Post Mortem Examination of the Collapse of Enron and the United States Sarbanes–Oxley Act 2002: Lessons for Nigeria

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ABSTRACT

The challenges and prospects of rescue interventions to corporate failures in the United States is the focus of this paper. The collapse of Enron and the lessons from it to corporate Americans and indeed the world at large forms the case study of this paper. How could America's seventh largest corporation suddenly descend to bankruptcy? The paper assesses the legislative interventions of US Sarbanes–Oxley Act 2002 by employing as a method, analytical exposition of the Act. The paper finds that governance and incentive problems contributed to Enron's rise and fall. It argues that though the provisions of the Act are aimed at compelling corporate governance and international best practices, inherent weaknesses and inconsistencies with superior legislations leave a big question mark on their applicability and effectiveness. The paper calls for legislative rethink if the corporate world must prevent future 'Enrons'.
Keywords: *Corporate Failures, Enron, Legislative Interventions, U.S.A, Nigeria.*

INTRODUCTION

The magnitude of corporate frauds perpetuated by hitherto acclaimed first class companies like Enron,[1] WorldCom, Tyco International, Adelphia Communications, Imclone, Nicor, Global Crossing, Sprint and Merck in the case of the United States woke the corporate world from its inebriate slumber. The ensuing outcry and public dissatisfaction with the scandals that tainted Corporate America galvanized all stake holders into action. This has resulted into far reaching reforms and consequences in the Corporate Governance System in the United States and the world at large. Available information suggests that Enron made its money with smoke and mirrors. With a set of off-the books, unregulated private partnerships to take on debts hide losses and kick off inflated revenues; Enron executives were able to keep bond-rating agencies happy. They were able to sustain this shell game through persistent refusal to disclose to analysts, who questioned where the money came from. Arthur Anderson, the auditing firm, turned a blind eye to questionable accounting

practices because they did not want to lose the lucrative consulting fees. In the US, the corporate corruption scandals, which followed in quick succession, shook the confidence of the investing public in the corporation. This was followed by a terrible crash in the stock market comparable only to the great depression of the 1930s.[2] The global economic and financial crisis sent tsunami ripples and wave shocks across the different socio–economic and political institutions in the present global environment. Tension mounted everywhere as job cuts were on the increase while many global corporate organizations shut down their operations and a few declaring bankruptcy.[3]

The legislature was moved to regulate these companies through enactment of remediable legislations.[4] In order to forestall a repeat of the crisis that engulfed the corporation in the United States, the New York Stock Exchange[5] (NYSE) initiated far reaching self regulatory reforms of the securities markets. This was followed by reforms by its rival, National Association of Securities Dealers Automated Quotation System (NASDAQ)[6] and other Trade Associations in the United States. These post Enron self-regulatory reforms though commendable, came a bit too late and indeed, too little. The unhealthy scandals triggered a legislative revolution almost unheard of in America corporate history and resulted in a sea change in the corporate governance system in the United States. The general consensus of American Investors and majority of United States citizens was that corporate governance issues and auditor independence should not be left to the prevailing self-regulatory regime.[7]

Americans in the post Enron era were demanding heavy regulation of the corporate system. The abuse of the corporate vehicle as exemplified by the failed corporations, once again brought to the fore, fears originally expressed by commentators such as Adolf Berle Jr and Gardiner Means[8] on the growing problems of distance between ownership and control. The resulting public outcry and press frenzy brought about by the seemingly failure of self-regulatory regime of the corporate governance system set out a chain reaction in corporate governance issues in America and indeed the world as a whole. In order to restore public confidence and minimize the risk of future occurrences, the United States congress conducted investigative hearings[9] with a view to determining the root cause of the scandals. The congress at the end of the hearings identified five major weaknesses which ultimately provided the springboard for the enactment of the Sarbanes-Oxley Act of 2002 as a remediable legislation against future corporate failures and to restore investors' confidence in the corporation business. The five identified major weakness are:

a. Corporate Governance;
b. The accounting and external audit functions;
c. The public disclosure system;

d. Corporate Ethics; and

e. Standards of conduct of key professionals in the capital markets.

In the light of these corporate failures and frauds, this paper carries out a postmortem examination of Enron and the legislative reactions that follow the collapse, bringing out the weaknesses and challenges in the legislative remedy put in place to check future occurrence. The paper undertakes a comparative assessment of the Sarbanes-Oxley Act 2002 of the United States and allied legislations on corporate failures and governance. It compares the Sarbanes-Oxley Act with the Nigeria's AMCON Act 2010 to see whether both legislations in their pursuit of good corporate governance in the United States and Nigeria, the confidence of the investing public have been restored in the corporate entity.

The Collapse of Enron and the imperative for Legislative Intervention

The inconceivable and unexpected fall of Enron was the trigger that opened the eyes of the American investors to the inherent decay in its corporate governance system. The fall of Enron was indeed pathetic. Enron was a trail blazer company with deep root and high reputation in natural gas and pipelines. Enron Company was reputed to be the 7th largest corporation in the United States.[10] For five years consecutively, the Company was ranked number one by Fortune Magazine as the most innovative Company in the United States.[11] Enron was seemingly 'successful' in energy market. The investment of the Company was very substantial with long gestation period before significant earning could be made. The Management, assuming the expected returns will eventually come, set up and used off balance sheet partnerships, otherwise known as Special Purpose Entities (SPE). The SPEs were utilized to hide the Company losses on their investments and to transfer substantial assets and debt of the corporation's balance sheet.[12] The exceptional returns did not materialize. Enron filed for bankruptcy on December 2, 2002.

As with most catastrophes, the fall of many other influential corporations followed in quick succession: WorldCom, Nicor, Global Crossing, Imclone and Waste Management. The ground was therefore, prepared for government intervention putting an untimely death to predominantly self-regulatory regime. The Sarbanes-Oxley Act of 2002 (henceforth referred to as 'the Oxley Act')[13] is the Federal Law enacted by the United States Congress in response to 'inconceivable' corporate financial scandals that bedeviled the American Corporate System in year 2001-2002. Before the Act, corporate governance issues were generally regarded as falling under the competence of the federating states and even in most instances were left under self-regulatory system of the

individual corporation. The congress was forced to Act in the face of clearly perceived inadequacies of corporate governance and investor protection regime prevailing at the time of the crisis in the United. The Bill named after its two sponsors; Senator Paul Sarbanes[14] (Senate) and Michael G. Oxley[15] (House of Representatives) were quickly passed by the American Congress on July 24, 2002. The President of the United States, George Walker Bush with the same haste, gave his assent to the Bill on July 30, 2002. The President in clear understanding of the implication of the Act hailed it as including 'the most far-reaching reform of American business practices since the time of Franklin D. Roosevelt'.[16]

The Act establishes an enhanced governance system for United States public companies, boards, and management and accounting firms. In accordance with the bias giving rise to the legislation, private companies were excluded from the provisions of the Act. The Act establishes a mandatory baseline of rules by which public company must comply. The following governance issues were vigorously addressed by the Act:

Corporate Responsibility: Board Structure, Directors' Independence, Certification of Chief Executive Officers and Chief Financial Officers of financial statement and information in the company's periodical report and forfeiture of benefits and penalties;

i. Code of Ethics for senior Management;
ii. Disclosure of Material off-balance sheet transactions and contractual obligations;
iii. Retention of Audit Records;
iv. Enhanced Financial Disclosure; and
v. Restructuring of the Regulation of Auditors of public Companies and their independence.

The Creation of the Public Company Accounting Oversight Board.[17]

One of the major victims of the corporate scandal in the United States is the external auditors. Before the scandal, the America Auditing profession was dominated by five major auditing firm called the 'Big Five' - Arthur Andersen (Enron Auditor), Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCooper. Apart from their core audit work, the public accounting firms were engaged in providing consultancy services for their clients.[18] Their responsibilities to double-check the work of the company's accountants and independence were greatly compromised. It is the view of this paper that the Act was more targeted at the auditing profession for their failure as the 'gatekeepers' to the corporation resulting in the following regulatory regime:

Self-Regulatory Regime: The effect of the Act on Public Accounting Firms can better be understood against the background that until year 1933, the United States Federal Government played no role in the regulation of accounting and auditors. The content of financial statements was only regulated by some states laws and exchange listing agreements. The Securities Act of 1933 placed the auditing of public corporation under Securities and Exchange Commission (SEC).[19] The SEC, instead of making full use of its supervisory role, delegated its powers to the American Institute of Certified Public Accountants (AICPA) who in turn delegated its powers to Financial Accounting Standards Board (FASB). At the break of the scandals and with the decisive steps being taken by United States Congress, SEC proposed the establishment of a Public Accounting Board (PAB) to regulate public accounting firms.

The decision of SEC was already too late. The Act swept away the whole regime of self-regulation and SEC half-affected attempt to regulation. The discipline procedure of public accounting firm was no longer voluntary. The Act established an intrusive regulation of public accounting companies with the creation of Public Companies Accounting Oversight Board (PCAOB). The Act saddled the PCAOB with the responsibilities of overseeing,[20] inspecting,[21] investigating,[22] disciplining[23] and registering[24] of accounting firm. The influence and control of accountants on PCAOB was greatly reduced by the Act. Section 101 (e)(2) limited the numbers of certified accountants on the five-member Board to two.[25] The Act underscores the importance of the Board's independence by guaranteeing its sources of funding.

The Board will be funded from Annual Fees from registered accounting firms[26] and Annual Supporting Fees from public companies determined by their market capitalization.[27] The funding of the Board will be mainly borne by public companies. The independence of members of the PCAOB was further entrenched by the direct prohibition of members of PCAOB from sharing in the profit or receiving payment from a public accounting firm 'other than fixed continuing payment' (such as retirement benefits).[28] However, this paper argues that the main contribution of PCAOB is in increasing the cost of monitoring of the corporate system. This is because most of its functions can be conveniently carried out by the SEC. Indeed, this paper argued that most of the duties of the PCAOB have been taken over by SEC before its establishment.

Though it was widely criticized as an evidence of over reaction of the United States Congress (Federal Government) to public outcry on a matter where its knowledge is suspect, this paper reasons that the establishment of the oversight board, despite its shortcomings, demonstrated the responsiveness of the United States Government to public opinion and economic interests of its citizenry. Above all, it demonstrates the seriousness of the legislators to compel full compliance to the mandatory provisions of the Act.

***The Auditor Independence*:** Writers like Coffee[29] have argued that the failure of the 'gatekeepers' (the Auditors) was the main cause of the Enron collapse. He complained that the watchdogs failed to bark. Corporate governance relied on Auditors to protect shareholders by monitoring Board/Management's behavior and reporting financial results in a correct and unbiased way that allows for an objective valuation of a corporation. Therefore, the importance of Auditor's duty is central to the issue of corporate governance.

The External Auditors were made the whipping boys for the scandals that engulfed American Corporate System. The heavy hammer that fell on Arthur Anderson,[30] one of the big five clearly demonstrates the effect of public findings indicting an auditing firm of dereliction of duty. In the Enron case, Arthur Anderson, Enron's External Auditors, failed to fully inform the Board about potential irregularities and to pursue aggressive accounting principles. This is one of the many pit falls inherent in the prevailing Generally Accepted Accounting Principles as it usually leaves ample rooms for various interpretations and discretions. The Company Financial Officers (CFOs) of the Company in most cases will prefer to apply the interpretation and discretion that put the Company's finances in the best favourable light to the public.

The independence of the Auditing firm was further compromised when it was found that apart from it's purely Audit duties, the firm also offered to execute consulting contracts to the company. The cost of the consultancy services were found to worth more than 50% of the total fees received from Enron.[31] Arthur Andersen failure as a 'gatekeeper' resulted into serious pecuniary and reputation loss in expensive civil and criminal litigation. The Auditing firm is yet to recover for its alleged failure in the Enron affairs.[32] The Act in ensuring auditors independence provides that independence should not be only in form but in function and barred statutory Auditors from providing non-audit (consultancy services) contemporaneously with the Audit.[33] The Act explicitly barred Audit firms from carrying out the following services simultaneously with the audit:

1. Book keeping or other services related to accounting records or financial statements.
2. Financial Information System Designs and Implementation.
3. Appraisal or valuation services.
4. Actuarial Services.
5. Internal Audit Out-sourcing Services.
6. Management functions or Human Resources.
7. Broker or Dealer Investment Adviser or Investment Banking Services.
8. Legal Services and Expert Services unrelated with the Audit.
9. Any other services that may be determined by the PCAOB as impermissible.

The independence of the auditing firm was further enhanced by the provision of the Act requiring rotation of partner in charge of the Audit for each client at least once every five years[34] This, it is believed, will reduce over familiarities of the Auditors with management of public companies. They are also required to evaluate the procedure put in place by Management to prevent and detect fraud.[35] The strict monitoring by the PCAOB and heavy dose of responsibilities and liabilities placed on Auditors has been heavily criticized. It has been canvassed that the extraordinary liabilities placed on Auditors and the fear of litigation was the direct cause of increase in Audit fee in the United States.[36]

The Independent Directors: One of the key areas of reform tackled by the Act is the responsibility of the Board. The sore point of Enron's failure was that on paper, Enron had what can be referred to as an 'independent' Board. The Board had twelve outside Directors with appreciable understanding of the demands of their task and only two insiders. Further still, the Audit Committee was composed exclusively of outside 'independent' Directors and chaired by a Professor of Accounting.[37] However, the report of The Enron Special Investigation Committee stated that the seemingly good corporate governance practice wore by the failed corporation was illusionary as the independence of almost every Board member was undermined by various side payments or by bonds of long service and familiarity.[38] Under the reforms brought by the Act, the role and responsibilities of the independent (outside) Directors have been substantially increased. They include:

1. The oversight on management and internal affairs of the public corporation.
2. Devotion of more time than before in carrying out their responsibilities.
3. Serving exclusively on the audit committee.

The new responsibilities have also brought about new worries for the corporation. The Corporation is now under pressure to get Independent Directors who fit the description stated in the Act. This paper argues that this provision of the Act had resulted into many Directors resigning their employment due to the excessive time required for monitoring and more importantly, for fear of personal liability suit for failure to carry out their duties.[39] According to survey conducted by Mercer Human Resource Consulting, this has also resulted into higher fees paid to Independent Directors.[40]

Audit Committee: The primary duty of the Audit Committee is to ensure the integrity of the company's financial statements/reports. The lesson from the fall of Enron was well taken by the Act. Section 301 provides that each member of the Audit Committee shall be a member of the Board and must be independent. The Act further defined 'independence' to connote:

Not receiving, other than for services on the Board, any consulting, advisory, or other compensatory fees from the issuer, and as not being affiliated person of the issuer, or any subsidiary thereof.

The Audit Committee was further saddled with the direct responsibilities of appointing, compensating and oversight of the work of the Statutory Auditor.[41] Other duties of the Audit Committee include establishing procedures for the receipt, retention and treatment of complaints received by the public company in respect of accounting, internal control and auditing. The independence of the Statutory Auditors was fiercely protected by directing public company to provide appropriate funding to the committee.

Chief Executive Officers and Chief Financial Officers Certification and Return of Incentives: One of the profound provisions of the Act with far reaching consequences was the strict duty placed on the Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs) of public companies to certify the 'appropriateness of financial statements and disclosure contained in the periodic reports and that those financial statements and disclosure fairly represent, in all material respects, the operations and financial condition of the issuer'.[42] The regime of certification reduces the ability of CEOs and CFOs to deny ignorance of false statements or omission in the report. It also makes it extremely difficult for CEOs and CFOs to evade personal liability in an anti-fraud action. Section 303 makes it unlawful for management (and Directors) to take any action with the aim of fraudulently influencing, coercing, manipulating or misleading an auditor while section 304 of the Act requires CEOs and CFOs to return compensatory bonuses and other incentives to the company in the event of restatement of financial result due to their misconduct.

Enhanced Financial Disclosure (Disclosure in Periodic Report): The clandestine use of off-balance sheet partnership[43] that Enron management took advantage of in hiding the Company's losses was addressed by the Act. Section 401 stipulates that each financial report, whether annual or quarterly, 'shall disclose all material off-balance sheet transactions, and other relationships with unconsolidated entities.' The Act also made it mandatory for Directors, Officers and owners of at least 10% equity to report designated transaction not later than the end of second business day following the day on which the transaction was executed. The provisions of section 404 were more fundamental as the Act required each annual report to contain an internal control report which must state the following:

1. The responsibilities of management for establishing and maintaining an adequate internal control structure and procedure for financial reporting.

2. Contain assessment of the effectiveness of the internal control structures and procedures at the end of the fiscal year.

It is noteworthy that the Act also required the statutory Auditor to attest and report on the assessment made by Management to the Audit Committee.[44]

Enhancement of Penalties for Corporate Crimes: The striking aspect of the Act was the strictness in the regime of penalties for corporate crime. This was clearly demonstrated in increase in the enhancement of punishment for white collar crimes, mail and wire fraud increased from five to ten years. The offence of tempering with official record or impeding official proceeding was jerked up to 20 years imprisonment.[45]

Cost/Benefits Analysis: Many securities market analysts had expressed the fear that the costs of the legislation outweigh its benefits. The Act has been described as an example of costly mandatory legislation. A recent survey revealed[46] that compliance cost in 2004 was around $5.5billion. The potential costs to the Company now include restructuring of the Board and engaging CEOs and CFOs that will certify financial statements. The professional liability insurance cost for accountants has risen thereby increasing the cost of auditing services. The failure of the Act to discriminate between small, mid-size and big public Company has been wildly criticized as evidence that the legislation is a 'rushed job'. The Act has been dubbed by detractors as unnecessary and costly government intrusion into corporate management that places United States corporations at competitive disadvantage with foreign firms and in effect driving business out of the United States.[47] The noticeable draw-back of the Act in failing to discriminate between large corporation and small and midsize corporation in the disclosure and monitoring regime had been much criticized. The cost of compliance has proven to be quite expensive even for large corporation.

The hastily drawn up Act did not take into consideration the cost implication of the new regime of Independent Directorship, membership and duties of the Audit Committee, monitoring and disclosure cost on small and mid-size corporation. The cost of implementing the Act has fallen disproportionately on smaller companies.[48] According to SEC Committee Report of 2004, US companies with revenue exceeding US$5billion spent 0.06% of revenue on compliance, while companies with less than US$100 in revenue spent 2.55%. The risk of these companies removing their securities from public trading and declination of private firms of converting to public companies are indeed very high.[49] After a long examination of the Act, this paper submits that corporate governance rules should in all cases be packaged to fit the particular circumstance of a Company. The Act should therefore be reformed to redress this inequalities as it affect small and mid-size companies.

Federalization of Governance System Law: Before the crisis necessitating the Act, the American corporate Governance law system was to a great extent under the purview of the state in which the Company was incorporated.[50] The Act has now promoted issues on the composition of the Board and its committee to the Federal Level. This, no doubt, compromised the principle of Federal System of Government. It is believed that such adventurous voyage by the Federal Government will stifle the spirit of innovation and competition in the federating states.[51] This paper cannot but agree with the view expressed by Ribstein that regulation of corporate governance issues should be governed at state and not at the federal level.[52]

This paper commends the Act for its promptness in assuaging public agitation and outcry and for providing far-reaching provisions in safeguarding the independence of the public accounting firm and the Board. It has been argued that governance system would have been highly enhanced only if the legislation has allowed more extensive consultation and debates on the nature of corporate accountability.

International Implication of the Act: The Sarbanes-Oxley Act has been accused of displacing business from New York to London. The heavy regulation was accused of providing incentives for small United State firms and foreign firms to deregister from the United States stock exchanges. The report of Wharton Business School[53] revealed that the number of United States companies deregistering from public stock exchange almost tripled in 2003; while the New York Stock Exchange had only ten new foreign listings in 2004. This was attributed to the high cost of monitoring regime under the Act particular from the provision of section 404.

Comparative Examination of Legislative Interventions in Corporate Failures

The use of Special Purpose Vehicles (SPVs) to rehabilitate the books of troubled financial institutions has been an age-long practice.[54] There are documented examples of the use of SPVs in the U.S., Sweden, Germany and Ireland.[55] Recently in the U.S., the Troubled Asset Relief Program (TARP) was set up under the terms of the Emergency Economic Stabilization Act of 2008[56] which authorized the U.S. Department of the Treasury to establish programmes to stabilize the U.S. financial system and prevent its systematic collapse. The TARP has nine components; namely: capital assistance programme; consumer and business lending initiative; making home affordable programme; public-private investment programme; regulatory reform; capital purchase programme; asset guarantee programme; targeted investment programme; and automotive industry financing programme.[57]

According to Kane, any SPV set up to buy up troubled assets of financial institutions should be proficient in four activities; namely: taking over the distressed assets (rescue); valuation of the assets (appraisal); protecting and enhancing the value of the assets (property management); and disposing of the assets (sales and related activities).[58] In addition, the SPV must have experts in each core activity together with experts in the types of assets within its supervision. On the hand, Cassell and Hoffman highlight ten lessons from the U.S. Home Owners' Loan Corporation and the Resolution Trust Corporation as follows:[59]

1. A temporary, dedicated administrative entity was key.
2. Clear formulation of the critical task is crucial.
3. Autonomy and discretion are needed in performing critical tasks.
4. Flexibility to adapt in the field is essential.
5. The temporary administrative entities must understand and be responsive to market conditions.
6. Government must have the expertise to hit the ground running in responding to a financial crisis.
7. Government must have the ability to effectively monitor and manage contractors.
8. Government must have sufficient financial and personnel resources to complete the task.
9. Government must have exit strategies.
10. There must be clear and transparent oversight.

According to Thomson,[60] Cassell and Hoffman's ten lessons complement Kane's four principles for asset salvage. However, eight key features can be deduced for SPVs used in the resolution of the troubled assets of banks. These are: temporary, dedicated entity; formulation of critical task; autonomy; flexibility; management of contractors; availability of financial and personnel resources; transparency; and exit strategy.[61] These can be said to be international best practices on such SPVs as can be gleaned from experiences in other jurisdictions. International best practices in the use of SPV in the resolution of troubled assets of financial institutions are that they are separate entities established for such special assignment. They may be under the supervision of a Department or other agency of government, but they are usually a temporary, dedicated entity. This applies for example to the Assets Management Corporation of Nigeria which is specifically created 'for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria.' While it is clear that the AMCON is a dedicated entity, its temporariness is not as certain. In the first place, the AMCON Act has no provision on the life span of the AMCON. It contemplates that it would be

liquidated at some future date, but that date is not provided for in the AMCON Act. The general impression is that the AMCON would exist for ten years.[62] A position that is supported by the fact that the bonds it creates should have a term of not more than seven years.[63]

Transparency is another crucial factor in the success of SPVs set up to resolve nonperforming debts of financial institutions. Its benefits include ensuring stakeholders buy-in regarding the plans and actions of the SPV, providing a framework for effective monitoring of the performance of the SPV, freely and fully communicating with stakeholders on the activities of the SPV, and keeping the SPV focused on its goals. One commentator stresses the lack of independence of AMCON could forecast its potential failure to reform the banking system of Nigeria.[64] Other successful asset management companies designed to remove non-performing assets from the banking system similarly lacked independence from bank regulators. For instance, the Resolution Trust Corporation ('RTC') established in the late 1980s in the United States was created 'to manage and resolve failed savings associations that were insured by the Federal Savings and Loan Insurance Corporation.'[65] The RTC, officially established on the Aug. 9, 1989, was to terminate all of its functions no later than Dec. 31, 1996.[66] The Thrift Depositor Protection Oversight Board was responsible for the general oversight and periodic review of the performance of the RTC.[67] The Board is required, in consultation with the Resolution Trust Corporation, to develop and establish overall strategies, policies, and goals for the Corporation's activities, including the Corporation's overall financial goals, plans and budgets.

The governance of the RTC and AMCON is remarkably similar. While the AMCON legislation enumerates several areas in which the CBN may regulate AMCON's activities and the CBN in effect appoints a majority of the AMCON board, the Oversight Board of the RTC consisted of the senior officials of the central bank and other bank regulatory agencies in the United States who are political appointees. The RTC is considered one of the more successful asset management companies created within the last thirty years.[68] Unlike the RTC legislation, the AMCON Act contains no termination date. The current AMCON Managing Director Chike-Obi and Governor Sanusi have implied that AMCON will not operate for more than ten years. The maximum term of the bonds to be issued by AMCON, one of AMCON's principal sources of funds, is limited to seven years.[69] This time limit is a strong indicator that AMCON is intended to operate for a limited time.[70]

CONCLUSION

From the arguments and submissions reached in this paper, it is clear that no nation, no matter how economically buoyant, can boast of complete insulation from corporate fraud. Concerted efforts are put in place to check incidences of failures and minimize effects it may have on investors and the economy as a whole. For example, as lesson to nations who think they have the well wither to shield their economy from crisis, the first reaction from politicians and other professional unions in the European Union was to treat the phenomenon arising from the Enron and subsequent scandals as an American abnormality. The United States corporate system was alleged to be suffering from a 'lethal combination of greedy executives, conflicted auditors, reliance on accounting rules instead of principles and an obsession with quarterly earnings'.[71] The euphoria did not last as Royal Ahold of Netherlands reputed to be the world third largest food retailer disclosed on February 24, 2003 that it had overstated its 2001 and 2002 earning for over $500 million.[72]

This led the EU to take serious and make practical step to improve the governance system in the corporation of member states. This was buttressed by the high priority given to the work of the High Level Group of Company Law Experts who brainstormed on ways to curb increasing cases f corporate failures in Europe.[73] Thus, the aftermath of corporate scandals and promulgation of the Sarbanes-Oxley Act has prompted a number of countries to amend their corporate governance code. Leading the pack is Japan with what is now referred to as the J-Sox.[74] Italy has followed suit with the reformation of its corporate governance relating to financial services institutions. The United States and European experience have clearly revealed that governance system should not be left to the whims and caprices of the corporation.

In Nigeria, the running of public companies leaves much to be desired. From all indication, it is evidently clear that we do not have a minimum acceptable standard of corporate governance on accountability in the Nigeria system. As clearly seen from the submission of this paper, the Oxley Act is not a perfect legislation and indeed possessed certain inherent weaknesses. Be that as it may, it is the firm position of this paper that Nigeria has much to gain from studying and adopting certain provisions of the reform especially as it relates to accountability and disclosure. Scandals have no nationalities. What happened in other jurisdiction can and is happening in our Nation with more destructive consequences. The case of Cadbury Nigeria Plc and the banking sector crisis which AMCON is establish to savage, buttress the above assertion. The Cadbury's case was a bit pathetic as the dramatis persona in the financial imprudence was hitherto credited to be of impeccable character. Also culpable are auditing firms of the highest credentials in Nigeria.

The Nigerian investing public was shock to their marrow when the financial saga broke in late 2006. The Bunmi Oni led Board of Cadbury was engaged in stock buy-back, cost deferrals, trade loading and false supplier stock certificates since 2002. Quite interestingly, Oni was named by Pricewatercoopers in September of the same year as the most respected Chief Executive Officer in Nigeria.[75] The regulators of Nigeria's securities market can no longer behave like the proverbial ostrich. It is high time they came out clearly with governance system that will change the unacceptable corporate culture to ensure best practice. The positive development in the Cadbury saga is the legal action embarked on by 300 Cadbury Nigerian shareholder and Lagos based brokerage securities firm against Cadbury and PricewaterhouseCooper for negligent conduct.

The legal challenge impacted positively on shareholders activism in Nigeria and other emerging markets. Due to the foregoing, this paper recommends an urgent reform of the Companies and Allied Matters Act especially chapter 1 of Part XI on provisions dealing with financial statements and Chapter 2 on Audit to bring them in line with reform in the US and other jurisdictions. Reform is also strongly advocated to radically change in Chapter 1 of Part IX dealing with Director with a view to ensuring the independence of the Board as it relate to the Independent Director and the Audit Committee in public Companies. The effect of Sarbanes-Oxley Act on governance system especially on accountability of Board and Management of public corporation, resolving conflicted situations and enhanced disclosure regime cannot be overemphasized. This paper has analyzed the inherent weaknesses in the Sarbanes-Oxley Act and therefore cannot advocate a wholesome adoption.

However we cannot shy away from the fact that our system need heavy dose of reform. As such this paper calls on all stakeholders to wake up and scrutinize the integrity of corporate governance in Nigeria. The paper emphasizes that any reform in Nigeria that fails to start from the regulators – CAC and SEC is doomed to fail. This is because what will have in Nigeria are beautiful but unenforced legislations as the regulators lack the capacity for enforcement. This paper cannot but fully agree with Abugu on the effectiveness of Securities and Exchange Commission on monitoring and enforcing provision of the ISA on Insiders. The Securities and Exchange Commission lacks the legal and administrative framework to effectively police the securities market, detect and prosecute insiders. The war against insiders as it is now, is merely a statutory war where the Investment and Securities Act and its precursor, the Companies and Allied Matter Act; have made a number of bold innovative provisions designed to check insider dealings, but there remain to be seen an infrastructural machinery for the effective monitoring, investigation, detection and punishment of insider dealing in the capital market.[76]

While Enron Corporation, like the eight troubled Nigerian banks was so highly praised by the outside observers, internally these companies had highly decentralized financial control and decision-making structure, which made it practically impossible to get coherent and clear view on their activities and operations. Of course, the problem was not exclusively due to poor managerial performance, all the department as represented in these companies were involved in the running of corporate ethical values and principles, but executives and managers bear primary responsibility for the absence of corporate culture, clear accountability and transparency of the companies. This paper opined that family and ethnic affiliations in the management and running of Companies should be de-emphasis, if not totally removed, Code of corporate governance and allied regulations and legislations should be given primacy in decision making and in the policy trust of the corporate entity - else sooner than later, the economy becomes endangered species to the avarice of greedy executives and their cronies in government. Corporate failure is tantamount to human resource annihilation particularly in a country like Nigeria with high rate of unemployment and dependency. The loss of one job means the starvation of scores of families thereby leading to increase in crime rate and a downward slide in the economic and political equilibrium.

NOTES

[1]N.H. Aronson, 'Enron: Lessons and Implications: Preventing Future Enrons, 8 *Stanford Journal of Law Business and Finance*, (2002) 127.

[2]The market crash of 1929 and the great depression that follow brought about public distrust in securities markets. The US congress passed Securities Act of 1933 followed by Securities Exchange Act 1934 in an attempt to restore public confidence.

[3]T.M. Fapohunda, 'The Global Economic Recession: Impact and Strategies for Human Resources Management in Nigeria', *International Journal of Economics and Management Sciences,* Vol.1, No. 6, pp. 07-12, 2012.

[4]The Sarbanes-Oxley Act 2002 of the US was enacted by Congress in 2002 to combat future corporate failure, while the Assets Management Corporation of Nigeria Act 2010 was enacted in 2010 to savage the fast collapsing banking sector of Nigeria.

[5]See the New York Stock Exchange Corporate Governance Listing Standards. Available at <http://www.nyse.com/pdfs/corp> Accessed June 10, 2013

[6] See National Association of Securities Dealers Automated Quotation System Rules. Available at <http://www.nasdaq.com/about/proposedrulechange.stm> Accessed June10, 2013

[7] Corporate governance issues were left to states and self-regulation by individual company. In the wake of Enron scandal, the investing public agitated for reform as states were no longer trusted to protect Investors' interest due to subsisting rivalry in attracting corporate charters.

[8]A. Berle Jr and G. Means, *The Modern Corporation and Private Property,* New York, Macmillan, 1932.

[9] See the report of the Senate Permanent Subcommittee on Investigations on the role of the Board of Directors in Enron's collapse (Reprint 107-70, July 8, 2002).

[10] K. Eriksson, 'Corporate Governance in the European Union Post Enron', *Bond Law Review,* 15, 2003. Also available at <http://epublications.bond.edu.au/blr/voll5/iss1/9> Accessed May 14, 2013

[11] See Fortune Magazine, April 2001 Edition.

[12] L. E. Ribstein, 'Market vs. Regulatory Responses to Corporate Fraud: a Critique of the Sarbanes-Oxley Act of 2002', (2002) 28 *Journal of Corporation Law*, 1.

[13] The Act also referred to as Sarbox or Sox derived its name from the two principal sponsors.

[14] Paul Sarbanes was the Democratic Senator representing the state of Maryland and the Chairman Senate Financial Service Committee.

[15] Michael Garver Oxley was the Republican Representative representing the state of Ohio and Chairman, House Financial Service Committee. He is presently the non-executive vice chairman of NASDAQ stock market.

[16] Bush in the Blue Room, White House on 30th July 2002. Available at <http://www.fed-soc.org/publications/page/president-bush-signs-corporate-corruption-bill> accessed June 20, 2013

[17] Sarbanes-Oxley Act section 101. The Board was established with a narrow focus – to keep tabs on external auditor of public companies.

[18] See J.C. Coffee Jr, 'Understanding Enron: It's about Gatekeepers' Stupid', Columbia Law School, The Centre for Law and Economic Studies, New York, NY 10027-7201 *Working Paper* No. 207

[19] Securities Act section 19(a) 15 USC 577 see also Securities Exchange Act 1934 section 4 (a) 210 15 USC 78d (a).

[20] Sarbanes-Oxley Act section 101.

[21] *Ibid*, section 104 empowers PCAOB to inspect firms that audit more than 100 companies annually and others every three years

[22] *Ibid* section 105, note also that PCAOB can compel officers of the Auditing firms to testify and produce documents (see section 105(b) (2) (A) & (B)).

[23] Section 105 (b) (3) (A) (ii) empowers PCAOB to suspend firm for failure to cooperate during investigation.

[24] Section 102.

[25] Section 101(e).

[26] Section 102 (f).

[27] Section 109.

[28] Section 101.

[29] Understanding Enron….' *supra* n 18 at 5.

[30] See *Arthur Andersen LLP* vs. *United States* 125 S. ct 2129 (2005)

[31] Out of US $52m paid by Enron to Arthur Andersen only US $25 was for direct audit services.

[32] Though the US Supreme Court overturned Andersen's conviction of witness tampering for shredding documents relating to Enron. The damage has been done. Apart from facing over 100 civil suits, the firm lost nearly all its clients.

[33] Section 201 of the Act.

[34] Section 203 of the Act.

[35] Section 404 (b) of the Act.

[36] According to the Report by FileNet Corporation (2003), 'Corporate Transparency:

Addressing Sarbanes Oxley in Today's Insurance Industry', professional liability insurance costs for accountants have risen similarly increasing the cost of outside auditing services.

[37] The Audit Committee was headed by a Professor Emeritus in Accounting of Stanford University. See Gillian & Martin, 'Financial Engineering, Corporate Governance, and the Collapse of Enron', *working paper* 2002 p 22. Available at <http://ssrn.com/abstract id=354040> accessed April 20, 2013.

[38] Report of Special Investigation Committee, 69 *Chicago Law Review* (Summer 2003).

[39] See R.A. Dye, 'Auditing Standards, Legal Liability and Auditor Wealth', 101 *Journal of Political Economics*, 887. Anticipated litigation costs are a substantial portion of the fees Auditors are charging their public companies' client.

[40] See the summary reprint at <http://www.mercer.com/knowledgecentre/reportsummary.jhtml> accessed June 01, 2013.

[41] See section 301 of the Act.

[42] Section 302 of the Act.

[43] See Enron's case.

[44] Section 404.

[45] See section 1102 of the Act.

[46] See FileNet Corporation Report supra n 49.

[47] See generally *Ribstein Larry E.,' Cross-Listing and Regulatory Competition.' Review of Law & Economics,* Vol. 1, No. 1. Article 7. Available at papers.ssrn.com/sol3/papers.cfm?abstract_id=70085. accessed March 20 2013.

[48] Securities Exchange Advisory Committee Report, page 33, 34 (2004).

[49] See generally S. Copp, 'A Winter's Tale', *Financial Management* (UK), April 2003.

[50] K. Eriksson, *supra* n 10 page 197.

[51] *Ibid.*

[52] L. E. Ribstein, *supra* n 12 at 1.

[53] Wharton Business School Report.

[54] J.B. Thomson, 'Cleaning up the Refuse from a Financial Crisis: The Case for a Resolution Management Corporation', *Federal Reserve Bank of Cleveland Working Paper 10-15* of September 2010, p2. Available online at www.clevelandfed.org/research accessed May 20, 2013. For a complete historical perspective, see generally, J.H. Jones and E. Angly, *Fifty Billion Dollars: My Thirteen Years with the RFC, 1932–1945*, New York: The Macmillan Company 1951.

[55] *Ibid* at p.3.

[56] It was signed into law by the then President of the United States, George W. Bush, on 3rd October 2008.

[57] M. K. Cassell and S. M. Hoffmann, 'Managing a $700 Billion Bailout: Lessons from the Home Owners' Loan Corporation and the Resolution Trust Corporation" in 'IBM Center for the Business of Government,' *Financial Management Series*, Washington: IBM Center for the Business of Government 2009, at p.7.

[58] E.J. Kane, 'Principal-Agent Problems in S&L Salvage', (1990) 45(3) *The Journal of Finance*, 755 at pp.756–757.

[59] *Ibid* at p. 32.

[60] J.B. Thomson, *supra* note 56 at p. 8.

[61] On the features of such SPVs, see generally, O.E. Ergungor and J.B. Thomson, 2006. 'Systemic Banking Crises' in A.H. Chen (ed.) *Research in Finance* (Elsevier 2006) and O.E. Ergungor, 'On the Resolution of Financial Crises: The Swedish Experience',

Federal Reserve Bank of Cleveland Policy Discussion Paper No. 21, June 2007, at pp.7 - 9.

[62]O. Chima, 'AMCON: Stakeholders Propose Tenure Extension', *THISDAY* (Lagos, Nigeria, August 22, 2010). Available at <http://www.thisdaylive.com/articles/amcom-stakeholders-propose-tenureextension/ 80481/>accessed May 12, 2013.

[63] AMCON Act section 26(1).

[64]N. Ofo, 'Is the Asset Management Corporation of Nigeria Designed to Fail?' Available at http://ssrn.com/abstract=1751459, accessed June 09 2013.

[65] U.S. Government Manual 693 (1990-91).

[66] 2 U.S.C.A. § 1441b(C) & (E) (2011).

[67] United States Government Manual 693 (1990-91).

[68] D. Klingebiel, 'The Use of Asset Management Companies in the Resolution of Banking Crises', *World Bank Policy Research Working Paper* 2284 (Feb. 2000); L. Davison, 'Politics and Policy: The Creation of the Resolution Trust Corporation', 17 *FDIC Banking Review* 17 (2005).

[69] AMCON Act, Part IV, § 26(1).

[70] N. Ofo, *supra* n 66 at 23 (Section 5.1).

[71] K. J. Hopt, 'Modern Company and Capital Market Problems Improving European Corporate Governance', Available at <http://ssrn.com/abstract id=356102> accessed June 18, 2013.

[72] B. Lublin et al, 'Directors face fire in the Wake of Ahold', *Wall Street Journal,*27/02/03.

[73]Report of High Level Group of Company Experts at <http://www.europa.eu.int/comm/internalmarket/company/news/index.htm> accessed at June 18, 2013.

[74]J SOX requirements are incorporated in the legislative draft entitled 'Financial Instruments and Exchange Law'. It is similar in substance to SOX section 302 and 404. All Japanese listed companies and their subsidiaries are subject to the requirement of J SOX. The Financial Instruments and Exchange Act, promulgated on June 14th, 2006, is the main statute codifying securities law and regulating securities companies in Japan. The law provides for: Registration and regulation of broker dealers and their registered representatives, Disclosure obligations applicable to public companies, investment trusts and similar entities, Tender offer rules, Disclosure obligations applicable to large shareholders in public companies, Internal controls in public companies; in this role the law is often referred to as J-SOX, a reference to the American Sarbanes-Oxley Act (SOX). Available at <http://en.wikipedia. Financial Instruments and Exchange Act> accessed February 10, 2013.

[75] Since 2003, Cadbury Nigeria, Plc. had overstated its financial position by naira 13bn to naira 15bn. This information came to light following the company's discovery of accounting irregularities in November. After a special audit conducted by PricewaterhouseCoopers (PWC), the company fired its Chief Executive Officer and Finance Director. Cadbury's handling of this mismanagement is a show of corporate responsibility and could signal a growing awareness of Nigerian firms of good corporate practice. See detail at <http://leaks.hohesc.us/?view=07LAGOS10> accessed April 11, 2013.

[76]J.E.O. Abugu, *Company Securities: Law & Practice,* Lagos, University of Lagos Press, 2005, p.260.