

**REVIEW OF AUDIT OVERSIGHT AND INDEPENDENCE UNDER CORPORATE
GOVERNANCE REGULATION IN NIGERIA**

By:

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Abstract

This article is a doctrinal research that uses comparative method to review audit oversight and independence as emerging corporate governance issues with Nigeria in focus. Provisions of applicable statutes and national and international corporate governance instruments in Nigeria and elsewhere have been examined. Local and foreign cases have also been considered. The secondary resources consulted and used for the explanation of the law concerned and for conceptual clarification include both local and foreign literature. The purpose of the study is to identify the place and role of audit oversight and independence in corporate governance regulation in Nigeria. The review is in the light of corporate governance international best practices especially as set by the OECD and domesticated by some national jurisdictions in their statutes and corporate governance codes and guidelines. The study revealed that Nigeria has, through legislation and issuance of corporate governance instruments by the regulatory authorities, compared favorably with international corporate governance standards including in the area of audit oversight and independence. The study also revealed that there is dearth of the Nigerian case-law on audit regulation. There is the need of continuing improvement of audit regulation and corporate governance regulation in Nigeria, the country being an emerging market economy that is set to compete with other market economies.

1.0 INTRODUCTION

This article examined audit oversight and independence as part of audit regulation within the corporate governance regulatory framework in Nigeria. It is divided into seven parts beginning with this introduction as part one. Part two is on explanation of the term ‘audit’ and ‘auditor’ as the focus of the study and some associated terms for conceptual clarifications. Parts three discusses Audit and Corporate Governance to show the relationship between the two concepts and how audit is located in corporate governance framework. Auditors’ Report is the subject of part four. The

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part discusses the report as part of the requirements of financial statements and as a key document relating to the work of auditors. Parts five and six are Audit Oversight and Auditors' Independence as the central focus of the study and critical issues of concern in the contemporary corporate governance regulation, scholarship and practice. Lastly, part seven is on the conclusion the study arrived at followed by a recommendation.

2.0 AUDIT AND AUDITORS

The terms 'audit' and 'auditing' are used interchangeably. Looking at the definition of audit from the statutory point of view in Nigeria, the Financial Reporting Council of Nigeria Act 2011 (FRCNA) adopts the approach of the International Federation of Accountants (IFAC) Code of Ethics for Professional Accountants.¹ The relevant provisions in the code refers to 'audit' to mean 'review'.² Associated terms or phrases in the provisions are 'audit team', 'audit engagement', 'audit client' and 'audit report' and they accordingly mean 'review team', 'review engagement', 'review client' and 'review report' respectively.³ The provisions in the code, therefore, merely give synonyms of audit and the associated terms rather than defining them to convey idea about audit such as the philosophy, principle and function of auditing.

The professional literature and leading academic texts that attempted to explain audit have not succeeded in conveying a complete and lasting idea about the dynamic concept of audit. From the examples of such attempts cited by Moizer,⁴ audit is viewed in terms of the function of an auditor to involve an auditor's examination of accounting records of a business without restriction by management as to the scope of the examination. The principal function of the auditor is to express a professional opinion on the financial statements formed from the accounting records.⁵ The

¹ Sec 77, Financial Reporting Council Act of Nigeria Act 2011 (No. 6).

² Sec 290.3 (a), *Handbook of the Code of Ethics for Professional Accountants* (New York: IFAC), 2013 Edition.

³ *ibid.*

⁴ See the introduction by Peter Moizer in Moizer, P., *Governance and Auditing*, ed. (Cheltenham: Edward Elgar Publishing Limited, 2005); Other examples are: 'The purpose of the work of the auditors is to enable them to express an opinion as to whether the accounts presented to the members show a true and fair view'. (Institute of Chartered Accountants in England and Wales); 'The objective of the ordinary examination of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present financial position and results of operations'. (American Institute of Certified Public Accountants); 'The object of the modern audit...has as its ultimate aim the verification of the financial position disclosed by the balance sheet and the profit and loss account of the undertaking'(*Practical Auditing*, Spicer and Pegler, 15th Edition, 1969,p.2); 'The object of an audit is to ensure that the accounts on which the auditor is reporting show a true and fair view and are not misleading'(*Manual of Auditing*, VRV Cooper, 2nd Edition,1969, p.1.

⁵ Accountants International Study Group as cited by Moizer *ibid.*

examination of the accounting records of the business is undertaken with a view to establishing whether they correctly and completely reflect the transactions to which they purport to relate. Auditing is essentially about examination of financial statements and expression of professional opinion on same by auditors.

Auditing is likely to be confused with accounting as the two activities revolve around the corporate governance principle of disclosure and transparency and are performed by essentially the same professionals. Accounting and auditing are related but distinct activities meant to serve different purposes. Accounting is 'the art of recording, classifying, and summarizing...transactions and events...and interpreting the result thereof'.⁶ In other words, it is an activity that involves the 'recording, classifying and summarising of economic events in a logical manner'.⁷ Accounting entails the process of accumulating and communicating information essential to an understanding of the activities of an enterprise.⁸ The services provided by a public accountant are non-attestation services and they include accounting, tax, banking and management consulting services.⁹ In contrast, auditing is the accumulation and evaluation of information to determine whether a company's financial report is in compliance with the established criteria, especially legislative requirements.¹⁰ The auditing process ensures that figures in a company's financial statements are materially correct, which in turn adds value to such information. The auditors ultimately issue professional opinion as to the credibility of information contained in the financial statements.¹¹ Unlike a public accountant, an auditor provides assurance services and has a duty to determine the reliability and relevance of accounting information.¹² Indeed, auditing is now considered to be a sophisticated professional assurance service performed in the interests of a variety of corporate stakeholders including companies, shareholders, investors, creditors and tax authorities. The inherent legal liability attached the auditing profession as a professional assurance service marks the significant distinction between auditing and accounting.¹³

⁶ Sharma, S., "The Impact of the Adoption of International Financial Reporting Standards on the Legal Profession, Houston Business and Tax Journal, 2010, Vol. X, 141-142.

⁷ Nguyen, V. and Rajapakse, P., *An Analysis of the Auditors' Liability to Third Parties in Australia*, Common Law World Review 37 (2008) 9-44, p. 13.

⁸ The enterprise may be large or small, corporate or non-corporate, profit or non-profit, public or private.

⁹ See Nguyen *Supra* note 18.

¹⁰ *ibid* p. 12.

¹¹ *ibid* p. 12-13.

¹² *ibid* 13.

¹³ *ibid*.

Audit services are provided by auditors under accounting and auditing firms. The Institute of Chartered Accountants of Nigeria Act¹⁴ (the ICAN Act) defines 'accountant' to include 'an auditor'.¹⁵ This means auditor is also an accountant as it is the accountants that perform both the accounting and auditing functions as appropriate. The FRCNA defines 'auditor' as 'a professionally qualified Accountant or firm of Accountants appointed to conduct an examination of the records of an enterprise and to form an opinion as to whether the accounts have been prepared in accordance with generally accepted accounting principles'.¹⁶ This definition reflects on the appointment, qualification and function of an auditor and how the audit function should be performed.¹⁷ Asada and Danwanka attempt to give a more detailed definition of an auditor. They define an auditor as 'a person appointed to scrutinize books of accounts of incorporated companies and to pass on to the shareholders a report which must state whether in the auditors professional opinion the company accounts prepared, represent a true and fair view of the financial position of the company'.¹⁸ This definition identifies shareholders as the corporate stakeholders the auditors are primarily accountable to and highlights 'the true and fair view' requirement of audit report. The further statement of the authors that '...people rely, with religious faith on the statement of auditors in relation to such financial statements and audit reports'¹⁹ suggests that audited financial statements are not only used by the principals of the auditors (the shareholders) but a host of other corporate stakeholders.

On the appointment of auditors, the Companies and Allied Matters Act 2020 (CAMA) provides that every company must, at each annual general meeting, appoint an auditor or auditors to audit the financial statements of the company.²⁰ The first auditors of the company are appointed by the directors at any time before the first annual general meeting to hold office until the conclusion of that meeting. If the directors do not exercise this power of appointment of first directors, then the company at a general meeting may appoint them.²¹ The company may also remove any auditor

¹⁴ 1965 (No. 15).

¹⁵ *Ibid.* sec 19.

¹⁶ Sec 77, Financial Reporting Council of Nigeria Act 2011 (No. 6).

¹⁷ The qualification and function of auditors who are covered by the statutory definition of accountants are statutorily determined. The Institute of Chartered Accountants of Nigeria Act 1965 and the Association of National Accountants of Nigeria Act 1993 are concerned with the qualification and legislations particularly CAMA and FRCNA bear on the function.

¹⁸ See Asada and Danwanka *Supra* note 10, p.1.

¹⁹ *ibid.*

²⁰ CAMA, sec 401(1).

²¹ *ibid* sec 401(5).

appointed by the directors in this regard and appoint in their place any other persons who have been nominated for appointment by any member of the company and whose nomination notice has been given to members not less than fourteen days before the meeting.²² Subsequent auditors are required to be appointed by the company at each annual general meeting to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting.²³ A retiring auditor may be re-appointed.²⁴ Where no auditors are appointed or re-appointed at an annual general meeting, the directors may appoint a qualified person to fill the vacancy,²⁵ while the company is required to within one week give notice of the vacancy to the Corporate Affairs Commission (CAC).²⁶ The directors may fill a casual vacancy, but while the vacancy continues, the surviving or continuing auditor or auditors, if any, may act.²⁷ In view of the provisions of CAMA and the the ICAN Act and the ANAN Act, a person must be a member of ICAN or ANAN to be qualified and appointed by a company as an auditor. CAMA provides for persons that cannot be appointed.²⁸

By the above provisions, an auditor is not an officer or servant and the disqualifications in the provision extend and apply to persons who in respect of any period of an audit were in the employment of the company or were otherwise themselves connected therewith in any matter. The definition of 'officer' in section 868(1) of the Act to include 'a director, manager or secretary' neither mentions 'auditors' nor excludes them. The decision in the English case of *R v Shacter*²⁹ shows that an auditor is an officer of the company for some limited purposes. It was held in the case that an auditor appointed under section 159 of the United Kingdom Companies Act 1948 (which is in *pari materia* with section 401 of CAMA) to hold the office of auditor of the company is an officer of the company. Consequently, an auditor would be liable like other officers of the company in, for example, situations of offences by officer of companies in liquidation;³⁰ power of court to assess damages against delinquent director, manager or liquidator, or any officer

²² *ibid* sec 401(5) (a).

²³ *ibid* sec 401(1).

²⁴ *ibid* sec 401(2).

²⁵ *ibid* sec 401(3).

²⁶ *ibid* sec 401(4).

²⁷ *ibid* sec 401(6).

²⁸ *ibid* sec 403(1).

²⁹ (1960) 2 QB 252 CA.

³⁰ CAMA, sec 668.

of the company;³¹ prosecution of delinquent officers and members of a company;³² and frauds by officers of companies which have gone on liquidation.³³ This applies to the regular auditor of the company as appointed or re-appointed annually by the company. An auditor appointed *ad hoc* (eg by directors for a private audit) is not an officer of the company.³⁴ The status or position of an auditor can be generally regarded as that of an independent contractor. Thus, the relationship between the company and the auditors is that of principal-independent contractor as opposed to the employer-employee relationship among others. In other words, professionals, including auditors, are generally engaged as independent contractors in principal-independent contractor relationship under contract for services as opposed to contract of service or any other contract.³⁵ The relationship under which an auditor is engaged can be that of principal-agent. Auditors can be regarded as agents of the members appointed to carry out certain duties as laid down by the Act and articles for the purpose of the audit.³⁶ But they are not agents for all purposes. The auditor may, however, be appointed agent with special powers.³⁷ Note that all the partners of a firm are required to be qualified as auditors for the firm to be eligible for apportionment as auditors of a company.³⁸

The CAMA provides for the remuneration of the auditors (including their expenses) to be generally fixed by the directors or the company in general meeting as follows.³⁹

On the vacation of the office of an auditor, the office may be vacated by the removal or resignation of the auditors. Regarding removal of auditors, a company may, by an ordinary resolution, remove an auditor before the expiration of his term of office, notwithstanding anything in any agreement between the company and the auditor.⁴⁰ Where a resolution removing an auditor is passed, the company must within fourteen days give notice of the fact in the prescribed form to the CAC, and

³¹ *ibid* sec 674.

³² *ibid* sec 675.

³³ *ibid* sec 670.

³⁴ *R v Shacter* (1960) 2 QB 252 CA; *Shonowo v Adebayo* (1969) 1 NCLR 82.

³⁵ For the distinction between contract for services and contract of service see *Shena Security Co. Ltd v Afropak (Nig.) Ltd* [2008] 6 CLRN7.

³⁶ See *Supra* note 87.

³⁷ Orojo, J.O, *Company Law and Practice in Nigeria*, 5th ed. (Durban: LexisNexis Butterworths, 2008), p. 309

³⁸ CAMA sec 403(4).

³⁹ *ibid* sec 408(1). Note that if the remuneration is not fixed by the company in general meeting, the amount thereof must be shown under a separate heading in the profit and loss account.

⁴⁰ *ibid* sec 409(1).

failure to give the notice is punishable with a fine.⁴¹ On resignation of auditors, an auditor resigns his office by depositing a notice in writing to that effect at the company's registered office, and such notice will operate to bring his terms of office to an end on the date on which the notice is deposited or such later date as may be specified in it.⁴² For a notice of resignation to be effective, it must be as required by CAMA.⁴³

Where such a notice is deposited at a company's registered office, the company is required to within fourteen days send a copy of the notice to the CAC and, if the notice contains a statement of any circumstance as above, then to every person who under section 387 is entitled to be sent copies of the accounts.⁴⁴ In the event an auditor's notice of resignation contains a statement as to circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company, he may requisition for a meeting under section 413.

3.0 AUDIT AND CORPORATE GOVERNANCE

The concept of corporate governance is rooted in the separation of ownership from control. It is in view of this separation that many principles of corporate governance are concerned with the need for company directors and managers to run the affairs of the company transparently and and to give account on their stewardship to the shareholders particularly through the instrumentality of annual reports that include financial statements. As such, transparency and disclosure are core to corporate governance. Indeed, many principles of corporate governance including those relating to audit and auditors fall under transparency and disclosure as one of the six (6) broad areas of corporate governance as classified in the 2004 Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance.⁴⁵ Information disclosed about a company may be about the past, present and future affairs of the company. The law does not require companies to disclose all information. The concept of materiality has been developed to distinguish the information required to be disclosed from other information. Information disseminated by a company should always be timely and accurate to avoid liability. The importance of timely and accurate material financial and non-financial information about a company or an

⁴¹ *ibid* sec 409(2).

⁴² *ibid* sec 412(1).

⁴³ *Ibid* sec 412(2)

⁴⁴ *ibid* sec 412(3), (4)-(7).

⁴⁵ See OECD Principles of Corporate Governance 2004 (Paris: OECD Publications, 2004).

industry to which a company belongs cannot be over-emphasized. Listed companies are particularly regulated by securities regulation. The objectives of securities regulation are three namely: the protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk. These three objectives are closely related and do overlap. It is important to note at this point that full disclosure of information that is material to investors' decision is the most important means for ensuring investors' protection. It invariably leads to market efficiency and reduction of systemic risk.⁴⁶

It is the responsibility of the auditors to ensure that the disclosed financial information about a company reflects the true state of affairs of the company. Stakeholders consider audit structures, processes and outcome in arriving at decisions about financial information of companies. The basic source of information about a company is its annual report. Auditors of companies are expected to audit the accounts of companies with care, skills and professionalism. Auditors' report in the annual report of a company should be responsibly issued to reflect the true state of financial affairs of the company. Irresponsible auditors' report may make the auditors liable to the company as a body of shareholders and to third parties as well.

Listed companies are required to comply with the disclosure requirements of the CAMA and Securities and Exchange Commission (SEC) in addition to those of the other statutes and instruments applicable to them. SEC plays a central role in securities regulation. Securities regulation requires a company offering securities to disclose adequate information about the securities it is offering and to further make periodic disclosure in required reports including annual report and accounts. The disclosure requirements of securities regulation enable both potential and existing investors have information that will equip them in making wise investment decisions. Such information also equips the securities market in moving capital to its optimal uses.⁴⁷ It is the auditors that verify the financial information required to be disclosed periodically or for special purpose.

⁴⁶See paper presented by Mary Uduk titled "International Regulatory Agencies: Principles and Functions" at a workshop on effective capital market operations, registration and renewal strategy, 25th September 2007.

⁴⁷Palmiter, A. P., *Securities Regulation- Examples & Explanations* (New York: Aspen Law & Business, a division of Aspen Publishers, Inc., 1998) p.1.

Capital markets as financial markets engender good corporate governance through disclosure, reporting and transparency requirements.⁴⁸ Findings of local and international bodies suggest weakness in information disclosure by Nigerian companies. The Central Bank of Nigeria (CBN) found that most banks are weak in risk management which includes unsound internal auditing and reluctance to observe proper disclosure, reporting and transparency requirements including failure to provide adequate information of possible risk exposure. In the same vein, SEC observed from filings by listed companies that most companies do not have adequate information of possible risk exposure particularly with respect to the company and the industry. These findings of local bodies corroborated the finding of the International Finance Corporation which indicated that Nigeria is thin in information disclosure.⁴⁹

The effectiveness of corporate governance is essentially located in the efficient deployment and use of the resources of companies in aligning the interests involved in the running of the companies and, equally, the accountability for the stewardship of those resources.⁵⁰ It appears from the available literature on corporate governance to be universally accepted in the market economy that directors of companies have the primary responsibility for corporate governance for the realization of the objectives of the companies. Accountability for the stewardship of the directors (as agents) to the shareholders (as their principals) is a core responsibility and a major issue in corporate governance. Auditors play a vital role as another agents of the shareholders who verify the information provided by the other agents (directors) in discharge of their accountability responsibilities. The financial statements provided by directors and audited by the auditors suppose to give the true financial state of the company concerned and indicate performance in particular. It is used in decision making processes not only by existing shareholders but a myriad of other corporate stakeholders including the regulators such as tax authorities and creditors as well as prospective investors.

⁴⁸ Ekineh, D., "Reform Agenda for Corporate Governance in Nigeria: Disclosure and Reporting Requirements", *Corporate Governance Journal*, Vol. No 1 PP 1-60 Q4 2010, pp.13-20 at 14.

⁴⁹ See paper titled "Making Corporate Governance Work for Public Companies in Nigeria" by Dr. Ige Omotayo Bolodeoku presented to the SEC committee on Corporate Governance, November 2008.

⁵⁰ Owolabi, S.A., *Quality Accounting Service a Panacea to Effective Corporate Governance*, *Journal of Corporate Governance*, Vol. 2 No. 1 October 2010 pp. 266-289 at 267.

Corporate governance has roots in the proposition that corporate officers operate best when they are held to account for what they do.⁵¹ Corporate governance is essentially about the responsibility of directors for accountability which involves reporting to the shareholders on their stewardship, usually at regular intervals such as annually, and to the regulatory authorities as may be required by law in the public interest.⁵² This is in line with the classic market economy where companies are held responsible in the marketplace, including the responsibility to report to the market. Definitions of corporate governance explicitly or implicitly point to such accountability. They generally view the concept of corporate governance in terms of how efficiently, responsibly and transparently companies are run within a framework of effective accountability. Audit makes the accountability responsibility of directors meaningful. Mackenzie buttresses the relationship between audit and accountability when he remarks that ‘without audit, no accountability; without accountability, no control; and if there is no control, where is the seat of power’.⁵³

Conceptually and in the context of this study, accounting and auditing are components of disclosure and transparency principles of corporate governance. The CAMA requires every company to cause accounting records to be kept.⁵⁴ The accounting records must be sufficient to show and explain the transactions of the company and be such as to:

- (a) disclose with reasonable accuracy, at any time, the financial position of the company; and
- (b) enable the directors to ensure that any financial statements prepared under Part XI of the Act comply with the requirements of the Act as to the form and content of the company's financial statements.⁵⁵

Financial statements consist of auditor’s report among other items.⁵⁶ Auditors' report is required to be read before the company in general meeting and be open to the inspection of any member of the company.⁵⁷ When the financial statement is duly signed by two directors, it is presumed to

⁵¹ Bavly, D.A., *Corporate Governance and Accountability: What Role for the Regulator, Director and Auditor* (London: Quorum Books, 1999), p. 7.

⁵² For example, corporate governance is seen as 'the way business organisations are managed and reported on' see Adedipe, B., *Corporate Governance and Code of Best Practice*, Lagos, September 2007, p.4.

⁵³ See Moizer *Supra* note 15, p. 4.

⁵⁴ CAMA, sec 374(1).

⁵⁵ *ibid* sec 374(2).

⁵⁶ *ibid* sec 377(2). By sec 377(3), the financial statements of a private company need not include the matters stated in subsection(2) (a), (g), (h) and (i).

⁵⁷ *ibid* sec 388(2).

have been duly audited until the contrary is proved. In the case of *Nigeria Wire Ind Plc v Euro Trade and Fin Plc*,⁵⁸ the counsel for the Respondent submitted that the financial statements exhibited could not be relied on as they were not signed by any auditor. The counter-submission of the Applicant's counsel was that the financial statements were approved by the Board of Directors, two of the directors signed them. The Court of Appeal considered section 343 of the CAMA 1990 (now section 386 CAMA) and held that any such document made in compliance with the section raises presumption, until contrary is shown, that it was audited by auditors qualified for that purpose and appointed by the company. The court therefore further held that the financial statements had reasonably complied with the section, having been signed by two directors and can be used in evidence.⁵⁹

4.0 AUDITORS' REPORT

Auditors whether appointed by the directors or members in the general meeting are traditionally assumed to be gatekeepers or watchdogs put in place to protect the interest of the members of the company. As independent contractors, agents or even stewards or officers depending on the circumstances, they are required to report to their principals or employers (the members) for the job they have been authorized to carry out or for their stewardship. The CAMA, therefore, requires the auditors to report to the members on the accounts examined by them and on every balance sheet, every profit and loss account and all group financial statements laid before the company in general meeting during their tenure of office. The report, which is required to be countersigned by a legal practitioner and read in the general meeting, shall verify that the financial statements represent a true and fair view of the company's operations during the financial year and state the matters set out in the Fifth Schedule to the Act

The Act contains provisions meant to enable the auditors to perform their functions effectively. They, accordingly, have a right of access at all times to the books and accounts and vouchers of the company and they may require any necessary information or explanation from any officer of

⁵⁸ (1997) 6 NWLR (Pt. 510) 642.

⁵⁹ Ibid at 648. The attitude of the courts as can be seen through the cases show that the law considers accounts duly signed and laid and approved as binding on the company and on its directors and shareholders. See *Jones v Bellgrove Properties Ltd* (1949) 1 All ER 498 at 500 and 503; *Re Compaina de Electricida de la Provincia de Buenos Aires Ltd* (1980) Ch 146 at 192; *Pricklik v Marsh and others* (1961) WNLR 59 at 61.

the company⁶⁰ and any provision in the articles to the contrary is ineffective.⁶¹ They are also entitled to attend any meeting of the company and to receive notices and other communications relating to a general meeting as any member, and to be heard at any general meeting which they attend on any business of the meeting which concerns them.⁶²

In the discharge of their functions, the auditors are required to report if the financial statements, as presented by the directors, represent a true and fair view of the state of financial affairs of the company. The phrase 'True and Fair View' represents a standard of preparation of accounts in jurisdictions like the United Kingdom and Nigeria. It is a concept central to financial reporting in the jurisdictions. The concept is not statutorily defined. It is essentially a matter of professional judgment as it is dynamic, evolving in response to changes in accounting and business practice.⁶³

The auditors' opinion that the accounts of a company represent a true and fair view of the financial position of the company is a general endorsement of the accuracy of the accounts. It is the level of dependence or reliability of such an opinion or verdict that led to the expression of concerns about auditors in Nigeria. The auditors expressed such an opinion regarding some companies in Nigeria that failed shortly after the issuance of the opinion. These companies included the banks affected by the 2009 banking crisis in Nigeria. The opinion of the auditors bear on the basis, content and extent of their liability. Auditors liability has perplexed the courts across jurisdictions as can be seen in the judgment of the House of Lords in *Caparo Industries Plc v Dickman*.⁶⁴

On signing an audit report, it is a common practice among professionals for documents prepared by them to be signed in the name of their firms rather than in the name(s) of the professional(s) or staff in the firm that prepared the documents. Many a financial statements and auditors' report thereon were issued or signed in the name of the audit firm engaged to audit the company's accounts without the name of a partner or the accountant or accountants who actually did the audit on behalf of the audit firm clearly endorsed on it. This touches on the issue of the status of the firm and responsibility for audit report as well as the attendant liability for the report. An audit firm is

⁶⁰ CAMA, sec 407.

⁶¹ *Newton v Birmingham Small Arms Co* (1906) 2 Ch 378.

⁶² CAMA, sec 410.

⁶³ See Abugu *Supra* note 10.

⁶⁴ (1990) 1 All ER 568.

not a body corporate. Indeed, a corporate body cannot be appointed auditors.⁶⁵ A member of ICAN or ANAN qualified to be appointed as an auditor is a human person not a firm. Although a firm can be appointed as auditors when all the partners in the firm are qualified to be appointed as auditors and also that a firm may be vicariously liable with respect to fraudulent or negligent misstatements in financial statement, the primary liabilities in all instances will be that of the person who actually conducted and signed the audit report. The Federal High Court presided by O. E. Abng J made a judicial pronouncement on who is eligible to sign an audit report. In the case of *Mazi Okechukwu Unegbu v KPMG Professional Services and Guinness Nigeria Plc*,⁶⁶ the court held that the fact that under section 358(4) of CAMA (now section 403 (5)), a firm is qualified for appointment as auditors if the partners are qualified accountants cannot be interpreted to mean that the name and signature of a person on a financial statement of a company that was enrolled to practice as an accountant under section 8(1)-(3) of ICAN Act should be dispensed with. Thus, only an accountant who had been enrolled in accordance with the provisions of section 8 of ICAN Act could sign a financial statement or auditor's report.

Unlike section 403(5) of CAMA, section 503 of the United Kingdom Companies Act 2006 has explicitly addressed the issue of who can sign an audit report. The section requires that audit report must state the names of the auditors and be signed by them. However, the company may resolve not to disclose the names of the auditors if disclosure would create a reasonable risk of physical violence or intimidation of the auditors. If the company so resolves, the names must nevertheless be disclosed to the Secretary of State in secrecy.⁶⁷

Auditors' report is forwarded to the secretary of the company who should put it before the meeting and if he fails, the auditors cannot be held liable.⁶⁸

5.0 AUDIT OVERSIGHT

Self-regulation as opposed to state-regulation is the hallmark of the regulation of auditors and auditing profession in view of reputational intermediary model of gatekeepers or the assumption

⁶⁵ *ibid* 403(1).

⁶⁶ Unreported: FHC/L/CS/373/2010.

⁶⁷ UK Companies Act 2006, sec 506.

⁶⁸ *Re Allen, Craig and Co (London) Ltd (1934) Ch 483.*

that as professionals with reputation to protect, auditors would behave responsibly and thus would not require much state intervention for their regulation.⁶⁹ Accounting and auditing Professional bodies exist in jurisdictions as self-regulatory bodies for the regulation of accounting and auditing profession. ICAN and ANAN are the professional and self-regulatory bodies for the accounting and auditing profession in Nigeria.⁷⁰ There seems to be a new trend in the regulation of the profession since the Enron scandal of 2002 in the United States in which the auditing firm of Arthur Andersen was indicted for conflict of interest. This is in form of the establishment of audit oversight bodies through enactment of new pieces legislation or amendment of existing ones in many jurisdictions. The establishment and organisation of Public Company Accounting Oversight Board (PCAOB) under the Sarbanes-Oxley Act of 2002 in the United States, the establishment and organisation of the Financial Reporting Council of Nigeria with the directorate of Auditing Practices Standards under the FRCNA and the amendment of the Securities Commission Act 1993 in Malaysia to create the Audit Oversight Board suggest a paradigm shift in the regulation of auditors and the auditing profession, from self-regulation inclined to state-regulation inclined approach to the regulation.

Regarding Nigeria, the FRCNA⁷¹ was enacted to repeal the Nigerian Accounting Standards Board Act, No. 22 of 2003. The FRCNA established the FRCN to replace the NASB with responsibilities associated with the promotion of good and effective corporate governance. The FRCN has the power to, among others, 'enforce and approve enforcement of compliance with accounting, auditing, corporate governance and financial reporting standards in Nigeria'.⁷² The functions of the council include to 'monitor and promote education, research and training in the fields of accounting, auditing, financial reporting and corporate governance'.⁷³ The objects of FRCN centre on financial report as a central issue to corporate governance and auditing mechanism in particular. The objects are to, among others, ensure good corporate governance practices and accuracy and reliability of financial reports and corporate disclosures.⁷⁴

⁶⁹ See Coffee *Supra* note 1, pp. 2-5.

⁷⁰ The bodies are respectively established by the Institute of Chartered Accountants of Nigeria Act 1965 and the Association of National Accountants of Nigeria Act 1993.

⁷¹ Act No. 6.

⁷² *Ibid.* Sec 7(2) (a).

⁷³ *ibid.* Sec 8(1)(i).

⁷⁴ *ibid.* Sec . 11.

One of the directorates of the Council pursuant to section 23 of the Act is the Directorate of Corporate Governance.⁷⁵ The Act establishes the directorate⁷⁶ and states its objectives and functions. The objectives include promotion of sound financial reporting and accountability based on true and fair financial statements duly audited by competent independent and ensuring that audit committees of public interest entities keep under review the scope of the audit and its cost effectiveness, the independence and objectivity of the auditors. On the other hand, the functions of the directorate to include issuance of code of corporate governance and guidelines.

The Act also establishes the Directorate of Auditing Practices Standards to, among others, develop or liaise with relevant professional bodies on auditing and ethical standards set by it and promote auditing standards which set out the basic principles and essential procedures with which external auditors in Nigeria are required to comply.⁷⁷

The FRCN is patterned after the Financial Reporting Council United Kingdom (UK FRC). However, the UK FRC is established as a company limited by guarantee rather than under a statute as in the case of Nigeria and some other jurisdictions.⁷⁸ The UK FRC as a company involves public and private stakeholders as its members. This illustrates the disposition of UK to corporate governance and auditing mechanism in particular. The United States, Nigeria and Malaysia, as demonstrated by their establishment of audit oversight board through statutes, incline to state regulation model of corporate governance. This is unlike the UK which inclines to market or self regulation model of corporate governance as demonstrated by its establishment of the regulator of accounting and auditing through a company limited by guarantee involving market players as members of the company.

⁷⁵ Ibid. sec 23(g)

⁷⁶ Ibid. sec 49.

⁷⁷ Ibid. sec. 26.

⁷⁸ See the 2014 UK Corporate Governance Code which describes the UK FRC as a company limited by guarantee (The Financial Reporting Council Limited) responsible for promoting high quality corporate governance and reporting to foster investment.

6.0 AUDITORS' INDEPENDENCE

Auditing is crucial to corporate governance. It is guided by the principles relating to disclosure and transparency under the 2004 OECD Principles of Corporate Governance.⁷⁹ Auditing has been an important institution in the Nigerian business and commercial landscape. Indeed, all registered enterprises are statutorily required to file with the relevant authorities reports accompanied with their audited accounts annually or as part of requirements for some transactions they are embarking upon. Public companies are particularly required to appoint or re-appoint external auditors every financial year. The Nigerian Code of Corporate Governance 2018 (NCCG) that is of general application and the Sector-Specific Corporate Governance Guidelines in Nigeria are therefore expected to address auditing as an indispensable issue in the Nigerian corporate governance framework or more specifically in the Nigerian business and commercial law and practice. It is against this backdrop that the SEC Corporate Governance Best Practices Guidelines issued 2011 (SEC Guidelines) are examined to bring to light the provisions on auditing mechanism and auditors' independence in particular. This is because the Guidelines treated in some details the independence of auditors compared to CAMA⁸⁰ and even the FRCNA 2011⁸¹ as the new statute for the regulation of corporate governance and auditors. Indeed, Sasegbon lamented the inadequacy of the provisions of the defunct CAMA 1990 on the independence and objectivity of auditors in his comments on section 358 of the repealed Act as follows:

*...the provisions of the Act do not go far enough as to ensure the independence of auditors. And in practice auditors will always have regard to the interests of those whose influence can maintain them in office.*⁸²

The SEC Guidelines provide for the principles of corporate governance relating to regulation of auditors including independence of auditors under the topic entitled 'Risk Management and Audit'

⁷⁹ See the principles under Disclosure and Transparency under OECD Principles of Corporate Governance 2004 *Supra* note 56.

⁸⁰ The provisions of CAMA on the independence of auditors are contained in sections 401 and 403 which we examined in our above discussion on the appointment and qualification of auditors.

⁸¹ The provisions of FRCNA on the independence of auditors are contained in section 46 which provides that 'A professional accountant in the exercise of his audit function shall carry out his function in full independently and shall not-(a) act in any manner contrary to the Code of Conduct and Ethics that be made by the Council or under any enactment in force; or (b) engage in any activity which is likely to impair his independence as a professional.

⁸² Sasegbon, D., *Nigerian Companies and Allied Matters Law and Practice* (Lagos, DSC Publications Limited, 1991), Vol. 1, p. 577.

which forms part E of the Guidelines. The provisions are specifically contained in the sub-topics in the part entitled 'The Audit Committee' and 'Rotation of External Auditors'.⁸³

We have earlier noted that the board of directors of a company is a body with the primary responsibility for corporate governance. The board and its committees thus play vital role in corporate governance. The provisions of the SEC Guidelines relating to auditing mechanism or auditors and which touch on the contemporary corporate governance issues on auditing are in view of the responsibilities of the audit committee of a board of directors. The responsibilities of the audit committee are provided in the code to include to:

- (a) Assist in the oversight of the integrity of the company's financial statements, compliance with legal and other regulatory requirements, assessment of qualifications and independence of external auditors, and performance of the company's internal audit function as well as that of external auditors;
- (b) Discuss the annual audited financial statements and half yearly unaudited statements with management and external auditors;
- (c) Meet separately and periodically with management, internal auditors and external auditors;
- (d) Review, with the external auditor, any audit scope limitations or problems encountered and management 's response to same;
- (e) Review the independence of the external auditors and ensure that where non-audit services are provided by the external auditors, there is no conflict of interest;
- (f) Preserve auditor independence, by setting clear hiring policies for employees or former employees of independent auditors;

The provisions regarding the sub-topic on rotation of external auditors in the Part E of the Guidelines are as follows:

- (a) In order to safeguard the integrity of the external audit process and guarantee the independence of the external auditors, companies should rotate both the audit firms and audit partners.

⁸³ Articles 30 and 33 of the 2011 SEC Code

(b) Companies should require external audit firms to rotate audit partners assigned to undertake the external audit of the company from time to time to guarantee independence. Audit personnel should be regularly changed without compromising continuity of the external audit process

(c) External audit firms should be retained for no longer than ten (10) years continuously. External audit firms disengaged after continuous service to a company for ten (10) years may be re-appointed seven (7) years after their disengagement.

It is clear from the above provisions relating to auditing mechanism that the SEC Guidelines seek to ensure the objectivity and independence of external auditors in line with the international best practices as encapsulated in 'A Statement of the Technical Committee on Principles of Auditor Independence and the Role of Corporate Governance in Monitoring an Auditor's Independence' issued by the International Organization of Securities Commissions (IOSCO) and reinforced by the 2004 OECD Principles of Corporate Governance.⁸⁴ The factors touching on the independence of auditors which the above provisions of the Guidelines seek to cover are basically: (1) ban on the provision of non-audit services by the external auditor or limiting the percentage of non-audit income from the same client audited; (2) mandatory rotation of the auditors partners; (3) periodic rotation of the audit firm in charge of the audit companies; (4) ban on employment of ex-auditor by a company-client; (5) prohibition of financial stake or management role in audited companies by staff/partners and the family members of partners of the audit firm; (6) limitation on the total percentage of auditor income from one client; and (7) determination of the remuneration of auditors. Like the SEC Guidelines in Nigeria, other contemporary corporate governance codes across jurisdictions have in their different ways attempted to a lesser or greater extent reflect these indices of the independence of auditors as can be inferred from international benchmarks. A given national corporate governance code may be reluctant to encapsulate all the indices as they are deemed to be addressed by professional and regulatory requirements particularly in national jurisdictions with contemporary and dynamic professional and regulatory frameworks. This explains why corporate governance codes in national jurisdictions may reflect only those indices of the independence of auditors they consider critical.

⁸⁴ See the OECD Principles of Corporate Governance *Supra* note 56.

The provisions in the 2014 UK Code specifically dealing with the independence of auditors are contained in section C of the code. The section is on accountability issues. The relevant provisions fall under the sub-section entitled 'Audit Committee and Auditors' (C.3). The main principle of corporate governance under the sub-section states that 'the board should establish formal and transparent arrangements for considering how they should apply the corporate reporting and risk management and internal control principles and for maintaining an appropriate relationship with the company's auditors'. The last phrase in the principle, 'maintaining an appropriate relationship with the company's auditors', is the portion of the principle relevant to our discussion. Maintaining appropriate relationship with company's auditors is essentially about ensuring their objectivity and independence as can be discerned from the code. The code charges the audit committee with the primary responsibility of ensuring the independence and objectivity of auditors. The main role and responsibilities of the audit committee are set out in the code to include to:

- (a) Make recommendations to the board, for it to put to the shareholders for their approval in general meeting, in relation to the appointment, re-appointment and removal of the external auditor and to approve the remuneration and terms of engagement of the external auditor;⁸⁵
- (b) Review and monitor the external auditor's independence and objectivity and the effectiveness of the audit process, taking into consideration relevant UK professional and regulatory requirements;
- (c) Develop and implement policy on the engagement of the external auditor to supply non-audit services, taking into account relevant ethical guidance regarding the provision of non-audit services by the external audit firm; and to report to the board, identifying any matters in respect of which it considers that action or improvement is needed and making recommendations as to the steps to be taken.

Both the SEC Guidelines and the 2014 UK Code seek to ensure the independence and objectivity of auditors. They, however, have different approach and perhaps encapsulate only those indices of the independence and objectivity of auditors they consider critical. Unlike the SEC Guidelines, the UK Code does not specifically emphasize on a number of the indices of auditors' independence and objectivity including rotation of external audit firms and periodic rotation of audit partners

⁸⁵ See Article C.3.7. It emphasizes on the appointment, re-appointment and removal of the auditors.

and personnel. For example, in the spirit of the voluntary nature and 'comply or explain' philosophy of the 2014 UK Code, the code has a flexible approach to the issue of rotation of audit firms in that it requires companies to put the external audit contract out to tender at least every ten years⁸⁶ rather than provide for the mandatory rotation of audit firms as provided by the SEC Guidelines. Perhaps the issues of the rotation of external audit firms and periodic rotation of audit partners and personnel, among others, are left to be exhaustively dealt with by the UK professional and regulatory requirements as contemplated in the 2014 UK Code.⁸⁷ The emphasis of the 2014 UK Code is on the indices of auditors' independence and objectivity that include remuneration of auditors and the provision of non-audit services by the auditors. While the SEC Guidelines have touched on more of the indices of auditors' independence and objectivity compared to the UK Code, the latter has addressed the issue of the remuneration of auditors which the former has not. Remuneration is an important corporate governance issue particularly in respect of executive directors and external auditors. The role and responsibilities of the audit committee under the 2014 UK Code include 'to approve the remuneration and terms of engagement of the external auditor'.⁸⁸

A marked difference between the two instruments under consideration is that the 2014 UK Code is more specific and detailed regarding information disclosure requirements. The code requires that a section of an annual report should describe the work of an audit committee in discharging its responsibilities including:

- (a) the significant issues that the committee considered in relation to the financial statements, and how these issues were addressed;
- (b) an explanation of how it has assessed the effectiveness of the external audit process and the approach taken to the appointment or reappointment of the external auditor, and information on the length of tenure of the current audit firm and when a tender was last conducted; and
- (c) if the external auditor provides non-audit services, an explanation of how auditor objectivity and independence are safeguarded.

⁸⁶ Ibid.

⁸⁷ Part of the role and responsibilities of audit committee as set out in Art. C.3. 2. of the 2014 UK Code is 'to review and monitor the external auditor's independence and objectivity and the effectiveness of the audit process, taking into consideration relevant UK professional and regulatory requirements'.

⁸⁸ Ibid.

Looking at another jurisdiction for further comparative purposes, the issue of auditing mechanism or auditors is specifically addressed in the 5th principle (uphold integrity in financial reporting) as contained in both the second and third sections of the 2012 Malaysian Code. The principle states that 'the board should ensure financial statements are a reliable source of information'. This principle has two recommendations (Recommendation 5.1 and Recommendation 5.2) with their respective commentaries. It is the second recommendation (Recommendation 5.2) that is specifically concerned with auditors. The recommendation provides that 'the Audit Committee should have policies and procedures to assess the suitability and independence of external auditors'. The commentary on the recommendation identifies provision of non-audit services to the company by the external auditors as a factor that can impair the independence of the auditors. Thus, the audit committee is enjoined to establish policies governing the circumstances under which contracts for the provision of non-audit services can be entered into and procedures that must be followed by the external auditors. It is important to note that the 2012 Malaysian Code focuses on provision of non-audit services out of the many other indices of auditors' independence and objectivity. While the code seeks to ensure the independence and objectivity of auditors in all their ramifications, it apparently leaves details of other indices of the independence and objectivity to be addressed by the existing requirements under professional and regulatory frameworks in the country. It is in view of this understanding that the code urges the Audit Committee to 'obtain written assurance from the external auditors confirming that they are, and have been, independent throughout the conduct of the audit engagement in accordance with the terms of all relevant professional and regulatory requirements'.

The 2012 Malaysian Code approaches the issue of independence and objectivity in a general way compared to the SEC Guidelines and the 2014 UK Code that specifically point out indices of auditors' independence and objectivity besides the provision of non-audit services. Provision of non-audit services is only specific indices of the independence and objectivity pointed out by the 2012 Malaysian Code. The code does not even point out the issues of appointment, re-appointment and removal of auditors as the basic issues relating to auditors and which are covered by legislation across jurisdictions. The fact that the three instruments considered (the SEC Guidelines, the UK Code and the 2012 Malaysian Code) have specifically pointed out the provision of non-audit services admits of the centrality of the issue in ensuring the independence and objectivity of auditors.

7.0 CONCLUSION

Auditors are essentially regulated in Nigeria by the provisions of relevant instruments, the case law and accepted practices in the auditing market. The instruments include statutes; statutory instruments; instruments containing standards and guidelines issued by professional accounting and auditing bodies; and code and guidelines of best practices such as the NCCG and the SEC Guidelines. These instruments and the case law as well as the accepted practices provide for the qualification, appointment, tenure, removal, duties, independence and objectivity and other issues relating to auditors. There is ample arrangement for the regulation of auditors in Nigeria particularly in terms of provisions in the CAMA as the basic company statute and applicable corporate governance code and guidelines especially the SEC Guidelines. While the provisions of CAMA are not adequate on auditors, particularly independence and objectivity of auditors, the NCCG, SEC Guidelines and Guidelines in other sectors seek to fill in the gap to make Nigeria compare favourably with international best practices in the regulation of auditors. There is however no significant development in the regulation of auditors in terms of case law in the country.