CORPORATE BUSINESS ORGANIZATIONS IN NIGERIA: THE CHALLENGES OF MONITORING CRIME-FREE OPERATIONS

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Introduction

The regulation of corporate businesses focuses both the corporation and its managers. The law has since recognizes the business corporation as a legal but an artificial person, who functions through her natural persons acting as agents or organs. The company may exercise all the powers of a natural person. Thereby, it may be criminally liable for its acts just as its officers and other natural persons acting on its behalf.

Crime- free operation of corporate businesses is of interest to investors, creditors as well as the public at large. For instance, while the investors and creditors would not want corporate managers to dissipate their investment and credit respectively, public interest is keenly concerned with the protection of lives, property rights and the interest of the revenue among other things. Therefore, since the inception of the realistic treatment of the principle of corporate personality through the veil-lifting device, there has been a great and sustained statutory advancement not only to ensure efficient corporate management but also to curtail the abuse of the corporate form for criminal purposes.

The Companies and Allied Matters Act contains diverse provisions against corporate overreaching. Most of these provisions appear to deal with matters of efficient management to the extent that they touch incorporation, floatation, management, reconstruction, mergers,

take-over and winding up of companies. However, they also are means through which company law directly or indirectly seeks to limit corporate criminal overreaching.

Businesses such as banking, insurance and securities dealings where crime is most likely to occur are further regulated by special statutes. These statutes include the Banks and Other Financial Institutions Decree (BOFID), the Failed Banks (Recovery of Debts) and Financial Malpractice in Banks Decree (Failed Banks Decree), the Nigeria Deposit Insurance Decree, the Insurance Decree and the Investment and Securities Act.

Statutory control of corporate crimes is topical because corporate businesses proliferate at a remarkable rate in harsh and highly competitive economic environment thereby engendering lots of unethical as well as totally unlawful business practices as corporate operators race viciously to the bottom. The general motivator could be the perception by the role-actors that business crimes have no visible victims. But they do. Otherwise, it was unprofitable for the law to regulate business operations at all. It is against this background that this article examines the regulatory framework as well some important regulatory bodies that monitor corporate businesses in Nigeria.

Because of the potential vastness of an enquiry that we embark here as well as our limited scope, our attempt could only be selective and not exhaustive of the whole ground.

Monitoring Companies

The Companies and Allied Matters Act[1] (hereinafter referred to as the CAMA) tries to ensure from the process of incorporation that the company is formed and operated in compliance with all the relevant laws. Particularly, it requires that the businesses or objects for which the company is formed are not illegal.[2] The CAMA set up the Corporate Affairs Commission (CAC) for that and other important purposes. The functions of the CAC are as follows:

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[1] Cap. 59, Laws of the Federation of Nigeria, 1990.
[2] S.36 (i), *id.*

(1) The administration of the Act, including the regulation and supervision of the formation, incorporation, registration, management and winding up of companies;
(2) Performance of such other functions as may be specified by the Act or any other enactment;
(3) Establishment and maintenance of companies registries and offices in all the states of the Federation suitably and adequately equipped to discharge the functions with which it is charged by the law;
(4) Arrangement and conduct of investigation into the affairs of any company where the interests of the shareholders and the public so demand;
(5) Undertaking such other activities as are necessary or expedient for giving full effect to the provisions of the Act.[3]

The Securities and Exchange Commission monitor company matters that relate to dealings in securities, unit trusts, reconstructions, mergers and take-over as well as other similar matters regulated by the Investment and Securities Act of 1999 (ISA). Before the latter came into effect, part XII of the CAMA regulated such matters, and provided that that the SEC administered that part. The need for a more effective and adequate monitoring of corporate activities in these important areas called for the ISA.

A. Monitoring Incorporation Process

The CAC begins to monitor every company from conception. The company must file its proposed name on form CAC 1 so that the CAC may verify the name, allow its use and reserve it for sixty days after it has approved it. Once the name is approved and the company is registered in that name, it must carry on its business and conduct its corporate affairs in that name. A failure to do so often attracts liability under the law. For example, any officer of the company or any person on its behalf who issues or authorizes to be issued a bill, parcel, invoice, receipt or letter of credit on which the name of the company was not properly indorsed would be guilty of an offence and on conviction be liable to a fine of five hundred naira. In addition, he "...shall be personally liable to the holder of

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[3] S.7, *id.*

such bill of exchange, promissory note endorsement, cheque, or order for money or goods, for the amount thereof, unless it is duly paid by the company."[4]

The CAMA prohibits a company from the use of certain names. No company shall be registered by any name that is " identical with that by which a company in existence is registered, or so nearly resembles that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in the manner as the Commission requires."[5] Likewise, no company shall use any name that is in the opinion of the Commission "capable of misleading as to the nature or extent of its activities or is undesirable, offensive or otherwise contrary to public policy.[6] The Act also prohibits the use of any name that in the opinion of the Commission violates an existing trademark or business name registered in Nigeria without the consent of the owner of the trademark or business name.[7] Nor could any company use any name that contains "Federal", "National", "Regional", "State", "Government" thereby suggesting that it enjoys the patronage of government or any of its departments or ministry.[8]

Name verification is an important means for the Commission to monitor the proposed company but the absence of organized postal or online verification constitutes an impediment. The legal practitioner retained to incorporate the company has to travel to the area office of the Commission or the Abuja headquarters office at a considerable expense for this simple process. It is not even certain that the Commission would clear the name the same day as experience has shown.

In order to form a company, the promoters must deliver the documents of incorporation to the Commission.[9] The documents include the memorandum and articles of association; the notice of the situation of the registered office of the company; the list and particulars of the directors together with their consent to serve; and a statement of the

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[4] S.631 (4) (c), *id.*
[5] S.30 (1) (a), *id.* See also *Niger Chemists Ltd. v. Nigeria Chemists* (1961) All N.L.R. 171
[6] S. 30 (1) (c)
[7] S. 30 (1) (d)
[8] S. 30 (2) (a).
[9] S. 35. (2)

authorized capital of the company that must not be less than ten thousand naira for a private company, and five hundred thousand naira for a public company.[10] In addition, the CAMA requires that the legal practitioner that the promoters engage in the formation of the company make in a prescribed form, a statutory declaration that the application has complied with the requirements of the Act relating to registration.[11] The Commission reserves the right to admit the declaration as a sufficient evidence of compliance, and must inform the declarant of its rejection within thirty days if it rejected the declaration.[12] In order to curb a deliberate stamp duty underpayment as well as other frauds that could result from false declaration, we submit that the CAMA should contain special provisions outside the general law to penalize false declarants.

The CAMA enjoins the Commission to register the memorandum and articles of the proposed company unless in its opinion:

(a) they do not comply with the provisions of the Act; or
(b) any of the subscribers to the memorandum is incompetent or disqualified under the Act;[13]
(c) the proposed company has not complied with the requirements of any other law regulating the registration and incorporation;[14]
(d) the name proposed for the company conflicts with or is likely to conflict with an existing trade mark or business name registered in Nigeria; or
(e) the proposed businesses or objects of the company or any of them are illegal.[15]

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[10] S.27 (2).
[11] S. 35 (3)
[12] *id.*
[13] See S.20 that disqualifies from company membership any person who is under the age of 18; or is of unsound mind; or an undischarged bankrupt; or has been convicted by a competent court of any offence in connection with the promotion, formation or management of a company.
[14] See, as examples, Section 3 of Decree No. 25 of 1991 on the conditions for the grant of a banking licence; and Section 3 of Decree No. 58 of 1991 for the conditions for the carrying on insurance business in Nigeria.
[15] S. 36 (1). However, where the court found that the businesses of the proposed company were lawful, and the company complied with the Companies Act as well as other laws

Where the registrar of companies registered a company in error whose businesses are illegal or contrary to public policy, the court often would quash the incorporation. This is because the Act provides that "the certificate of incorporation shall be *prima facie* evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental to it have been complied with and that the association is a company authorized to be registered and duly registered under this Act.[16] Thus, in the highly persuasive English case of *R. v. Registrar of Companies, ex. Parte H.M. Attorney General,*[17] someone incorporated a company by the name "Lindi St. Claire (Personal Services) Limited." Its stated business was "to carry on the business of prostitution." The Attorney General applied for an order of certiorari to quash the incorporation of the company on the ground that in certifying the incorporation of the company, and in registering it, the Registrar of Companies acted *ultra vires* or misdirected himself, or otherwise erred in law since the company was formed for an unlawful purpose. The court held that the business of the company was against public policy and quashed its registration.

Professor Pennington puts the grave effect of certiorari on the company succinctly as follows:

Certiorari would annul the certificate of incorporation as though it had never been issued; and the company would be deemed never to have owned any property or incurred any debts or obligations, so that none of the property in its apparent ownership would be available to satisfy the liabilities incurred in its name.[18] Therefore, because of the enormous problem that such a termination of the life of the company has on the

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relevant to its incorporation, it would compel the Commission to register the Company- *Lasisi v. Registrar of Companies* (1976) 7 S.C. 73 (Supreme Court); *Kehinde v. Registrar of Companies* (1979) 5 F.R.C.R. 101 (Federal High Court).

[16] S.36 (6). Before 1990, the certificate of incorporation was deemed a conclusive evidence of incorporation and compliance with the Act – Section 17 (1) of the repealed Companies Act, 1968. See Barnes, K. "Terminating the Incorporation of Offensive Companies", (1988) 1 G.R.B.P.L. 79.

[17] (1991) BCLC 476

[18] Pennington, *Company Law*, 5th Edition, (London: Butterworths, 1995), p.43.

shareholders and creditors, it is important that the CAC and corporators act diligently in the process of incorporation.

It is important to keep in mind that a company that has as one of its businesses something that cannot be done lawfully unless an official permission is obtained may be formed and registered without first obtaining the permission.[19] In the case of *Lasisi v. Registrar of Companies*,[20] the applicant sought to register a company by the name "Page Communications (Nigeria) Limited" under the repealed 1968 Companies Act. The company had among its objects broadcasting, satellite and other forms of communication activities. The Registrar of Companies refused to register the proposed company on the ground that that applicant failed to furnish a licence issued by the Director of Posts and Telegraphs under the Wireless and Telegraphs Act, Cap 223, Laws of Nigeria, 1948. The court found that the provisions of the Telegraph Act stipulated that the proposed company could not operate without the appropriate licence, and not that the company could not be formed. Therefore, it held that the Registrar was bound to register the company. Belgore J. (as he then was) pointed out as follows:

> The tradition in drawing up the memorandum of a company is to make it as comprehensive as possible; some of the clauses may be dormant, some may not be taken up immediately...while others may be undertaken immediately, and if a clause should require further compliance with any regulation, that permission will be necessary when the clause is to be operative. Registration does not mean that the permit has been obtained, or that a further permit should not be obtained where necessary.[21]

In cases to which the decision above applies, the CAC or other regulatory authority must ensure that the company complies before operating in the area that requires the special permission.

Another area that the CAC needs to monitor is the address of the registered office of the company and the head office if different from the

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[19] See however S.3 (i) of Decree 25 of 1991 that suggests that a banking licence must be obtained before a bank is incorporated.

[20] (1974) 3 A.L.R. Comm. 85.

[21] *Id.* p.88.

registered office. The CAC accepts physical addresses and not postal box or private mailbag addresses.[22] However, from personal experience and observation, some of the physical addresses are not traceable therefore creating problem of communication between the CAC and the affected companies as well as that of monitoring. Some companies exist only in the brief cases of the majority shareholder and managing director and thereby lend themselves to fraud and other sharp practices. It is important that the CAC ensure that the addresses supplied by companies are not only physical, but also those at which the companies could receive mails. Perhaps, one way to ensure that is to strike out from its register the names of companies that do not respond to post incorporation correspondences, for example notice of due annual returns.

Once a company is incorporated, one important monitoring device is that of "lifting the veil of incorporation" which "...is grounded on equitable principles which permit the court in clear and appropriate cases to look behind the legal persona and make a member or director of the company personally liable or accountable to a third party."[23] The law uses this device *inter alia* to prevent the corporators from hiding behind the corporate façade to perpetrate fraud and other sharp practices. In the case of *Jones v. Lipman,*[24] the first defendant had agreed to sell freehold land to the plaintiffs. However, in order to avoid his legal obligation under the contract, he transferred the land to a company that he subsequently acquired. He and a clerk of his solicitors were the shareholders and directors of the newly acquired company. The court held that the company was a cloak for the first defendant to avoid his legal obligation and decreed specific performance of the contract against the defendants.

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[22] S. 35 (2) (b), CAMA.

[23] *Dunlop Nigerian Industries Ltd. v. Forward Nigeria Enterprises Ltd.* 1976) 1 A.L.R. Comm. 243, *per* Ajose-Adeogun J. (as he then was).

[24] (1962) 1 W.L.R. 832.

Litigants have also sought the remedy of "lifting the veil" to prevent tax evasion by companies and to ensure that companies do not enjoy some privileges without performing corresponding duties.[25] Most penal provisions of company statutes that impose personal liability on agents and officers of the company for some wrongful acts and omissions of the company are similar in their utility to the veil lifting remedy.[26]

B. Monitoring the Management of Companies

The CAC has an enormous monitoring and supervisory role in matters relating to the management of companies. Its responsibilities in this regard are so wide that only the very important aspects could be examined in some details within our limited scope. Therefore we limit our inquiry to the monitoring of company officers and their activities,[27] limiting the company to its authorized businesses and powers,[28] ensuring that corporate managers do not dissipate company's capital, protecting the minority against the illegal and oppressive conduct of the majority of members of the company, receiving and registering certain documents, returns, statements and orders with the purpose of protecting investors and creditors,[29] registering certain charges created by the company and keeping the register of such charges, calling and directing the calling of meetings of the company as well as that of the board of directors and other important statutory means of monitoring the operations of the company.

C. Monitoring the Directorate

The directors manage the affairs of the company. They are "commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it."[30] Because of this all-important role and the fact that company ownership is divorced from control, the law closely monitors the activities of the directors. The CAMA states their legal position as follows:

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[25] *See Marina Nominees Ltd. v. Federal Board of Inland Revenue* (1982) 2 N.W.L.R. (Pt. 20) 40 S.C.); *Reis & Co. (Nigeria) Ltd. v. Federal Board of Inland Revenue* (1979) 3 F.R.C.R. 251; *Gresham Life Assurance V. Registrar of Companies* (1973) 1 All N.L.R. (Pt. 1) 617 (S.C.); and *Re F.G. (Films) Ltd.* (1953) 1 All E.R. 615.

[26] *See infra* for further discussions.

[27] *See* CAMA, Ss. 244 -298

[28] *See* Ss. 38-40 *id.*

[29] *See* for examples, ss. 331, 333 & 334.

[30] *Per* Jessel M.R. in *Re Forest of Dean Coal Mining Co.* (1878) 10 Ch 450, 452.

> Directors are trustees of the company's moneys, properties and their powers and as such must account for all the moneys over which they exercise control and must refund any money improperly paid away, and they must exercise their powers honestly in the interest of the company and all the shareholders, and not in their own sectional interest.[31]

The directors are agents of the company as long as they act within the authority and powers conferred on them by statute and the company. They stand in fiduciary position to the company. As such, they must act in the best interest of the company;[32] exercise their powers for proper and not collateral purposes;[33] they must neither fetter their discretion to vote in a particular way nor allow their interests to conflict with their duties.[34] They must act honestly and in good faith as well as exercise that degree of care, diligence and skill that[35] a reasonably prudent director would exercise in comparable circumstances. Where they have a good cause to delegate their powers they must not abdicate their duty.[36]

The diligence and integrity that the directors show in the performance of their duties determine the survival or failure of the company. Therefore the CAMA requires that competent persons be duly appointed directors, and that they be men of high integrity. A person is disqualified from being a director if he is insolvent;[37] he has been fraudulent in the promotion, formation or management of any company or has breached any of his duties to any company;[38] he is a lunatic or person of unsound mind or an infant;[39] or he has made an arrangement or composition with his creditors.[40] In order to give efficacy to these requirements, the CAC must maintain an effective record and information system on the appointment and disqualification of directors, especially on

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[31] S.283 (1)
[32] S.279 (3)
[33] S.279 (5)
[34] S.280 (1)
[35] S.282 (1)
[36] S.279 (7)
[37] S.253
[38] S.254
[39] S.257 (1) (a)
[40] S.258 (1) (b)

the directors of public companies whose ownership is divorced from control. Information on disqualified directors ought to be published in the official gazette. In addition, those proposed as directors may be required to make a declaration of fitness on a prescribed form at the pain of a stiff penalty for a false declaration. While it is desirable to penalize companies who knowingly or inadvertently breach the law here, it also is essential that shareholders or other persons with relevant information be given the opportunity to give the CAC the information as the position is in the appointment of trustees prior to the incorporation of such trustees.

The provisions of the CAMA on the enforcement of directors' duties and the remedying of wrongs done by corporate managers to the company are potent means of monitoring the operations of companies to rid them of crimes. Where any irregularity is committed in the course of the company's affairs or any wrong is done to the company, only the company could ratify the irregular act or sue to remedy the wrong.[41] However, for the protection of his personal right, and albeit indirect protection of the rights of the company, a shareholder may by an injunction or declaration restrain the company from the following:[42]

(i) An *ultra vires* or illegal transaction;
(ii) Passing a resolution irregularly;[43]
(iii) An act or omission that may affect his individual rights as a member;
(iv) Committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;[44]
(v) Where the directors have profited or benefited or are likely to benefit or profit from their negligence or breach of duty; or
(vi) Where a meeting of the company cannot be called in time to be of practical importance in redressing a wrong done to the company or to minority shareholders.

The CAC may bring a derivative action in the name or on behalf of the company, or intervene in an action to which the company is a party for

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[41] S.299, that codified the rule in *Foss v. Harbottle* (1843) 2 Hare 461.
[42] S.300
[43] *See Abubakri & ors. v. Smith & ors.* (1973) 1 All N.L.R. (Pt. 1) 730
[44] *See Omisade v. Akande* (1987) 2 N.W.L.R. (Pt. 55) 158 (S.C.)

the purpose of prosecuting, defending or discontinuing the action.[45] This potent power of the CAC ought to be used to curb all cases of irregularities and wrongs not only against the company but also the minorities. The best situations to invoke the power are cases of *ultra vires* and illegal acts involving the directors who are in control and would ordinarily be unwilling to enforce the rights of the company.[46]

In addition to the foregoing, the CAMA provides some safeguards against oppressive and unfairly prejudicial acts of corporate directors and managers.[47] Although the Act does not define such acts, the case of *Ogunade v. Mobile Films (W.A.) Limited*[48], a case of an "oppressive or fraudulent act" under section 201 of the repealed Companies Act of 1968 offers an insight. In that case, Karibi-Whyte J. (as he then was) said *inter alia:*

> The oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. Thus negligence in conducting the affairs of a company or lack of business ability or inefficiency will not be sufficient....

In situations of oppression and fraud a shareholder ordinarily could petition the court that it is just and equitable to wind up the company.[49] However, since this drastic step may in some cases be counter-productive, the CAMA provides also that a member, director or former director of the affected company, the CAC, or any other person found proper in the discretion of the court may bring by a petition before it "an application for relief on the ground that the affairs of [the] company are being conducted in an illegal or oppressive manner."[50] The CAC, in the exercise of its powers under the Act or any other law, may bring an application that the court intervene in the affairs of the company if " the affairs of the

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[45] CAMA., S.303 (1)

[46] *See* S.303 (2) (a) and the case of *Omisade V. Akande, supra.*

[47] Ss. 310 and 311.

[48] (1976) 2 E.R.C.R. 10; *see* also *Re R..A. Noble and Sons (Clothing) Limited* (1983) B.C.L.C. 273 and *Re A Company* (1986) B.C.L.C. 376

[49] *See* Ss. 408 and 410 of the CAMA.

[50] Ss. 311 (1) and 310 (1)

company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of the public interest; or any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of public interests."[51] The court may, if the application is successful, make such an order or orders as it thinks fit, which may include *inter alia* an order for regulating the conduct of the affairs of the company in future or directing an investigation by the Commission of the affairs. In serious cases, the court may order that the company be wound up.[52] While the latter is most useful as deterrence to other companies, it is ironical that the CAMA does not seem to contain adequate penal provisions to deal with erring officers who were either the role actors or conspirators. Section 506, which appears to touch the issue, does not adequately address it. That section provides that if it is found in the course of winding up of a company "that any of its businesses has been carried on in a reckless manner or with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose," the court may impose an unlimited liability for the debts or other liabilities of the company on the persons who knowingly conducted the business in that manner. In addition, the persons shall be guilty of an offence and liable on conviction to a fine of two thousand five hundred naira or to an imprisonment for a term of two years or both. An example is where the directors of an insolvent company borrowed money and ordered goods ostensibly for the company when they knew that the company would not be able to pay.[53]

I submit that the penalty in section 506 is of a limited utility. It is too mild and limited only to winding up situations.

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[51] S.311(2)(c)

[52] S.312

[53] *Re William Leitch Brothers Ltd.* (1932) Ch. 71

D. Investigation of Company Affairs

The CAC may investigate the affairs of the company and its ownership by virtue of wide ranging provisions of the CAMA[54] so as to ensure probity and prudent management. Lord Denning M.R. offered an incisive background to the investigation in the English case of *Norwest Holst Limited v. Secretary for Trade*[55] as follows:

> It sometimes happens that public companies are conducted in a way, which is beyond the control of the ordinary shareholders. The majority of the shares are in the hands of two or three individuals. These have control of the company's affairs. The other shareholders know little and are told little. They receive their glossy annual reports. Most of them throw them in the waste paper baskets. There is an annual general meeting but a few of the shareholders attend. The whole management and control is in the hands of the directors. They are a self-perpetuating oligarchy and are accountable. Seeing that the directors are the guardians of the company, the question is asked: *quis custodiet ipsos custodes?* Who will guard the guards themselves?

The CAC has the power to "guard the guards" through its investigative powers. It may, of its own motion, or on the application of the company or any of its members or pursuant to a court order, appoint inspectors to investigate the affairs of any company as well as its membership and report to it as it may direct.[56] The members who desire to make an application of this nature must hold not less than one quarter of the class of shares issued by the company, or one quarter of the members of a company that has no share capital.[57] However, it appears that the number required here is too high and the requirement could discourage the members from invoking the process of investigation. A learned writer therefore suggests one tenth of the company membership.[58]

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[54] Ss.314-330

[55] (1978) 3 W.L.R. 73, 223.

[56] CAMA, S.314 (1).

[57] *Id.* S. 314 (2)

[58] E.O. Akanki, (ed.) *Essays on Company Law* (Lagos: University of Lagos Press, 1991), pp. 22-23.

It is axiomatic that the CAC would be more interested in investigating the affairs of a company than its directors and members who might be benefiting from its criminal overreaching. Therefore, the CAMA empowers the CAC to investigate the company of its own motion if it appears that:

(a) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other erson or in manner which is unfairly prejudicial to some part of its members; or

(b) any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose; or

(c) persons concerned with the company's formation or the management of its affairs have, in connection with it, been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or

(d) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.[59]

An inspector appointed to investigate a company may also investigate a related company where necessary.[60] He may examine all documents in the possession of the directors, including bankbooks and accounts[61] to ensure that there is no financial impropriety or any other irregularity. He equally is empowered to examine officers and agents of the company on oath,[62] and if they failed to cooperate with him or answer any questions he put to them, the inspector could complain to the court

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[59] S.315. *See Otong v. Mogal Nigeria Ltd.* (1978) F.R.C.R. 80.

[60] S.316

[61] Ss.317 (2) and 318

[62] S317 (3)

that could punish them for contempt.[63] The findings of the inspector may be grounds for civil proceedings to recover any property of the company that has been misapplied or wrongfully recovered and to recover damages due to fraud, misfeasance or any other misconduct.[64] In addition, the CAC or any other person enabled in that behalf may bring criminal proceedings against any person who is likely to be guilty of any criminal offence by virtue of the inspector's report.[65] If the report indicates that it is expedient in public interest and on a just and equitable ground that the affected company is wound up, the CAC may present to court a petition that the company be wound up. The cost of all the investigations is defrayed from the Consolidated Revenue Fund.[66] Professor Gower sums up the importance of investigation as follows:

> It is now widely recognized in all countries that the only effective way of preventing impropriety in the management of the corporate enterprise is to ensure effective supervision by some government agency.... Even if shareholders have the determination and financial means, they will often lack the inside knowledge of the facts which is needed. Accordingly, the tendency in all countries is to provide wide powers of investigation and inspection.[67]

Although the CAC has enormous investigation powers under the CAMA, there is nothing to show that it effectively uses the powers, yet the powers are very effective means of monitoring the operations of companies.

E. Records and Returns

The CAMA contains many provisions on company records and returns. However, the most important point here is the ability of the CAC to ensure that the company and its officials comply with the provisions. The diversity of the provisions limits us to a selective discussion of the salient ones.

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[63] S. 319 (3)
[64] S.321
[65] S.322
[66] S.324
[67] Final Report of the Commission of Enquiry into the Working and Administration of the Company Law of Ghana (19__), p163.

Every company must make to the CAC annual returns on its activities in the form prescribed by the Act.[68] The returns ought to inform the CAC and the desiring public of the state of the company. The recent effort by the CAC to enforce the penal provision for failure to file the returns as at when due is commendable and ought to be sustained. The Commission must ensure that no company is in the habit of persistently writing state of affair letter in lieu of audited accounts. Otherwise the returns become a mere fulfillment of the law and not a means of keeping the public adequately informed about the company. Every company must be made to diligently keep accounting records and the directors must prepare financial statements for each year to include auditor's report and statement of the source and application of funds.[69] The auditors must ensure that the company keeps proper accounting records, and that the company's balance sheet and profit and loss accounts agree with the accounting records and returns.[70] It is only then that investors and creditors of the company could have some measure of adequate protection.

The CAMA makes it an offence for an officer of a company to knowingly or recklessly make a false, misleading or deceptive statement to the auditors of the company. However, in the light of the present economic and crime realities, the penal sanction of one-year imprisonment or a fine of five hundred naira is too mild to deter officer with propensity for fraud. In addition, it may be desirable to compel companies to include in their annual reports the penalties paid or payable in the current year.[71]

Banks and Other Financial Institutions

Due to the propensity of crimes in the financial sector of the economy, in addition to the CAMA, Banks and Other Financial Institutions Decree (BOFID),[72] Central Bank of Nigeria Decree (CBN Decree),[73] and the Nigeria Deposit Insurance Corporation Act (NDIC Act)

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[68] Ss.370-375

[69] S.334

[70] S.360

[71] There is such a provision for banks and other financial institutions in Decree 25 of 1991, S.27(1).

[72] No. 25 of 1991

[73] No 24 of 1991

also regulate banks and other financial institutions.[74] There has been an upsurge of activities in the financial sector in the last decade and a half due to financial deregulation, devaluation of the naira, hyperinflation, unstable political situation all of which have created inter-related problems in the financial sector. These problems include growing non-performing assets, loans and advances, large-scale fraud and forgeries as well as abuse of insider price sensitive information in the process of financial intermediation. Added to these is conflict of the interests and duties of directors. In the process, banks abandoned their traditional role of financial intermediation for speculation. Consequently, quite a number of banks failed. It is against this background that this article examines the legal framework for monitoring financial institutions.

A. Licensing of Financial Institutions

No person may carry on any banking or other finance business (other than insurance and stock broking) in Nigeria except it is a body corporate that holds a valid banking licence issued by the Central Bank of Nigeria. Otherwise the person is guilty of an offence and liable on conviction to a term of imprisonment for up to ten years or a fine not exceeding five hundred thousand naira (N500, 000) or to both.[75] The application for licence must be accompanied by *inter alia* a draft copy of the memorandum and articles of association of the proposed bank or institution, such other information, documents and reports as the Central Bank may from time to time require, and in the case of banks, a list of the shareholders, directors and principal officers of the proposed bank as well as their particulars.[76] It is submitted that this process helps to ensure that only competent persons and persons of integrity own and manage banks and financial institutions.

B. Monitoring Bank Management

The BOFID stipulates that only men of integrity manage and direct the affairs of banks. Every bank shall, before appointing its directors, seek and obtain a written approval of the officers from the Central Bank.[77] No person shall be an officer of a bank if he is of unsound mind, a bankrupt,

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[74] Cap. 301, Laws of the Federation of Nigeria, 1990.
[75] BOFID Ss. 2, 56 & 57.
[76] Ss. 3 & 57
[77] S.44 (1)

or has been convicted of an offence involving dishonesty or fraud, or has been found guilty of serious misconduct in relation to his duties, or if he possessed a professional qualification, he has been disqualified or suspended from practicing his profession in Nigeria by an order of a competent authority made against him personally.[78] Equally disqualified from bank employment are persons whose appointment with a bank has been terminated or who have been dismissed for reasons of fraud, dishonesty or conviction for an offence involving dishonesty or fraud.[79] Where the court wound up a bank, the Central Bank must declare its former directors fit to be directors of another bank lest they be permanently disqualified from such offices.[80] The penal sanction for an infringement of these provisions ranges from fifty thousand to one hundred thousand naira fine.[81] It is trite that an effective use of the monitoring devises above requires that the Central Bank keep up to date records and publicize them as the need arises. Bank inspectors also must be painstaking in verifying the information banks supply.

C. Duties of Bank Officers

In addition to the duties of directors under the CAMA, the BOFID imposes other duties on managers and other officers of banks. These duties though aimed primarily to, among other things, ensure probity, curb conflict in the directors' interests and duties as well as preserve depositors' funds and the assets of the bank also seek to ensure the health of the financial system.

Under the BOFID; no manager or any other officer of a bank shall grant to any person any advance, loan or credit facility except in accordance with the provisions of the decree as well as the rules and regulations of the bank. The manager or officer must not directly or indirectly have a personal interest in such a transaction without disclosing the nature of his interest to the bank in accordance with the provisions of the decree.[82] Any person who contravenes any of these provisions is liable to a fine of one hundred thousand naira or to an imprisonment for a term

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[78] S.44 (2)
[79] S.44 (4)
[80] S.44 (3)
[81] S.44 (4) (5)
[82] S.18 (1)

of three years. In addition, he shall forfeit all the gains and benefits that he derived from the transaction.[83] In *Federal Republic of Nigeria v. Christopher I. Anyaegbunam,*[84] the Failed Banks Tribunal convicted the accused and fined him one hundred thousand naira in lieu of a three-year jail term because he stood at both ends of the loan transaction but repaid the loan. The charges against him were:

> [T]hat [the accused]…,being a Director of Group Merchant Bank Limited, failed to disclose [his] interest in two million naira (N2,000,000.00) credit facility granted to Corbik Supplies and Trading Company Limited in which [he has] substantial share holding interest contrary to Section 11(7) of the [Banks and Other Financial Institutions Decree, 1991].
>
> That [the accused]…,being a Director of Group Merchant Bank Limited, Lagos failed to disclose [his] interest in a nine million, three hundred thousand, four hundred and forty-seven naira, ten kobo (N9,313,447.10) credit facility granted by a company, Group Merchant Bank Limited to Corbik Supplies and Trading Company Limited, in which [he had] substantial share holding interest contrary to Section 18(3) of the Banks and Other financial Institutions Decree No. 25 of 1991 and punishable under Section 18(9) of the same decree.

Had the borrower and accused been unable to repay the loans, the Tribunal could confiscate his personal assets and those of the company in which he saw substantially interested and auction them to satisfy the indebtedness. If the value realized from the assets was inadequate to satisfy the loan, the only option the Tribunal would have was to jail the borrower without being able to help the financial position of the lender.

There are situations where bank officials conspire with loan seekers to overvalue the collateral securities the latter offered for the loans they secured from some banks thereby misleading the latter to give loans to unqualified borrowers. In such situations, the default repayment of the

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[83] S18 (2)

[84] (1997) 1 F.B.T.L.R. 1 (Failed Banks Tribunal of Nigeria).

loans was tied to the overvalued collateral and the borrower was able to default in repayment knowing that the bank could not recover from her personally without a separate memorandum of agreement to the effect.[85] On the face of the transactions, the parties "complied" with the statutory requirement of securitization, but beneath the façade of "compliance" lay a harmful fraud that suggests that the erring bank officials have economic self interest the loan.[86] I submit that the fine prescribed by the decree is too low in the light of the current rate of the naira. The penalty ought to suit the wrongdoing and the lending bank be compelled to employ independent valuers to value collateral securities. In the same vein, bank officers and employees shall not ask for or receive bribes and gratification in the course of their duties. Otherwise, they shall forfeit the bribes or gratification to the Federal Government, pay a fine of ten thousand naira or be imprisoned for a term of three years or be liable to both the fine and imprisonment.[87] This article submits that they be liable to both a higher fine and imprisonment. Such a penalty should go a long way in limiting fraud and forgeries, abuse of insider information and conflict of duty and interest of bank managers, directors and employees

D. Records and Returns

Every bank shall keep proper books of account on all its transactions.[88] A director or manager of the bank who fails to ensure that it does so or has willfully caused the bank to default is potentially liable to a fine of up to fifty thousand naira or to imprisonment for a term of up to ten years or to both the fine and imprisonment.[89] The bank must ensure that its accounts are audited periodically in accordance with the provisions of the decree so that they give "a true and fair view of the state of affairs of the bank as at the end of the report period."[90] The accounts together with the balance

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[85] *Chief Edu v. National Bank of Nigeria and West African Travel Agency Limited* (1986) 3 N.W.L.R. 183 (S. Ct. of Nigeria).

[86] Joe Goldface-Irokalibe, *"Eradication of bank malpractices in Nigeria: Will law alone succeed?"* 33 CENTRAL BANK OF NIGERIA ECONOMIC AND FINANCIAL REVIEW, No. 1, (March 1995), 66.

[87] S.43

[88] S.24 (1)-(4)

[89] S.24(5).

[90] Ss. 28-30

sheet must be published and forwarded to the Central Bank.[91] Additional statutory safeguard requires that every bank submit to the Central Bank a periodic statement stating among other things the assets and liabilities of the bank and an analysis of its advances and other assets. A defaulting bank is guilty of an offence and liable on conviction to a fine of five thousand naira for each day during which the offence continues.[92]

Another very useful monitoring provision of the BOFID requires a bank to " disclose in detail penalties paid as a result of contravention of the provisions of this decree and provisions of any policy guidelines in force during the year in question."[93] The decree requires the auditor's report to also give such information.[94] The defaulting bank is liable to a penal fine of one hundred thousand naira,[95] and the shareholders have sufficient information to remove the erring directors and managers who are duty bound to ensure that the bank complies with the BOFID by virtue of section 46.

E. The Role of Central Bank Nigeria

The Central Bank of Nigeria (CBN) has the object of promoting "monetary stability" and a sound financial system in Nigeria.[96] Therefore it may, among other things, pursue such policies that it considers to be of national interest.[97] It has enormous powers to supervise banks as well as make policies on banking and finance operations in Nigeria through periodic monetary circulars.[98] It may order a special examination of the books and activities of any bank, especially where it is satisfied that it is in public interest to do so, or the bank has been carrying on its business in a manner detrimental to the interest of its depositors and creditors, or the bank has "insufficient assets to cover its liability to the public or has been contravening the provisions of the BOFID, or a director or shareholder has

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[91] S.27.
[92] S.25.
[93] S.27(2).
[94] S.29.
[95] S.27(5).
[96] Central Bank of Nigeria Decree, No. 24 of 1991 (hereinafter referred to as the CBN decree) S. 1(2)(c).
[97] *Id.* S.39.
[98] Ss.30 &31.

requested for such an inspection.[99] It goes without saying that the CBN has effective means of monitoring the operations of banks in Nigeria and it is effective in that regard to the extent of its autonomy and integrity. In the performance of its duties, it must notify bank shareholders and depositors of the illegal acts of the management in order to curb sharp practices as well as ensure that the recommendations of bank examiners are implemented. It must improve the accuracy, information contents and comparability of external auditors' reports as well as engage non-staff of CBN in supervision of banks as at when necessary.[100]

The CBN decree empowers the Governor of the bank to revoke the operation licence of any bank that does not comply with the provisions of the decree.[101] If he invoked this provision promptly and efficiently, it certainly would go a long way to reduce the involvement of banks and their officials in fraudulent operations. But the down side of this is the adverse effect that would have on the investors and creditors of the affected banks, especially that a depositor would not be able to recover more than fifty thousand naira from the affected bank no matter the quantum of her deposit by virtue of the Nigeria Deposit Insurance Act.

The Operations of Insurance Business

The Insurance Decree of 1997 regulates insurance business in Nigeria.[102] The decree aims generally and expectedly at ensuring that insurance business is properly established and managed by competent persons with the highest regard for probity. The decree provides that the business must be registered, just as its registration may be cancelled for non-compliance with the provisions of the decree. However, because of the diverse provisions of the decree and the limited scope available for the discussion of issues relating insurance in this article, the latter admits discussions of only three issues namely, investment of insurance funds, the need to ensue prompt payment of premium by an agent to the insurer and to curb the menace of fake claims.

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[99] S.32.

[100] Ayodele Jimoh, *"The Changing Regulatory Environment of the Nigerian Financial System: The Place of Decrees 24&25 of 1991"* 1992 NIGERIAN FINANCIAL REVIEW 46, 49

[101] S.12

[102] No. 2 of 1997

A. Investment of Insurance Funds

Concerning the investment of insurance funds, this article submits that the investments that the decree permits may be too narrow against the value of the naira and may tempt insurers to take excessive risk in the bid to make appreciable profit. It provides that an insurer shall "...invest and hold invested in Nigeria, assets equivalent to not less than the amount of the funds in such insurance business as shown in the balance sheet and the revenue account of the insurer." However, the insurer shall invest only in-

(a) securities specified under the Trustees Investment Act;
(b) shares in other securities of a co-operative society registered under a law relating to co-operative societies;
(c) loans to building societies approved by the [National Insurance] commission;
(d) loans on real property, machinery and plant in Nigeria;
(e) loans on life policies within the surrender values;
(f) cash deposit in or bills of exchange accepted by licensed banks; and such investment as may be prescribed (presumably by the National Insurance Commission).

Investments permitted under the Trustee Investment Act seem to be outdated considering that that Act has not been reviewed since it came into effect in 1961 though the economic situation today differs radically from that of that year. It also is important to keep in mind that only a meager two per centum interest is payable on housing fund loan while the potential risk of an insurer and inflation rate are grossly disproportionate. There ought to be a review of the list of permissible investments to aid insurers in complying with the decree. The risk portfolio of insurance companies makes the cost of their funds to outweigh the returns they expect from the permissible investments.

B. Ensuring Prompt Payment of Premium by an Agent to the Insurer

Where the insurer carries on business through an agent, the latter shall immediately pay to the insurer any premium he collected from the insured, otherwise he is guilty of an offence and liable on conviction for the first of such an offence to a fine of ten thousand naira, for the second offence, to a fine of fifty thousand naira, and for a third offence, to a fine of one

hundred thousand naira or to a jail term of three years or to both such fine and jail term as well as the cancellation of his agency licence.[103]

C. Curbing Fake Insurance Claims

The Insurance Decree of 1997 appears not to have adequately dealt with the phenomenon of fake claims and the penalty suitable to likely parties, that is, the false claimant and the insurer. Cases of false insurance claims may be difficult to discover, especially where the insurer is privy to the claim. Therefore the law in this regard ought to be reviewed so as to put in place the appropriate machinery for detection and adequate penalty of the parties involved. The enforcement network must of necessity involve the diligent participation of in-house investigators and claim verification agency of the insurer whose real and pecuniary independence the insurance company must ensure. The general meeting of the company is best placed to retain the claim verification agency so that the company may avoid the likely conflict of interest and duties of fraudulent officers and agent of the insurer company.

Monitoring the Securities Market

A. Public Offers of Securities

The Investment and Securities Act (ISA)[104] established the Securities and Exchange Commission (SEC)[105] to "regulate investments and securities business in Nigeria" according to the ISA.[106] Therefore, the SEC is the sole authority that registers securities to be offered to the public for subscription or sale.[107] The SEC also "registers and regulates Securities Exchanges, Capital Trade Points, Futures, Options and Derivatives Exchanges, Commodity Exchanges and any other recognized Investment Exchanges."[108]

In addition to these important functions, it also registers corporate and individual capital market operators as well as the "workings of

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[103] S.35 (2) & (3). This seems to be an improvement in the fines of between one hundred and five hundred naira that the repealed 1991 Insurance Act provided for. But how willing are insurance companies to provide the Commission the relevant information instead of simply terminating the agency of the culprit?

[104] No.45 of 1999.

[105] *Id.* S.1(1)

[106] S. 8(a)

[107] S.8 (c)

[108] S. 8 (b).

venture capital funds and collective investments schemes including mutual funds".[109] As the highest regulatory organization for the Nigerian capital market, it has the duty to protect investors, maintain fair and orderly markets as well as "prevent fraudulent and unfair trade practices relating to the securities industry.[110] In performing these and the other important functions under Section 8 of the ISA, the SEC has enormous powers of investigation, demand for information, penalizing erring companies as well as disqualifying unfit persons from employment in the securities industry. Pursuant to its powers under section 262 of the ISA to make rules, the SEC has made a comprehensive body of diverse rules to regulate security dealings in Nigeria.[111]

By virtue of the ISA, only a public company may invite the public to acquire its securities or "...deposit money with any body corporate for a fixed period or payable at call, whether bearing or not bearing interest unless the body corporate concerned is a body corporate licensed under the Banks and Other Financial Institutions Decree 1991 to carry on banking business."[112] All persons, company officers and body corporate making any invitation in contravention of this provision shall be guilty of an offence and liable to a fine of not less than one hundred thousand naira, and in the case of the natural persons, an imprisonment of at least two years or the fine or both the fine and imprisonment. Anybody who is adversely affected by the invitation made illegally may rescind the subscription and recover a compensation for the loss sustained by him.[113]

Securities must be registered by the SEC before they are offered for sale to or for subscription by the public or privately with the intention that the securities will be held ultimately by persons other than those to whom the offers are made. Otherwise, the issuers of the securities have committed an offence and are liable on conviction to a fine of fifty thousand naira and to a further fine of five thousand naira for every day

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[109] S. 8 (c) (d).
[110] S.8 (h) (j) (u).
[111] Securities and Exchange Commission, *Rules and Regulations Pursuant to Investment and Securities Act of 1999* (2000)
[112] S.44 (1)
[113] S.44 (3) (4).

during which the offence continues.[114] The ISA seeks to ensure that investors receive material information on all publicly offered securities. Therefore, it makes provisions for registration and antifraud liability. It is unlawful to issue an application form for securities in a public company unless a prospectus or a statement in lieu thereof that must comply with the requirements of the Act accompanies it. A violation of this provision is on conviction punishable by a fine of one hundred thousand naira.[115] In order to ensure that those who prospect for investment do not deceive investors, any company officer who authorized the issue of a prospectus with an untrue statement or any person who authorized the delivery of a statement in lieu of prospectus with an untrue statement could be liable on conviction to a fine of one hundred thousand naira or to a term of imprisonment for up to three years or to both the fine and the imprisonment. He could avoid liability only if "he proves that the untrue statement was immaterial or that he had reasonable ground to believe and did up to the time of the issue of the prospectus [delivery for registration of the statement in lieu of prospectus] believe that the statement was true."[116] In securities transactions in the United States, the Supreme Court offered a useful definition of materiality in the case of *Basic, Inc. v. Levinson.*[117] A statement is deemed to be material if there is a substantial likelihood that a reasonable investor would consider it as altering the "total mix" of information in deciding whether to buy or sell the securities in question. Therefore, if the information would affect the price of the securities, the information is material. This definition should guide the determination of materiality of statements in Nigeria.

It is an offence for a person to "...create, or cause to be created, or do anything which may create a false or misleading appearance of active trading in any securities on a Securities Exchange or Capital Trade Point or a false or misleading appearance with respect to the market for or price of any such securities."[118] This and some other manipulations of trade or market in securities in order to raise or lower the price thereof so as to

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[114] S.32
[115] S. 48 (1) (3).
[116] Ss. 63 & 64.
[117] 485 U.S. 224 (1988)
[118] ISA, S.81(1)

influence the public to buy or not to buy them are punishable by a fine of not less than five hundred thousand naira or an imprisonment for a term not exceeding three years or both.[119] The ISA has these and other wide-ranging provisions that should deter criminal operations and practices in the securities market.

Since the SEC has the duty to administer the ISA, and more particularly "to prevent fraudulent and unfair trade practices relating to the securities industry,"[120] we presume that its in-house lawyers who are knowledgeable in securities regulation would exclusively prosecute the offenders and not State Counsels in the Federal Ministry of Justice who already have many cases of general nature to prosecute.

C. Unit Trusts

A unit "trust scheme" or "mutual fund" is " any arrangement made for the purpose, or having the effect, of providing facilities for the participation of the public as beneficiaries under a trust in profits or income arising from acquisition, holding, management or disposal of securities or any other property whatsoever."[121] The unit trust is designed to enable investors with smallholdings to pool their resources in order to make significant and substantial investment in the capital market. The SEC must authorize and register every operating unit trust, and it must be satisfied that the competence and probity of the manager and trustee of the scheme are such as to make them suitable for those offices.[122]

It is unlawful to operate a unit trust scheme that is not registered by SEC, and once the deed expressing the trusts as well as the name of the trusts are approved any manager or trustee who alters them "…commits an offence and is liable on conviction to a fine of N50, 000 and in addition to a penalty of N5, 000 per day for the period during which the default subsists."[123] A manager of a unit trust scheme may invest only in securities specified under the Trustee Investment Act[124] and such other

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[119] *Id.* S.87.
[120] S.8
[121] S.124
[122] S.125
[123] S.127.
[124] Cap. 449 Laws of the Federation of Nigeria, 1990.

investments as the SEC may, from time to time, approve.[125] The manager may not trade for his own account or make personal profit from the assets of the scheme. He must not borrow money on behalf of the scheme to acquire securities or other properties for it. He equally must not lend anyone the money of the scheme to enable him buy units of the scheme. He must not mortgage, charge or encumber the securities or other properties of the scheme or engage in any transaction that is not in the interest of the scheme and unit holders lest he be liable to a fine of twenty thousand naira.[126]

In order to effectively monitor the activities of unit trust schemes, the ISA vests in the SEC diverse powers to call for the audited accounts of such schemes and require the same to be published in national newspapers, investigate and report on the administration of any unit trust scheme as well as require that scheme managers produce relevant documents for scrutiny. The SEC also may revoke its authorization of any scheme for contravening the ISA or any regulation made under it.[127] As the unit trust is used more and more as a vehicle of investment, the challenges of monitoring is bound to be higher since unit ownership is divorced from its management.

D. Monitoring Reconstructions, Mergers, Take-Overs and Acquisitions of Companies

There might be the need for a company to make a structural or organizational change for a more effective operation and maximization of profits. The need arises more when the economy is in recession and companies find it difficulty to stay afloat. The organizational changes that we envisage here could take the form of reconstruction, merger, take-over or acquisition by one company of the other. While it is impossible to do an in-depth examination of these corporate formations within the scope of this article, we endeavour some salient factors in the process that are relevant to our enquiry.

The ISA empowers the SEC to "review, approve and regulate mergers, acquisitions and all forms of business combinations."[128] In the

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[125] ISA S.136

[126] S132.

[127] *See* Ss. 128,134,137, 141,142 and 145

[128] S.8 (o)

exercise of its powers, the SEC shall approve every merger, acquisition or business combination that "is not likely to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise" or whose vote or proxies shall not cause the same.[129] The ISA also requires that the SEC consider before its approval of a take-over bid the likely effect of the bid on the economy of Nigeria and any policy of the Federal Government with respect to manpower development. The SEC may require the parties to any business combination to provide more information to enable it reach the right decision. A take-over bid that the parties make without SEC authorization or registration is an offence punishable on conviction by a fine of not less than one hundred thousand naira or an imprisonment for a term not exceeding twelve months or by both the fine and term of imprisonment.[130]

The effect of the above provisions and other monitoring devices of the law as well as the need for their diligent enforcement are best appreciated by keeping in mind the abuses that could occur in the process of merger acquisition and other business combinations. Although the directors involved in these processes appear all the time to be acting in the best interest of the company, there also is the possibility that they act in their own interest or for some other ulterior motive. The abuses they could subject the process to include:

(a) manipulation of price of shares and insider trading;
(b) receipt by the directors of the target company of 'golden handshake', that is, financial inducement from the take-over bidders for loss of office that attends the bid;
(c) failure of the directors of the target company to give adequate information to the shareholders in the circulars or notices the directors send to them about the bid so that the shareholders are unable to form an enlightened opinion of the bid;
(d) defensive tactics by the directors of the target company to frustrate the bid although it would be favorable to the shareholders. This they could do by issuing more shares or shares with weighted votes

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[129] S.99 (3)
[130] S.122

or by initiating other schemes that will make it financially suicidal for the bidder to continue with the bid; or

(e) allowing the bid so as to create a monopoly or oligopoly by absorbing other trade competitors.[131]

E. Insider Trading

The ISA empowers the SEC to "protect the integrity of the securities market against abuses arising from the practice of insider trading."[132] In addition, the Act prohibits an individual who is an insider of a company from buying or selling or otherwise dealing "in the securities of the company which are offered to the public for sale or subscription if he has information which he knows is unpublished price sensitive information in relation to those securities."[133] Similarly, no public officer or former public officer may trade with the information he obtained by virtue of his office as a public officer.[134] The contravention of these provisions is an offence punishable on conviction by a fine of one million naira or an imprisonment for a term of two years or both the fine and imprisonment.[135] However no transaction shall be void or voidable only because it violated the provisions of sections 88 or 89 of the ISA but the guilty insider shall compensate all persons who suffered direct loss "as a result of the transaction, unless the information was known or with the exercise of reasonable diligence could have been known to that person at the time of the transaction." In addition, the guilty person shall account to the company for the direct benefit or advantage received or receivable by him from the transaction."[136]

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[131] O.A. Osunbor, *The Nigerian Law of Take-overs and Mergers* (1989) 2 G.R.B.P.L. (No.5) 40, 41-42

[132] S. 8 (m)

[133] S. 8 (1). The defines corporate insiders to include persons who "at any time in the preceding six months have been knowingly connected with the company" as directors, other officers and employees of the company or a related company or persons who have business or professional relationship with the company in such a way that they have in relation to its securities "unpublished price sensitive information...which it would be reasonable to expect a person in [that] position not to disclose except for the proper performance of [their] functions".

[134] S.89

[135] S.94

[136] S.93

The menace of insider trading is one of law's oldest problems but there is no record that anyone has ever been prosecuted for it in Nigeria. This raises a serious question about the securities market and regulator's determination to protect the market against this scourge. Regulators must address this problem urgently.

Conclusion

This general traverse of the challenges of, and the legal as well as policy framework for, crime-free operation of corporate entities in Nigeria has attempted much but has only done little in highlighting the problem of crime in the operation of companies and some salient provisions of the laws that address the problem. We admit that the field of inquiry is wide and that our scope is limited. Therefore, in the limited scope, this article has discussed some likely crimes in the course of the operation of corporate businesses as well as some salient provisions in a number of statutes that seek to curb the identified crimes. For most of our enquiry, the article observed that there is enough on the statute books to fight crimes in corporate business operations. In other areas, we have suggested that the law be reviewed either to make the prescribed penalty more stringent or to make the law more efficacious. As an important part of the efficacy, the supervisory and enforcement regime must be alert and efficient. Happily, the CAC, SEC, CBN, National Insurance Commission and other relevant regulatory bodies are set up to be autonomous. They must remain autonomous and free from unnecessary intervention by the Federal Government and its agents. The government must abandon policy inconsistency for determined law enforcement. Since economic instability and recession as well as hyperinflation have the tendency to propel companies and businessmen towards excessive risk taking and even criminal operation in the race for the bottom, law enforcement has to be alert to meet the challenges that are bound to arise daily.

To facilitate law enforcement, the CAC must further decentralize its operations. Presently, it has a few zonal offices that perform limited functions that do not involve investigation of companies but register business names, clear business and company names and receive annual returns. The zonal offices seem to concentrate on meeting revenue target at the expense of sanitizing the operations of corporate bodies. It is high time the CAC had branch offices in all the state capitals headed by officers

of the status of Deputy Registrar-General. Every branch office should exercise all the powers of the CAC, including the power of investigation and law enforcement, over all the corporate bodies in that state. Effective electronic network is required for an effective monitoring and linkage of the branches to the head office in Abuja. The present situation of using computers for name verification only is not only cumbersome and counter-productive, but it also makes the zonal offices revenue collection centers only. To the extent that the most of the operations of the CAC are concentrated in Abuja, much room is given to inefficiency and corruption as companies jostle to have the CAC officials attend to their business. A Commission that is under an intense pressure to cope with fillings hardly would have time for investigation and law enforcement.

The SEC has enough statutory powers to monitor corporate operations but must use electronic information storage and monitoring devices to the effect. With offices in Lagos and Abuja, it is well positioned but must provide electronic linkage. If its autonomy is preserved, it should function effectively to protect the integrity of the capital market from criminal operations.

All regulatory bodies must give premium to training both at home and overseas of their officials so that they could cope with high-tech criminal operations. They also must cooperate with regulators of advanced economies. These and other positive measures will enhance the efficiency of the regulatory bodies.