accessed on 17 November 2015.

3 CHAPTER THREE- REGULATORY FRAMEWORKS FOR CORPORATE GOVERNANCE IN NIGERIA

3.1 Background of Corporate Governance in Nigeria.

Globally, corporate governance became prominent in the 1980s.⁸⁰ This is because this era was characterised by stock market crashes and the collapse of giant corporations due to poor corporate governance practices.⁸¹ During this period, as more corporate entities in different parts of the world collapsed, there was a change of attitude with regards to corporate governance. Higher performance expectations were placed on boards of companies. There was also, a growing realization that whilst managers were responsible for the day to day running of companies, the boards were to ensure that companies were run effectively and in the right direction.⁸² This change of attitude led to increased attention on corporate governance.

In Nigeria, prior to the evolution of corporate governance codes, all company related matters as well as corporate governance related issues were essentially provided for by the Companies Legislation.⁸³ This legislation has its roots in Nigeria's colonial past.⁸⁴ Like most other former British colonies, Nigeria inherited its Company legislation from Britain during the colonial period. However, upon attainment of political independence, she replaced the company legislation with the Companies Ordinance of 1922. Later, this was also replaced⁸⁵ with a new Companies Act⁸⁶ which, to a large extent, mirrored the UK Companies Act of 1948.⁸⁷

In addition, although issues relating to the regulation, control and governance of business enterprises were largely contained within the provisions of the company legislation, various

⁸⁰ H Parker 'Re-Empowering the Board: An Agenda for Action' (1996) in RAG Monks, N Minow (eds.) 'Watching the watchers: corporate governance for the 21st century' (rev Ed.)

⁸¹ RD Francis 'Ethics and Corporate Governance: an Australian handbook, (2000) Sydney: UNSW Press as cited in BM Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1 available at www.sciedu.ca/ijba, accessed on 8 October 2015.

⁸² MA Adams 'The Convergence of International Corporate Systems – Where Is Australia Heading?' (Part 1) (2002) *Keeping Good Companies Journal*, 54(1), 14-21 as cited in BM Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1 available at www.sciedu.ca/ijba, accessed on 8 October 2015.

⁸³ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 53 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 16 November 2015.

⁸⁴ EN Okike 'Corporate Governance in Nigeria: The Status Quo' (2007) *Corporate Governance: An International Review* Vol 15, Issue 2, 173-193 available at <http://dx.doi.org/10.1111/j.1467-8683.2007.00553.x>, accessed on 24 July 2015.

⁸⁵ Companies Ordinance of 1922 Cap. 37, Laws of the Federation Nigeria of 1958.

⁸⁶ The Companies Act of 1968.

⁸⁷ Ibid.

corporate governance codes later evolved to specifically address corporate governance issues.⁸⁸ This was as a result of factors such as the financial scandals experienced in the banking sector and capital markets during the 1990s.⁸⁹ There was also evidence from various surveys, which indicated that corporate governance lapses were significantly responsible for the collapse of over 70 per cent of companies in Nigeria within the last two decades.⁹⁰ Therefore, in light of its colonial heritage, Nigeria adopted the ‘Anglo-Saxon’, or the ‘outsider control system’ of corporate governance,⁹¹ which tends to embrace the shareholders’ primacy approach and makes paramount, the interest of shareholders in the day-to-day decisions and activities of a company.⁹²

3.2 Legal and Regulatory Frameworks for Corporate Governance in Nigeria

In view of the above, the corporate governance legal frameworks that evolved after the Companies Act can be said to have been developed to complement the company’s legislation and specifically address the issue of corporate governance.⁹³ These codes shall be examined in the preceding chapters, in order to assess their compliance or otherwise with international best practices. They include the Securities and Exchange Commission’s Code of Best Practice⁹⁴ for publicly listed Companies in Nigeria; the Central Bank of Nigeria’s (CBN) Code of corporate governance,⁹⁵ the Pension Commission’s (PenCom) Code of corporate governance;⁹⁶ the National Insurance Commission’s (NAICOM) Code of corporate governance,⁹⁷ the Securities and Exchange Commission’s Code of Corporate Governance for Public Companies;⁹⁸ the CBN and

⁸⁸ EN Okike ‘Corporate Governance in Nigeria: The Status Quo’ (2007) *Corporate Governance: An International Review* Vol 15, Issue 2, 175 available at <http://dx.doi.org/10.1111/j.1467-8683.2007.00553.x>, accessed on 15 December 2015.

⁸⁹ K Aina, B Adejugbe ‘A Review of Corporate Governance Codes and Best Practices in Nigeria’ (2015) *Journal of Law, Policy and Globalization*, Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 15 December 2015.

⁹⁰ BS Olawoyin ‘Corporate Governance in Nigeria: The Ethical and Behavioural Imperatives’ (2014) *International Conference on Art, Economics and Management (ICAEM) Dubai(UAE)* 88 available at <http://icehm.org/siteadmin/upload/9731ED0314025.pdf>, accessed on 15 December 2015.

⁹¹ EN Okike ‘Corporate Governance in Nigeria: The Status Quo’ (2007) *Corporate Governance: An International Review* Vol 15, Issue 2, 175 available at <http://dx.doi.org/10.1111/j.1467-8683.2007.00553.x>, accessed on 15 December 2015.

⁹² Ibid.

⁹³ JB Marshall ‘Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria’ (2015) *International Journal of Business & Law Research* Vol. 3(3) 54 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 15 December 2015.

⁹⁴ The Code of Best Practices on Corporate Governance of 2003.

⁹⁵ The Central Bank of Nigeria (CBN) Code of Corporate Governance for Banks in Nigeria post Consolidation of 2006.

⁹⁶ The Code of Corporate Governance for Licensed Pension Operators of 2008.

⁹⁷ The Code of Corporate Governance for the Insurance Industry of 2009.

⁹⁸ The Code of Corporate Governance for Public Companies of 2011 amended in 2014.

Nigeria Deposit Insurance Corporation Code of Corporate Governance⁹⁹ and the Nigerian Communications Commission's Code of Corporate Governance.¹⁰⁰

3.2.1 *The Securities and Exchange Commission's Code of Best Practice for Publicly Listed Companies of 2003*

The Securities and Exchange Commission (SEC) Code of Corporate Governance was the first code of corporate governance to be developed by any regulator in Nigeria.¹⁰¹ It was a self-regulatory (voluntary) code applicable to all public companies in Nigeria¹⁰² and was prompted by the need to promote good corporate governance in Nigeria and regain the confidence of the public in the capital market.¹⁰³

The SEC code was the product of a 17-member committee (which had representatives from all sectors of the economy) set up by SEC in collaboration with the Corporate Affairs Commission (CAC) in June 2000.¹⁰⁴ The committee was mandated not only to identify weaknesses in the corporate governance practices in Nigeria at that time, but were also to come up with changes that would address identified challenges and improve corporate governance practices in Nigeria.¹⁰⁵

Since the code was intended to be a guide to the board of directors of public companies on how to advance corporate governance practices,¹⁰⁶ it made provisions for the composition and structure, duties and responsibilities, requisite qualification, remuneration, tenure and re-election requirements of the board. It also made provisions for accounting and reporting methods.¹⁰⁷

⁹⁹ The Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry of 2014.

¹⁰⁰ The National Code of Corporate Governance for the Telecommunication Industry of 2014.

¹⁰¹ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 54 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 15 December 2015.

¹⁰² Ibid.

¹⁰³ K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 15 December 2015.

¹⁰⁴ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 54 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 5 December 2015.

¹⁰⁵ Ibid.

¹⁰⁶ The Code of Corporate Governance for Public Companies of 2011 amended 2014.

¹⁰⁷ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 54 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 15 December 2015.

Compliance with these provisions by the board of public companies, was to be enforced and monitored by shareholders in the first instance and SEC thereafter.¹⁰⁸

However, despite its provisions to foster good corporate governance practices, the provisions of the SEC 2003 Code became inadequate to deal with the new corporate challenges and developments in the sector. This was as a result of rapid changes in the corporate world and various corporate scandals across the globe.¹⁰⁹In addition, following the failure of the SEC to amend the provisions of the code to address these challenges and developments, some regulators like the Central Bank of Nigeria (CBN) had to develop codes of corporate governance to address challenges specific to their sectors, which were not taken into account by the SEC 2003 Code.¹¹⁰

3.2.2 The Central Bank of Nigeria's Code of Conduct for Banks in Nigeria Post Consolidation of 2006

Following the banks consolidation exercise in 2005 which was as a result of the crisis in financial institutions in Nigeria, the Central Bank of Nigeria (CBN) decided to develop a corporate governance code mandatorily applicable to all banks operating in Nigeria.¹¹¹This was because 'poor corporate governance practices' were 'identified as one of the major factors in virtually all known instances of a financial institution's distress in the country'.¹¹²

In addition, following the identification of key weaknesses in the corporate governance practices of the Nigerian banking industry and a report by SEC, that corporate governance practice in Nigeria was at an elementary stage,¹¹³ the CBN developed its code of corporate governance.¹¹⁴ This was in anticipation of likely challenges that could come up post consolidation of the banks.¹¹⁵ This code came into effect on 3 April, 2006 and was applicable to all banks and financial institutions registered in Nigeria.¹¹⁶ It made provisions for the organizational structure of banks and particularly made reference to executive duality, the

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ The Code of Corporate Governance for Public Companies of 2011 amended 2014.

¹¹¹ Ibid.

¹¹² Part 1, section 1.0 – 1.7 CBN 2006 Code as cited in JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 54 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 15 December 2015.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Op cit note (n 104) 55.

remuneration of directors, the establishment of risk management units, audit and credit committees, and disclosure requirements.¹¹⁷

More so, although the code was primarily made to enhance existing policies in the banking sector, it was also stated to have been introduced to ensure the accountability of bank CEOs, since it made provisions for fines and penalties (including jail terms) for erring CEOs.¹¹⁸

3.2.3 *The Code of Corporate Governance for Licensed Pension Operators of 2008*

This is also called the National Pension Commission (PenCom) Code of Corporate Governance for licensed pension operators in Nigeria.¹¹⁹ It was created in June 2008 by the National Pensions Commission¹²⁰ to set out corporate governance best practices in relation to pension fund administration.¹²¹

The code was a guide to pension fund administrators on the structures and processes to be used in achieving desired governance. It was also meant to set a bench mark for corporate governance in that sector.¹²² Its main objective was to ‘establish overall economic performance and market integrity through creation of incentives for pension schemes in order to impact positively on stakeholders, which in the end would boost their confidence’.¹²³ The code was voluntary in its application and made provisions for the composition of the board of directors particularly with regard to the separation of the chairman from the CEO, director remuneration and transparency in the industry.¹²⁴

¹¹⁷ J B Marshall ‘Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria’ (2015) *International Journal of Business & Law Research*, Vol. 3(3) 53, available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf> accessed on 21 December 2015.

¹¹⁸ K Aina, B Adejugbe (2015) ‘A Review of Corporate Governance Codes and Best Practices in Nigeria’ *Journal of Law, Policy and Globalization*, Vol.38, 55-56 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 21 December 2015.

¹¹⁹ Code of Corporate Governance for Pension Operators in Nigeria available at www.pencom.gov.org/, accessed on 21 December 2015.

¹²⁰ Code of Corporate Governance for Pension Operators in Nigeria PENCOD RP/P & R/08/013. from www.pencom.gov.ng. as cited in K Aina, B Adejugbe ‘A Review of Corporate Governance Codes and Best Practices in Nigeria’ (2015) *Journal of Law, Policy and Globalization*, Vol.38, 55-56 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 21 December 2015.

¹²¹ Op cit note (n117) 81.

¹²² JB Marshall ‘Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria’ (2015) *International Journal of Business & Law Research*, Vol. 3(3) 53, available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 21 December 2015.

¹²³ Ibid.

¹²⁴ Ibid.

However, despite PenCom's effort towards a corporate governance code for the pension sector, it would appear that the PenCom Code was inadequate with regards to new developments on corporate governance.¹²⁵

3.2.4 *The Code of good Corporate Governance for the Insurance Industry of 2009*

The code of good corporate governance for the insurance industry was issued in 2009 by the National Insurance Commission (NAICOM) in a bid to 'rebuild and sustain the declining confidence of stakeholders in the insurance sector.'¹²⁶ The code was issued following the global economic meltdown around the world which was attributed to sharp practices. It was made mandatory to all insurance and re-insurance companies under the regulatory supervision of NAICOM.¹²⁷

The code is voluntary in its approach and subsequent to expectations that sound corporate governance practices in the insurance industry would promote corporate transparency, accountability and enhanced shareholders' value.¹²⁸ It takes cognisance of certain basic principles of corporate governance such as disclosure and transparency; the responsibility and accountability of the board; and cultivating a culture of compliance with rules and regulations etc.¹²⁹ It also, makes provisions for the composition, duties and responsibilities of the board of directors; the tenure and modus operandi of external auditors and accounting systems, as well as disclosure and reporting requirements.¹³⁰ It sets out and recommends various structures and control systems designed to ensure the accountability of both the board and management of insurance companies in line with modern trends.¹³¹ Like other industry specific codes which

¹²⁵ Ibid.

¹²⁶ Ibid

¹²⁷ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research*, Vol. 3(3) 53, available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 21 December 2015.

¹²⁸ Ibid.

¹²⁹ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research*, Vol. 3(3) 53, available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 21 December 2015.

¹³⁰ K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 81 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 26 December 2015.

¹³¹ Code of Corporate Governance for Insurance Companies in Nigeria NAICOM CODE 2009 page 1-2 as cited in K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 81 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 26 December 2015.

emerged following the inadequacy of the SEC code, the NAICOM code was set up to complement the SEC code.¹³²

3.2.5 The Securities and Exchange Commission (SEC) 's Code of Corporate Governance for Public Listed Companies of 2011 later replaced by the SEC Code of 2014.

The SEC code of corporate governance for public companies was issued in April 2011.¹³³ It was developed to ensure the minimum standard of transparency, accountability and good corporate governance. It was applicable to all public companies whose securities are listed on a recognised securities exchange in Nigeria and to all companies who sought to raise funds on the Nigerian stock exchange.¹³⁴ The code was also voluntary in nature and compliance was expected from all companies it was applicable to. Whenever there was a conflict between the provisions of the code and any other law regarding a matter, whichever was stricter was to be applied.¹³⁵

Furthermore, apart from emphasizing the role and importance of the board of directors of a company, the code made provisions for the relationship between a company and its shareholders. It also required shareholders to participate in the promotion of good corporate governance practices by ensuring that the public companies they invested in, are carrying out good corporate governance practices.¹³⁶ The code required public companies to have effective risk-based internal audit committees, well-known whistle-blowing policies and increased disclosures in their annual financial reports in order to improve their accountability and integrity.¹³⁷

However, in view of the dynamic nature of the capital market and corporate challenges, the SEC code of 2011 was replaced in May, 2014 with the SEC code of corporate governance 2014, in order to reflect international best practices.¹³⁸ The main issue addressed by this amendment was the change in the status of the code from being voluntary in nature to being mandatory with regards to public companies as well as the provision of sanctions and penalties with regards to erring companies.¹³⁹ Consequently, in light of the regular amendment of the

¹³² Ibid.

¹³³ Op cit note (n 104) 58.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Op cit note (n 104) 60.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

code, it has been described as a dynamic document defining minimum standards of corporate governance since it sets out mandatory minimum acceptable standards of corporate governance for quoted companies, for which failure to comply attracts sanctions.¹⁴⁰

3.2.6 The Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry of 2014.

The Code of Corporate Governance for Banks and Discounts Houses in Nigeria and Guidelines for Whistle Blowing in the Nigerian Banking Industry of 2014 has been said to be an amendment of the earlier Central Bank of Nigeria (CBN) Code of Corporate Governance for Banks post consolidation 2006.¹⁴¹ The code is applicable to all banks and discount houses in Nigeria and was made following the inadequacy of the former code. This inadequacy was brought to light during the banking examination carried out by the Central Bank of Nigeria/Nigerian Deposit Insurance Cororation panel on banks during the 2008 global economic crisis. During the examination, corporate abuses which the corporate governance mechanisms of the previous code failed to check, were revealed.¹⁴² Although the amendment of the CBN code of corporate governance post consolidation of banks was mainly driven by the need to address poor corporate governance practices in the banking sector, it also aimed at aligning the code with international best practices.¹⁴³

The revised code does not only amend the minimum requirement for the composition size of a board, it also amongst others provides for the positions which related parties should not hold on the board as well as the minimum disclosure requirements to be included by the board of directors in the annual reports of banks and discount houses.¹⁴⁴ This is in order to ensure better corporate governance practices and disclosures in annual reports, in line with international best practices.¹⁴⁵

¹⁴⁰Op cit note (n 104) 62.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Op cit note (n 104) 63.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

3.2.7 *Code of Corporate Governance for Telecommunication Industry of 2014*

Premised on the notion that good corporate governance can be fostered by creating a system that not only meets shareholders' interests but also the expectations of other stakeholders, the Nigerian Communication Commission (NCC) released a corporate governance code in 2014.¹⁴⁶

The code adopts its principles from the companies' legislation (the Companies and Allied Matters Act) and is applicable to all telecommunications companies licensed by the NCC in Nigeria.¹⁴⁷ It makes provisions for; the importance, role and composition of the board; the management of businesses in a way that will balance the interests of shareholders and stakeholders; the establishment of systems and structures that will ensure risk management and internal control; and reporting requirements that ensure proper disclosure and transparency in the financial and annual reporting of the company etc.¹⁴⁸

However, it would seem that by virtue of the challenges of the self-regulatory approach of most of the previous codes of corporate governance, and the inefficacy of the bottom up approach strategy used to introduce the concept of corporate governance in Nigeria (which limited the concept to listed and unlisted public companies),¹⁴⁹ Nigeria has decided to adopt another approach by releasing a draft National corporate governance code. This code shall be mandatory in nature and applicable to all companies registered in Nigeria.¹⁵⁰ The draft National Corporate Governance code was released in May 2015 by the Federal Reporting Council of Nigeria (FRCN) and shall be administered by the FRCN, which shall have express jurisdiction over corporate governance matters in Nigeria.¹⁵¹

3.2.8 *The Draft National Code of Corporate Governance, 2015*

On 28 May 2015, the Financial Reporting Council of Nigeria (FRCN) released a draft National Code of Corporate Governance.¹⁵² This laudable move was informed by the need to harmonize and unify all existing sectorial corporate governance codes in Nigeria.¹⁵³ This was particularly expedient, as not only were there conflicting provisions in the different existing corporate governance codes on the same subject matters; there was also the need for Nigeria to align with

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Op cit note (n 104) 62.

¹⁵⁰ Ibid.

¹⁵¹ Op cit note (n 104) 62.

¹⁵² Ibid.

¹⁵³ Ibid.

international standards of best practices on corporate governance, mainly in relation to its approach of having multiple sectorial codes which were alien as compared to other foreign jurisdictions who are foremost in the aspect of corporate governance legislation.¹⁵⁴

By this new national corporate governance code, not only will there be a baseline standard of rules serving as a guide on corporate governance to all companies registered in Nigeria, there will also be consistency as per the rules of corporate governance in Nigeria and an alignment with international best practices of corporate governance.

The draft code is a federal law which shall be overseen by the FRCN. It is divided into three parts and applicable to all categories of companies provided for under the different sections (Part A, B and C) of the Companies and Allied Matters Act, 2004.¹⁵⁵ Consequently, it shall be applicable to private and public companies and all not-for-profit organizations registered in Nigeria. While the part of the code that refers to the private sector shall be called the National Code of Corporate Governance for the Private Sector in Nigeria 2015,¹⁵⁶ the part which governs the public sector shall be referred to as the Public Sector Governance Code in Nigeria 2015¹⁵⁷ and that which pertains to the non-profit organizations shall be called the Not-for-Profit Organisations Governance Code, 2015.¹⁵⁸

The above mentioned codes are a result of the directive given by the Minister of Trade and Investments to the steering committee on the national code of corporate governance to extend corporate governance to the private and public sectors as well as the not-for-profit organizations.¹⁵⁹ This is in order to enable the Financial Reporting Council of Nigeria (FRCN) to amongst others; do the following:

- a) Promote the highest standards of corporate governance; promote public awareness about corporate governance principles and practices;
- b) Act as the national coordinating body responsible for all matters pertaining to corporate governance in private, public and not-for-profit sectors of the Nigerian economy;

¹⁵⁴Financial Reporting Council of Nigeria (FRCN)'s exposure draft National Code of Corporate Governance for Private Sector in Nigeria (2015) 3 available at <http://www.financialreportingcouncil.gov.ng/index.php> accessed on 29 December 2015.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷Financial Reporting Council of Nigeria (FRCN)'s exposure draft Public Sector Governance Code in Nigeria (2015) available at <http://www.financialreportingcouncil.gov.ng/index.php>, accessed on 29 December 2015.

¹⁵⁸ Financial Reporting Council of Nigeria (FRCN)'s exposure draft Not-for-Profit Organisations Governance Code, (2015) available at <http://www.financialreportingcouncil.gov.ng/index.php>, accessed on 29 December 2015.

¹⁵⁹ Financial Reporting Council of Nigeria (FRCN)'s exposure draft National Code of Corporate Governance for Private Sector in Nigeria (2015) 3 available at <http://www.financialreportingcouncil.gov.ng/index.php>, accessed on 29 December 2015.

- c) Encourage sound systems of internal control and information systems control to safeguard stakeholders' investment and assets of public interest entities; and
- d) Promote sound financial reporting and accountability based on true and fair financial statements duly audited by competent independent Auditors.¹⁶⁰

The provisions of each of the above mentioned codes shall be examined.

i. The National Code of Corporate Governance for the Private Sector in Nigeria 2015.

On 17 January 2013, the minister of trade and investment gave a directive to the steering committee on the National Code of Corporate Governance to harmonize and unify all existing sectorial codes of corporate governance in Nigeria.¹⁶¹ This was in order to harmonize all existing laws on corporate governance and thereby, foster consistency in the law.¹⁶² The committee was chaired by Mr. Victor Odiase. It was mandated to develop a 'unified corporate governance code with governance safeguards that are more country specific, contextual and environmentally congruent, while at the same time conforming to international best practices'.¹⁶³ In the execution of its mandate, it took cognisance of some of the factors that contribute to the perceived challenges to good corporate governance practices in Nigeria.¹⁶⁴ These include the corporate governance system in Nigeria, which is premised on the Anglo-Saxon unitary board structure where most conflicts are between shareholders and managers;¹⁶⁵ and, the investment environment in Nigeria which is replete with ownership concentration and characterised by dominant conflicts between controlling shareholders and minorities.¹⁶⁶

In view of global corporate failures during the late 1990s and early 2000s including those in Nigeria;¹⁶⁷ the code is focused on transparency and accountability, hence the criticism that its emphasis is tilted towards accountability.¹⁶⁸ It is mandatory in nature and applicable to all public companies; all private companies that are holding companies or subsidiaries of public

¹⁶⁰ Op cit note (n 155) 4.

¹⁶¹ Ibid.

¹⁶² Ibid

¹⁶³ Op cit note (n 155) 4.

¹⁶⁴ Ibid.

¹⁶⁵ Op cit note (n 155) 5.

¹⁶⁶ Ibid.

¹⁶⁷ Op cit note (n 155) 6.

¹⁶⁸ Ibid.

companies; and all ‘public interest entities’ as defined by section 77 of the Federal Reporting Council of Nigeria Act 2011.¹⁶⁹

The code makes provision for the purpose, composition, appointment and responsibilities of directors as well as instances where these directors will be required to make disclosures. It provides for the separation of the position of the managing director from the chief executive officer and the various officers of the board in relation to their function, qualification, responsibilities, remuneration, tenure and re-election.¹⁷⁰ In addition, it provides for the different board committees to be inaugurated (nomination and governance, remuneration, audit and risk management committee), meetings, the induction and continuing education of directors, terms and conditions of service, the creation of whistle blowing mechanisms, the relationship of a company and its shareholders particularly with regards to institutional investors, shareholders’ association and insider trading, minority interest expropriation as well as related party transactions.¹⁷¹

Lastly, apart from providing for other stakeholder relations especially regarding sustainability issues, the code also emphasises transparency by expressly providing for various instances where adequate disclosures will be obligatory. It further requires every company to have a code of business conduct and ethics.¹⁷²

ii. The Public Sector Governance Code in Nigeria 2015

The Public Sector Governance Code is also a result of the directive given by the Minister of Trade and Investments to the steering committee on corporate governance on the 17th of January 2013 to extend corporate governance to the public sector.¹⁷³

The code extends corporate governance to public sector entities, government ministries and departments, all state owned entities, parastatals and government commercial agencies which are referred to by the code as Public Sector Entities (PSEs).¹⁷⁴ It adopts a ‘top-down’ strategy based on the corporate governance mantra “tone at the top” which insinuates that corporate governance and its key underlying values ought to start from the very top. That is,

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Op cit note (n 155)5.

¹⁷² Ibid.

¹⁷³ Financial Reporting Council of Nigeria (FRCN)’s Exposure Draft Public Sector Governance Code in Nigeria (2015) 21, available at <http://www.financialreportingcouncil.gov.ng/index.php>, accessed on 6 January 2016.

¹⁷⁴ Ibid.

government, its agencies and the myriad of state-owned entities.¹⁷⁵ This strategy is in contrast to the initial ‘bottom up’ approach adopted for the implementation of corporate governance, which did not successfully entrench corporate governance in Nigeria¹⁷⁶ due to the limitation in its applicability which technically exempted most state owned entities, parastatals and government commercial agencies.¹⁷⁷

The purpose of the public sector governance is ‘to ensure that a Public Sector Entity – by whatever name called – fulfils its overall mandate, achieves its intended outcomes for citizens and service users, and operates in a very effective, efficient, transparent and ethical manner.’¹⁷⁸ It places emphasis on the adequacy and effectiveness of legal and regulatory frameworks for public sector entities, and makes provision for amongst others, the following: the role of the State acting as owner (with public servants dominantly acting as managers and regulators) and represented by the Government; the relationship between the State and PSEs which ‘should be comparable to the relationship between a holding company and its subsidiaries in the private sector; including the need to have a clear separation between the State’s ownership function and its management and regulatory involvement that may influence PSEs in terms of discipline and otherwise.’¹⁷⁹ It makes recommendations on the financial relationship between the State and state owned banks, state owned financial institutions and other state owned companies. This is in order to ensure operational competitiveness across the sector, and the relationship with stakeholders and the need to provide for their redress in the event of the violation of their right.¹⁸⁰

The code further provides for; the role of the Ministries as supervisory authorities to PSEs; the mandated equitable treatment of owners (shareholders and citizens); the need for PSEs to have ownership policies that define their objectives, their role in corporate governance and how those policies are to be implemented; and the need for some level of independence of the state board from the State.¹⁸¹

In addition, the code also provides for the board of directors with regards to its mandate and how the mandate should be executed. It also provides for; its composition, which aside from the regular executive and non-executive directors, should comprise of the following: government institutional directors (who shall represent specific ministries or agencies) and nominee directors;

¹⁷⁵ Op cit note (n 173)

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Op cit note (n 173)11.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² the officers of the board and their respective roles, the appointment and removal of directors, their responsibilities, remuneration, evaluation, the relationship between the board and government, the board and its stakeholders, and internal and external control mechanisms.¹⁸³ Moreso, just like in the National code of corporate governance for the private sector, the code also highlights the need for transparency and adequate disclosure in certain instances and requires all PSEs to have a formal code of conduct and ethics, whistle blowing and sustainability systems as well as provisions for related party transactions.¹⁸⁴

Furthermore, in addition to the unusual recommendation of the code to ministries supervising any PSE to create an overarching and diversified Ministerial Management Committee (MMC) which will enable the ministry execute its leadership role in the activities of departments and PECs;¹⁸⁵ it also recommends a Public Entity (oversight) Committee (PEC) which will be a subcommittee of the Ministerial Management Committee (MMC). This Public Entity Committee is to assist the ministry in the exercise of their stewardship role of external contribution and oversight (just as provided by independent non-executive directors in private governance) especially as the PECs will be assisting the ministry in its oversight function just as group boards oversee the affairs of their subsidiaries.¹⁸⁶ Likewise, the composition, responsibilities and powers of the MMC and PEC are also provided for in the code.

In conclusion, the code provides that in the event of non-compliance, PSE boards and the supervisory and monitoring authorities are to be held accountable by representative bodies such as the national or state house of assembly.¹⁸⁷

iii. Not-For-Profit Organisation Governance Code 2015.

Just like in the case of the National Corporate Governance Code for the private sector and the governance code for the public sector, the not-for-profit organisation (NFPO) code was the outcome of the directive given by the Minister for Trade and Investment on 29 November, 2013 to the steering committee on corporate governance to extend corporate governance to the not-for-

¹⁸² Op cit note (n 173) 21.

¹⁸³ Op cit note (n 173) 26 -27.

¹⁸⁴ Op cit note (n 173) 36-38.

¹⁸⁵ Op cit note (n 173) 39.

¹⁸⁶ Op cit note (n 173) 3-4.

¹⁸⁷ Op cit note (n 173)12.

profit sector, which can also be referred to as the civil society or the benevolent sector.¹⁸⁸ This decision was informed by the presence of corporate governance on the priority list of so many nations at the time to promote good governance, which in the context of NFPOs means ‘a transparent decision-making process in which the leadership of a non-profit organisation, in an effective and accountable way, directs resources and exercises power on the basis of shared values’.¹⁸⁹

Following the peculiar nature, goals and modus operandi of NFPOs which could be charities, charitable trusts, and public benefit corporations established for a humane cause or to fill a social gap,¹⁹⁰ they tend to attract large funding from members of the society in the form of donations. However, in light of current global crisis and the fact that many of these NFPOs operate within frameworks that are unknown to the government and without any principal accountability, this has raised certain concerns¹⁹¹ particularly with the government, who in the bid to avert NFPOs spending blind and faceless money, decided to establish orderliness in NFPOs’ operations from the perspective of stakeholder satisfaction, donor trust, national reputation, economic growth, state security and safety.¹⁹² The need for good governance of NFPOs in Nigeria is thus clear.¹⁹³

The code is applicable to all NFPOs registered in Nigeria and compliance with its provisions is mandatory. It provides for the organisational structure of the board of trustees, the governing board, and management committee, the founder of the NFPO, committees as well as the officers of the board, spelling out amongst other things their functions, qualifications, appointment, remuneration, removal and duties.

In conclusion, having looked at the foregoing provisions of the Nigerian legal frameworks on corporate governance, there is the need to also look at those propounded by foreign jurisdictions such as the United States of America and renowned international organizations like the United Nations, the OECD and the Commonwealth. This is in order to ascertain the alignment or otherwise of the Nigerian legal frameworks with international best practices.

¹⁸⁸ Financial Reporting Council of Nigeria (FRCN)’s Exposure Draft Not-for-Profit Organisations Governance Code (2015) 3-4 available at <http://www.financialreportingcouncil.gov.ng/index.php>, accessed 6 January 2016.

¹⁸⁹ Ibid.

¹⁹⁰ Op cit note (n 188) 5.

¹⁹¹ Ibid.

¹⁹² Op cit note (n 188) 6-7.

¹⁹³ Op cit note (n 188) 5.

4 CHAPTER FOUR- SPECIFIC FOREIGN AND INTERNATIONAL LEGAL REGIMES ON CORPORATE GOVERNANCE

4.1 Introduction.

According to the United Nations, corporate collapse is the primary driver responsible for calls for and changes to corporate governance codes for guidelines on standard corporate governance practices.¹⁹⁴ This is because, following the impact of financial crisis in the 1990s, the need for standard corporate governance principles was brought to the fore and recognised by international organisations, developed and developing countries alike.¹⁹⁵

Nevertheless, because of varying legal systems, corporate ownership structures, and cultural and economic situations in different countries, there has been debate on the best approach¹⁹⁶ and model of legal framework for an effective implementation of corporate governance principles.¹⁹⁷ To this end, two main approaches to corporate governance have been identified in relation to the legal systems of different countries.¹⁹⁸ Countries that follow the civil law developed corporate governance frameworks that focused on stakeholders while countries that follow the common law developed frameworks focused on shareholders' interest. In civil law countries such as France, Germany, Italy and Netherlands, the role of corporate governance is to balance the interests of a variety of key groups such as employees, managers, creditors, suppliers, customers and the wider community.¹⁹⁹ On the other hand, countries like Australia, United Kingdom, USA, Canada and New Zealand that have a tradition of common law have corporate governance structures which are centred on shareholders' returns or interests.²⁰⁰ In their case, corporate governance is supposed to ensure that corporations achieve the objectives

¹⁹⁴ United Nations report as cited in M Davies, B Schlitzer 'The impracticality of an international "One size fits all" corporate governance code of best practice' (2008) *Managerial Auditing Journal* vol. 23, Iss: 6, 532 – 544 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 19 January 2016.

¹⁹⁵ E Adegbite 'Corporate Governance Regulation in Nigeria' (2012) *Corporate Governance: The International Journal of Business in Society*, Vol. 12 Issue: 2, 257 – 276 available at <http://dx.doi.org/10.1108/14720701211214124>, accessed on 19 January 2016.

¹⁹⁶ J Solomon, A Solomon 'Corporate governance and Accountability' (2004) as cited in RAG Monks & N Minow (Eds.), *Watching the Watchers: Corporate Governance for the 21st century*, (rev ed.).

¹⁹⁷ RAG Monks, N Minow (Eds.), *Watching the Watchers: Corporate Governance for the 21st century*, (rev ed.)

¹⁹⁸ BM Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1 available at www.sciedu.ca/ijba on 19 January 2016.

¹⁹⁹ Op cit note(n198)

²⁰⁰ Op cit note(n198)

set by their owners.²⁰¹ Furthermore, in extreme cases, some countries have adopted corporate governance systems that are a mixture of the two extreme forms.²⁰²

Additionally, in relation to the approach to be adopted by corporate governance legal frameworks, there is an ongoing debate on the most effective mechanism to employ.²⁰³ At one end of the debate, are proponents of a self-regulatory framework. On the other end are, proponents for a mandatory framework.²⁰⁴ Those in favour of a self-regulatory legal framework show preference for the need to encourage more soft-law alternatives; a form of regulation which is dominantly principle-based and allow firms to voluntarily adhere to corporate governance codes of conduct and practice.²⁰⁵ On the other hand, those in support of a mandatory regulation argue that there is the need to increase regulation and punish corporate offenders more heavily in order to ensure the effectiveness of good corporate governance principles.²⁰⁶ Thus, they propose that corporate governance principles should become requirements carefully monitored by law and associated with stringent penalties when breached.²⁰⁷

Consequently, in view of the debate on the best approach to be utilized in the implementation of corporate governance, the approaches adopted by international organizations, such as the United Nations, Organization for Economic Development Corporation, the Commonwealth, and foreign jurisdictions such as the United States of America, shall be examined.

4.2 By International Organizations

4.2.1 The United Nations Guidance on Good Practices in Corporate Governance Disclosure of 2006.

Following the adoption of corporate governance as part of its agenda, the United Nations, in 1989, established an intergovernmental working group of experts on International Standards of Accounting and Reporting (ISAR), which in 2004 launched a succession of reviews on the

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ E Adegbite 'The determinants of good corporate governance: the case of Nigeria' PhD, London(2010)

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ A Proimos 'Strengthening Corporate Governance Regulations' Journal of Investment (2005) Vol. 6(4), 75-84 as cited in E Adegbite 'The determinants of good corporate governance: the case of Nigeria' PhD, London(2010).

²⁰⁷ Ibid.

implementation status of corporate governance disclosure in countries around the world.²⁰⁸

Thereafter, in 2006, the United Nations in its bid to ‘standardize the disclosure of information on corporate governance’, issued a guide to good corporate governance practices.²⁰⁹ This guide was entitled “Guidance on Good Practices in Corporate Governance Disclosure” and was propounded in the United Nations Conference on Trade and Development in New York and Geneva, 2006.²¹⁰ It was an update on the UNCTAD 2002 report on ‘Transparency and Disclosure Requirements for Corporate Governance.’²¹¹ It is based on recommended practices from various national and trans-international institutions such as the Organisation for Economic Co-operation and Development (OECD), the International Corporate Governance Network (ICGN), the Commonwealth Association for Corporate Governance (CACG) etc.²¹² The recommendations contained in the guide are for the disclosure of corporate governance practices which include the financial disclosures or information (financial and operational results), non-financial disclosures or information (e.g. company objectives), owner/shareholder rights, general meetings (holding of meetings, voting, accessibility/availability of documents), timeliness and means of communication (objectivity and communication with shareholders), and best practices of compliance (recommending the adoption of international corporate governance practices by all countries).²¹³

The primary objective of this guide is to encourage countries and companies alike to implement best international practices according to their peculiar legal requirements and environment.²¹⁴ It recommends 52 indicators as parameters for countries or companies to assess their compliance or otherwise with good corporate governance practices and is divided into five parts.²¹⁵ It makes recommendations with regards to the following: financial disclosures; non-financial disclosures; general meetings; timing and means of disclosure, and good practices for compliance.²¹⁶

²⁰⁸ Oliveira et al ‘Comparative analysis of the corporate governance codes of the Five BRICS countries’ *Contabilidade, Gestão e Governança journal* 61, available at https://www.google.com.ng/?gfe_rd=cr&ei=kxeeVuWeK www.spell.org.br/documentos/download/34044 accessed on 19 January 2016.

²⁰⁹ The United Nations Guidance on Good Practices in Corporate Governance Disclosure (2006) available at http://unctad.org/en/docs/iteteb20063_en.pdf, accessed on 19 January 2016.

²¹⁰ Ibid.

²¹¹ Op cit note (n 210) 16

²¹² Op cit note (n 210) 16.

²¹³ Ibid.

²¹⁴ Op cit note (n 210)

²¹⁵ Op cit note (n 210) 16.

²¹⁶ Ibid.

Concerning financial disclosures, it mandates the board of directors to provide shareholders and stakeholders with high quality disclosures on the financial and operating results of a company to enable them have an understanding of the nature of its business, current state of affairs and future goals.²¹⁷ Financial disclosures here shall be subject to the reporting requirements of the country where the company is situated.²¹⁸ The code also highlights extensive disclosure in relation to related party transactions and goes further to recommend the minimum standards of disclosures that are considered best practice with regards to diverse related party transactions.²¹⁹

Regarding non-disclosures, the code recommends disclosures on the commercial and governance objectives of the company as well as the social and environmental objectives of a company in order to address the interests of stakeholders and promote long term sustainability.²²⁰ It provides for beneficiary ownership structure to all interested parties (especially in relation to the concentration of shareholders). It also provides for how these shareholders and other members can exercise their rights through voting or some other mechanism, and specific procedures in place to protect minority shareholders' interests.²²¹ In addition, the code recommends adequate disclosure in instances of changes in control of the company and transactions involving significant asset²²² particularly concerning the rules and procedures relating to the acquisition of corporate control in the capital market and extraordinary transactions such as mergers and sales of substantial portions of corporate assets, disclosures on anti-takeover measures and compensation policies and packages for senior executives leaving the firm as a result of a merger or acquisition, and disclosure of sales of substantial proportion of corporate assets to all shareholders.²²³

Irrespective of the board system operated by a company whether unitary or two-tiered, the code recommends that disclosures should involve the composition of the board particularly in relation to the number of executive and non-executive directors. This is in order to ensure independent leadership within the board.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ The United Nations Guidance on Good Practices in Corporate Governance Disclosure (2006) available at http://unctad.org/en/docs/iteteb20063_en.pdf, accessed on 19 January 2016.

²²¹ Ibid.

²²² Ibid.

²²³ Op cit note (n 222) 16.

4.2.2 OECD Principles of Corporate Governance of 2004

Following the proactive role of international organizations to promote sound corporate governance systems, the OECD was the first international organization to establish an intergovernmental task force to produce a globally accepted standard of corporate governance.

²²⁴ The OECD principles provide a framework that will assist countries develop corporate governance structures in line with their legal, institutional and regulatory peculiarities.²²⁵ It was originally adopted by 30 member countries and since the first issue of the OECD principles in 1999, they have gained ‘worldwide recognition as an international benchmark for sound corporate governance’.²²⁶ It serves as a corporate governance guide and reference tool to, amongst others; governments, policy makers, market participants and countries all over the world.²²⁷ It also provides practical guidance and recommendations to investors, corporations and parties involved in promoting good governance practices.²²⁸

However, the OECD Principles of Corporate Governance was revised in 2004²²⁹ to respond to corporate governance developments such as corporate scandals. These scandals led governments to focus on improving corporate governance practices.²³⁰ And by another recent review of the code in 2015,²³¹ it is evident that governments want to ensure the continuous high quality, relevance and usefulness of the principles, taking into account recent developments in the corporate sector and capital markets. The initial review of the principles was undertaken by the OECD Steering Group on Corporate Governance under a mandate from OECD Ministers in 2002.²³² During this revision, cognisance was taken of not only the experiences of OECD countries but also that of emerging countries.²³³

²²⁴ M Davies, B Schlitzer ‘The impracticality of an international “one size fits all” corporate governance code of best practice’ (2008) *Managerial Auditing Journal*, Vol. 23 Issue 6, 533 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 24 January 2016.

²²⁵ Ibid.

²²⁶ F Jesover, G Kirkpatrick ‘Revised OECD Principles of Corporate Governance and their relevance to non- OECD Countries’ (2005) *Corporate Governance: An International Review* available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/33977036.pdf>, accessed on January 6, 2016.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ G20/OECD Principles of Corporate Governance available at <http://www.oecd.org/corporate/principles-corporate-governance.htm>, accessed on January 26 2016.

²³² OECD Principles of Corporate Governance (2004) available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>, accessed on 2 February, 2016.

²³³ Ibid.

The principles of corporate governance recommended by the OECD are six in number and are as follows: ²³⁴

- a) The first principle is to ensure the basis for effective corporate governance framework which should promote a transparent and efficient market, be consistent with the rule of law and clearly articulate the division of responsibilities among supervisory, regulatory and enforcement authorities.
- b) The second deals with the rights of shareholders and key ownership functions which should protect and facilitate the exercise of shareholders' rights ²³⁵with regards to the right to secure methods of ownership registration, right to transfer shares, right to obtain relevant information about company, right to participate and vote in general meetings, right to elect and remove directors and right to share profit.
- c) Thirdly, the principle that there should be an equitable treatment of shareholders is with regard to same class holders, foreign shareholders and minority shareholders.²³⁶ By implication, all shareholders in the same class should be treated equally, insider trading should be prohibited, directors and senior executives should be required to disclose to the board any material interest they may have in transactions with the company, minority shareholders should be protected from abusive actions by controlling shareholders, all shareholders should have an effective means of redress in cases where their rights are violated, impediments to cross-border voting should be removed, and company procedures should not make it unduly difficult for votes to be cast.²³⁷
- d) Another principle pertains to the roles of stakeholders in corporate governance. It recommends that the rights of stakeholders established by law or through mutual agreements should be respected, that companies should encourage active cooperation between corporations and stakeholders in creating wealth, jobs and sustainability of sound enterprises,²³⁸ that performance enhancing mechanisms should be developed in order to foster employee participation, that employees and other stakeholders should be able to 'freely communicate their concerns about illegal or unethical practices to board' and that

²³⁴ Op cit note (n 233).

²³⁵ Op cit note (n 226).

²³⁶ Ibid.

²³⁷ F Olawale 'Corporate Governance' Presentation by the Institute of Chartered Secretaries and Administrators, Nigeria (June 2014 Diet).

²³⁸ Op cit note (n 226).

corporate governance should be completed by efficient insolvency framework and enforcement of creditors' rights.²³⁹

- e) An additional principle deals with disclosure and transparency and emphasizes the need for timely and accurate disclosure of material information concerning a company,²⁴⁰ which should include information on the company's financial and operating result, corporate objectives, major share ownership, details of the members of the board, governance structures and policies etc.²⁴¹ Information concerning the company's annual audit which should be conducted by an independent, qualified and competent auditor should also be included.²⁴²
- f) Last but by no means least is the principle recommending that a corporate governance legal framework should ensure the strategic guidance of a company by spelling out the responsibilities of the board which include amongst others,²⁴³ providing corporate strategy, risk policy, annual budgets and business plans, and major capital expenditure and also effectively monitor the management of the board, the recruitment and compensation of key executives, the integrity of a company's accounting and financial reporting system, as well as overseeing the process of disclosures and communication.²⁴⁴

4.2.3 *The Principles for Corporate Governance in the Commonwealth of 1999.*

According to the Commonwealth Association for Corporate Governance (CACG), 'as regulatory barriers between national economies are removed and global competition for capital increases, investment capital will follow the path to those countries and corporations that have adopted efficient governance standards'.²⁴⁵ It is in the light of this requirement for a set of standards, guidelines or principles, which include acceptable levels of investor protection and board practices as well as satisfactory accounting and disclosure standards, that the CACG issued a set

²³⁹ Op cit note (n 226).

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ F Jesover, G Kirkpatrick 'Revised OECD Principles of Corporate Governance and their relevance to non- OECD Countries' (2005) available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/33977036.pdf>, accessed on January 26, 2016.

²⁴⁴ Ibid.

²⁴⁵ CACG Code on Corporate Governance (1999)1 available at http://www.ecgi.org/codes/documents/cacg_final.pdf, accessed on 28 January 2016.

of corporate governance guidelines in 1999.²⁴⁶ In preparing the guidelines, reference was made to the OECD Principles of Corporate Governance which was endorsed by G7 countries as ‘acceptable standards of corporate governance with universal applicability’²⁴⁷ hence the similarity of the CACG guidelines to the OECD principles.²⁴⁸

The purpose of this guideline is to assist in ‘the development of national strategies for the promotion of corporate governance’²⁴⁹ and to facilitate best business practice and behaviour of enterprises whether private or state-owned.²⁵⁰ The guidelines are particularly focused on establishing good corporate governance systems in emerging and transition economies in the global market which comprise a substantial number of Commonwealth countries²⁵¹ and developing African countries.²⁵² According to some writers,²⁵³ because these principles serve as a starting point for the development of good corporate governance systems, they are better suited to developing and emerging countries than the OECD principles.

The CACG guidelines advocate an inclusive approach and are voluntary in its application.²⁵⁴ It sets out 15 corporate governance principles which are targeted primarily at the boards of directors of companies with a unitary board structure.²⁵⁵ These principles are applicable to both the executive and non-executive directors of the boards of directors of all business enterprises whether private, public, family owned or state-owned.²⁵⁶ The principles are as follows:

- a) With regards to leadership, the CACG requires the board to exercise leadership, enterprise, integrity and judgment in directing the corporation in order to achieve continued

²⁴⁶CACG Code on Corporate Governance (1999)1 available at http://www.ecgi.org/codes/documents/cacg_final.pdf, accessed on 28 January 2016.

²⁴⁷ Op cit note (n 245)2.

²⁴⁸ M Davies, B Schlitzer, ‘The impracticality of an international “one size fits all” corporate governance code of best practice’ (2008) *Managerial Auditing Journal*, Vol. 23 Issue 6, 534 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093> accessed on 30 January, 2016.

²⁴⁹ Ibid.

²⁵⁰ Op cit note (n 245)4.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Philips as cited in M Davies, B Schlitzer ‘The impracticality of an international “one size fits all” corporate governance code of best practice’(2008) *Managerial Auditing Journal*, Vol. 23 Issue 6, 534 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093> accessed on 30 January, 2016.

²⁵⁴ Op cit note (n 245)3.

²⁵⁵ Op cit note (n 245)6.

²⁵⁶ Op cit note (n 245)7.

sustainability of the company in the long run and to also act in the best interest of the company at all times in a transparent, accountable and responsible way;²⁵⁷

- b) Secondly, on the appointment of directors, the code recommends that the board should ensure that board appointments are made through a managed and effective process which provides a mix of proficient directors, each of whom is able to add value and make independent judgments in their decision-making process;²⁵⁸
- c) Thirdly in relation to strategy and values, the board is required to determine the corporation's purpose and values and the strategy to achieve this purpose and implement these values. This is in order to ensure that not only does the company survive and thrive, but that procedures and practices that protect the corporation's assets and reputation are in place;²⁵⁹
- d) Fourthly, another principle is on company performance. It recommends that the board should monitor and evaluate the implementation of strategies, policies, management performance criteria and business plans;²⁶⁰
- e) The next principle is on compliance. It states that boards should ensure that the corporation complies with all relevant laws, regulations and codes of best business practice;²⁶¹
- f) The sixth principle, is on communication, and states that boards should ensure that the corporation communicates with shareholders and other stakeholders effectively;²⁶²
- g) Another principle on accountability to shareholders emphasises the need for the board to serve the legitimate interest of the shareholders of a company and account to them fully;²⁶³
- h) The eighth principle deals with the board's relationship with stakeholders and recommends that the board should identify the company's internal and external stakeholders and then agree on a policy, or policies, determining how the company should relate to them;²⁶⁴
- i) The ninth principle, relating to balance of powers, highlights the need for an appropriate balance of power and authority in the board in order to ensure that no one person or set of persons has unfettered power. This can be achieved, *inter alia*, by separating the roles of the chief executive officer and the chairman, and by having a balance between executive and non-executive directors;²⁶⁵

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Op cit note (n 246)7.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Op cit note (n 246)7.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Op cit note (n 246)7.

- j) In relation to the principle on internal procedures, the board is required to regularly evaluate its processes and procedures and ensure the effectiveness of its internal systems of control, so as to guarantee and maintain a high level of decision-making capability and the accuracy of its reporting and financial at all times;²⁶⁶
- k) Also, with respect to the principle of board performance assessment, it is recommended that not only should there be an assessment of the board performance and effectiveness as a whole, but also that of the individual directors including the chief executive officer;²⁶⁷
- l) In addition, the twelfth principle, which refers to management's appointment and development, states that the board should not only appoint the chief executive officer, but should also participate in the appointment of senior management and ensure that they have a succession plan. They are also to ensure that there is adequate training in the company for management and employees, as well as the motivation and protection of intellectual capital intrinsic to the company;²⁶⁸
- m) Moreso, the principle on technology provides that the board should ensure that the technology and systems used in the company are adequate to the needs of the business;²⁶⁹
- n) The principle on risk management says that the board must identify and monitor key risk areas and key performance indicators of the company;²⁷⁰
- o) Lastly, the fifteenth principle, is with regards to the annual review of future solvency, and the board is directed to ensure annually, that the company will continue as a going concern for its next fiscal year.²⁷¹

4.3 By Foreign Jurisdiction

4.3.1 *The Sarbanes-Oxley Act of 2002*

The Sarbanes-Oxley Act was passed by congress in June, 2002, ²⁷²following the collapse of corporate of giants such as Enron, WorldCom and Xerox as a result of fraudulent accounting

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Op cit note (n 246)7.

²⁶⁹ Ibid

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² J Coates, ' The goals and promise of the Sarbanes-Oxley Act'(2007) *Journal of Economic perspective* , Vol. 1,Nos 1, 1, available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.21.1.91> , accessed on 28 January, 2016.

practices and executives' self-dealing transactions.²⁷³ The major aim of the Act was to promote corporate responsibility, enhance public disclosure, and improve the quality and transparency of financial reporting and auditing in order to protect shareholders.²⁷⁴ To this end, the Act contains reforms for issuers of publicly traded securities, auditors, corporate board members, and lawyers' and adopts tough new provisions intended to deter and punish corporate and accounting fraud and corruption.²⁷⁵ It also made provisions to improve the overall quality of financial reporting, independent audits, and accounting services for public companies.²⁷⁶ It is mandatory in nature and is applicable to all companies in the United States (U.S.) that are required to file annual reports with the Securities and Exchange Commission (SEC). It is also applicable to foreign companies listed in the United States or otherwise who must file periodic reports with the SEC.²⁷⁷

The principal components of the Act include the established independent oversight of public companies audit; the strengthened audit committees and corporate governance; enhanced transparency, executive accountability and investor protection; and enhanced auditor independence.²⁷⁸ In relation to the independent oversight of public companies audit, the Act established an independent regulatory public company accounting oversight board (PCAOB) which has investigative, enforcement and standard setting powers to regulate the accounting industry and to discipline auditors.²⁷⁹ This move has ended more than 100 years of self-regulation by the public company audit profession.²⁸⁰ In order to facilitate strengthened audit committee and corporate governance, the Act requires all listed companies to have audit committees which are independent of management.²⁸¹ This audit committees are obligated in the stead of management, to be directly responsible for the appointment, compensation and oversight

²⁷³ R Romano 'The Sarbanes Oxley Act and quack making of corporate governance' (2004) *NYU, Law and Econ Research Paper* 04-032; *Yale Law & Econ Research Paper* 297, page .Available at <http://dx.doi.org/10.2139/ssrn.596101>, accessed on 29 January, 2016.

²⁷⁴ M Davies, B Schlitzer 'The impracticality of an international "one size fits all" corporate governance code of best practice'(2008) *Managerial Auditing Journal*, Vol. 23 Issue: 6, pp.533 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 5 February 2016.

²⁷⁵ R Zameeruddin, 'The Sarbanes-Oxley Act Of 2002: An Overview, Analysis, and Caveats' (2003) *American city Business Journals* available at <http://www.westga.edu/~bquest/2003/auditlaw.html> , accessed on 2 February, 2016.

²⁷⁶ Ibid.

²⁷⁷ Op cit note (n 248)7.

²⁷⁸ Ernest & Young report on 'The Sarbanes-Oxley Act at 10-Enhancing the reliability of financial reporting and Audit Quality' (2011) [http://www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/\\$FILE/JJ0003.pdf](http://www.ey.com/Publication/vwLUAssets/The_Sarbanes-Oxley_Act_at_10_-_Enhancing_the_reliability_of_financial_reporting_and_audit_quality/$FILE/JJ0003.pdf) accessed on 2 February 2016.

²⁷⁹ Section109 of the Sarbanes Oxley Act of 2002 available at www.soxlaw.com/, accessed on 2 February2016.

²⁸⁰ Op cit note (n 274)

²⁸¹ Ibid.

of the external auditor and to also disclose if there was at least one “financial expert” on the audit committee.²⁸² To enhance transparency, executive accountability and investor protection, the Act put in place certain mechanisms that would achieve this goal. For instance, it mandated audit firms to disclose certain information about their operations for the first time, including the names of clients, fees and quality control procedures.²⁸³ It also requires the Chief Executive Officers (CEO) and Chief Financial Officers (CFO) to certify financial reports and instituted ‘clawback’ provisions for CEO and CFO pay after financial restatements.²⁸⁴ Corporate officers and directors are prohibited from fraudulently misleading auditors and protection for whistle blowers employed by public companies to report accounting, auditing and internal control irregularities was also put in place.²⁸⁵ Furthermore, while management is required to assess the effectiveness of internal controls over financial reporting (404(a)), auditors are also required to attest to management’s representations (404(b)).²⁸⁶ In addition, a “Fair Funds” programme at the United States Securities and Exchange Commission (SEC) was established to augment the funds available to compensate victims of securities fraud.²⁸⁷ In order to improve the independence of auditors, the Act not only prohibits audit firms from providing certain non-audit services to audited companies and then necessitates an audit committee pre-approval for all audit and non-audit services,²⁸⁸ it also reduces the duration of lead audit partner rotation to every five years rather than every seven years. Lastly, it provides control function of the stock market in the United States of America by requiring regular reviews of public companies by the Securities and Exchange Commission.²⁸⁹

In view of the provisions of the codes of corporate governance by international organizations and the Sarbanes-Oxley Act of the United States of America, the draft National Code of Corporate Governance by the Federal Reporting Council of Nigeria shall be compared with these codes in the next chapter, in order to determine its compliance or otherwise with international best practices.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Op cit note (n 274)

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ M Davies, B Schlitzer ‘The impracticality of an international “one size fits all” corporate governance code of best practice’ (2008) *Managerial Auditing Journal*, Vol. 23 Issue: 6, 533 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 5 February 2016

5 CHAPTER FIVE- COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS

5.1 The draft National Code of Corporate Governance in Nigeria, the legal frameworks of International Organisations and the Sarbanes Oxley Act.

Introduction

The importance of having laws that regulate the activities of companies cannot be overemphasized as corporate power left unchecked can lead to abuse.²⁹⁰ In order to check such abuse, a government can set standards for companies²⁹¹ by creating legislation that hold companies accountable, monitor corporate activities, recognise social goals²⁹² and enforce these goals. It is apparently in the light of the above that the Federal Reporting Council of Nigeria was mandated to draft the National Corporate Governance Code.

In this chapter, a comparative analysis will be carried out between the draft National Corporate Governance Code in Nigeria and the corporate governance guidelines of International Organizations' as well as the Sarbanes-Oxley Act of the United States of America. This is in order to determine if indeed the provisions of the proposed code are in compliance with provisions of the aforementioned codes, which are deemed to be, the international standards of corporate governance. These codes proffered by international organisations such as the United Nations and the Organisation for Economic Co-operation and Development (OECD) are considered international standards especially those of the OECD which as mentioned earlier have been endorsed as 'acceptable standards of corporate governance with universal applicability'.²⁹³ This is because the principles of corporate governance enshrined in their provisions as guidelines and recommendations have become the founding principles adopted by most sovereign states in the development of their corporate governance codes.²⁹⁴ On the other hand, comparison of the

²⁹⁰ Companies, as juristic persons, with limited accountability shield individuals who manage and direct such legal entities. J Bendell, 'Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement' (June 2004) United Nations Research Institute for Social Development: Technology, Business and Society Programme 13 at 8; J Marson Business Law (2013) 462.

²⁹¹ R Hamann, 'Corporate social responsibility, partnerships, and institutional change: The case of mining Companies in South Africa' *Natural Resources Forum* 28 (2004) 278 at 286.

²⁹² M E Porter, M Kramer, 'Creating Shared Value: How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth' (2011) *Harvard Business Review* Vol. 1 at 14.

²⁹³ M Davies, B Schlitzer 'The impracticality of an international "one size fits all" corporate governance code of best practice' (2008) *Managerial Auditing Journal*, Vol. 23 Issue 6, 533 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 24 January 2016.

²⁹⁴ M Davies, B Schlitzer 'The impracticality of an international "one size fits all" corporate governance code of best practice' (2008) *Managerial Auditing Journal*, Vol. 23 Issue 6, 533 available at <http://www.emeraldinsight.com.ezproxy.uct.ac.za/doi/full/10.1108/02686900810882093>, accessed on 24 January 2016.

new draft code with the Sarbanes-Oxley Act (SOX Act) is premised on the fact that apart from the SOX Act being mandatory, the United States of America is one of the global leaders which most countries around the world tend to emulate, and the field of corporate governance is no different.

Nevertheless, the comparison of the new draft code with the above mentioned legal instruments is limited in extent. It will not be a comprehensive comparison of all aspects as this would be impossible to achieve in a thesis of this length.

Comparative Analysis

Following the need and recommendations to have good corporate governance in place, Nigeria's release of a new overarching corporate governance code is a laudable move. This is because some of the corporate governance challenges currently experienced in Nigeria are, being addressed by the new code. Some of these issues include; the proliferation of corporate governance codes, inconsistencies in the provisions of the existing sectorial codes,²⁹⁵ the applicability of the code to companies operating in only some sectors of the economy, the voluntary nature of existing codes and the non-compliance of the codes with international best practices or standards, all of which did not help in the promotion and enforcement of good corporate governance practices in Nigeria.

With regard to the issue of proliferation of corporate governance codes, it has been stated that 'good corporate governance without undue proliferation is fundamental to corporate profitability, risk reduction and foreign capital inflow'.²⁹⁶ Therefore, the need for an effective code instead of a 'plethora of codes with grave disparities' cannot be overemphasized.²⁹⁷ Accordingly, where there are lesser codes or one overarching code of corporate governance, the chances of there being a disparity between the codes will be slim, thereby reducing any issue of disparity amongst the various provisions of the corporate governance codes. For example, in the United States of America and even in South Africa, there is only one code on corporate governance (that is the Sarbanes-Oxley Act and the King III Code respectively).

295 K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 10 February 2015.

296 Ibid at 6.

297 GO Demaki 'Proliferation of Codes of Corporate Governance in Nigeria and Economic Development' (2011) *Business and Management Review* ISSN: 2047-0398 available at <http://www.businessjournalz.org/bmr.1.6:1-7>, accessed on 10 February, 2016.

With regard to the issue of inconsistency, this is not a new as even the the Organisation for Economic Co-operation and Development recognises this.²⁹⁸ However, irrespective of the fact that most corporate governance practices are not uniform across nations and even within nations,²⁹⁹ there is the need to strive for consistency in corporate governance regulations particularly within a nation.³⁰⁰ In view of this, the current inconsistencies or conflicts between the various existing sectorial corporate governance regulations in Nigeria could impact negatively on the economy, hence the need to harmonise these laws.³⁰¹ Some of the aspects where inconsistencies exist among the codes are in relation to; board composition, internal auditors, independent directors etc. With regard to board composition, the SEC code provides for not less than 5 members of the board,³⁰² while the CBN code provides for no minimum but a maximum of 20 directors of the board³⁰³ and the PenCom code provides for a minimum number of 7 and a maximum number of 15 members of the board.³⁰⁴ Thus, for instance, if a licensed public PenCom Administrator, which is listed on the capital market, decides to inaugurate the members of its board, there will be a disparity on which of the provisions (that is of either the SEC code or the PenCom code) should be followed. Also, with regard to independent directors, where the SEC Code provides for one independent director, the CBN code provides for two independent directors.³⁰⁵ In addition, where both codes provide that independent directors should be Non-Executive Directors, the PenCom and NAICOM codes have no such provisions.³⁰⁶ It is in light of these inconsistencies that there has arisen the need to harmonise and unify all

²⁹⁸ The OECD in its 1998 report acknowledges the lack of a single model of corporate governance practice that is applicable to all organizations even within one country).

²⁹⁹ Davies, Schlitzer (2008) as cited in B M Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1; February 2011 available at www.sciedu.ca/ijba, accessed on 10 February 2015.

³⁰⁰ BM Mulili, P Wong 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) *International Journal of Business Administration* Vol. 2, No. 1; February 2011 available at www.sciedu.ca/ijba, accessed on October 8, 2015.

³⁰¹ GO Demaki 'Proliferation of Codes of Corporate Governance in Nigeria and Economic Development' (2011) *Business and Management Review* ISSN: 2047-0398, available at <http://www.businessjournalz.org/bmr.1.6:1-7>, accessed on February 10, 2016.

³⁰² Section 4.2 of the Securities and Exchange Code of corporate governance, 2003.

³⁰³ Section 5.3.5 of the Code of corporate governance for Banks in Nigeria post Consolidation, 2006.

³⁰⁴ Section 4.0 of the Code of corporate governance for pension operators in Nigeria, 2008.

³⁰⁵ K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 80 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 19 February, 2016.

³⁰⁶ Ibid.

existing codes,³⁰⁷ in order to foster consistency in corporate governance codes and comply with international standards of best practices.³⁰⁸

Furthermore, with regard to the applicability of existing codes to companies in specific sectors in Nigeria and the voluntary nature of these codes, the new draft code is different in its approach and shall be mandatorily applicable to all companies in Nigeria. This approach is preferable in view of a report that out of about 2000 companies registered in Nigeria, only 500 are listed on the Nigerian Stock exchange.³⁰⁹ Thus, by implication and in relation to a survey of enterprises in six randomly selected states in Nigeria conducted by the development policy centre (where it was discovered that only 13.3% of Nigerian Companies were listed on the NSE as at 1999), the facts seem to suggest that 87% of businesses currently operate outside the scope of the SEC Code³¹⁰ and other corporate governance regulations. Consequently, by the proposed new code, a lot of companies registered in Nigeria, which were formerly operating outside the guidance of corporate governance regulations, will be adequately guided and governed with regard to the implementation of corporate governance practices.

Additionally, by making its provisions mandatory, the new National Corporate Governance Code is similar in its approach to that of the Sarbanes-Oxley Act of the United States of America. Since, most of the corporate governance codes by international organizations (the OECD, the United Nations and the Commonwealth), foreign jurisdictions like the United Kingdom and most of the corporate governance codes in Nigeria are voluntary (self-regulatory). However, there are critics of the mandatory nature adopted by the new corporate governance code on grounds that not only will it impose excessive regulatory burden upon the traditional structure and organisation of business relationships,³¹¹ but that it will also amount to a situation of 'one size fits all'. Irrespective of this, having a mandatory corporate governance code is recommended. This is in view of the power wielded by most corporate organizations and the fact that soft law generally 'lacks the bite of the law'. Accordingly, a mandatory code is necessary, not only to enforce oversight and control measure provisions governing the activities

³⁰⁷ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 17 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 19 February 2016.

³⁰⁸ The Corporate governance code for private sectors

³⁰⁹ A Nwandulu, A Oyejide & A Soyibo *Corporate Governance For Sustainable Growth* in the summary of proceedings by the Institute of Economic affairs' West African Regional Conference held in Accra, Ghana on 29 and 30 January, 2001.

³¹⁰ Ibid.

³¹¹ E Adegbite 'Corporate Governance Regulation in Nigeria' (2012) *Corporate Governance: The International Journal of Business in Society*, Vol. 12 Issue: 2, 257 – 276 available at <http://dx.doi.org/10.1108/14720701211214124>, accessed on 19 February 2016.

of a company³¹² but to also ensure the integrity and good corporate governance practices of companies.³¹³ Furthermore, even though the new code shall be mandatorily applicable to all companies registered in Nigeria, its provisions have not been tailored after the ‘one size fits all’ approach adopted by the Sarbanes-Oxley Act. Rather, by the separation of the code into three different sub codes and the couching of the provisions in each sub code to specifically provide for the three different categories under which all companies can be registered in Nigeria, it has to some extent circumvented the issues associated with a ‘one size fit all’ legislation. This is especially since, the provisions of the draft code did not only adopt the key principles of corporate governance recommended by international organisations; they also couched them in a way that could be adapted specifically to suit different companies.

Furthermore, following the release of the code for public hearing, corporations like Price Waterhouse Coopers (PwC) have criticized the code on the basis that amongst others the impracticalities of the code may pose likely challenges in the future.³¹⁴ Some of these impracticalities for example, have been said to be in respect of the fact that the draft code is too detailed in its provisions and appears to have gone past setting out a base line standard of principles by recommendations to delving into procedures on how its recommendations should be executed.³¹⁵ Also, the audit provision of the code has been criticised as not being in compliance with international standards. This is because of its provision for a mandatory audit rotation, which according to the report by PwC, is not in compliance with most international standards.³¹⁶

However, despite these critics, the draft code appears to be in compliance with the international standards of good corporate governance because it encapsulates the core principles of good corporate governance as recommended in the codes and guidelines of international organizations in its provisions. For example, just like in the provisions of the United Nations code, the draft National Corporate Governance Code makes provision for, amongst others, ownership and rights of shareholders, the function, qualification, roles and responsibilities of the members of the board and its committees, meetings, the independence of auditors, financial and

³¹² E Adegbite ‘Corporate Governance Regulation in Nigeria’ (2012) *Corporate Governance: The International Journal of Business in Society*, Vol. 12 Issue: 2, 257 – 276 available at <http://dx.doi.org/10.1108/14720701211214124> , accessed on 19 February 2016.

³¹³ Ibid.

³¹⁴ Report by Price Waterhouse Coopers on ‘Exposure Draft: Unified Code of Corporate Governance’ (2015) available at <https://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf>, accessed on 17 February, 2016.

³¹⁵ Ibid.

³¹⁶ Ibid.

non-financial disclosure requirements etc. Furthermore, just like in the provision of the OECD principles of corporate governance, the code makes provision for the equitable treatment of shareholders, corporate governance and transparency, amongst others. However, the provisions in the draft National Corporate Governance code are more detailed. For example, where with regard to general meetings the United Nations Corporate Governance Code provides for general meetings, the draft National code does not only provide for meetings like Annual General meetings, it goes further to mention those that should attend the meeting such as independent non-executive directors³¹⁷ and suggests what should be discussed by the Chairman at the meeting.³¹⁸ This is why PWC criticised the code for suffering from too many details.³¹⁹

³¹⁷ Section 20.4 of the Financial Reporting Council of Nigeria (FRCN)'s exposure draft National Code of Corporate Governance for Private Sector in Nigeria (2015) 3 available at <http://www.financialreportingcouncil.gov.ng/index.php> accessed on 19 February, 2016.

³¹⁸ Section 20.2 of Financial Reporting Council of Nigeria (FRCN)'s exposure draft National Code of Corporate Governance for Private Sector in Nigeria (2015) 3 available at <http://www.financialreportingcouncil.gov.ng/index.php> accessed on 19 February, 2016.

³¹⁹ Report by Price Waterhouse Coopers on 'Exposure Draft: Unified Code of Corporate Governance' (2015) available at <https://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf>, accessed on 17 February, 2016

6 CHAPTER SIX - RECOMMENDATION AND CONCLUSION

6.1 Recommendations

- 1) *The frequent review of the Code to address emerging developments and issues relating to corporate governance.*

Given that the first SEC code became irrelevant because of its shortcomings and inability to address emerging corporate governance issues that arose in the corporate world;³²⁰ I would recommend that there be a regular review of the new draft code once it is passed into law. This is in order to ensure that it addresses upcoming developments and issues as they arise. The rationale is that as new experiences ensue and business circumstances change, so the content and structure of the Code's framework might need to be modified to cater for those changes.³²¹ For example, in South Africa, the King Code has been revised several times in cognisance of emerging changes and developments in the corporate world. Accordingly, if Nigeria should imbibe this approach of constant review of the code, it will be effective in driving the good corporate governance practices amongst corporations.

- 2) *Review of the Companies and Allied Matters Act.*

The Companies and Allied Matters Act is the principal statute governing all companies in Nigeria. At the time of its promulgation in 1990, corporate governance was yet to emerge as a distinct concept.³²² Thus, following corporate challenges around the world which revealed the importance of corporate governance, the Companies and Allied Matters Act was found wanting as it could neither adequately nor specifically address the issues of corporate governance.³²³ This is because apart from its provisions in section 279, which relate to the fiduciary relationship of a director; section 282 which requires that a director carry out his duty with utmost good faith; and section 283 which provides for the role of directors as trustees to the company amongst other things, there are no specific provisions relating to corporate governance and the penalties for the

³²⁰ JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 65 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 19 February 2016.

³²¹ OECD Principles of Corporate Governance (2004) available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>, accessed on 19 February, 2016.

³²² Op cit note (n 320).

³²³ Ibid.

breach of the Companies and Allied Matters Act is inadequate.³²⁴ Given that the Companies and Allied Matters Act is the principal law regulating the activities of companies in Nigeria, there is need to review it to embrace corporate governance principles in order to align its provisions with the new draft corporate governance code and also with international best practices.³²⁵

3) *Alternative to a Mandatory Audit Rotation.*

Despite the fact that research indicates that the quality of audit markets appear to improve, on average, from enactment of mandatory audit rotation rules,³²⁶ most audit companies are against the implementation of this. In Nigeria, some foremost audit firms like Price Waterhouse Coopers for instance, have criticised the mandatory audit firm rotation being proposed by the draft code on grounds that mandatory audit firm rotation would diminish audit quality, make financial reporting less reliable, and add costs for investors.³²⁷ Accordingly, I recommend that the Financial Reporting Council of Nigeria (FRCN) should go back to their drawing board and examine whether a mandatory firm audit rotation will be the best way to achieve audit independence and objectivity. If this is not the best approach, just like in the United States of America it may need to mandate lead partners in an audit firm to rotate off an audit project every five years in order to avoid familiarity and maintain high quality audit,³²⁸ or come up with an alternative best suited to the Nigerian environment.

4) *Passage of the draft Corporate Governance Code.*

In view of the significance of corporate governance in relation to a country's investment performance,³²⁹ the passing of the draft new code can be an effective political strategy by the

³²⁴JB Marshall 'Corporate Governance Practices: An Overview of the Evolution of Corporate Governance Codes in Nigeria' (2015) *International Journal of Business & Law Research* Vol. 3(3) 65 available at <http://seahipaj.org/journals-ci/sept-2015/IJBLR/full/IJBLR-S-4-2015.pdf>, accessed on 19 February 2016.

³²⁵ Ibid.

³²⁶ Financial Reporting Council of Nigeria (FRCN)'s exposure draft National Code of Corporate Governance for Private Sector in Nigeria (2015) 3 available at <http://www.financialreportingcouncil.gov.ng/index.php> accessed on 19 February, 2016.

³²⁷ Report by Price Waterhouse Coopers on 'Exposure Draft: Unified Code of Corporate Governance' (2015) available at <https://www.pwc.com/ng/en/assets/pdf/exposure-draft-unifiedcode-corporategovernance.pdf>, accessed on 17 February, 2016.

³²⁸ V Ryan 'PCAOB Abandons Auditor Rotation' published on February, 4, 2014 by CFO Newsletter available at <http://ww2.cfo.com/auditing/2014/02/pcaob-abandons-auditor-rotation/>, accessed on 19 February, 2016.

³²⁹K Aina, B Adejugbe 'A Review of Corporate Governance Codes and Best Practices in Nigeria' (2015) *Journal of Law, Policy and Globalization*, Vol.38, 86 available at www.iiste.org/Journals/index.php/JLPG/article/download/23517/23923, accessed on 19 February, 2016.

Nigerian government to foster foreign direct investment in Nigeria. This is because not only are policy makers now more aware of the contribution good corporate governance makes to financial market stability, investment and economic growth,³³⁰ reports from studies conducted among investors reveal that most investors are of the belief that good corporate governance is as important as financial performance when evaluating an investment.³³¹ Thus, in order to improve foreign investment in Nigeria and boost the confidence of foreign investors who chose to invest in Nigeria, there is the need to pass the new draft corporate governance code into law as soon as possible

- 5) Lastly, in as much as the new draft code enshrines the principles of corporate governance in its provisions, thereby aligning the code with international standards, it may be a bit too detailed. The provisions of the code should be more of a guide on the principles of corporate governance which can be adapted by companies to suit their individual respective environments, rather than a body of rules, especially since it is easier to flout laws rather than principles. Thus, care should be taken to avoid a situation whereby the code will become just another set of rules that will be flouted by companies or approached with a tick box mentality.

³³⁰OECD Principles of Corporate Governance (2004) available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>, accessed on 20 February, 2016.

³³¹ GO Demaki 'Proliferation of codes of corporate governance in Nigeria and Economic Development' (2011) *Business and Management Review* ISSN: 2047-0398, available at <http://www.businessjournalz.org/bmr.1.6:1-7>, accessed on February 19, 2016.

6.2 Conclusion

From the role corporations play in global economies; it is clear that corporate governance as an all-encompassing concept will be able to institute and guarantee to some extent credible bedrock governance standards in the creation of wealth.³³²

Corporate governance regulations have been put in place in developed countries like the United States (the Sarbanes Oxley Act) and the United Kingdom (the Corporate Governance Code), but this is not the case in developing countries especially in Africa. Apart from countries like Kenya, Ghana and South Africa, which have a corporate governance code (the King Code), most countries including Nigeria do not have a standard overarching corporate governance code.³³³ Accordingly, Nigeria has taken a cue from foreign jurisdictions such as the United States of America and the United Kingdom as well as its African counterparts who have formulated corporate guidelines by the adoption of the OECD guidelines on corporate governance to suit their peculiar circumstances. By so doing, Nigeria has taken a giant step towards creating safeguards against corporate mismanagement and corruption, as by means of this new code, transparency and integrity in businesses will be promoted. This will foster more local and foreign investment, and consequently promote the economic growth and development of Nigeria.

³³² D Adekunle, L Fashola et al 'Development in Business Law'(2010) *Compilation of papers presented at the Nigerian Bar Association section on Business Law Conferences*' at 263

³³³ E N Okike 'Corporate Governance in Nigeria: The Status Quo' (2007) *Corporate Governance: An International Review* Vol 15, Issue 2, pages 173-193 available at <http://dx.doi.org/10.1111/j.1467-8683.2007.00553.x> , accessed on 22 February 2016.

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