THE BASES OF SECURITIES INFORMATION DISCLOSURE

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1. INTRODUCTION

The study of the protection of investors through information disclosure regulation is not new.[1] In fact, it is almost as old as many major securities market and indeed older than many emerging markets, including Nigeria. However, over the years, scholars have not only disagreed on the importance of information disclosure to investor protection, there also has been an ongoing debate on whether the disclosure should be voluntary or mandatory. The voluntary disclosure school argues that the securities market and securities issuers, reputation consciousness provide adequate incentives for issuers to voluntarily provide socially efficient level of information.[2] Conversely, the mandatory disclosure school is generally of the opinion that without direct and explicit governmental regulation requiring disclosure, securities issuers would be selective and evasive in disclosure. Thus, disclosure would equalise access to information, "thereby starting everyone at the same place in the competition to find the best investment. Disclosure would, at the same time, hinder fraud and improve the morals of the market place."[3]

2. THE PURPOSES OF SECURITIES MARKETS

Existing works have established that securities markets serve certain important purposes. The market is an instrument of economic growth that performs the functions of capital formation, provision of liquidity and risk management. In the process of capital formation, the market brings together "capital laden investors and capital needy businesses" for equity (common stock and preferred stock) or debt securities (debentures, notes, bonds, commercial paper) transactions.[4] The capital raiser issues the securities that the investors subscribe for with their money. The market provides liquidity, that is, ready marketability of investment instruments, by bringing in contact those who wish to sell and those who wish to buy those instruments. It also offers investors the means to minimize their investment risk through diversification and hedging.[5] The Nigerian securities market performs all of these important functions.

II.1 The Purposes of the Nigerian securities market

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1. *See, as examples,* Harold Marsh, "New Approaches to Disclosure in Registered Securities Offerings" 28 *Bus. Law* 505 (1973); Frank, Easterbrook and Daniel Fischel, "Mandatory Disclosure and the Protection of Investors" 70 *Va. L. Rev.* 669 (1984); Gellis, Ann "Mandatory Disclosure for Municipal Securities: A Revaluation" 36 *Buff. L. Rev* 21 (1987); James Cox, "Insider Trading Regulation and the Production of information: Theory and Evidence" 64 *Wash U. L.Q.* 474; Dennis S. Karjala "Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law" 80 *Nw. L. Rev.* 1508 (1986);
2. *See* Joseph A. Franco, "Why Antifraud Prohibitions are not Enough: The Significance of Opportunism, Candor and Signalling in the Case for Mandatory Securities Disclosure" (2002) *Colum. Bus. L. Rev.* 223, 230.
3. Advisory Committee to the Securities and Exchange Commission (United States), 95 *Cong.*, 1ST SESS, *Report on Corporate Disclosure*, 308 (Comm. Print 1977)
4. A.R. Palmiter, *Securities Regulation Examples and Explanations* 3 (New York, 1998). See also A.T. Popoola, *The Structure and Context of the Valuation of New Ordinary Shares in the Nigerian Primary Stock Market*", 38-43, unpublished Ph.D thesis Obafemi Awolowo University, Ile-Ife, 1991; O.O Oladele, "The Nigerian Capital Market Regulations", 15(1) *Lesotho Law Journal*, 141, at 142-144 (2005)
5. O.O Oladele, "The Nigerian Capital Market Regulations", 141, at 142-144 Hedging is a means of offsetting investment risk. The manager of a large pool of funds such as a pension fund may hedge his or her exposure to interest rate or currency risk by buying or selling derivatives (futures or options contracts).

The reasons for the establishment of the Nigerian securities market are largely similar to those for establishing such markets elsewhere in the world; the only addition being the taking into account of our peculiar domestic needs at the time the market was established. In its memorandum to The Panel on the Review of the Nigerian Capital Market[6] the SEC, the apex regulatory agency for the Nigerian securities market stated the objectives *inter alia* as to

- mobilise savings from the surplus economic units for on-lending to deficit units to ensure efficient and effective allocation of scarce financial resources;
- create an avenue for the populace to participate in the economy;
- reduce over-reliance on the money market for industrial financing;
- provide seed money for venture capital development;
- promote solvency, efficiency and a competitive financial sector;
- encourage corporate financial discipline and accountability;
- provide long-term financial sector requirements without increasing the tax burden on the citizens (of Nigeria); and
- promote stock market culture.

Added to the above was the need to provide government an avenue to raise long-term capital.[7]

In 1961, at the inception of the Lagos Stock Exchange (now Nigerian Stock Exchange), a foundation member of its Council and the managing director of the Nigeria Industrial Development Bank Limited (NIDB), one of the promoters of the Exchange, stated the objectives of the Nigerian capital market as follows:

(a) the mobilization of savings for economic growth;
(b) diversion of capital from less productive sectors such as real estate to more productive sectors such as industries;
(c) augmentation of the banking system and reduction of dependence of government on taxation for economic development;
(d) decentralisation of the ownership of assets and creation of a healthy private sector;
(e) avoidance of excessive concentration of economic power in the hands of government;
(f) avoidance of excessive concentration of economic power in the hands of a small private group;
(g) encouragement of more even distribution of wealth; and
(h) facilitation of co-operation between indigenes and aliens in fostering economic development.[8]

The Panel on the Review of the Nigerian Capital Market affirmed the validity of these objectives, and reported that most of the problems the market set out to solve still remain unsolved. Financial resources are still not fully mobilised

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6 Odife Panel, 1996

7 The first Federal Government of Nigeria Loan Stock was floated in London long before the Lagos Stock Exchange was established.

8 *See* D. Odife, "Stockbroking in Nigeria: Problems and Prospects" 1 *Securities Market Journal (Nigeria)* 24 (1983).

for industrialisation; economic power is yet largely in the hands of Government; the economy still over-depend on the banking sector; the private sector is yet unhealthy; there are still not enough foreign investors and the problems of distribution and concentration of wealth persist.[9]

When the Lagos Stock Exchange was incorporated, its memorandum of association stated the objectives of the securities market as to *inter alia*:

(a) provide facilities to the public, in Nigeria for the purchase and sale of funds, stocks and shares of any kind and for the investment of money;

(e) correlate the stock-broking activities of its members and facilitate the exchange of information for their mutual advantage and for the benefit of their clients and to offer facilities whereby the public can be informed of securities dealt in by member;

(f) co-operate with the association of stockbrokers and Stock Exchanges in other countries and to obtain and make available to members information and facilities likely to be of advantage to them or their clients....

The securities market could achieve its stated purposes if it has in place at all times the mechanisms for protecting those who approach it for investment. These mechanisms are what securities regulation seeks to ensure.

III. THE OBJECTIVES OF SECURITIES REGULATION

Investment and trade in securities are regulated by statutes, regulations, government and self-regulatory institutions on which much work has been done globally.[10] However, not much has been done in Nigeria, and most of the little that has been done concentrate on securities market institutions. Scholars have diverse but complementary opinions on the purpose of securities regulation. Olawoyin's *The Nigerian Capital Market*[11] is a general appraisal of the structure and operations of the Nigerian capital market against the legal and regulatory tools employed to monitor the market from 1961 till the early 1980s. While acknowledging the importance of the market to national economic development, he observed importantly that –

> The economist or financial analyst is primarily concerned with the analysis of securities and general price trends in a capital market, but the focal point for consideration by a lawyer relates to the controls introduced either by statute or by self-regulatory bodies with a view to ensuring an orderly development of the market.[12]

He identified the objectives of securities regulation as including:

(a) the creation and maintenance of an orderly market in which securities can be issued and traded;

(b) the full, prompt and honest disclosure to shareholders and creditors of all relevant matters and in particular of information necessary to a decision to buy, hold or sell securities or to the establishment of a fair price;

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9 See the *Report of the Panel on the Review of the Nigerian Capital Market* (1996).

10 The literature on securities regulation in general is too vast to be captured in a footnote, but see as examples F. Easterbrook, and D. Fischel, "Mandatory Disclosure and the Protection of Investors" 70 *Virginia Law Review*, 669 (1984); L. Loss, *Fundamentals of Securities Regulation* 280-281 2nd ed., (New York: Little, Brown and Company, 1998); J.D. Cox, *et al*, *Securities Regulation*, 5th ed., (New York, Aspen Publishers, 2006); H.S. Scott and P.A. Wellons, *International Securities Regulation*, (New York: Foundation Press, 2002);

10 For a study with a global focus, *see* U. Geiger "The Case for the Harmonization of Securities Disclosure Rules in the Global Market" (1997) *Columbia Law Review* 241.

11 G.A. Olawoyin *The Nigerian Capital Market*, University of Ife Nigeria Inaugural Lecture Series 46, (Ile-Ife: University of Ife Press, 1982).

12 *Id.* at 5

(c) the protection of investors from misleading information and from abuse of privileged information.[13]

Olawoyin acknowledged that the law requires every public company offering its securities to the public to publish a prospectus. He added that the prospectus must contain sufficient information to enable investors to make informed investment decisions. The work is a succinct brilliant appraisal of the framework and functions of the Nigerian securities market. It however did not focus the content and impact of securities information disclosure. More importantly, the law on securities has changed remarkably since Olawoyin wrote his lecture. This work has updated knowledge of securities regulation in Nigeria by filling the gap created by new developments and legislation.

As far back as 1967, Morton and Booker[14] posited that the purpose of securities regulation is to facilitate the working of securities markets in financing businesses. However, Professor Anderson[15] submitted that securities regulation has two purposes, namely the protection of investors against the fraud and other abuses in the securities markets as well as that of providing useful information to assist investors in making buy, sell, and hold decisions in securities. Concerning these purposes, the belief is that "... a disclosure law would provide the best protection for investors. In other words, if the investor had available to him all the material facts concerning a security, he would then be able to make an informed judgment whether or not to buy."[16] With due respect, Anderson's work assumed that disclosure automatically leads to informed investment decision. To that extent, it left out the important issue of the target of the disclosure and their ability to make sense out of the disclosed information.

Louis Loss,[17] who introduced the term "securities regulation" when he adopted it as the title of the first edition of his treatise on the subject,[18] considered the protection of investors as an important objective of securities regulation. This is because a system of "private capital" is unimaginable without the instrumentality of securities whose "very nature makes them a ready device for preying on the unsophisticated and the gullible. This creates the general problems of fraud, share-pushing (to use a British term), and market manipulation."[19] From these, there arise the problems of keeping numerous shareholders informed, giving them a "corporate franchise that is as effective as their political franchise" and protecting them "...against the selfish use of inside information by their corporate representatives or by persons in control of their companies."[20]

Securities statutes seek to achieve its objective of investor protection through the philosophies of regulation and disclosure.[21] The philosophy of regulation is a

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13 *Ibid.*, quoting with approval the United Kingdom Stock Exchange, *The Role and Functioning of the Stock Exchange*, 1 (London: Her Majesty Stationery office, 1978).

14 Morton and Booker, "The Paradoxical Nature of Federal Securities Regulations" 44 *Den. L.J.* 479 (1967)

15 A.J. Anderson, "The Disclosure Process in Federal Securities Regulation: A Brief Review" 25 *Hastings L.J.* 311 (1973).

16 SEC Securities Act Release No. 5,223 (Jan. 11, 1972). *Notice of Adoption of Rule 144, reprinted in* [1971-1972] Fed. Sec. L. Rep. (CCH) 78,487.

17 L. Loss *Trends in Corporate Governance and Investor Protection*, The J.I.C Taylor Memorial Lectures for 1980, 33 (Lagos: Faculty of Law, University of Lagos, 1981).

18 L. Loss *Securities Regulation*, 1st ed., (New York Boston, Little, Brown and Co., 1951).

19 *Op. cit. supra* f.n. 17.

20 *Id.* at 34

21 *Id.* at 36

"statutory formulation of substantive standards that must be satisfied before securities may be offered for sale." These standards, among other things, not only seek to prevent illegality and fraud, but they also seek to ensure that the privilege of offering securities to the public is based upon the regulator's finding that the proposed business plan is 'fair, just and equitable'."[22] The philosophy of disclosure had its origin in the prospectus provisions of the English Companies Act of 1844.

True to federalism, the United States has a dual system of federal and state securities regulation. The federal government chose the disclosure philosophy when it enacted Securities Act of 1933, while it preserved the states' statutes with their 'regulatory or merit' philosophy. Loss has been of the opinion that "Congress...did not take away from the citizen 'his inalienable right to make a fool of himself.' It simply attempted to prevent others from making a fool of him."[23] Curiously, the Securities Act of 1933 borrowed the anti-fraud provisions of the blue sky law of New York and combined them with the prospectus provisions of the United Kingdom's Companies Act of 1929.[24] Loss' work offers an excellent tool for the understanding of the investor protection philosophies of the Investments and Securities Act (ISA) of Nigeria.

Gower, a renowned professor of company law, who spearheaded the review of investor protection in England, agreed with loss. He submitted that financial services include securities transactions through means of instruments that many do not adequately understand. Therefore, it is important to protect investors form those who could take advantage of their ignorance. The need therefore arises for adequate investor protection "to prevent people being made full of."[25]

Odife, the chairman of the defunct Presidential Panel on the Review of the Nigerian Capital Market, 1996 whose report resulted in the enactment of the Investments and Securities Act[26] shed some light on the philosophy of the emerging Nigerian capital market. According to him, it is to facilitate "broad-based economic development" for the sustenance of democracy through the adoption of "transparent procedures."[27] Commenting on the role of the financial system and the purpose of capital market regulation, he submitted:

> It is essential to the above stated philosophy that the markets contribute in the most effective way to the functioning and the growth of the economy and to the creation of wealth. The emerging capital market recognises the need for all the various components of the financial system, the money and the capital markets inclusive, to work in tandem rather than at cross purposes to deliver superior economic performance. The philosophy of capital market regulation thus recommended is to maintain an appropriate level of regulation sufficient to sustain the highest standards of market integrity and investor

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22 *Ibid.* This is what Loss describes as "the home-grown regulatory or *merit* philosophy of most of the blue sky laws of the fifty states in the United States as well as the District of Columbia and Puerto Rico. The blue sky laws are directed at promoters who "would sell building lots in the blue sky in fee simple" – Mulvey, "Blue Sky Law" 36 *Can. L.T.* 37 (1916). These laws have anti-fraud provisions and, among other things, condition offering of securities on a finding by the bureaucracy that the issuer's proposed business plan is "fair, just and equitable.

23 *Ibid.*

24 *Id at* 37.

25 L.C.B. Gower, *Review of Investor Protection Report: Part 1*, 6 (London: Her Majesty's Stationery office, 1985).

26 No. 45 of 1999, now re-enacted as Cap. 124, Laws of the Federation of Nigeria 2004

27 D.O. Odife, "Philosophy and thrust of Nigeria's emerging capital market", 4 a paper presented at the 1999 SEC Seminar on Democracy and Nigeria's Emerging Capital Market held at Sheraton Hotel from November 23-25, 1999.

protection, without hindering the freedom and flexibility of the market to grow and to introduce innovations.

The...capital market also imbues the lead regulator with rule-making power. The idea is that the scope of the law can be expanded to keep pace with the demands of economic development...[28]

In addition to the above, the lead regulator, the SEC, has a duty to licence capital market trade associations as self-regulatory organisations (SROs) so that they could assist in democratically monitoring the capital market according to approved rules of association and conduct.[29]

This study has evaluated the capacity and effectiveness of the existing regulatory system to sustain market integrity and investor protection in Nigeria through information disclosure and compliance enforcement.

IV. SECURITIES INFORMATION DISCLOSURE AND INVESTOR PROTECTION

Investors in the securities industry need to be protected because of a number of important reasons. Companies with public market for their shares are organisations in which ownership is diversified and divorced from control.[30] In these companies, shareholders and investors occupy an important position because of their role in wealth generation, employment provision and economic development. This fact gives importance to investor protection. In accomplishing this task, our company law grapples with interrelated matters which company law scholars, including Kiser Barnes, identify as including the relationship between the shareholders and the company, the protection of the minority shareholders from unfairly prejudicial conduct;[31] the protection of the company and majority shareholders from frivolous, oppressive and time-wasting suits of the minority shareholders;[32] the right of the minority shareholder to institute a corporate derivative action;[33]; the establishment of equality of voting power of shares and the abolition of weighted shares;[34] the rules on maintenance of capital and payment of dividends;[35] the *ultra vires* rule and abolition of the constructive notice of registered documents rule[36] and, most importantly, the statutory rules on dealing in company securities and the protection of investors, including the prohibition of insider dealings.[37]

Importantly, unlike tangible assets like automobile, buildings and the like, securities are not inherently valuable. The value that the holders obtain from them is in their entitlement to claim from the assets and earnings of the issuer and the voting power that could attend such claims. Thus the nature of securities and the intricacies of trading in them justify the protection of the investors who are prone to the manipulative devices of the unscrupulous securities issuers and professionals.

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28 *Id.* at 8-9.
29 *Ibid.*
30 L. Loss *op. cit. supra* f.n. 19 at .34.
31 Companies and Allied Matters Act, 2004, sec. 310-313.
32 Companies and Allied Matters Act, 2004 and under the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461.
33 Companies and Allied Matters Act, 2004 sec. 303
34 Companies and Allied Matters Act, 2004 sec. 116.
35 *Trevor* v. *Whitworth* (1887) 12 A.C. 409 as well as Companies and Allied Matters Act, 2004 sec. 386.
36 Companies and Allied Matters Act, 2004 secs., 38-40 and 68.
37 *See* K.D. Barnes, "*Nigerian Corporation Law and Shareholder and Investor Protection*" (unpublished paper).

Bernard Black[38] is of the opinion that the law must protect investors because they pay much money to strangers for intangible rights. He adds that the issuers of securities have an incentive to puff or lie about the quality of their securities, and this problem is compounded by the fact that the investor is unable to directly verify the accuracy of the information that the issuers provide. This problem acquires more prominence with small issuers. "The smaller the issuer, the less the investor can rely on the issuer's prior reputation as a signal of the quality of the information that it provides."[39]

Black adds that the activities of small securities issuers could create for the investors the problem of 'adverse selection' of securities. This adverse selection combines with information asymmetry to drive issuers of high quality securities out of the market. It also drives securities prices down because the investors will discount the prices they are willing to offer for securities.[40] Black summed up the impact on the market in the following words:

> In modern lingo, securities markets are a particular vivid example of a market for lemons. Investors don't know which issuers are truthful and which aren't, so they discount the price they will offer for all securities. That makes honest issuers less interested in offering securities, but doesn't discourage the dishonest ones. Securities that aren't worth the paper they're printed on are, after all, quite easy to produce. Paper, like talk is cheap.[41]

Paddy is of the opinion that capital market regulation must have four basis elements. The first is certainty of contract and property right, the second is disclosure by publicly quoted companies of material information that affects the value of their securities. The third is the protection of investors from unfair practice by corporate insiders and securities market professionals. The fourth is systemic protection against financial failure of market professionals and institutions.[42]

In another scholarly contribution, Bernard Black submitted that the value of the securities that investors hold is predicated on the quality of the information that they receive on the issuer's candor.[43] One important means that legal systems adopt in protecting investors is mandatory disclosure of information by securities issuers. The United Kingdom's Companies Consolidation Act of 1845 was the first to establish the system of mandatory disclosure of information which the United States adopted when it enacted its Securities Act of 1933. The former Act had two principal objectives namely, "(1) to obviate the evils of fraudulent and fictitious companies and (2) to protect the public from companies which...were faulty in their nature because unsound calculations and inadequate management."[44]

The United States Congress adopted mandatory disclosure of securities information when it enacted the Securities Act of 1933 in response to its securities market crash of 1929. Senate hearings on the crash showed remarkable evidence of unethical and fraudulent conduct by investment bankers and corporate promoters

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38 B. S. Black, "Information Asymmetry, the Internet and Securities Offering" 2 *Journal of Emerging and Small Business Law* 93-94 (Summer, 1998).

39 *Id* at 92.

40 *Ibid.*

41 *Ibid.*

42 Paddy Roberts "Institutional Reforms in Emerging Securities Markets", a World Bank Policy Research Working Paper, May 1992, at p.4.

43 Bernard Black, "The Legal and Institutional Preconditions for Strong Securities Markets" (2001) 48 *UCLA Law Review* 781 at 782.

44 See R.L. Knauess, "A Re-appraisal of the Role of Disclosure", 62 *Michigan Law Review*, 607, 611 (1964).

that comprised conflicts of interest, manipulation of stock prices through devices like market rigging and corporate insider dealings. In the period that preceded the crash, improved standard of living caused corresponding increase in demand for securities. Confronted by this phenomenon, investment bankers who were underwriters abandoned ethical standard of banking and encouraged corporations to offer highly spurious, speculative and fraudulent securities to uninformed investors.[45]

The need for a federal regulation that would rid the securities market of the abuses that precipitated the crash of 1929, restore investors' confidence in the market and protect the investors became central to the American presidential election campaign of 1932. Once President Franklin D. Roosevelt emerged the winner of the election and was sworn in, he made a speech to Congress on March 29, 1933 which summarised the philosophical basis of the United States securities regulation as follows:

> There is an...obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed form the buying public.[46]

The philosophical thrust of the mandatory disclosure initiative could be appreciated in the light of the opinion of scholars such as Adolf A. Berle and Gardner C. Means.[47] Scholars of this persuasion argued persuasively that neither the members of the financial sector nor the directors of public companies were subject to liability, concerning the investing public, for breach of their fiduciary duties. This was significant because at the time the United States Congress passed the 1933 Act, American securities markets were self-regulatory, and under that system, the investing public had no legal remedy against corporate managers for breach of their fiduciary duties.

Nigeria has not experienced a market crash with such a damaging impact on investors as occurred in the United States. The Federal Government of Nigeria, as a matter of deliberate policy choice, decided to have an officially regulated securities market. Just as the United States, it responds to the need for investor protection through policies and regulations. It has statutes and regulations as well as an intricate set of public and private institutions, discussed above, meant to reasonably assure investors that the issued securities are authentic and worth investing in. Our securities statute and the regulations made pursuant thereto require extensive disclosure with severe sanctions for misleading and false information. They are enforced through securities regulators with professionally competent staff, and adequate budget to fight securities fraud. This effort is supplemented by accounting rules that seeks to reduce the propensity of securities issuers to fudge their financial reports. It also is complemented by the input of 'reputational intermediaries' such as investment bankers and securities lawyers. The investment bankers investigate the issuers of the securities that they underwrite. This is because their reputation

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45 See J.M. Landis, "The Legislative History of the Securities Act of 1933", 28 *George Washington Law Review* 29 (1959); and A.G. Anderson, "Disclosure Process in Federal Securities Regulation: A Brief Review", 25 *Hastings L.J.* 311, 316 (1973).

46 H.R. Rep. No. 73-85, at 1-2 (1933). See also J.M. Landis, *ibid.*

47 A.A. Berle, and G.C. Means, *The Modern Corporation and Private Property*, Harcourt, Brace & World rev. ed. (Newyork, Harcout, Brace and World, 1968). *See also* L.D. Brandeis, *Other People's Money and how Bankers Use it*, (1914).

depends on not selling fraudulent or overpriced securities to investors. Solicitors to securities issues have the duty to ensure that the issuers' offering documents comply with the statutory disclosure requirements and to counsel their clients against making overly optimistic statements that could be false and misleading. The purpose is to maintain the integrity and transparency of the securities market and reduce the problem of adverse selection of securities by attracting honest issuers and driving out, or at least reducing the dishonest ones.[48]

The most recent and comprehensive treatise and on securities regulation in Nigeria is Abugu's *Company Securities: Law and Practice.*[49] The work dealt with the legal and institutional framework for the regulation of securities transactions in Nigeria, issue, sale and transfer of shares including private placement and public offer of securities. It also discussed some of the arguments for and against the Efficient Capital Market Theory (ECMT). It argued for disclosure as a means of protecting investors, but because it traversed general, transactional and regulatory issues pertaining to the Nigerian securities market, it did not plum the depth of securities information disclosure as the present has. In its commendable attempt to present an overview of the Nigerian securities regulation, it has neither provided an in-depth theoretical framework for securities information disclosure nor a contextual evaluation of the Nigerian system.

Speaking to the theme of this work, Abugu submitted that the existence of a vibrant securities market depends on regulation. "This provides an incentive for countries to gravitate towards securities laws that appear most inclined to attract investment...In this context, the capital and financial markets stand on a tripod of regulations. The first is the corporate legal framework where the law focuses on companies and their securities..."[50] He added that securities markets invariably follow similar pattern which result in similar regulatory systems. The regulatory systems "typically have mandatory disclosure requirements on the distribution of securities to the public. They typically have ongoing mandatory disclosure requirements to provide information in support of the post-issue trading of securities. Insider trading and market manipulation techniques are usually prohibited in some manner."[51] They also cover the market and duties for corporate control, record keeping by market professionals and their standard of competence, duties to clients and minimum capital for operational purposes.[52]

While Abugu's work has highlighted the legal and institutional frameworks for information disclosure in securities transactions in Nigeria, it has left their appraisal, in the light of the known theoretical underpinnings, for further scholarly inquiry. It is that inquiry that this study has undertaken so as to enhance the understanding of this area of the law.

V. MANDATORY DISCLOSURE THROUGH REGISTRATION AND AUTHORISATION PROCEDURES

The ISA and the *SEC Rules and Regulations* have extensive provisions on registration with and authorization by the SEC as means of regulating securities market institutions, market operators and the issue of securities. These form the

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48 *Id.* at 93.
49 E.O. Joseph Abugu, *Company Securities: Law and Practice*,(Lagos: University of Lagos Press, 2005).
50 *Id.* at 55-56.
51 *Id.* at 62.
52 *Id.*

basis of subjecting securities issuers and intermediaries acting for them on the market to disclosure and reporting obligations for the protection of investors. To the extent that would guide this scholarly inquiry, some attention has been paid to the to SEC registration of the market institutions including the Securities and Commodities Exchanges, the Central Securities Clearing System and the National Association of Securities Dealers. Attention is, at this juncture, turned to the registration and authorization of the market operators and securities.

V.1. Registration and disclosure obligations of securities market operators

Registration is the means that the SEC adopts to authorize the securities market operators to participate in the market. Through this process, the SEC is able to regulate the securities market for the protection of investors from fraudulent dealings and ensure fair, transparent and equitable market in securities. At the point of registration, the SEC has the power to limit operations on the market to credible operators and sponsored persons. All sponsored individuals are required to undergo police clearance in a manner specified by the SEC. They shall also appear before the SEC committee on registration of capital market operators and institutions for interview[53] These requirements are not static, but they may be reviewed by the SEC from time to time.

Corporate operators must, among other things, attach their latest audited accounts or statements of the affairs of the company (if it has been in operation for less than one year) to their registration applications. In addition, they must post and maintain fidelity bonds representing 20 per cent of their paid up capital against possible fraud by their staff members. They must also undertake by oath to keep proper books and accounts. Their records must contain all their affairs and the transactions they have done.[54] The SEC prescribes and reviews the nature, form and contents of the records that they must keep. In addition, the market operators must file quarterly returns with the SEC.[55] To ensure objectivity in their record keeping and reporting, the SEC has designed various forms that require statement and disclosure of diverse line items. These forms are in Schedule III of the *SEC Rules and Regulations.*

V.2 Registration and disclosure obligations in securities issuance

The Investments and Securities Act (ISA) of Nigeria obtains mandatory disclosure from securities issuers by the same method that the Securities Act, 1933 of the United States adopts. They both require an issuer to file with the SEC a registration statement that consists of two parts. Registration of offers and sales of securities is a primary means of achieving two important objectives of securities regulation. The first is that of providing investors and the public with material information concerning publicly offered securities. This is to enable investors to appraise the soundness of the securities, and exercise an informed investment decision. The second is to prevent fraudulent practices such as misrepresentation and deceit in sale of securities.[56]

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53 *SEC Rules and Regulations, rule 15(3) and (4).*

54 SEC Rules and Regulation, *rule 168 ibid.* This Rule prescribes a fine of N1000 for every day during which market operator has contravened the Rule.

55 *See generally SEC Rules and Regulations Rules 31-38 ibid.*

56 Securities and Exchange Commission, *The work of the SEC* 7-10 (1997).

The registration statement, which is in two parts, is filed with the SEC for scrutiny and record purposes. The first part is a prospectus which ultimately is sent in an abridged form to prospective investors. The second part consists of detailed information about the securities being offered for subscription and exhibits which are not sent to the investors but are available in the SEC files for inspection by the public.

Although the registration process requires that the facts presented in the prospectus and registration documents be accurate, it does not guarantee such accuracy. However, the ISA and other securities statutes prohibit the making of false and misleading statements in securities disclosures under the pain of imprisonment, fine or both. Investors who are able to prove that they have been induced to buy or sell securities inchoate or inaccurate disclosure of material statements in the registration statement or prospectus have remedies under the law.

Important as the registration requirement is, it also does not vouch that the issuer is profitable, well managed and not risky. The issuer may not represent that the SEC has approved the issue on its merit. Summing up the import of securities registration some learned scholars in corporation law and securities regulation submitted:

> The only standard which must be met when registering securities is adequate and accurate disclosure of required material facts concerning the company and the securities it proposes to sell. The fairness of the terms, the issuing company's prospects for successful operation, and other factors affecting the merits of investing in the securities (whether price, promoters' or underwriters' profits, or otherwise) have no bearing on the question of whether or not securities may be registered.[57]

VI. THEORIES ON THE PURPOSE, TARGET AND EFFECT OF SECURITIES INFORMATION DISCLOSURE

Scholars have expressed some theories on the purpose, target and effect of information disclosure as a means of protecting investors. Barnes[58] is of the opinion that disclosure is a price that companies must pay for the privilege of incorporation. In his well considered opinion,

> The obligation on a company to disclose material information that will protect shareholders/investors and others dealing with the corporation is seen as a justifiable consideration for the privilege of incorporation. Disclosure requirements not only highlight the role of government in the administration of company law in a manner that protects the investing public, it also illustrates that the system of filing and searching has become fundamental to the practical operation of company law and to the theory on which it is based. For the disclosure rules are intended to protect all investors, notwithstanding their economic strength or whether they are majority or minority shareholders.[59]

While Barnes instructively gave a theoretical pedestal for information disclosure in securities offering, he did not appraise the statutory provisions and subsidiary legislation thereon. More importantly, the law on the subject has changed substantially after he wrote his essay.

VI.1 Forms, purpose and effect of disclosure

Proponents of disclosure are of two schools namely, the mandatory disclosure and voluntary disclosure groups. Mandatory disclosure rules compel securities

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57 L.D. Solomon, J.D. Bauman, *et al.*, *Corporations Law and Policy Materials and Problems*, 4th ed., 21 (St Paul, MINN, 1998).

58 *Op. cit. supra* f.n. 37

59 *Ibid.*

issuers to continually disclose specific information for a meaningful evaluation of their securities before they are issued and when they are traded in the market. The justification offered for this mode is that without compulsion, some securities issuers would misrepresent information or refuse to make disclosure. The major proponents of mandatory disclosure include Louis Loss and Joel Seligman,[60] Franco,[61] as well as Abugu[62]

Franco submits that theoretically, disclosure regulation aims at ensuring that securities issuers disclose "socially efficient ... levels of firm-specific information." That important purpose arises from the problem of informational asymmetry that he describes as follows:

> Absence regulation, issuers control not only access to, but the accuracy of information and timing of, firm-specific disclosure. Investors seldom will be able to ascertain contemporaneously whether issuer-disseminated information is accurate, complete, or current. Even if investors could independently verify information in some cases, they would have no guarantee of continuing access to firm-specific information or continuing capability to verify it, and such a process might be costly. This, in a nutshell, is the problem of informational asymmetry.[63]

He classifies such disclosures into two. The first category consists of 'antifraud prohibitions' the purpose of which is to eliminate deceptive disclosure. This category "[enhances] the integrity of disclosure by prohibiting materially false and misleading representations. [It does] not impose affirmative content-based disclosure obligations, but rather mandate accuracy."[64] The second category comprises 'mandatory disclosure requirements' meant to increase the quantum of information available to investors and to enhance the truthfulness of the information.[65] They arise when a company offers its securities to the public, and could also be of periodically continuing nature when the securities are traded on a securities exchange or are widely held. The provisions of statutes that mandate these disclosures "...compel disclosure of information that would not necessarily be voluntarily [made] by an issuer. Such information-forcing requirements promote greater candor by establishing a content floor for an issuer's disclosure."[66]

Franco examined mandatory disclosure of securities information from the perspective of economic efficiency. His central thesis is that a number of factors concerning "the production and distribution of firm-specific information cause the private profit-maximizing calculus of issuers to diverge from firm-specific disclosure policies that would be socially optimizing."[67] He evaluated three core economic arguments in favour of mandatory disclosure namely, informational asymmetry between securities issuers' and investors, positive informational

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60 J.Seligman, "The Historical Need for a Mandatory Disclosure System" (1983) *J. Corp. L.*, 1; L. Loss, and J. Seligman, *Securities Regulation*, (Boston & Toronto: Little, Brown & Co.) 1989, *See also* J. Bauman, "Loss and Seligman on Securities Regulation: An Essay for Don Schwartz" 78 *Georgetown L.J.* 1753 (1990).

61 J.A. Franco, "Why Antifraud Prohibitions are not Enough: The Significance of Opportunism, Candor and Signalling in the Economic Case for Mandatory Securities Disclosure", (2002) *Columbia Business Law Review* 223 at 236 -237.

62 J. Abugu, *Company Securities: Law and Practice*, (Lagos: University of Lagos Press, 2005).

63 *Id.* at 244-245.

64 *Id.*at 232.

65 *Id* at 231-232.

66 *Id. at* 233

67 *Id. at* 237-238.

externalities arising from the issuer's disclosure and the ability of investors to gather information excessively thereby incurring excessive costs. Of these arguments, he submitted that the informational asymmetry justification is the most compelling and superior to the extent that it assists policymakers in designing disclosure paradigm and achieving its purpose.[68] "The principal advantage of the informational asymmetry justification is that it strengthens the link between the theoretical justification for mandatory disclosure and its implications in designing mandatory disclosure requirements."[69]

Franco argued, and persuasively too, that rather than through antifraud provisions alone, an efficacious investor protection is better achieved through a combination of antifraud provisions and mandatory disclosure requirements as follows:

> The mandatory disclosure theory] addresses a broader range of candor issues that stem from asymmetric relationship between issuers and investors than antifraud prohibitions. Whereas antifraud prohibitions are designed to prevent affirmatively false disclosure. mandatory disclosure combats evasiveness and problem of selectivity by issuers in disclosure. Why aren't antifraud prohibitions enough? Only through the combination of antifraud prohibitions and mandatory disclosure requirements can candid issuers efficiently and effectively signal candor. as well as accuracy to securities markets."[70]

Abugu argued that a company's past performance and future prospect should determine the value of its securities. He added that there, however, is the problem of getting the information to the investors to enable them make well thought through investment and to decide on their existing investment.[71] He added that ready availability of the information that affects the value of securities makes a securities market efficient. "The ultimate aim of regulation therefore, is to prevent or minimize abuses, which might distort information and therefore the value of securities and thereby mar investor's confidence and the market integrity."[72]

From the preceding and following literature, disclosure has come to be a central philosophy of securities regulation. A Nigerian company law scholar, Akanki, submitted that publicity is an antidote to fraud, and "its philosophy transcends the entire gamut of Nigerian statutory law on companies."[73] However, there is an ongoing debate on whether disclosure ought to be mandatory or voluntary.

A very significant challenge to the system of mandatory disclosure is the economists' "Efficient Capital Market Theory (ECMT)" that gained prominence from the theoretical formulations of Eugene Fama in the 1960s.[74] Though the literature on this theory is vast, the core of the ECMT is that all active securities markets are "efficient."[75] That is, all publicly available information is swiftly

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68 *Id.*
69 *Id.* at.242.
70 *Id. at* 355.
71 J. Abugu, *op. cit. supra* f.n. 59-60.
72 *Id.* at 60.
73 E.O. Akanki, "The History of Company Law" (1977-78) 11 *Nigeria Journal of Contemporary Law* 105
74 *See generally* E. Fama, "The Behaviour of Stock Market Prices" (1965) 38 *J. Bus.* 34; E. Fama, & Blume, "Filter Rules and Stock Market Trading" (1966) 39 *J. Bus.* 226; Mandelbrot, B. "Forecasts of Future Prices, Unbiased Markets, and 'Martingdale' Models" 1966) 39 J. Bus. 242.
75 Fama describes an efficient market as a "market where there are large number of rational profit maximizers actively competing with each other trying to predict future market values of individual securities, and here important current information is almost freely available to all participants...In that

"impounded" in the prices of securities. Thus, the best position for most investors is that the market prices of securities reflect all available information. The market is fair, and the best evidence of securities' value is the market price. Therefore, it is useless to attempt to make more than normal profit in securities transactions or to trade to beat the market.[76]

Arising from the ECMT, the proponents added that to reduce the risks of particular securities investors have to diversify their portfolio.[77] Kripke summed up the effect of the ECMT and the diversification theory on mandatory disclosure in the following words:

> On their face, these theories leave little or no room for the present disclosure system. Admittedly, not all theorists or participants in the investment world accept them, but certain conclusions seem inescapable. Diversification leaves the small investor with so little investment in any particular company that it is scarcely worth his while to wade through the enormously complicated disclosures, financial and otherwise, in the annual report and prospectus disclosure system, or in the proxy system.[78]

There is a substantial opposition to the ECMT in the available studies.[79] A group of financial economists, known as the *noise theorists*, are of the conviction that

> Naïve speculative traders, activated by fads, fashions, or irrational psychological predispositions toward things like chasing trends, add cumulative noise to share prices so that for significant periods of time share prices end up deviating from their *fundamental value* – the efficient market price that would prevail if the market consisted entirely of rational investors who possessed all available information.[80]

Considerable work provides support for the noise theorists' position. Robert Schiller, in his pioneering study, examined stock prices and dividends over a period of 100 years and found that volatility of price "appear[s] to be far too high...to be attributed to new information about future real dividends if uncertainty about future dividends is measured by the sample standard deviations of real dividends around their long-run exponential growth path.[81]

Fox is of the opinion that noise theory predicts a worse consequence than the ECMT does for the uninformed and speculative investors. They tend to buy when stock prices are too high and sell when prices are too low, thereby providing profits

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market competition among the many intelligent participants lead to a situation where, at any point in time, the actual prices of individual securities already reflect the effects of information based both on the events that have already occurred and on events, which, as of now, the market expects to take place in the future. In other words, in an efficient market, at any point in time, the actual price of a security will be a good estimate of its intrinsic value" – E. Fama, "Random Walks in Stock Prices" (1965) 9-10 *Fin. Analyst J.* 22. For an evaluation of the ECMT, *see generally* J. Abugu, *op. cit. supra* f.n. 69 at 213-231.

76 H. Kripke, "Fifty Years of Securities Regulation in Search of a Purpose" (1984-1985) *Corp Prac Comm* 545 at 563. For an introduction to the EMCT, see Kripke, H. "A Search for a Meaningful Disclosure Policy" 31 *Bus. Law* 293 (1973)

77 Kripke, *Id.* at 564.

78 *Ibid.*

79 J. Abugu, *Id.* at 221-231 gives a summary of some of the critique.

80 J.B. Fox, "Securities Disclosure in a Globalizing Market: Who Should Regulate Whom" 95 *Mich. L. Rev.* 2498 at 2536 (1997).

81 J. R. Shiller, "Do Stock Prices Move too much to be Justified by Subsequent Changes in Dividends?" 71 *Am. Econ. Rev.* 421, 433-34 (1981). *See also* F. Black, "Noise" 41 *J. Fin.* 529 (1986); Bradford De Long, *et al.*, "*Noise Trader Risk in Financial Markets*", 98 *J. Pol. Eco.* 703 (1990); and Donald C. Langevoort, "Theories, Assumptions, and Securities Regulation" 140 *U. Pa. L. Rev.* 851 (1992) for an analysis of legal implications of the noise theory.

for the informed investors. He concluded that it is "questionable whether the concept of fairness should be expanded to condemn this wealth transfer...given the availability to uninformed investors of a strategy – a randomly chosen diversified portfolio – that permits participation in the benefits of equity investing without risking such losses."[82]

The quest for voluntary disclosure has been gaining momentum in recent years. The proponents of voluntary disclosure have challenged the need and value of requiring mandatory disclosure from issuers of securities. They argued that securities markets provide adequate incentives for issuers of securities to voluntarily disclose "socially optimal levels firm specific" information.[83] The issuer's management, they argued, has motivations to establish a reputation with securities markets of truthfulness and integrity. They added that mandatory disclosure is expensive and burdensome as it offers little useful information to investors that economic self-interest of the issuers would not have persuaded them to disclose.[84] Scholars of this persuasion include Easterbrook, Fischel,[85] Stigler,[86] Benston,[87] Ross[88] and Mahoney.[89]

In a 2005 research, Mahoney[90] studied mandatory disclosure in documents filed in the United States. These filings were in response to the Securities Act of 1933 which mandates disclosure in public offering of securities, and the Securities Exchange Act of 1934 which requires periodic disclosures by all companies whose securities are listed on a stock exchange. Based on the threshold that market makers[91] increase their bid-ask spread in apprehension of loss when they trade with

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82 Merrit B. Fox, "Securities Disclosure in a Globalizing Market: Who should Regulate Whom" 95 *Mich. L. Rev.* 2498 at 2537. The Challengers of the Noise Theory Include F.E. Fama, "Efficient Capital Market: II" 46 *J. Fin.* 1575 (1991); T.A. Marsh. & R.C. Merton, "Dividend Viability and Variance Bounds Tests for the Rationality of Stock Market Prices" 76 *Am. Econ. Rev.* 483 (1986).

83 J.A. Franco, *op. cit. supra* f.n. 61 at 230.

84 A.R. Palmiter, *op. cit. supra* f.n. 4 at 25.

85 F.H. Easterbrook, and D.R. Fischel, "Mandatory disclosure and the protection of investors", *op. cit. supra* f.n 10 at 682-684 where the learned authors submitted that the principle of voluntary disclosure is a solution to property right in information applied in the primary and secondary markets. This is because investors want to sell their stock in the trading market at the highest price possible, and this depends "on a flow of believable information." Otherwise potential buyers reduce the bid prices, assuming the worst). The firm is best able to distribute its own information, and a firm that wants the highest price attainable for its stock must continually disclose information without compulsion.

86 G.J. Stigler, "Public Regulation of Securities Markets" 37 *J. Bus.* 117, 122-24 (1964). Stigler studied two groups of new share issues, one from 1923-28 (before mandatory disclosure) and the second from 1949-55 (after the passage of the U.S. Securities Act mandating disclosure). He found that the latter did not do better than the former group. He suggested that mandatory disclosure has not made available any new information that eliminated any unfairness.

87 G. Benston, "The Value of SEC's Accounting Disclosure Requirements" 44 *Acct. Rev.* 515-532 (1969).

88 Paul G. Mahoney, "Mandatory disclosure as a solution to agency problems" 62 U. Chi. L. Rev. 1047 (1995). This article argued that mandatory disclosure requirements were purposed to address more narrowly defined agency problems associated with offering of securities and not to promote informational efficiency of securities markets.

89 Paul G. Mahoney, "Mandatory Disclosure as a Solution to Agency Problems" 62 *U. Chi. L. Rev.* 1047 (1995). This article argued that mandatory disclosure requirements were purposed to address more narrowly defined agency problems associated with offering of securities and not to promote informational efficiency of securities markets.

90 Paul G. Mahoney, "Mandatory versus Contractual Disclosure in Securities Markets: Evidence from the 1930s" http://www.law.virginia.edu/home2002/pdf/workshops/0506/mahoney visited on 12/1/06

91 A securities market dealer makes a market when he maintains "firm bid and offer prices in a given security by standing ready to buy or sell [round lots] at publicly quoted prices. The dealer is called a market maker in the over-the-counter market and a SPECIALIST on the exchanges. A dealer who makes a market over a

informed insiders. Mahoney found out that the securities investigated did not show marked reduction in the bid-ask spread after the mandatory disclosure regime. He therefore concluded that the additional mandatory disclosure in the filed documents did not constitute information to investors that reduced informational asymmetry. This is because changes in bid-ask spread and liquidity should occur and continue for some time after an event that reduces informational asymmetry.[92]

Benston[93] submitted that mandatory disclosure gains little value for investors He investigated whether or not companies' stock prices improved after they were required to make mandatory disclosure of sales data. He compared the annual stock price returns of companies that voluntarily disclosed information with the returns of companies that disclosed the information after they were compelled to do so. He found that the latter did not perform better than the former.[94] However, Daines and Jones[95] opined that Benston's study has many limitations. "It is not clear that the best measure of the [Securities Exchange] Act's effect is its net impact on share price. Moreover, Benston examined only New York Stock Exchange firms, large firms about which there was already substantial available information, while it is possible that the Act had different effects on smaller firms."[96] They added that the Securities Exchange Act might have produced new mandated information the cost of which offset the benefit with no net increase in stock price.[97] Summing up their criticism of Benston's findings, Daines and Jones submitted that

> Stock price return and volatility are...incomplete measures of the Act's effect and miss a primary goal of the legislation. The Act's primary goal was not to produce new information, but rather to force firms to publicly share information previously held only by insiders, and share price effects are not the best measure of information dispersal. If informed managers, customers or suppliers traded on information prior to the Act, the information would already be impounded in the firm's stock price even if not widely known. Subsequent revelation of this information under mandatory disclosure rules would have little effect on a firm's stock price volatility, even if the rules made public information that was previously private.[98]

Daines and Jones studied the effect of mandatory disclosure and the supporting anti-fraud provisions of the United States Securities Exchange Act on informational asymmetry. They argued from the premise that prior to the Act, disclosure was purely voluntary, but from the enactment of the Act, all the firms whose securities are publicly traded on any stock exchange are required to make mandatory disclosures. They sought to answer two questions: (1) have the Act's mandatory disclosures given investors meaningful information? (2) could there be found any information externalities that would warrant mandatory disclosure?

To answer the questions above, they examined changes in bid-ask spread over a period after the effective date of the Act. "Bid-ask spread are common proxy for

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long period is said to *maintain* a market" – J. Downes, and J.E. Goodman, (eds.) *Barron's Dictionary of Finance and Investment*, 34 (Hauppauge, NY: Barron's Educational Series, Inc.).

92 Mahoney, *op. cit. supra* fn. 90 at 236.

93 *Op. cit. supra* fn. 87 See also Benston, George J. "Required Disclosure and the Stock Market: an Evaluation of the Securities Exchange Act of 1934", 63 *American Economic Review* 132-135 (1973).

94 *Ibid.*

95 R. Daines and C.M. Jones, "Mandatory Disclosure, Asymmetric Information and Liquidity: the Impact of the 1934" http://www.law.northwestern.edu/colloquium/law-economics/daines visited on 22/12/05.

96 *Id.* at 7.

97 *Ibid.*

98 *Ibid.*

information asymmetries because they reflect the risk that market makers will lose money when trading against informed parties. Idea is that because informed parties only buy (sell) when the stock is under(over)-priced, specialists face an adverse selection problem."[99] Market makers have to widen their spread as informational asymmetries increase against losses to the informed parties so as to recoup their losses by wide profit margin as they trade with uninformed parties. Daines and Jones expected the bid-ask spreads to reduce if the 1934 Act reduced informational asymmetries. They found little evidence that the Act produced new information or improved liquidity.[100] They found that issuers who voluntarily disclosed information started out with wider spreads than those who compulsorily disclosed information. However, the spreads of the former narrowed down remarkably to nearly match those of the latter. This contradicted what they should have found if increased disclosure reduced information asymmetry.[101] They however did not rule out the possibility that the mandatory disclosure requirements coupled with antifraud and civil liability provisions "improved the information environment for all firms."[102]

VI.2. Targets of disclosure

Over the years, there has been much debate on whom the intended audiences of securities disclosure are – the layman or institutional investors? Of equal importance is what an investor needs to understand to make an informed investment decision. The need therefore arises for the prospectus and annual reports of companies to be written in intelligible language. In the United States the SEC maintains that disclosure must address all categories of investors from the layman to the professional investment analyst. The most pragmatic step taken in that direction was its adoption of *Plain English disclosure rules* on January 22, 1998.[103]

While the SEC has since the 1970's been insisting on brevity and simplicity of the prospectus so that it could benefit laypersons.[104]scholars insist that laymen do not directly benefit from securities disclosures because their complexity make them understandable by professionals only.[105] Homer Kripke, an emeritus professor of law, studied the response of the American public to securities disclosures in the period between 1933 and 1970. He came to the conclusion that the public did not make securities decisions based on the SEC prospectus disclosure requirements.[106] He challenged the informational function of the United States securities regulation as creating "the myth of the informed layman."[107] Employing 'filtration theory', he submitted that the layperson is able to benefit from mandated disclosure "after a process of filtration through professionals, directly in the form of investment advice

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99 *Id.* at 3.

100 *Id.* at 3-4.

101 *Id.* at 12.

102 *Id.* at 21.

103 See generally Plain English disclosure, Securities Act Release No. 33-7497, *63 Fed. Reg. 6370* (1998) Plain English arose from an Anglo-American legal tradition that legal writing and drafting be made simple and easier to understand. It also emphasises "accuracy, brevity and simplicity" freed of "tautologies, redundancies and circumlocutions...unintelligible to those whom it concerns most – T.W., Taylor, "Plain English for Army Lawyers" 118 *Mil. L. Rev.* 217, 223 (quoting Thomas Jefferson)

104 Levenson, "Appropriate Disclosure" Rev. SEC. Reg. 961 (March 4, 1971). The author was then the Director of the American SEC's Division of Corporation Finance.

105 *See generally* Advisory Committee to the Securities and Exchange Commission, 95TH CONG., 1ST SESS. *Report on corporate disclosure*, chs II to VI (Comm Print 1977); W. Douglas & Bates, "The Federal Securities Act of 1933" 43 *Yale L.J.* 171 (1933). Kripke, Homer, "The SEC, the Accountants, Some Myths and Some Realities" 45 *N.Y.U. L. Rev.* 1151, at 1164 - 1175 (1970).

106 Homer Kripke *ibid.*

107 Homer Kripke "The Myth of the Informed Layman" 28 *Bus. Lawyer* 631 (1973)

or management, and indirectly through their effect on the market."[108] This line of thought established that the value of widely traded securities is best estimated as the market price determined through the interplay of sellers and buyers.[109]

Firtel[110] argued that the general public has difficulty understanding the law (disclosures) because they have no understanding of legal concepts. "Simple language does not mean simple concepts..., the average investor, as foreshadowed by the 'myth of the informed layman, still will not be able to understand disclosure." Therefore, he added that the best the issuer could do is to write disclosure documents in plain English for the professional market analyst to assist the investor to make an informed investment decision.[111]

The "myth" that an average investor could understand and effectively use disclosures to make "an intelligent investment decision[112] has been refuted on three grounds. First, the average investor lacks the ability to understand complex financial information supplied by a typical issuer of securities. Only professionals could make an effective use of it. A typical prospectus "does not make light reading."[113] Second, the complexity of securities transactions renders impossible the telling of the "whole truth" to an average investor in an intelligible way.[114] A simplification of disclosure for the benefit of the layman often leaves out the information that is valuable to securities professionals. The prospectus then becomes "a routine, meaningless document which does not serve its purpose."[115]

VII. CONCLUSION

Much of the theories so far reviewed rightly submitted that mandatory information disclosure is germane to the protection of investors. The actualization of the theories has been a matter for each securities market and the legal system that has established it. This article agrees that disclosure is better mandatory than permissive. The positioning of emerging securities markets in the global scheme of securities transactions depends importantly on how much the regulators of such markets take cognizance of the theoretical foundation of securities regulation and information disclosure in enacting and updating the applicable statutes. The ultimate purpose must be not only for mobilisation of capital and maintenance of a fair and orderly market, but for investor protection and to give value for the money invested.

Nigeria, a prominent emerging market in Africa, adopts a system of mandatory information disclosure in securities transactions. In so doing, it acknowledges the importance of protecting investors who cannot protect themselves from information concealment and market manipulative devices of securities issuers and market professionals who act as intermediaries. The protective system is reinforced by an institutional framework of regulators that must be proactive in monitoring information disclosure. The SEC leads the way that self-regulators of the market must follow.

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108 Homer Kripke "Fifty Years of Securities Regulation in Search of a Purpose" 1984 -1985 *Corp Prac Comm* 547 at 561.

109 SEC Securities Act Release No. 6176 (January 15, 1980) *reprinted in* [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH).

110 K.B. Firtel, "Plain English: a Reappraisal of the Intended Audience of Disclosure under the Securities Act of 1933" 73 S. *Cal. Law Rev.* 851 (January/March 1999).

111 *Ibid.*

112 Homer, Kripke "The SEC, the Accountants, Some Myths and Some Realities" 46 *N.Y.U. L. Rev.* 1151 at 1164.

113 *Ibid.*

114 Douglas & Bates, *op. cit. supra* f.n. 105 above at p.171.

115 Kripke, *op. cit. supra* f.n. 107 at 631 and 633.