INSTITUTIONAL SHAREHOLDERS AS SAVIOURS OF SHAREHOLDERS RIGHTS?

By

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Abstract

The directors of company are usually empowered to run the affairs of the company for and on behalf of the shareholders who are the owners of the company but are generally not involved in the day to day running of the company. The fact remains that the directors who are entrusted with the management of the company sometimes pursue objects that are different from that of the shareholders and that may result in loss to the shareholders if the company fails. One way out is for shareholders to engage and monitor the activities of the managers of the company for optimum result to the shareholders. But the problem is that due to disperse shareholders it is not possible for the shareholders to monitor managers, as they should. This void is expected to be filled by the institutional shareholders who have been proclaimed as the saviours of shareholder rights due to their size combination, focused share ownership, pleasing reputation and their right to a wide range of financial resources, which enables them to conquer the lack of interest shown by other shareholders. However, this paper argues that though the influence of institutional shareholders in corporate governance may advance the firm, a host of other reasons exist to believing that institutional shareholders will not be effective monitors and may in some cases side with management even when management proposes measures that will likely reduce shareholders' wealth.

KEYWORDS: Institutional Shareholders, Activism, Corporate Governance, Directors, Capitalism, Investor, Passivity, Persuasion.

Introduction

Placing the business of governance of a company's affairs solely with the management without any form of interference from the shareholders, when occasion demands, may not guarantee sound corporate governance. The principle of checks and balances which operates in government circles can be applied to the governance of a company. The arm of the company that is best suited for performing this role of checking the excesses of the directors is the shareholders. This is because ultimate powers of control lie in the shareholders. Besides, the brunt or benefit of the governance of a company will ultimately be borne by the shareholders.[1]

Shareholder activism is no longer the domain of individual rogue entrepreneurs and "cowboy-capitalists, "but rather an increasingly popular strategy employed in substantially influencing a variety of large corporations.[2] In recent years, activism's growth has been striking. It has

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[1]Ajogwu F. "Shareholders Activism: Any Added Value to Governance?" *Journal of Corporate Governance Vol.8 No.1 August 2016 p. 1688*

[2]Slawotsky J. "The Virtues of Shareholder Value Driven Activism: Avoiding Governance Pitfalls" *12*

become increasingly acceptable and has "hardened into the default boardroom agenda.[3] As noted by Slawotsky in the US Since 2011**,** activists have helped depose the CEOs of Procter & Gamble, and Microsoft and have fought for the breakup of Motorola, eBay and Yahoo.[4] As the tactic has become mainstream, a rising chorus of critics have urged a crackdown on activism. This is hardly surprising as activism intersects with the current corporate governance debate over "shareholder value" versus "sustainable capitalism"[5]and touches upon the fiduciary duties of directors to monitor and correct poor management. Politicians, corporations, business interests and scholars have joined the criticism of shareholder activism.

In response, proponents of activism and smaller shareholders argue that in a corporate governance model devoid of activism, managerial misconduct and/or incompetence will often drive the operation of the company to the detriment of the business and the shareholders. Without activists overseeing the company, advancement of self-interest, operational mismanagement, director failure to monitor, poor corporate governance and other damage to the company and its shareholders would remain unaddressed. Supporters also note that activists will gravitate towards badly managed companies and that, without such activists, smaller shareholders are powerless to remedy a poor management situation.[6] Defenders of activism note that activists improve the operation of a business. Where a business is lacking a major activist investor, lacklustre managerial performance will likely remain.

During the past decades, institutional investors become increasingly important as shareholders. There are two views about institutional investors activism, the one is active monitoring. The opposite view is represented by the “passive monitoring” hypothesis[7]

Institutional Shareholder

Institutional shareholders are organisations that have large amounts of funds to invest and put much of these funds into company shares. Such institutional funds include pension funds, insurance companies and collective investment institutions such as unit trust funds and open-ended investment companies.

Institutional investors do not confine themselves to holding shares in domestic companies.[8] They are extensive investors in shares of companies in other countries all around the world. It is therefore not surprising having in listed companies some shareholders who are foreign institutional investors. The international nature of investment can add to the difficulties of

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Hastings Bus. L.J. 521 2015-2016 available online in www.heinonline.org last visited on 2/02/2017 p.523

[3] Dennis K. B., “Activists Wept for There Were No More Worlds to Conquer”, *WALL ST. J. Apr. 23, 2014, cited in Slawotsky J p.524*

[4]Slawotsky J. op cit p. 524

[5]Renee B. A. et al., “Board Members' Values and the Shareholder-Stakeholder Dilemma” *3 European Corp. Governance Inst. - Fin. Res. Paper Series No.204/2008, 2008*

[6]April K. &Emanuel Z. “Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors”, *64 J. FIN. 187***,** *222-25.*

[7] Nwaiwu, J. N. “Corporate Governance Structure and Institutional Investment: Evidence from a Developing Country” *Asian Journal of Economics and Empirical Research Vol. 1, No. 2, 48-56, 2014, available athttp://asianonlinejournals.com/index.php/AJEER last visited on 30th March 2017*.

[8]Brian C. The ICSA Study Text in Corporate Governance (London: ICSA Information &Training Ltd, 6th edn. 2009)117.

establishing a good relationship between a company and its shareholders.

Some institutional shareholders might choose to 'play the stock market' and buy and sell shares regularly. Although they might be long-term investors in some companies, they might treat other shareholdings as short-term investments. If shareholders come and go regularly, a company's board of directors cannot possibly get to know them or develop a relationship with them.[9]

Another development in recent years has been the activism of some institutions, particularly hedge fund investors in company shares. These institutions might pursue an investment policy of identifying under-valued companies with a view to acquiring a shareholding and then applying pressure on the board of directors for measures to improve the performance and value of the company. This type of institutional investor is significantly different from the more 'traditional' type, which might be more prepared to support the company's management and invest for the longer term.

Even when shareholders are long-term investors, their interests might be much more in the financial returns from their investment than in anything that the company does. The relationship between a company and its institutional investors cannot be properly understood without recognising that large institutional investors will hold shares in a large proportion of the major stock market companies, but their shareholding will not often be significant. Since large institutions hold shares in many listed companies, it could be argued that they cannot show a concern for every single company in which they invest.[10]

Shareholder Activism and Approaches

Shareholder activism is a way in which shareholders can influence a corporation's behaviour by exercising their rights as owners. These can range from dialogue with management to voice their concerns about an issue to formal proposals that are voted on by all shareholders at a company's annual meetings.[11]

Broadly stated, shareholder activism denotes a series of reactions by unsatisfied shareholders.[12] These reactions come in different forms and are executed by different types of shareholders. Admati & Pfleiderer[13] for example, claimed that when the companies' management deviates from their responsibility, i.e., does not act in the best interest of the shareholders, the shareholders then normally may sell shares (the so-called "Wall Street Rule" or "Wall Street Walk"). Perhaps selling off their shares would be the last resort after initial activism efforts have failed. However, in the context of larger shareholders, if it were not an act of exit, a simple threat (although only an intention to act) would suffice.[14]

[9] ibid
[10]ibid
[11]www.investopedia.com/terms/shareholders last visited on 31st March 2017.
[12] Gillan, S. L., & Starks, L. T. (2007). "The Evolution of Shareholder Activism in the United States." *Journal of Applied Corporate Finance, 19(1), 55–73.*
[13] Admati, A. R., & Pfleiderer, P. (2009). "The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice." *Review of Financial Studies, 22(7), 2645–2685.*
[14] ibid

Additionally, negotiation with senior managers or with the boards about their concerns over the companies' affairs, with the intention of bringing about corporate change, is also one form of activism.[15] Dialogue, a behind-the-scene type of activism that requires confidentiality, has gained momentum in the world of shareholder activism.[16] Moreover, unlike dialogue, shareholders' proposal have been widely employed by various activist investors, such as social groups, individuals, and institutional investors, with the intention of directing attention, raising awareness, and challenging managers to enhance their firms' social or financial performance.[17] At the same time, shareholders' proposals serve to alert the managers about issues that deserve attention. These proposals, however, vary according to the intention of the activists. These include, as examples, shareholder proposals regarding social and environmental issues, governance proposals, and say-on-pay proposals[18]

Other than the above-mentioned shareholder activism approaches, activism may also be exercised through letter-writing or by posting questions to corporate management or the board[19] although these are not regarded as customary means of ensuring that their rights and interests are protected.

Minority shareholder activism can come from various types of minority shareholders, including institutional shareholders, hedge funds, and by the retail/individual shareholders. However, in terms of engagement density, individual minority shareholders activism, in the U.S for example, was great during the rise of shareholder activism after the Securities and Exchange Commission (SEC) introduced a rule on shareholders' proposal submissions. Following that, the shareholder activism wave shifted to the significant roles of the institutional investors, and hedge fund activism. Activism by the individual/retail shareholders received less attention, not only in practice but also in the academic world, as compared to institutional and hedge fund activism of recent years. This is perhaps due to their relatively small shareholding, which is seen as less significant in voting, and is less likely to have a large impact on the performance of the corporations. Although it appears that the voices of institutional shareholders and hedge funds are heard loudly compared to these individual minority shareholders, one cannot deny their significant role in shareholder activism and corporate governance.[20]

Shareholder Activism in Nigeria and The Need for Institutional Shareholders

Shareholder activism is considered a buzzword in the world of corporate governance to envision the success of shareholder empowerment agenda. Broadly speaking, the term

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[15]Mallin, C., & Melis, A. (2010). "Shareholder rights, shareholder voting, and corporate performance." *Journal of Management & Governance, 16(2), 171–176.*

[16]Rehbein, K. etal (2012). "Corporate Responses to Shareholder Activists: Considering the Dialogue Alternative." *Journal of Business Ethics, 112(1), 137–154.*

[17]Chung, H., & Talaulicar, T. (2010). "Forms and Effects of Shareholder Activism." Corporate Governance: *An International Review, 18 (4), 253–257.*

[18]Gillan, S. L., & Starks, L. T. op cit 56.

[19]Sjöström, E. (2008). "Shareholder activism for corporate social responsibility: what do we know?" *Sustainable Development, 16(3), 141–154.*

[20]Sarina O. and William G. B. "Shareholder Activism in Malaysia: Is It Effective?" *Procedia - Social and Behavioral Sciences 172 (2015) 427 – 434 available online at www.sciencedirect.com last visited on 28-08-2016.*

shareholder activism can be defined as the use of ownership position to actively influence company policy and practice.[21]

While shareholder activism in Nigeria is still in its premature developmental phase, there is an already rapidly growing institutional misapprehension and misapplication of the concept. This is the reason in Nigeria shareholder activism is seen as tool for populist rabble-rousing and an interruption to the organization of the Annual General Meeting (AGM). It is considered an extortion scheme. According to Ojeka[22], it has been observed that shareholder associations sometimes give a show of their power to thwart legal operations and the smooth running of the company. Adegbite[23] makes it clear that their survey outcome truly demonstrate that activist shareholders are generally seen as pests or rascals to normality in corporate organization and management and that the ways in which shareholders' associations execute their activisms mirror level of oppression and corruption intrinsic in the Nigerian political culture.

In Nigeria, it was observed that shareholders' association has taken over the responsibility of institutional shareholders. However, the former is becoming quite ineffective in ensuring good corporate governance because of corruption and sell-outs. In fact, there is a scenario where onetime shareholders' association's president was made a director of a firm as its reward for compromise.[24] Therefore, there is an urgent need for institutional shareholders to take up their responsibility for ensuring good management of funds and sound corporate governance in a firm.

Institutional Shareholders' Views on Engagement in Nigeria

It has been made observed that shareholders in Nigeria are generally faced with the problem of lack of knowledge and even in situations where they do know their rights, there is a passive nature of lack of experience of the best method possible in the situations. In a particular interview with institutional shareholders in Nigeria, Uche and Adegbite,[25] were able to discover institutional shareholders' views on engagement and activism. It can be seen from the interview that institutional shareholders have a passive approach to engagement.

In Nigeria when institutional investors perceive that a company was not doing great, they would immediately sell off their shares. According to them, selling off their shares is the best way to maximizing their wealth instead of being involved in activism to enhance good

[21] Judge, W. Q et al (2010). "Antecedents of Shareholder Activism in Target Firms: Evidence from a Multi-Country Study." *Corporate Governance: An International Review, 18(4), 258–273.*

[22]Tan A, Keeper T (2008) Institutional investors and corporate governance: A New Zealand perspective. Working paper series cited in Ojeka S. A. etal "Institutional Shareholder Engagement, Corporate Governance and Firms Financial Performance in Nigeria: Does Any Relationship Exist?" *Journal of Internet Banking and Commerce (http://www.icommercecentral.com/open -access last visited on 16-08-2016.*

[23] Adegbite E. et al "The Politics of Shareholder Activism in Nigeria" *available at www.research.ed.ac.uk/portal last visited on 31st March 2017.*

[24]ibid

[25] Uche C, Adegbite E (2011) Towards Corporate accountability: Impediments to Institutional Shareholder Activism in Nigeria." *Available at http//www.iconmmercecentral.com/openaccess last visited 28th August 2016.*

governance. Customarily, institutional shareholders are not absolutely engaged in corporate governance, they simply maintain the exit policy. It is their belief that, their involvement in shareholders' activism is a way of showing rebellion to the management, which could result into threats to their business concerns. In fact, it could also result in low patronage of their products, which could also affect their image and brand. Many of the institutional shareholders in Nigeria considered monitoring as time and financial wastage, which could hinder the maximization of shareholders' wealth. [26]

A common criticism of institutional investors is that they are preoccupied with current performance of companies and they are not sufficiently patient to wait for higher earnings in the future. The allegation is that they want a quick financial gain and do not look at things over the long term. This allegedly occurs in substantial measure because fund managers are under pressure to achieve quick results. This is because fund managers' performance is evaluated from year to year and sometimes even on a quarterly basis. To the extent that institutions do suffer from short-termism, one would expect that their investment decisions would be based on current results, rather than a potential long-term performance.[27]

So, what they will be looking at is to unload shares in an underperforming company at the first sign of trouble. This in turn places pressure on the executives to maximise profits over the short term rather than the long term. This short-termism will translate into short-sighted decision-making by the executives of the companies in which institutional shareholders have invested.[28]

The case is made that if institutional shareholder could instead of just exiting the firm when there is problem of mismanagement, they should rather see the benefits their engagement could bring to their shareholders' funds and the overall benefit to the other smaller unit's holders and the country at large. This would help in mitigating cost of liquidation, increase return on investment, increase firm value, ensuring fair representation of all stakeholders, which would eventually lead to effective control of resources.

Institutional Shareholders' Role in Corporate Governance

Institutional shareholders are reputed to performing the following roles in corporate governance.

Institutions as Constituents: Institutional Voting

The argument is that the presence of a controlling shareholder does not destroy the incentives of institutional shareholder to monitor. Where the controlling shareholder has *de jure* control it will not be possible for institutional shareholders to prevent the controller from doing anything that may be done by ordinary resolution *(i.e.,* by a simple majority). Since directors are elected by ordinary resolution, this would initially appear to greatly attenuate the

[26] Ojeka S. A. et al note 8

[27] Mongalo T. "The myth of director appointment by shareholders and shareholder activism in listed companies" *2004 J.S. Afr. L. 96 2004 pp. 107-108 available online at www.heinonline.org last visited on 2/2/17*.

[28] ibid. p.108

incentives of institutional shareholders to engage in monitoring. This initial impression is incorrect. Since there is a heightened probability of attempts to redistribute from minority to controller, institutions have an incentive (taking away free rider problems, and other problems discussed anon) to monitor for attempts by the controller to redistribute wealth to itself at the expense of the minority. This incentive is not defeated by the fact that the controller can pass an ordinary resolution unopposed. [29]

Corporate statutes routinely require a *special* resolution (two-thirds of all shares voted) for the adoption of corporate fundamental changes. Thus, at least acting collectively, institutions may possess a power of *negative control;* that is, the power to defeat a special resolution. Since many events of redistribution will take place in connection with fundamental changes such as arrangements, amalgamations, winding up, changes to the articles or by-laws, *etc.*, these voting requirements create the possibility that institutions can defeat a measure that would redistribute wealth to the controller.[30]

Institutions as Diplomats and Critics: Institutional Powers of Persuasion

Institutional Shareholders are more likely than retail shareholders to have the ear of management, and to exercise powers of persuasion over management. This power extends in part from the fact that institutions will frequently be prospective buyers of future primary market offerings made by the corporation. It also extends from the fact that the loss of institutional support can cause the corporation's stock price to slide. This in turn may reduce managerial wealth, by depreciating the value of management's shareholdings. It may also result in a reduction in managerial compensation, to the extent that managers hold stock are otherwise compensated by incentive schemes tied to stock price.[31]

Institutional Investors have ready access to the press. Because of this, institutional complaints about corporate performance tend to find their way onto the business pages and serve to embarrass management. Again, the mere ability to threaten management with a public tongue-lashing gives institutions shareholders an added lever over managerial behaviour.[32] Indeed, public opinion not only exerts pressure directly on corporate management but also indirectly by its effect on stock prices, legislative decisions and government actions.[33]

Institutions as Defenders of the Right: The Incentive to Sue

Because of collective action problems, retail shareholders may fail to sue management and/or controlling shareholders even when there is a good chance that a suit would succeed. Because institutional shareholders may coordinate at lower cost than retail shareholders, have superior

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[29]MacIntosh J.D. "Institutional Shareholder and Corporate Governance in Canada" *26 Can Bus. L. J. 145 1996 available online at www.heinonline.org last visited 2/2/17 p. 28*

[30] ibid p. 29

[31] ibid p.31

[32] ibid

[33] Heftel C. L. "Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations" *5 U. Haw. L. Rev. 135 1983 available online at www.heinonline.org last visited on 2/2/17. P.55*

resources at their command, and better incentives to redress redistributive activities (because of their larger holdings), they are more likely to sue management than retail shareholders (although the high costs of corporate litigation, and collective action problems nonetheless render this a relatively infrequent event).[34]

The presence of a controlling shareholder does not affect an institutional shareholders' ability to seek redress through the courts. In some cases, simply the threat of litigation will cause management to resile from an intended course of action. Institutional shareholders are also more likely than retail shareholders to have the ear of securities regulators, who may use their wide-ranging "public interest" powers to enjoin transactions thought to be abusive of the public interest.[35]

Institutions as Nuisance: Exercise of Dissent Rights

The corporate statutes give all shareholders the right to "dissent" from a variety of corporate transactions and require that the corporation pay them the "fair value" of their shares. If several institutional shareholders exercise their dissent rights, this might cause a serious cash drain on the corporation, and may in turn, cause the directors to abandon the transaction. Moreover, just the threat of exercising dissent rights can be sufficient to alter management's course of conduct.[36]

Institutions as Spur to Legislative Change

Institutional shareholders acting individually or collectively, could play a role in spearheading legislative and policy changes that would serve to augment institutional power.[37]

Sum

Institutional shareholders retain a variety of weapons to influence corporate conduct even where there is a controlling shareholder. These weapons have increasingly been used over the past decade and are likely to be used with even greater frequency in the future. According to Montgomery institutional investors themselves believe not only that institutional activism had increased substantially over the past decade, but that it will continue to increase in the future.[38] Institutional shareholders indicated in Montgomery's survey that they would most likely be active in cases involving "abuse of power by management or majority shareholder". While these survey results do not indicate the relative weights which institutional respondents place on abuse of majority and management power, it thus indicates that institutional shareholders will respond equally to both forms of abuse.[39] In net, institutional shareholders play an active role in corporate governance even where there is a controlling shareholder.

[34] ibid p. 33
[35] ibid p. 34
[36] ibid pp.34-35
[37] E.J. Waitzer, "Are Institutional Investors Really Impacting Corporate Governance?" *(1991), 3Can. Invt. Rev. 9, at p. 11.*
[38] Montgomery, K. E. op cit p.11
[39] MacIntosh J.D. op cit p. 36

Despite the above role played by institutional shareholders in corporate governance the facts remain that the odd against the satisfactory performance of these roles are so huge that one may be tempted to conclude that they possibly cannot be credited with the position as saviours of the shareholders' interest. These odds are next considered.

Factors Militating Against Institutional Shareholders

Institutional Investors are Contaminated by Free Rider Problems

Institutional investors are not exempt from free rider problems. Whether an institution acts alone to attempt to improve the performance of a corporation in which it has invested, or forms a coalition to do so, other institutions (including many who are competitors) free ride on these efforts.[40]

Fund manager compensation depends on assets under administration. This creates a reward for superior performance, since funds, which outperform their institutional rivals, will increase their share of assets under administration.[41] While at first this might appear to create an incentive for funds to monitor the firms in which they invest, there will be little incentive to attempt to increase the performance of a company, which is also held by institutional rivals. These rival institutions will free-ride on this improved performance and the comparative performance of the active fund will not be enhanced.

Thus, in theory, an incentive to engage in active monitoring exists only if the fund is over weighted in the one corporation compared to its rivals; that is, if it holds a larger percentage of the stock than its institutional rivals, and hence stands to gain more byadopting an activist stance.[42]

Free rider problems also inhibit the development of institutional coalitions. The costs of institutional activism can be considerable, and institutions, which refuse to join the coalition, will share in its benefits but not its costs.[43] This creates an incentive to sit on the side-lines and let other shareholders bear the expense.

Institutions as Agents

Institutions are themselves agents of the beneficial owners of the fund. This introduces some slack into the incentives of fund managers to act vigorously on behalf of the fund. Like any agent, the manager of a fund does not capture the full benefit of corporate monitoring activity; the fund beneficiaries capture the lion's share. This diminishes the manager's incentive to engage in monitoring activity.[44]

In addition, the fund managers may not be subject to vigorous oversight by fund beneficiaries.

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[40]ibid p.15

[41] Michael B. and Yehuda K. "Incentives and Efficiency in the Market for Management Services: A Study of Canadian Mutual Funds" *(1993), 26 Can. J. of Econ. 850.*

[42] ibid

[43] ibid

[44] MacIntosh J.D op cit p. 16

Nor in many cases will market checks on manager slack or diversion be as strong as in the case of commercial corporations. This raises the question of Who Will Watch the Watchers?[45]

Institutional Co-option

Institutional investors may be subject to a variety of pressures that may prevent them from acting as effective monitors. Private pension funds, for example, are invested by administrators designated by the corporation, and the administrators may include some or all the directors or officers of the company.

It has been suggested that pension administrators sometimes follow a "golden rule": the administrators of the pension fund of corporation A will not become activists in respect of the fund's holdings of corporation B in the expectation that the administrators of the pension fund of corporation B will show similar restraint in respect of its holdings in corporation A.[46]If all pension fund administrators follow this rule, then pension administrators will engage in little or no effective monitoring.

Insurance companies, which hold insurance policies of a corporation in which they own shares, may be co-opted by managerial threats (almost always implicit, rather than explicit) that insurance business will be withdrawn if the fund managers do not vote with management.

The banks - which all-own investment banking subsidiaries - may fear that activism will result in loss of underwriting or other business for these subsidiaries. Banks may also fear loss of loan business or deposits because of opposing management.

Fiduciary Conflicts of Interest

All corporate directors have a fiduciary responsibility to act in the best interests of the corporation, which they serve. However, a director who is a fiduciary of an institutional investor (such as a senior fund manager), also has a fiduciary duty to act in the best interests of the fund's beneficiaries. A situation may arise in which these fiduciary responsibilities are incompatible. This potential conflict of interest is said to have deterred many institutional investors from placing managers on boards of corporations in which they hold large stakes.[47]Some institutional managers may also feel that holding large stakes in individual corporations is incompatible with their obligation to invest prudently and to diversify the fund’s portfolio.

Political Pressures on Public Pension Funds

Public pension funds stand in a somewhat unique position amongst institutional investors. They are particularly immune from the corrupting influence of management pressure. Since

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[45] ibid

[46]R. Romano, "Public Pension Fund Activism in Corporate Governance Reconsidered" *(1993) 93 Colum. L. Rev. 795 available online at www.heinonline.org last visited on 2/2/17.*

[47]K.E. Montgomery and D.S.R. Leighton, "The unseen revolution is here" *(1993), 58:1 U.W.O. Bus. Quar. p. 38. Cited in MacIntosh J.D op cit p. 18.*

they do not stand to lose business from the firm in which they have invested, they may stand relatively aloof from (and uncorrupted by) management. However, as Romano has demonstrated of U.S. public pension funds, they are also peculiarly susceptible to political influence which can result in politically motivated, wealth-reducing investing.[48]

Limited Monitoring Capabilities of Institutional Investors

Institutional investors typically purchase diversified portfolios of scores or even hundreds of companies. Even the largest institutions, however, have small research budgets and staff. Thus, no fund can engage in active monitoring of more than a very small fraction of its portfolio.[49]This is particularly true when the fund is partly or fully indexed. Many institutional managers will also lack the expertise to engage in active hands-on management of investee corporations, whether by virtue of a seat on the board of directors or otherwise.

This is reflected in Montgomery's survey of institutional investors. Institutional respondents identified "too time consuming" and "too expensive" as the two most important factors tending to deter shareholder activism.[50]The third most important factor was "insufficient knowledge of company and industry".[51] Indeed, many fund managers believe that their mandate does not include shareholder activism; the fifth most important factor tending to deter activism in Montgomery's survey was " perceived or explicit mandate as passive owner".

Legal Restraints on Institutional Activism

There are a great many legal requirements that restrict the ability of institutions to become actively involved in matters of corporate governance. An example is insider-trading rules, which limit the extent to which institutional investors can gain access to privileged information without compromising the liquidity of their portfolios.[52]

The Culture of Passivity

To the extent that legal restraints do play a role in restricting the corporate governance activities of institutions, such rules may have created or enhanced a "culture of passivity".[53]That is, institutions that have long played a passive role may have become used to this role and will switch only reluctantly to a more active role even if legal restraints are removed. Black suggests that the academic training of money managers, which tends to focus on passive investment strategies, tends to reinforce this bias.[54] The culture of passivity may be a product not merely of legal limits on institutional activities. As noted earlier, the aggregate holdings of institutional investors have grown dramatically in the past few decades. The

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48 Romano R. op cit. p. 20

49 R.S. Gilson & R. Kraakman, "Reinventing the Outside Director: An Agenda for Institutional Investors" *(1991), 43 Stan. L. Rev. 863 at pp. 876-79.*

50 Montgomery, K. E. "Survey of Institutional Shareholders" *(1992), 4:4 Corp. Gov. Rev. 5 at p. 10.*

51 ibid

52 MacIntosh J.D. op cit p. 24

53 B.S. Black "Shareholder Passivity Re-examined" *(1990), 89 Mich. L. Rev. 520. P.563*

54 ibid

culture of passivity has undoubtedly been partly a product of the fact that institutions once lacked the market power which, by the large holdings they now possess.

Money managers are unaccustomed to exercising these powers, and some feel uncomfortable doing so. Indeed, some still feel that institutions should play no role at all in matters of corporate governance.

In net, the culture of passivity serves as an inertial dampening force; it causes change to happen only with a lag. Thus, even if all legal restraints on institutional activism were to be repealed tomorrow, it is likely that institutions would respond to these legal changes slowly.[55]

In Nigeria, institutional shareholders consider engagement and monitoring as time absorbing. In fact, monitoring is viewed by institutional shareholders in Nigeria as an act of uncontrolled and disobedient behaviour.[56] Therefore, an in-depth study into connecting governance to performance is needed, as this will encourage institutional shareholders to rise up in their involvement in corporate governance.[57]

Fear of Political Backlash: Bay Street versus Main Street

Those who have advanced a political explanation for the passage of laws which have the effect of limiting institutional involvement in corporate governance have also suggested that fund managers moderate their governance activities for fear of provoking the same sort of populist political reaction which initially spawned these laws.[58]As noted by MacIntosh, public pension funds may be publicity-shy for fear of drawing attention to their governance activities, hence the tendency of both public and private money managers to limit their governance activities for fear of attracting political reaction.[59]

Difficulties in Identifying Other Shareholders

An institution anxious to communicate with other shareholders is entitled to inspect or receive a copy from the corporation of a list of shareholders. However, because many shares are held in by brokers or clearing houses, "street form" it will often be difficult to use such a list to identify other shareholders.[60]

Short Term Horizons

Many have argued that, because the performance of institutional money managers is reviewed quarterly, institutions have short-term horizons. This in turn is said to focus money managers' attention on short term trading profits rather than forming relationships with management and

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55 MacIntosh J.D. op cit p. 26

56 Uche C, Adegbite E (2011) Towards Corporate accountability: Impediments to Institutional Shareholder Activism in Nigeria cited in Ojeka S. A. etal as in note 27 above.

57 Ojeka S. A. etal "Institutional Shareholder Engagement, Corporate Governance and Firms Financial Performance in Nigeria: Does Any Relationship Exist?" *Journal of Internet Banking and Commerce (http://www.icommercecentral.com/open -access last visited on 16-08-2016.*

58 Black B.S. op cit p.564

59 MacIntosh J.D. op cit p. 26

60 ibid p.27

attempting to improve the performance of individual firms. This short termism is communicated to corporate managers, who then eschew profitable long- term strategies in favour of less profitable short-term strategies.[61]

Conclusion

There is no doubt that institutional shareholder activism can bring about positive changes in the way and manner the affairs of a company is run. This they can do by putting the management of the company on their toes who will in turn perform in order to continue to enjoy the patronage of the various institutional shareholders who are sometimes major shareholders of the company. This may not happen if the institutional shareholders are bedevilled with such plague as passivity and the free rider syndrome amongst others that would make them indecisive in making a strong case on behalf of other shareholders of the company. Since the odd against institutional shareholders surmounting these barriers are huge it would be misnomer in crediting them to be the saviours of the shareholders as they are driven by selfish motives rather than altruistic consideration.

[61] M.E. Porter, "Capital Choices: Changing the Way America Invests in Industry" *(1992) 5:2 J. Applied Corp. Fin. P.4.*