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REMOVAL OF BANK DIRECTORS BY THE CENTRAL BANK OF NIGERIA

The Recent Case of First Bank of Nigeria Limited and FBN Holdings Plc



Introduction

Last week, the Central Bank of Nigeria (CBN) approved and directed the removal of all directors of First Bank of Nigeria Limited (FBN) and its parent company, FBN Holdings Plc (FBN Holdings) and appointed new directors to replace the directors removed. The CBN in its Governor's Statement on the Purported Management Change at the First Bank of Nigeria Limited explained that its action has been necessitated to preserve the stability of FBN in order to protect minority shareholders and depositors. The CBN in its Governor's Statement frowned at the changes in the executive management of FBN without proper recourse to the apex banking regulator. According to CBN "It was, therefore, surprising for the CBN to learn through media reports that the board of directors of First Bank, a systemically important bank, under regulatory forbearance regime, had effected sweeping changes in executive management without engagement and/or prior notice to the regulatory authorities,". The CBN Governor argued that the action of the board of directors of FBN sends a negative signal to the market on the stability of the leadership of the bank in view of the performance of the bank in the last five years which has necessitated the CBN to provide regulatory forbearance and closely monitor the bank in order to stem a slide in the going concern status of the bank. The CBN Governor further explained that FBN is a systemically important bank which makes it imperative for the CBN to step in to stabilize the Bank to ensure financial stability.

The action of the board of directors of the FBN and CBN raises a number of legal issues. In this newsletter, we undertake a preliminary analysis and an elaborate consideration of the key legal issues on this development will be discussed in our subsequent article.

Meanwhile, we have highlighted hereunder some of the issues that underpin the CBN's actions such as regulatory forbearance, systemically important bank, and minority shareholders vs. depositors, in addition to the legality of the removal and appointment of the directors.

The Legality Question

The appointment and removal of directors of any company are primarily governed by the Companies and Allied Matters Act (CAMA). Every corporate entity is subject to the provisions of CAMA except where a overriding statute expressly limits the application of CAMA. The Banks and other Financial Institutions Act 2020 (BOFIA) provides such exception. The provisions of BOFIA shall apply notwithstanding the provisions of CAMA as they relate to financial institutions. By virtue of Section 34 of BOFIA, the CBN may direct the removal of a manager or officer of a bank where after an examination, it is satisfied that the bank is in a grave situation. Two critical conditions must be satisfied before CBN can take such action: first, CBN must have conducted an examination on the bank, secondly the CBN is satisfied that the bank is in a grave situation. The earlier case between shareholders of Union Bank of Nigeria Plc (Union Bank) and the CBN provides a useful precedent. In 2009, the CBN removed the Chief Executive Officers and Executive Directors of seven banks including the directors of Union Bank of Nigeria. The Court held that the CBN had powers under Section 34 of BOFIA, to remove directors of the bank. Although this is an important precedent, but the facts may be distinguishable from the current matter. In the Union Bank case, the removal of the directors of the bank was a remedial action by the CBN following



an examination on the bank. In the instant matter, the CBN had conducted an examination on FBN in 2016 and resolved to grant the bank regulatory forbearance which has been in place till date. The removal and appointment of directors was triggered by the failure by the bank and its parent company to obtain CBN's prior approval for the removal of the bank's managing director. Note that the distinguishing fact of this matter may or may not be of much value given the fact that CBN had already conducted an examination on FBN in 2016. Section 34 of BOFIA neither stipulate the timeline within which the CBN can exercise the power to remove and appoint directors following such examination nor define what amounts to grave condition.

Another issue to consider is whether the removal of the Managing Director of FBN would stand the test of the law. A similar decision was taken by FBN about twenty years ago in 2002 on the removal of the Managing Director of the Bank, unfortunately the Bank lost the case at the Supreme Court.

Regulatory Forbearance

Can it be deduced that since the bank has been under CBN's regulatory forbearance and monitoring, an order for removal of the directors falls within the purview of Section 34 of BOFIA? May be so. Section 34 of BOFIA provides that "where after an examination under Section 33 of this Act or otherwise howsoever, the Bank (CBN) is satisfied that the bank is in a grave situation the Governor may by order in writing, exercise any one or more of the powers specified in Subsection (2) of this section". The powers provided in Subsection 2 include power to remove officers of the bank.

When a bank is granted regulatory forbearance, it presupposes that the CBN has taken steps not to impose sanctions or insist on compliance by the bank with its regulatory requirements. However, this does not preclude the CBN from taking any other remedial action outlined in subsection 2 of section 34 of BOFIA. Essentially a bank under the CBN regulatory forbearance pursuant to section 34 of BOFIA may still be subject to the power of the CBN to remove its officers.

Systematically Important Bank

As a systemically important bank (SIB), any major shakeup in FBN have the potential to impact the stability of the financial system. Systemically important banks, otherwise known as "too big to fail" banks are banks who are considered important to any economy and must be protected from failing given the impact a failure of such bank would have on the financial system. The CBN is empowered to designate any bank as SIB. Consequently, the CBN prescribes the assessment criteria for designating a bank as such and also determines the policy standards that applies to such banks including liquidity standard, stress testing requirement, recovery and resolution plan, enhanced supervision and disclosure requirement. The CBN has designated seven Nigerian banks including FBN as SIB based on their size, interconnectedness, substitutability, and complexity. It can be argued that it is in the interest of the financial system for the CBN to intervene in the removal of the CEO of the bank without regulatory approval.



Majority Shareholder vs. Minority Shareholders vs. Depositors

As regulator of financial institutions, it is the duty of the CBN to maintain a robust financial system by protecting the interests of the most important stakeholders: the shareholders and the depositors bearing in mind the overall public interest and need to maintain financial stability. The CBN stated that the reason for removing the directors of FBN and FBN Holdings is to protect the minority shareholders and the depositors. Typically, majority shareholders are well entrenched in any company either through direct board participation or through representation. In effect, majority shareholders hold controlling stake. This informs the reason for the special statutory protection often provided to the weaker stakeholders such as minority shareholders and depositors. For example, CAMA provides for the right of the minority shareholders to institute protective action against illegal and oppressive conduct. Similarly, BOFIA places priority on depositors interests over and above any other liability of the bank.

Conclusion

Many have opined that CBN acted rightly by intervening in the board crisis in FBN and FBN Holdings in line with its statutory objective of promoting sound financial system in Nigeria. The effect of breaching regulatory obligations by not obtaining CBN approval prior to the removal of the bank's CEO, could destabilize the market, erode shareholder confidence and create panic amongst the depositors. The legality of the removal of the directors of a bank and appointment of new directors by the CBN may not yet be settled given the peculiarity of each case. The legal issues raised in this newsletter will be thoroughly analyzed in our subsequent article.



Key Contacts



Adekunle Soyibo

Partner & Sector Co-Head, Financial

e: kunlesoyibo@jacksonettiandedu.com



Okey Nnebedum

Sector Co-Head, Financial Services

e: okeynnebedum@jacksonettiandedu.com

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RCO Court 3-5, Sinari Daranijo Street,
Victoria Island, Lagos, Nigeria.

t: +234 (1) 4626841/3, +234 (1) 2806989f: +234 (1) 2716889

e: jacksonettiedu@jacksonettiandedu.com

www.jacksonettiandedu.com