

Original Article

Nigerian Capital Market: Issues, Problems and Prospects

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Abstract

This article appraises the legal and institutional frameworks of the Nigerian Capital Market and the extent to which the market has achieved the purposes of those frameworks. It identifies some core issues and problems faced by the market and investors which include ensuring certainty of contract and protection of property rights of investors, efficacy of information disclosure by publicly quoted companies in prompting investment and securing the value of investment, protecting investors from unfair practices by corporate insiders and professionals, and systemic protection against financial failure of market professionals and participating financial institutions. It found the regulatory institutions and law adequate in structure and contents. However, it established that information disclosed by securities issuers is too complex for the understanding of most retail investors. Added is weak enforcement regime in the face of which regulation failed to prevent abuse of securities clearing and settlement procedure, market rigging and other manipulative activities of core market operators and corporate insiders, including violation of margin regulations through excessive insider borrowings and securing of repayment of bank loans with the securities purchased with the loans, with contagious effect resulting in failure of the lending institutions. It concludes that the market has prospects, but demands purposeful regulation to ensure fair, efficient and transparent dealings for the protection of investors and the economy.

Keywords: Capital, market, regulation, manipulation, disclosure, investor, protection

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INTRODUCTION

The capital market is a market where capital funds (equity and debt) are traded. Thus, it offers corporate business organizations and governments the forum and means to raise long-term funds at a cheaper cost than the money market that consists of banks. The Nigerian Capital Market is an important market in Africa, second only to the South African market in terms of sophistication and market capitalization. Government and self-regulatory organizations regulate the capital market because of its importance to the economic growth and development of the country. The regulations seek to ensure that the market is fair, efficient and transparent to such an extent as to adequately protect investors and the economy, the latter from systemic effect of market failure.

This paper appraises the performance of the Nigerian Capital Market and its operators as well as the extent to which it has achieved the purposes of its institutional and regulatory framework. It identifies some core issues and problems faced by the market and investors which include adequate contents of regulations but weak enforcement regime, flow of scarce financial resources to properties instead of the capital market, concentration of economic power in the hands of government, overdependence of the economy on the banking sector [and the oil sector], unhealthy private sector due to market rigging and other manipulative activities of core market operators and corporate insiders, and paucity of foreign investors, which deprives the market of depth. It makes a case for purposeful regulation of the market to ensure fair, efficient

and transparent dealings for the protection of investors and the economy. It also projects the regulatory future of the market in the national and global scheme of events.

The Capital Market

A capital market is a market for trading capital funds (debt and equity). It is a forum for corporate business organizations and governments to raise long-term capital, and it traditionally exists in contradistinction to the money market in which short-term debt instruments are traded.¹ The cost of capital in the capital market is lower than that of the money market.² A capital market is also "... the complex of institutions and mechanisms through which intermediate-term funds and long-term funds are pooled and made available to business, government and instruments already outstanding are transferred."³

The Functions of Capital Market

The capital 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 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. The Nigerian capital market performs all of these important functions.

The Objectives for Establishing the Nigerian Capital Market

The objectives for the establishment of the Nigerian Capital 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 (1996), the Securities and Exchange Commission ("SEC"), the apex regulatory agency for the capital market, stated the objectives *inter alia* as to

... mobilize 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

¹ Remi R. Bakare. *Financial Market Glossary* (Lagos, Nigeria: Prince of Prints Ltd.) s. v. 'Capital Markets.'

It is important to keep in mind that the recently introduced universal banking has opened the capital market door to commercial banks that were money market institutions only. Hitherto, these banks participated in capital market activities indirectly through their subsidiaries, but they may do so now, not only through those subsidiaries, but also directly through the designated departments. The Guidelines on Universal Banking have enhanced the definition of "banking business" in section 61 of the Banks and Other Financial Institutions Act (BOFIA). It added "... consultancy and advisory services relating to corporate and investment matters; making or managing investment on behalf of any person; and the provision of insurance marketing service and capital market business." Thus the strict compartmentalization of financial institutions into money market and capital market institutions respectively is losing most of its significance. However, universal banking raises regulatory concern. Traditionally, the Central Bank of Nigeria regulates banking; the Securities and Exchange Commission regulates the Capital market; while the National Insurance Commission regulates insurance business. To the extent that these agencies will share regulatory functions, there must be cooperation, coordination and a regular exchange of information. The government may need the Finance System Regulatory Coordinating Committee (FSRCC) to effectively do these.

² In the year 2000, more than twenty Nigerian companies and two state governments (Edo and Delta) raised over N17 billion from the Nigerian Capital Market. This has been on the increase. For instance, most of the state governments raise money on the market. Recently, the Debt Management Office of the Federal Government issued oversubscribed euro bonds to raise foreign currency denominated funds.

³ HE. Dougall & J.E. Gaumnitz, *Capital Markets and Institutions* (Englewood Cliffs, New Jersey: Prentice Hall Inc., (1975), p.3.

⁴ Allan R. Palmiter, *Securities Regulation* (New York, NY: Aspen Law and Business, 1998), p. 3. 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).

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), promote stock market culture.

Added to the above was the need to provide governments an avenue to raise long-term capital⁵. In 1961, at the inception of the Lagos Stock Exchange (now Nigerian Stock Exchange), a foundation council member and the managing director of one of its promoters, the Nigeria Industrial Development Bank Limited ("NIDB") stated the objectives of the Nigerian capital market as

... the mobilization of savings for economic growth, diversion of capital from less productive sectors such as real estate to more productive sectors such as industries to augment the banking system and reduce the dependence of Government on taxation for economic development to decentralize the ownership of assets and create a healthy private sector, avoidance of excessive concentration of economic power in the hands of Government, avoidance of excessive concentration of economic power in the hands of a small private group to encourage more even distribution of wealth, and to facilitate co-operation between indigenes and aliens in fostering economic development.

The Panel on the Review of the Nigerian Capital Market affirmed the validity of these objectives, and reported that most of the problems that the market set out to solve still remain unsolved. Scarce financial resources flow to properties still; economic power is yet largely in

the hands of Government; the economy still over depend on the banking sector [and the oil sector]⁶; the private sector is yet unhealthy; there are still not enough foreign investors, and the problems of distribution and concentration of wealth persist.⁷

When the Lagos Stock Exchange was incorporated as a company limited by guarantee, its memorandum of association stated the objectives of the market, *inter alia* as to:

- 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;
- b. 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 prices dealt in by members; and
- c. 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 Evolution of Nigerian Capital Market Regulation

The principal statute that regulates the Nigerian Capital Market is the Investments and Securities Act of 2007 ("ISA"). The ISA re-establishes the Securities and Exchange Commission ("SEC") as the regulatory apex organisation for the capital market. It also makes extensive provisions to regulate dealings in securities and market participants. It empowers the SEC to make rules and regulations for the capital market, pursuant to which the SEC has made extensive rules following the pattern of those that regulate the major capital markets of the world.⁸

⁵ The first Federal Government of Nigeria Loan Stock was floated in London long before the Lagos Stock Exchange was established.

⁶ Addition mine

⁷ See the *Report of the Panel on the Review of the Nigerian Capital Market*.

⁸ Securities and Exchange Commission General Rules and Regulations Pursuant to the Investments and Securities Act, 2007 (2013); The United States Securities Act of 1933 - General Rules and Regulations 17 CFR 230 and Rules and Regulations Under the Securities Exchange Act 1934 17 CFR 240. For a compendium the U.S. securities statutes, rules and forms, see R. W. Jennings, et al., *Federal Securities Laws - Selected Statutes, Rules and Forms 1999 Edition*, New York, New York: Foundation Press, 1999. The U.S. rules are wider and more advanced, bearing suitable relevance to the age and sophistication of her capital market and legal system.

The Nigerian Stock Exchange, a major institution of the capital market and a Self-Regulatory Organization ('SRO'), also regulates the market, and is in turn regulated by the SEC. A self-regulatory organization is '... any registered securities exchange, capital trade point, an association of securities dealers, clearing house, capital market trade association [and] any other self regulatory body approved as such, by the [Securities and Exchange] Commission. SROs perform certain rulemaking, inspection, investigative, and disciplinary functions with respect to their members and their personnel. They also offer alternative and expeditious dispute resolution forums for participants in the capital market. They stand to perform useful regulatory roles because they are more familiar with the market and participants than the SEC, the government regulatory agency.⁹ Importantly, however, their actions are subject to review by the SEC under the ISA. The ISA and SEC Rules and Regulations of 2013 charges the SEC with registration, regulation and disciplining of all SROs including the Nigerian Stock Exchange, the Abuja Stock Exchange, the National Association of Securities Dealers, Capital Trade Points, Derivatives Exchanges, and Securities Clearing and Settlement Agencies.¹⁰ Significantly, no securities exchange or capital trade point shall operate unless it is registered with the SEC in accordance with the ISA and the rules and regulations made thereunder.¹¹ An association of securities dealers must, in addition to its memorandum and articles of incorporation, have by-laws or rules, code of conduct or code of dealing for members. Likewise, a capital trade point must have listing requirements in addition to its memorandum and articles of association. The practice of self-regulation is expected to develop with the capital market.

The Central Bank of Nigeria facilitated the development of the Nigerian Capital Market

and cooperates with the SEC to regulate the market and the SROs. In 1959, it floated the first Federation of Nigeria Development Loan of N4 million and worked out the arrangement for its marketing. Its representative is on the SEC, and was the chairman of the defunct Capital Issues Commission of 1973, a progenitor of the current SEC.

Securities Exchange

The ISA defines a Securities Exchange as "... and exchange or approved trading facility such as a commodity exchange, metal exchange, petroleum exchange, options, future exchange, over the counter market, and other derivatives exchanges."¹² The Stock Exchange is a major capital market institution. The Nigerian Stock Exchange ("NSE") and the Abuja Stock Exchange Plc. ("ASE") dominate the Nigerian Capital Market.

The Lagos Stock Exchange

The Lagos Stock Exchange ("LSE") was established in 1959, although initiatives towards the establishment of the Nigerian Capital Market could be traced to the 1940s.¹³ In 1958, House of Parliament appointed a committee under Professor Barback, the Director of the Nigerian Institute for Social and Economic Research to find ways and means of establishing a shares' market in Nigeria. In 1960, following the report of that committee, the Central Bank of Nigeria collaborated with the Investment Company of Nigeria Limited (later known as the Nigerian Industrial Development Bank) and the business community to set up the LSE. It was a private company limited by guarantee but having a share capital. One of the reasons for the establishment of the LSE was to provide avenue for Nigerians with surplus funds to invest locally. Hitherto, they invested their surplus funds in London. Another reason was to give Nigerians the opportunity to

⁹ Susan Nash, Robert D. Strahota and Anne H. Sullivan, "Building an Effective Regulatory Structure/or an Emerging Securities Market" 7 *Securities Market Journal* (Nigeria), 37, 50.

¹⁰ See sections 28-37, Part V of the ISA.

¹¹ S. 28, *ibid.*

¹² S. 315.

¹³ In 1946, the Colonial Government promulgated the 10-year Plan Local Loan Ordinance that provided for the floatation in London of 300,000 Pound Sterling 3% first Government Stock. In 1957, the Government and Other Securities (Local Trustee Powers) Ordinance came into force, allowing Trustees to invest in the securities of public corporations such as the Coal Corporation, the Electricity Corporation, the Railway Corporation and the Ports Authority. None of these corporations has raised capital from the domestic Capital Market.

participate in their economy.¹⁴

The LSE set out to be a purely self-regulatory organization on the terms of its memorandum and articles of association. However, in 1961, because the Federal Government of Nigeria desired to give it statutory protection and exercise some form of control over it, it enacted the Lagos Stock Exchange Act¹⁵ (repealed by the ISA of 1999), granting the Lagos Stock Exchange the monopoly to:

... restrict the practice of stock broking, including stockjobbing, in the securities granted quotation by the Exchange, to its members; admit members, regulate them and report its activities quarterly to the Minister of Finance through the Governor of the Central Bank of Nigeria, and report to the Minister through the Governor whenever the Council of the Exchange rejected an application for membership.

Section 7 of the Lagos Stock Exchange Act gave the Central Bank of Nigeria the right, either on its own behalf or on behalf of another person, to sell or offer for sale or purchase or offer to purchase stocks and other securities of the Government of the Federation, whether or not they are for the time being granted a quotation by The Exchange.¹⁶ That section recognized the Central Bank of Nigeria ("CBN") as a regulatory agency for the capital market, a position that is no longer so with the establishment of the SEC.

The Nigerian Stock Exchange

The Lagos Stock Exchange metamorphosed into the Nigerian Stock Exchange ("NSE") on December 2, 1977, with branches in some major cities of Nigeria. The Exchange has three categories of members, namely council members,

ordinary members and dealing members. The members of Council are drawn from dealing and ordinary members.¹⁷ The National Council of the Exchange is the governing and the highest policymaking authority, and it functions through committees charged with various responsibilities that include listing and delisting of securities, admission of new members and discipline. The powers and functions of the Council include:

- (a) Enforcement of the Articles as well as the Rules and Regulations of the Exchange;
- (b) Investigating complaints from investors and members as well as settling disputes investors and brokers or members inter se;
- (c) Policing the market, and taking disciplinary measures against erring members;
- (d) Making, amending or revoking regulations and prescribing fees for the effective operation of the Exchange;
- (e) Granting quotation to companies, and deciding to delist, suspend or withdraw quotation from a quoted company when it deems it necessary;
- (f) Appointing committees suitable to the smooth functioning of the Exchange.¹⁸

Dealing members combine the functions of stockbrokers and dealers. The Exchange requires dealers to deposit a sum of money with, pay annual dealership fee and maintain an effective presence in at least two floors of the Exchange.

The NSE has *General Listing Requirements*. These are a set of rules and regulations on companies that may be admitted to listing on the Exchange and the conditions for quotation of securities. They also specify payment of listing fee, the rights attached to the shares quoted on the Exchange and other

¹⁴ See Research Department of the Central Bank of Nigeria, *Twenty Years of Central Banking in Nigeria*, (1979).

¹⁵ No. 14

¹⁶ *Ibid.*, 553-6

¹⁷ This followed the *White Paper on the report of the Pius Okigbo's Financial System Review Panel (1976)*. The Federal Government set up that panel in April of that year to study the structure and operations of the Nigerian financial system and make recommendations to it for improvement.

For further reading on membership and governance of the Exchange, see H.I. Alile and A.R. Anao, *The Nigerian Stock Exchange in Operation*, Lagos: Jeromelaiho & Associates for the Nigerian Stock Exchange, 1986, 19-33.

¹⁸ For the mode of constituting the Council and its functions, see the Stock Exchange Articles of Association (as amended). See also Alile and A.R. Anao, *ibid.*, pp.29-30. The branches of the Stock Exchange also have branch Councils. Although they are not autonomous, they may make by-laws for effective functioning of their respective trading floors. They do initial vetting of application for membership and make recommendations to the National Council.

obligations of the listed companies.¹⁹

On April 30, 1985, the Federal Government established the Second-tier Securities Market ("SSM") for businesses that could not meet the Listing Requirements of the NSE. The SEC gave the purpose for which the SSM came into operation as "providing stock market access to small businesses at less demanding admission rules/costs than full quote as a means of creating opportunities for economic growth and employment through the growth of small businesses..."²⁰ The SSM provides "a wider and cheaper source of funding for small/medium ... enterprises."²¹

The Central Securities Clearing System

In 1992, the NSE incorporated the Central Securities Clearing System Limited ("CSCS") as a part of its effort to make the Stock Exchange more efficient following the recommendation of the International Finance Corporation. The CSCS is a subsidiary of the Stock Exchange, its clearinghouse and depository. As a clearinghouse it facilitates the validation, delivery and settlement of securities transactions, and as a depository, it facilitates the exchange of stock and bond certificates as well as offers custodian services. The NSE owns 51 per cent of its shares while stock registrars, stockbrokers, investment banks and other nominees hold the remaining 49 per cent. Due to apprehension that the CSCS will not be able to efficiently cope with the volume of transactions on the securities market, the SEC and the National Council on Privatisation ("NCP") have considered the establishment of another clearinghouse. However, the NSE, in a preemptive move to forestall the establishment, is willing not only to reduce its shareholding in the CSCS by admitting more shareholders, but also to change the name of the clearinghouse for a more national one.²²

The Abuja Stock Exchange

The Abuja Stock Exchange Plc. ("ASE") was incorporated on 17 June 1998. Its promoters include the CBN, the Nigeria Reinsurance Corporation, the Nigeria Bank for Commerce and Industry, the Nigeria Industrial Development Bank and the National Insurance Corporation Plc. The ASE is an automated market as it has a trading system called the Abuja Stock Exchange Automated Trading System ("ASEATS"). The system has software module for Initial Public Offering ("IPO") of securities and an order-driven, screen-based facility for the secondary market as well as security clearing and depository facility. Thus the market is accessible on-line and efficient. With these facilities, the Nigerian Capital Market is set to join the modern major markets of the world. The ASE has three subsidiaries, namely Securities Clearing and Depository Limited ("SCDL"), ASE Properties Limited and ASE Publications Limited.

The SEC registered the ASE to create a level ground and an environment conducive for competition by qualified capital market institutions. The monopoly to deal in shares and stocks that the Lagos Stock Exchange Act granted the LSE, and albeit, the NSE, was contrary to free market enterprise, therefore, the ISA of 1999 repealed the Act.

The repealed CIC Decree and successive SEC Acts provided for the licensing of multiple stock exchanges but only the NSE was registered up till 1998. The Federal Government permitted the establishment of the ASE following the recommendations of the *Odife Panel on the Review of the Nigerian Capital Market* in October 1996 that a national stock exchange of an international standard be established in Abuja. The ASE has added to the number of SROs on the capital market.

The ASE with its automated trading system is one of the most remarkable innovations

¹⁹ 23 Generally the Listing Requirements permit free transferability of fully paid-up shares. All listed companies must advertise a proposed Annual General Meeting conspicuously in at least two widely read newspapers at least 7 days before the meeting. The subscription monies pending allotment and return of funds to the subscribers must be deposited in a designated bank account appointed by the Issuing House and the Company. All accrued interests must be paid to the Company to offset part of the cost of the Issue. The Council of the Exchange, its policy-making organ may at its discretion add to or subtract from the Listing Requirements at anytime.

²⁰ *Securities Exchange Commission Quarterly* Vol. 2, No. 1 (March 1985), p.1.

²¹ *Ibid.*

²² 26 Williams Ekanem, "NSE Opens Up CSCS for New Shareholders" *Punch*, 19 January 2002, p.24.

by the SEC. In consonance with that, the SEC has issued comprehensive guidelines on dual listing and multiple trading of securities in the Nigerian Capital Market.²³ Rule 399 of the SEC Rules and Regulations permits issuers to list their securities on more than one exchange since the listing is a business decision of the issuer, provided that they comply with the listing requirements of the relevant securities exchange. Rule 185 provides that "pursuant to the provisions of the [Investments and Securities] Act, a securities exchange shall by its rules permit the trading of a security not listed on it; provided that such security has been registered and listed on any recognized securities exchange..." The exchange has the discretion to "impose conditions for granting such "permitted trading status" and file it with the SEC.

Once registered with the SEC, a broker/dealer may be a licensed dealing member of more than one Exchange.²⁴ "Where the broker or dealer effects transactions on any exchange and over-the-counter market, the appropriate self-regulatory organization shall be the exchange(s) and the association of the relevant over-the-counter market."²⁵ In order to preserve the sanctity of dual listing, Rule 203 (8)(b) prohibits a securities exchange from making rules that prohibit or penalize its dealing members from trading in listed securities of on other recognized exchanges as permitted by the rules of those exchanges. The latter is without prejudice to the provisions of any memorandum of Understanding on the issue between exchanges filed with the SEC within five days of execution. SEC Rules prohibit arbitraging by stipulating that the "highest closing price of a security on any of the exchanges shall be the opening price on all the other exchanges."

The Federal Government curiously and unilaterally converted the ASE into a Commodities Exchange on 8 August 2001 thereby creating another monopoly in share trading. This action has raised a number of questions - Why should the government sacrifice

competition for monopoly? Should the establishment of a Stock Exchange be a political decision rather than an economic decision? Could the government validly convert the ASE to a Commodities Exchange? What will the ASE really be? One may add, why take so much trouble making rules for multiple stock exchanges? How do we optimize the gains of the facilities on the ASE? How do we truly internationalize our capital market?

The Central Bank of Nigeria

The Central Bank of Nigeria ("CBN") came into operation in 1958, not only as banker's bank, but also to regulate the Nigerian Capital Market in some areas of operation. The debates in the House of Representatives on the desirability of establishing the bank revealed the nexus between it and the capital market. When the Dr. K.O. Mbadiwe proposed a private member's motion for the establishment of the bank, the expatriate Financial Secretary to the Government opposed the motion because he was of the opinion that

[y]ou must have institutions, such as banks, insurance companies, building societies, mortgage societies, finance houses and the like, who are prepared to buy and sell securities at short notice. You must have a highly organised stock exchange through which these security (sic) can be marketed.²⁶

Though the government of the federation established the CBN before the Lagos Stock Exchange, the Bank came to regulate the capital market. Section 4 of the Central Bank Act, 1958²⁷ charged the CBN "to promote monetary stability and sound financial structure in Nigeria."²⁸ Sections 39 of the same Act enjoined the CBN to cooperate with other banks in Nigeria to promote and maintain adequate and suitable banking services as well as maintain management ethics in the banking system and to pursue other policies that are in the national interest. Pursuant to its

²³ SEC Guidelines on Dual Listing and Multiple Trading of Securities (2000).

²⁴ Rule 203(8)(a).

²⁵ Rule 25(3)

²⁶ See Research Department of the Central Bank of Nigeria, Twenty Years of Central Banking in Nigeria, (1979), p.38, quoting from the House of Representatives Debates, First Session, March April 1952, Vol. 2.

²⁷ Repealed Cap.30, Laws of the Federation of Nigeria and Lagos, 1958.

²⁸ Under the repealed Central Bank of Nigeria (Amendment) Decree No.3 of 1968, S.2.

powers the CBN through its credit guidelines regulate the volume of money in the economy, and albeit the money available for investment in the capital market.²⁹

It also is significant to keep in mind that the fact that the CBN was germane to capital market regulation prompted the Government to make its representative the chairman of the Capital Issues Commission of 1973 and a member of the Securities and Exchange Commission ("SEC") of 1979. These Commissions successively have been at the apex of capital market regulation.³⁰

The repealed Lagos Stock Exchange Act³¹ required the Stock Exchange to submit quarterly reports of its activities to the Minister of Finance through the Central Bank whose governor must comment on the writing so as to enable the Government to monitor and regulate the capital market.³² The Federal Government policy guidelines have revealed that the CBN has been able to assist it in the realization of its economic objectives.³³

The Capital Issues Committee/Commission

In 1962, the Federal Government set up the Capital Issues Committee as an³⁴ ad-hoc committee "... with the basic understanding that if experience and market development justified it, a more formal structure would be established with a fundamental objective of providing the mechanism of regulating the capital market."³⁵ This step was consistent with the fact that as a

private company, the Stock Exchange began as a self-regulatory organization. Even the 1961 Stock Exchange Act was terse in content. The Committee was purely advisory, and although the Stock Market respected its decisions, they lacked legal force and sanction. It operated as a department of the CBN. Its ad-hoc status made it idle on the capital market to the extent that it handled only twenty issues in the fourteen years of its existence.

In 1973, the Federal Government enacted the Capital Issues Decree³⁶ (now repealed) creating the Capital Issues Commission ("CIC") that replaced the Capital Issues Committee.³⁷ Under the Second National Development Plan, the Government had promulgated the Nigerian Enterprises Promotion Decree in 1972 to pursue the first phase of indigenization of foreign enterprises doing business in Nigeria. It envisaged that capital market activities would increase and raise more than ever the need to protect investors. It found the Capital Issues Committee incompetent for that important role.³⁸ The Capital Issues Decree charged the CIC with the duty of determining:

- (a) the price at which the shares or debentures of a company are to be sold to the public either through offer for sale or by direct issue;
- (b) the timing and amount of any subsequent public issue of shares or debentures by that company; and
- (c) such other matters incidental or

²⁹ The Central Bank of Nigeria Monetary, (Credit, Foreign Trade and Exchange Policy Guidelines/Fiscal 2002/2003 (Monetary Policy Circular No. 36) seeks "to subdue inflation to a single digit over the two year-period. Consequently, the central focus [included] effective control of anticipated liquidity injection ... in order to ... "enhance " ... greater access to credit for the real sector" of the economy - p.9.

³⁰ Curiously, the Securities and Exchange Act. No. 29 of 1988 reenacted as a chapter of the Laws of the Federation of Nigeria, 1990 (which Act has been repealed by the Investments and Securities Act, No.45 of 1999) left out the CBN from the then re-established SEC. It also left out representatives of the Federal Ministries of Finance and Trade (Corporate Affairs Commission from 1990) - see section 2.

³¹ S. 5 (1).

³² *Ibid.* S. 5(2).

³³ See G.A. Olawoyin, *The Nigerian Capital Market*, University of Ife, Nigeria, Inaugural Lecture Series 46 (Ile-Ife: University of Ife Press, 1980), p.8.

³⁴ J.O. Sanusi, "Capital Market in Nigeria" in Ayua, I.A. (ed.) *Nigerian Commercial Laws: Problems and Perspectives*, (Kaduna: Layon Security and Colour Printers), p. 136.

³⁵ Olawoyin, *supra*.

³⁶ 1973, No. 14.

³⁷ The CIC comprised the Chairman who was a representative of the CBN and one representative each of the Federal Ministries of Finance, Trade, Economic Development and Reconstruction and Industries as well as a representative of the Stock Exchange, and three other persons appointed by the Minister of Finance. The enabling Decree clearly gave the leadership role to the CBN.

³⁸ Olawoyin, *supra* p.17

supplementary to the foregoing as the Commission may at its discretion determine.³⁹

The Capital Issues Decree also penalized companies that issued a prospectus inviting members of the public to subscribe to their shares or debentures without the prior approval of the CIC as regards the price at which the shares or debentures were to be sold and the timing as well as amount of the sale. The fine payable by the company that contravened the law was ten thousand naira (or about twelve thousand US dollars then). Any of its officers found guilty paid a fine in like sum or went to jail for at least three years in the alternative.⁴⁰ Any person with grievances relating to the decision of the CIC could appeal not to the courts but to the Commissioner (Minister) for Finance whose decision on the matter was final.⁴¹ The Capital Issues Decree never intended to regulate the Stock Exchange, and the CIC never did, but it had statutory powers and performed more functions than the Committee it replaced. It approved fifteen securities issues in its lifetime.⁴²

The Capital Issues Decree limited the jurisdiction of the CIC to public companies only.⁴³ Because of that, many of the companies affected by the first phase of indigenization escaped its regulatory oversight as only 28 of the 430 of the companies were public companies. Therefore, to rectify the situation at the second phase in 1977, the Federal Government empowered the CIC to determine the prices of the shares of all enterprises that were indigenized whether public or private.⁴⁴

The volume of securities transactions during the second phase of indigenization sensitized the Federal Government to the inadequacy of the CIC and led to the establishment of the Securities and Exchange Commission.

The Securities and Exchange Commission⁴⁵

The Securities and Exchange Commission ("SEC") is the regulatory apex organization of the Nigerian Capital Market. The SEC is established and recomposed by Part I of the ISA, 2007. That part also prescribes a Code of Ethics for its members. It is expected that the SEC will play a vital role in the making and implementation national development and poverty alleviation policies. According to a learned solicitor and capital market consultant,⁴⁶ the new SEC is designed to be pro-active by taking the Capital Market to the grassroots with a clearly defined twin objective, that is, ensuring nationwide participation in stock market activities as well as the mobilization of savings at the grassroots.

To enable the SEC to effectively protect investors and superintend capital market development, section 13 of the ISA charges the SEC inter alia to

- a. regulate investments and securities business in Nigeria as defined by [the] Act;
- b. register and regulate Securities Exchanges, Capital Trade Points, Futures, Options and Derivatives Exchanges and any other recognized Investment Exchanges;
- c. regulate all offers of securities by public companies and entities;
- d. register securities of public companies;
- e. render assistance as may be deemed necessary to promoters and investors wishing to establish Securities Exchanges and Capital Trade Points;
- f. prepare adequate guidelines and organize training programmes and disseminate information necessary for the establishment of Securities Exchanges and Capital Trade Points;
- g. register and regulate corporate and

³⁹ 1973, No. 14, S.1(2).

⁴⁰ *Ibid.*, S.4.

⁴¹ *Ibid.*, S.6.

⁴² See Alile and Anao, *supra*, p.39.

⁴³ By section 4(1) these are companies which by their articles of association are "not precluded among other things, from issuing invitation to members of the public to subscribe for shares or debentures" whether or not such shares were to be dealt in on a Stock Exchange.

⁴⁴ See the Nigerian Enterprises Promotion Decree Act, No.3 of 1977 (since repealed), s.9.

⁴⁵ For more reading on the Securities and Exchange Commission up till 1995 see *SEC Evolution and Functions*, (Lagos, Nigeria: Securities and Exchange Commission)

⁴⁶ See Section 1

- individual capital market operators as defined by this Act;
- h. register and regulate the workings of venture capital funds and collective investments schemes in whatever form;
 - i. facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly markets;
 - j. facilitate the linking of all markets in securities with information and communication technology facilities;
 - k. act in the public interest having regard to the protection of investors and maintenance of fair and orderly markets, and to this end to establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administered by Securities Exchanges and Capital Trade Points;
 - l. keep and maintain a register of foreign portfolio investments;
 - m. register and regulate central depository companies, clearing and settlement companies, custodians of assets and securities, credit rating agencies and such other agencies and intermediaries;
 - n. protect the integrity of the securities market against the abuses arising from the practice of insider trading;
 - o. promote and register self regulatory organizations including securities exchanges, capital trade points and capital market trade associations to which it may delegate powers;
 - p. review, approve and regulate mergers, acquisition takeovers and all forms of business combinations and affected transactions of all companies as defined by this Act;
 - q. authorize and regulate cross-border securities transactions;
 - r. call for information from and inspect, conduct enquiries and audit of securities exchanges, capital market operators, collective investment schemes and all their regulated entities;
 - s. promote investors' education and the training of all categories of intermediaries in the securities industry;
 - t. call for, or furnish to any person, such information as may be considered necessary by it for the efficient discharge of its functions;
 - u. levy fees, penalties and administrative costs of proceedings or other charges on any person in relation to investments and securities business in Nigeria in accordance with the provisions of this Act;
 - v. intervene in the management and control of capital market operators which it considers has failed, is failing or is in crisis, including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors;
 - w. enter and seal up the premises of persons illegally carrying out capital market operations;
 - x. in furtherance of its role of protecting the integrity of the securities market, seek judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the Act, or any securities law or regulation in Nigeria or other jurisdictions;
 - y. relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into co-operative agreement on matters of common interest;
 - z. conduct research into all or any aspect of the securities industry;
 - (aa) prevent fraudulent and unfair trade practices relating to the securities industry;
 - (bb) disqualify persons considered unfit from being employed in any arm of the securities industry;
 - (cc) advise the Minister [of Finance] on all matters relating;
 - (dd) perform such other functions and exercise such other powers not inconsistent with this Act as are necessary or expedient for giving full effect to the provisions of this Act.

Pursuant to its powers under the ISA, the SEC has established four specialized departments to regulate securities exchanges, capital market operators, including investment advisers and consultants, collective investment schemes, and

business combinations respectively. In addition, it has upgraded the Research and Market Development Division to a full department and established a Compliance and Enforcement Department. It also created the Department of Human Resources out of the Administrative Department.

The Investments and Securities Act

The Federal Government enacted the Investments and Securities Act ("ISA")⁴⁷ in 1999 following its acceptance of most of the recommendations of the *Panel on the Review of the Nigerian Capital Market* of 1996 (Odife Panel). The ISA, 1999 has been repealed by the Investments and Securities Act, 2007. Nigeria has a comprehensive statute for the regulation of its Capital Market. The Act focuses not only on the market institutions and operators, but trade in securities also. Its overall objective is to ensure a fair, orderly and transparent market and protect investors.

Part V of the ISA empowers the SEC to register Securities Exchanges and Capital Trade Points. By virtue of this Part and other provisions of the Act as well as the 2013 *General Rules and Regulations Pursuant to the Investments and Securities Act, 2007*, the SEC could register and regulate more Stock Exchanges in Nigeria. Part VI regulates the registration of capital market operators. The latter include securities dealers, stockbrokers, sub-brokers, jobbers to issues of trust deeds, registrars to issues investment bankers, issuing houses, underwriters, portfolio managers, investment advisers, and such other intermediaries as the SEC may license in accordance with the Regulations made under the Act. Under this Part, the SEC for the first time in Nigeria has been registering solicitors, engineers, surveyors and other professionals before they could be consultants in the capital market.⁴⁸ However, the Federal High Court has decided that the SEC has no power to register solicitors whose participation in the capital market is merely incidental to their practice of their profession.

In *Prof. A.B. Kasunmu, SAN v Securities and*

Exchange Commission & Anor.,⁴⁹ the plaintiff asked inter alia for:

A declaration that the [SEC] has no rights or powers under the provisions of the ISA or under any other law to demand, direct and/or insist that the plaintiff must be accredited and registered with the [SEC] before the plaintiff can act or be appointed as a Solicitor to any capital market transaction and more particularly before it (the Plaintiff) can act as Solicitor to a company in a public issue;

A declaration that any regulation made by the [SEC] requiring a Solicitor to be accredited and registered with the [SEC] before the Solicitor can act in a capital market transaction is illegal and ultra vires and inconsistent with the provisions of [the ISA].

The plaintiff has been, at all material times, the Solicitor to Chartered Bank Plc. The bank intended to publicly issue securities so as to raise fund on the Nigerian Capital Market, and it informed the plaintiff to be the solicitor to the issue. The SEC refused to permit the plaintiff to act in that capacity unless the SEC accredited and registered it under sections 8(t), 9(b), 29, 30, 258(I) and 264 of the ISA, 1999 as well as Rule 39 of the SEC Rules and Regulations made pursuant to section 258 of the ISA, 1999. The SEC contended inter alia that the phrase "... and such other intermediaries associated with the securities Industry..." in section 29(1) of the ISA included Auditors, Reporting Accountants, Valuers and Legal Practitioners in the Market Operators registerable by the SEC. Consequently, the plaintiff sought the above declarations, arguing successfully that the phrase excluded Legal Practitioners to the extent that section 29(1) of the ISA specifically listed those that the SEC must register. The plaintiff persuaded the court further that only such other intermediaries that buy, sell or deal in securities on the capital market must be registered with the SEC, and the plaintiff does not deal in securities within the meaning of section 264 of the ISA. In addition, the

⁴⁷. 1999, No.25

⁴⁸. Suit No. FHC/LJCS170/2002 (Unreported).

⁴⁹. Suit no. FHC/L/CS/70/2002 (Unreported).

preparation by the plaintiff of the offer documents, confirmation of the facts in the documents, and like matters are incidental to the profession of a Legal Practitioner.

The court held *inter alia* that beside the fact that a Legal Practitioner is not specifically mentioned in sections 29(1) and 30 of the [ISA], section 264 of the same Act expressly enacted that an Investment Adviser does not include a Solicitor and Advocate or Accountant in practice whose carrying out of the business is solely incidental to the practice of his profession. It is therefore the view of the court that it is not the necessary intendment of the Act to include Legal Practitioners amongst those to be registered by the Securities and Exchange Commission.⁵⁰

If only a Capital Market Operator is required to be registered in view of Section 8(t) of the act which confers powers on the [SEC] to register and regulate Corporate and Individual Capital Market Operators and if by the combined effect of 29(1), 30 and 264 of the Act, a Legal Practitioner whose carrying out of business is solely incidental to the practice of his profession is not a Capital Market Operator and is not to be registered, then Rule 39 of the Rules and Regulations which provides that Legal Practitioners and other professionals whose opinion directly impact on Capital Market transactions are also subject to registration by the [SEC], is at variance with the necessary intendment of the Act, and is inconsistent with the express provisions ... of the principle (sic) Act and so it is invalid.⁵¹

The Securities and Exchange Commission General Rules and Regulations Pursuant to the Investments and Securities Act, 2007

In 2013, the SEC made the *General Rules and Regulations Pursuant to the Investments and Securities Act, 2007*. Prior to that time, the SEC had made *SEC Rules and Regulations pursuant to the ISA of 1999*. These Rules and Regulations replaced the SEC Regulations of 1989. The 2013 General Rules and Regulations have repealed the 1999 Rules and Regulations. The SEC prescribe them to effectively and efficiently carry out the

objectives of securities regulation as embedded in the ISA. The SEC expects also that they would provide participants (regulated persons) in the capital market with more precise notice of what is expected of them, what conduct would be sanctioned and as well as promote transparency fairness and equality of treatment.

The SEC Rules are in Parts A to N with eleven schedules, all of general and specific applications. They cover registration and regulation of Capital Market Operators, Public Companies, Capital Market Experts or Professionals, Self-Regulatory Organizations and transactions on Exchanges, Capital Trade Points and similar organizations. They have extensive provisions on registration of securities, issuers and underwriters' processes and obligations, prospectus and public offers, rights issue, private placement and conduct of securities business. Their enhanced provisions respond adequately to margin lending, which abuse was partly responsible for the capital market meltdown of 2008-2009 from which the Nigerian capital market has not fully recovered.

The SEC Rules and Regulations address copiously regulation of foreign investment and cross-border securities transactions. The transparency that they have infused is yielding significant results as evidenced by euro bonds that the Federal Government issued recently to raise two billion dollars, which was oversubscribed to the tune of seven billion dollars. They also sufficiently provide for the regulation of mergers, take-overs and acquisitions, collective investment schemes, Islamic fund, venture capital fund, private equity funds as well as fixed income securities that facilitate borrowing by governments and their agencies as well as corporate bodies. Finally, it introduces *Sukuk*, which is borrowing on the terms of *Shariah*.

SEC recognizes that rule making is a continuous process, and the existing rules would be amended, and more would be made, especially to regulate areas of the capital market operations that would evolve from time to time. Consequently, between 2014 and the end of 2016, SEC has made Rules on Infrastructure Funds to promote infrastructural development, including

⁵⁰ *Ibid.* p. 22.

⁵¹ *Ibid.*

public housing, Rules on Trading in Unlisted Securities, Rules on Investor Protection Fund, and Rules on Securitization. The latter is to situate Nigeria in the scheme of asset securitization (Asset-Based Securities and Mortgage-Based Securities) as well as trade in derivatives. The market operations backed by these Rules will require diligent monitoring and enforcement by regulators, especially the SEC and anti-financial fraud Commissions and other agencies.

The Investments and Securities Tribunal

The defunct SEC, acting ostensibly under section 24 (1) of the repealed SEC Act of 1988, set up and operated an Administrative Hearing Committee ("AHC") to handle matters of alleged violation of The SEC Act and Regulations. If it set up the AHC as a model after the American SEC Administrative Committee, a quasi-judicial forum for resolving capital market disputes in the United States ('US'), the former differed from the latter. The American AHC is properly integrated into the US judicial system. It follows the due process of the law, and is headed by a Federal judge of the High Court level who also is a full-time employee of the SEC. Appeals from it go to the US Court of Appeals. The Nigerian AHC differed in all these regards. The Odife Panel recommended that a judicial forum be set up with the Nigerian Capital Market in place of the AHC to curtail the latter's "... usurpation of judicial powers ... and the pretences at the dispensation of justice by SEC.⁵²

Section 274 (1) of the ISA established the Investments and Securities Tribunal ("IST") to interpret securities regulation and resolve disputes that may arise in the capital market.⁵³ Section 284 (2) of the Act empowers the IST, to the exclusion of any other court of law or body in Nigeria, to exercise jurisdiction to hear and determine any question of law or dispute involving

- a) a decision or determination of the [Securities and Exchange] Commission in the operation and application of the [ISA], and in particular, relating to any dispute between:
 - (i) capital market operators;
 - (ii) capital market operators and their clients;
 - (iii) an investor and a securities exchange or capital trade point or clearing and settlement agency;
 - (iv) capital market operators and self regulatory organization;
- b) the Commission (SEC) and self regulatory organization;
- c) a capital market operator and the Commission;
- d) an investor and the Commission;
- e) an issuer of securities and the Commission; and
- f) disputes arising from the administration, management and operation of collective investment schemes.

The Tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of the National Assembly.⁵⁴ The IST consists of seven members to be appointed by the Minister of Finance. The chairman must have been a legal practitioner for not less than fifteen years with cognate experience in capital market matters.⁵⁵ Any person who is aggrieved by any action or decision of the SEC under the ISA may institute an action before the IST, or appeal to it within thirty days of the decision, or as the IST may permit. The IST must dispose of any matter before it with finality within three months of the date the action commenced. No civil court shall have jurisdiction over any matter that the ISA empowers the IST to determine. If any person, including the SEC, is dissatisfied with a decision

⁵² *Odife Panel Report*, supra.

⁵³ For more reading on resolution of disputes in the Nigerian Capital Market, see J.T. Agbadu-Fishim, "Dispute Resolution Under the Investments and Securities Act of 1999" *The Nigerian Stockbroker*, Vol. 1 no. 4 (October-December 2000): 19-25; and Linus O. Okeke, "One Step Forward, Two Steps Backward: An Examination of the Fate of the Investments and Securities Tribunal under Nigeria Legal Order" *Journal of International Financial Markets*, Vol. 1, Issue 7 (December 1999), pp. 308-318.

⁵⁴ Section 284(2). The current provision has rightly eliminated the power of the Minister of Finance to delimit the jurisdiction of the IST under the repealed 1999, section 234.

⁵⁵ See generally, sections 275-276.

of the IST, he (it) may appeal to the Court of Appeal.⁵⁶

The decision of the IST must be in writing and its orders or sanctions may include, but are not limited to, fines, suspensions, withdrawal of registration or licenses, specific performance or restitution. On an appeal to it, it may confirm, modify or set aside any order or decision of the SEC.

The IST has no jurisdiction over criminal matters, as it shall be deemed to be a civil court for all purposes.⁵⁷ In addition, where in the course of its investigation of any matter, the SEC discovers evidence of possible commission of crime, it shall pass the information to the appropriate criminal prosecution authority for prosecution in the regular courts.⁵⁸

Capital Market Issues and Problems

In an Inaugural Lecture titled *How Secure are Securities?*⁵⁹ this author identified for evaluation four of the core objectives that capital market regulation seeks to achieve. These objectives are appraised hereunder so as to determine how well the Nigerian regulatory system has fared in protecting the value of securities:

1. Ensuring Certainty of Contract and Protecting Property Rights of Investors

Nigeria has elaborate regulatory and institutional framework for ensuring certainty of contract and protecting property right of investors in securities. In the author's appraisal of the regulatory and institutional framework of our securities market,⁶⁰ it was found that the institutional framework for securities regulation in Nigeria were adequate and comparable to those of the similar emerging and the developed securities markets in the Common Law system.

In research collaboration, this author has also appraised the dual system of securities regulation in Nigeria by the Government and Self-Regulatory Organizations (SROs) in comparison with the practice in the advanced

United States jurisdiction so as to establish its systemic justification and demerits.⁶¹ At the apex of the regulatory structures of both securities markets is the SEC. However, the law allows market institutions to provide the first layer of regulation by regulating themselves. Hence, they are called Self-Regulatory Organisations (SROs) and are in turn regulated by the SEC. The SROs include the Nigerian Stock Exchange ("NSE"), an official market for trade in publicly listed securities, The Central Securities Clearing System Limited ("CSCS"), a subsidiary of the NSE as well as its clearing house and depository, the Abuja Stock Exchange ("ASE") as well as its subsidiary, the Securities Clearing and Depository Limited ("SCDL") and the National Association of Securities Dealers ("NASD").

The justification found for self-regulation is that SROs have the expertise to provide detailed regulation, deal with ethical and moral issues in the market in a more responsive way, eliminate regulatory tensions and ensure participation by the regulated. Phillip Parker also identified the advantages of the self-regulatory model as the technical expertise and flexibility of the SROs, cost savings to government as well as the acceptability of the SROs' rules over those of government regulators.⁶² Against the advantages, however, Parker found as disadvantages conflict of interests, antitrust implications, and due process concern. He further elaborated as follows:

Because a securities exchange is both a business venture and a regulatory body, there is always a danger that the rules will not be enforced in circumstances where the enforcement would be detrimental to business.... Because the members of an SRO are collectively regulating their own behaviour, there is a danger of collusive behaviour that ultimately hurts customers. A member's right to conduct business can be taken away by individuals exercising a

⁵⁶ Section 295(1), ISA

⁵⁷ Section 290(3), *ibid.*

⁵⁸ Section 304, *ibid.*

⁵⁹ Inaugural Lecture of Osun State University, Series 002, delivered by O.O. Oladele, Professor of Business Law, on Wednesday 16th February, 2011 at the University Auditorium, Osogbo, 77pp, also available at www.uniosun.edu.ng

⁶⁰ Oladele, O.O., "Nigerian Capital Market Regulations" (2005) 19 (1) *Lesotho Law Journal* 141-170.

⁶¹ Oladele, O.O. and Ogunleye, T.A., "The Conceptual Basis and Limit of Self-Regulation by Securities Markets in Nigeria and United States" (2006) 3 *University of Botswana Law Journal*, 45-66.

⁶² Parker, Phillip, D., "The Concept of Self-Regulation under the Federal Securities Laws", an unpublished paper delivered at the SEC International Institute for Securities Market Development, Washington DC (12 March 1999).

form of governmental power. A member may have all of the procedural rights, however, that would apply if the government were the disciplinary body.⁶¹

Sadly but truly however, the framework has failed in some important areas that badly impact the advantages and confirm the disadvantages. There is clear evidence that issuers, insiders and market operators manipulate the institutional framework in ways that devalue investors' securities and affect their property right. Permit me to appraise two of the SROs whose procedure could be manipulated to the harm of investors. They are the NSE and the CSCS. The latter facilitates clearing and settlement of trade in securities so that investors could realize and pass value of securities easily through sale and purchase. The Bank for International Settlements (BIS) and the International Organization of Securities Commissioners of Securities Regulators (IOSCO) stipulate the development of an efficient securities trade clearing and settlement system within each member jurisdiction. Participants in the securities market should set up the system with clearing and depository facilities, and it must aim at a settlement period of the transaction day plus a maximum of three days (T + 3).⁶² The securities regulators of the Group of Thirty (G30) in its report on securities settlement systems, had recommended a clearing and settlement period of (T + 3) for the major markets⁶³, and (T + 5) for emerging markets.⁶⁴ It is commendable that Nigeria has achieved the T + 3 period.

In response to the recommendations above, the leading SRO in Nigeria, the NSE, established the Central Securities Clearing System Limited (GSCS) in 1992. The CSCS facilitates the exchange of stock and bond holdings as well as offers custodian services. As a clearinghouse, it facilitates the validation,

delivery and settlement of securities transactions. The NSE holds 51 per cent of its shares while stockbrokers, stock registrars, investment bankers and other market participants hold the remaining 49 per cent.

To achieve its statutory objectives, the CSCS employs the procedure of dematerialisation of securities. Sadly, that procedure is susceptible to easy manipulation that could devalue outstanding securities. This dematerialisation procedure requires a shareholder who had been issued share certificates before the establishment of the CSCS to open an account with broker/dealers who are members of the CSCS and obtain an account number. The shares evidenced by all his share certificates are credited into that account, and the shareholder no longer requires the certificates for transactions. Such a shareholder then provides his account number to issuers of securities that he subsequently purchases for direct crediting of his account with the shares. That way, issuers should no longer have to issue certificates to investors. The shares are dematerialised as they appear as figures only in his account. The advantage is that the investor could easily get value for his shares by instructing his broker to sell shares from his account and credit his bank account within T+3 days.

This author opened a CSCS account though his stockbroker, applied for the shares of a leading commercial bank and indicated on the application form his CSCS account number to which the shares should be promptly credited. Curiously, the issuer bank issued the author a share certificate which reached him late through the postal system. The value of the shares increased remarkably, recording an appreciation of N7.00 per unit within weeks. This author made to dematerialise the shares so that he could sell them off through the CSCS. The Registrar of the issuer queried his signature as irregular. Thus the value of his shares was locked in through the

⁶¹ *Ibid.*

⁶² Bank for International Settlements (2001), *Report of the Committee on Payment and Settlement Systems (CPPSS- IOSCO Joint Task Force on Securities Settlement Systems, Consultative Report*, Basel (January 2001).

⁶³ The Group of Thirty (G30) is a 'think-tank' of 30 high-level individuals drawn from central banks, commercial banks, economists and finance ministries of countries, which include Australia, Austria, Belgium, Canada, France, Germany, Italy, Japan, Singapore, Spain, Switzerland, United Kingdom and United States. The group made nine core proposals on securities trade clearing and settlement systems, which the member-countries of IOSCO, including Nigeria, have been complying with since the 1990s. See Hal S. Scott and Phillip A. Wellons, *International Securities Regulation*, New York, Foundation Press (2002), pp. 416-418.

inconvertibility of the certificate which the issuer had no business issuing him in the first instance. We were at it during the weeks that followed, during which many institutional and other investors as well as market professionals were selling off their stock in a frenzy that drove the price lower than the N33.00 that this author bought each unit at the issuer's public offering. It was only when the price had dropped to N28.00 that the Registrar unilaterally accepted this author's signature as regular and credited his CSCS account. He had been deprived of the opportunity to sell the shares at a considerable profit and had lost N5.00 per unit of his investment. Whither the security of his securities?

Importantly, to ensure that the SROs do not become law unto themselves, government regulatory oversight in major and emerging markets have to adequately respond to the perceived and potential disadvantages of self-regulation. The SEC may, *suomoto*, enforce the regulations of the SROs that they fail to enforce on their own because of their perception that they may thereby suffer adverse economic or financial detriment.

2. Requiring Disclosure by Publicly Quoted Companies of Material Information that affects the Value of their Securities

The Nigerian securities regulatory system has failed partially to keep numerous corporate investors informed of the material securities information and the rights that attach to the corporate securities that they have invested in against the backdrop of the propensity of securities issuers to conceal and mystify material information. It has not solved the problem of informing retail investors who, more often than not, lack the means and technical ability to have, understand and utilize material securities

information. The contents and complexity of the required information have addressed the problem of a disclosure system that best protects institutional investors who are sophisticated and have the means to obtain as well as verify information. Like the major securities markets such as the United States and United Kingdom, it makes disclosure mandatory and also prescribes the information that securities issuers must disclose. In addition, it increases the content and quality of the required information in response to real and anticipated market crashes as well as fraud on investors from time to time.⁶⁶ The contents and complexity of the information disclosed as well as incidences of fraud on the investors show clearly that the unsophisticated targets of the disclosure have not benefited from the protection it offers. The assumption that all investors could evaluate securities disclosure concentrates on the functioning of the Nigerian securities market as a capital raising forum without adequately addressing the protection of all investors, informed and uninformed.

The registration statement in securities offering is in public domain once the issuer has filed it with the SEC and the latter has registered it. Of this statement, the prospectus is the material part that every investor is entitled to. It usually is a document of about forty pages in glossy and expensive print. According to a former Director at the SEC and the head of its Lagos Zonal Office⁶⁷ as well as a former senior officer of the Nigerian Stock Exchange who has served for some years as Principal Manager in the Listing and Quotation Department⁶⁸, although every prospective investor is entitled to a copy of the prospectus, the cost of making it available to all of them is so prohibitive that it could not be available to all of them. In addition, even if the issuer made it available to all prospective investors, the ones who would end up investing in the issuer's

⁶⁶ The Investments and Securities Act, 2007 and the Sarbanes-Oxley Act, Public Law 107-204, July 30, 2002 - 116 Stat, 745 of the United States are representatives of those trends.

⁶⁷ Okereke, Chris, O, Unstructured interview conducted by me in Lagos on October 3, 2006. Okereke was a highly placed official of the SEC who served on the joint Committee (of the SEC and CAC) on Corporate Governance of Public Companies in Nigeria. The report of the committee formed the basis and substance of the *Code of Corporate Governance in Nigeria* (October, 2003). The findings from that interview of over a decade ago remain valid from the experience of the author as a solicitor researcher that has engaged capital market issues over the period.

⁶⁸ Momoh, Mohammed, Unstructured Interview conducted at an examination session of the Chartered Institute of Stockbrokers (CIS), held in Lafia Hotel Ibadan on October 20-21, 2006. Again, the findings from that interview of over a decade ago remain valid from the experience of the author as a solicitor researcher that has engaged capital market issues over the period.

securities would be a relatively small percentage of the recipients. Either way, there is a disincentive to the circulation of a prospectus to all prospective investors.

The field interviews that I conducted and the advisory services that I have rendered on capital market issues over the past three decades up to date confirmed that the prospectus is a highly technical document containing legal and accounting information that could not be understood by a person who is well educated but not in finance, accounting and law at the same time. As such, even for persons with requisite technical expertise, it does not make light reading and understanding. In the United States, an attempt to make the prospectus intelligible to the average investor through plain English has failed. It cannot succeed in Nigeria because English language is not only a second language to as many as three hundred and sixty local languages, but many are uneducated. It is mythical to hold that an average investor could understand and effectively use prospectus and other securities disclosures to make 'an intelligent investment decision.'⁶⁹ He lacks the ability to understand complex financial information supplied in a typical registration statement. Only professionals could make an effective use of it.⁷⁰

In addition, the complexity of securities transactions renders impossible the telling of the 'whole truth' to an average investor in an intelligible way.⁷¹ A simplification of disclosure for the benefit of the layman often leaves out the information that is valuable to securities professionals. Consequently, Kripke, submitted that the prospectus then becomes "a routine, meaningless document which does not serve its purpose."⁷²

It is submitted that the impossibility of reducing securities information disclosure into plain, understandable and valuable language rightly justifies the application of *filtration theory* in Nigeria. By this theory, the average investors

could benefit from securities disclosure only after they have filtered it through professionals. Findings from interviewees in the course of my research confirmed the findings of Homer Kripke, an emeritus professor of securities regulation, who 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.⁷³ Therefore, he has described the informational function of the United States securities regulation as creating "the myth of the informed layman."⁷⁴ He consequently submitted, employing the 'filtration theory' that a layperson could only benefit from mandated disclosure "after a process of filtration through professionals, directly in the form of investment advice or management and indirectly through their effect on the market."⁷⁵ This line of thought has established that the value of widely traded securities is best estimated as the market price determined through the interplay of sellers and buyers.⁷⁶

My interviewees added that because of the constraints of limited circulation and understanding of the full prospectus, the SEC allows the circulation of an abridged prospectus to all prospective investors. In addition to the disclosure in it, the abridged prospectus advises every recipient to consult his broker and solicitor before investing in the securities being offered. However, the interviewees noted that majority of prospective investors in Nigeria are unwilling to pay for information, therefore they hardly filter the content of the full or abridged prospectus through professionals. This observation, from personal experience as a solicitor of almost thirty-three years in Nigeria, is true, because the legal advice that friends, associates and acquaintances obtain from the writer is more than what they pay or are willing to pay for.

The investors who do not understand the

⁶⁹ Kripke, Homer, "The SEC the Accountants, some Myths and some Realities" 45 *N.Y.U.L. Rev.* 1151 at 1164 (1970).

⁷⁰ *Ibid.*

⁷¹ Douglas, W. & Bates. "The Federal Securities Act of 1933" 43 *Yale L.J.* 171 (1933).

⁷² Kripke, Homer "The Myth of the Informed Layman" 28 *Bus. Lawyer* 631 and 633 (1973).

⁷³ Kripke, Homer, "The SEC, The Accountants, some Myths and some Realities", *supra*.

⁷⁴ Kripke, Homer, "The Myth of the Informed Layman", *supra*.

⁷⁵ Kripke, Homer, "Fifty Years of Securities Regulation in search of a purpose" 1984-1985 *Corp PracComm* 547 at 561.

⁷⁶ SEC Securities Act Release No. 6176 (January 15, 1980) reprinted in [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH).

prospectus buy shares whose prices indicate that the issuers are trading profitably, paying dividends and allotting bonus shares to the shareholders. To such investors, securities are as good as their prices. In this attitude, they easily find allies in investors who buy securities on impulse, the noise traders who buy because buying is the perceived trend, and the "dart throwers" who simply gamble through investment. It is significant that of all the retail investors in securities in the seventeen years that I interviewed purposively, none of them invested due to the information that the issuers disclosed. Motivated by increased income, they followed the fad to invest in securities whose prices were rising.

The average investor requires education and reorientation. Significantly, the ISA charges the SEC to promote investors' education and the training of all categories of intermediaries in the securities industry.⁷⁷ The IOSCO, of which Nigeria is a member, also has objectives and principles of investor education, compliance with which it monitors in member countries on regular basis.⁷⁸ It is significant that the SEC has held regular public enlightenment campaigns around the states of the Federation on the opportunities in the Nigerian securities market. It has also launched a television network programme to educate investors and other stakeholders in the securities market.⁷⁹ The SEC should collaborate intensely with SROs for an elaborate and sustained education of investors not only to engender their interest in the market and promote the growth of the economy, but also ensure that they are adequately informed and protected.

Regulators in the SEC and Nigerian Stock Exchange recommend that retail investors who are not knowledgeable enough to understand the disclosure should invest in mutual funds managed by securities professionals who would have analyzed and filtered the disclosure before making informed investment decisions for and on behalf of the uninformed and unsophisticated. If they utilize this option, they do not have to take the trouble of information gathering and analysis,

and they pay little for quality investment since each of them is a minute part of a pool of many benefiting investors. It is submitted that the SEC should remain vigilant and be more proactive in regulating and monitoring mutual funds managers. With the introduction of the contributory pension scheme, there has been a tremendous increase in mutual funds. The vigilance of the SEC will go a long way in ensuring that investors in this pool of mutual funds do not suffer from the overreaching of the fund managers of the kind that led to the United States securities market crash of 1929 and the resultant Great Depression.

3. Protecting Investors from Unfair Practices by Corporate Insiders and Securities Professionals

Between 2008 and 2009, genuine investors on the one side and naive ones driven by fadsuffered damaging impact of gross devaluation of their securities through violation of two core provisions of the ISA on investor and systemic protection. The first was the violation of section 105 of the ISA. That section prohibits the creation or doing of something that may create a false or misleading appearance of active trading in any securities on a securities exchange or capital trade point or with respect to the market price of such securities. It also prohibits the straddling of the sale and purchase ends of the same security as well as devices meant to maintain, inflate, depress, or cause fluctuations in the market price of any securities.

Conversely, findings subsequent to the market crash of the past three years revealed that market professionals employed the prohibited devices in ingenious ways that appeared legal. Those devices ended up driving the prices of some securities excessively up and depressing them by as much as 92 per cent when the bubble burst. They abused and violated the margin requirement provision of section 104 of the ISA, which seeks to prevent excessive use of credit for the purchase of securities by dealers and member companies. Broker-dealers did not only borrow

⁷⁷ ISA, Section 13(s).

⁷⁸ IOSCO held a seminar/training programme on "Methodology for assessing implementation of the objectives and principles of securities regulation and investor education" in Madrid, Spain from November 17-21 2003. It is significant that two members of staff of the Nigerian SEC attended the seminar/training programme - See *Securities and Exchange Commission Annual Report and Accounts, 2003*.

⁷⁹ *Ibid.* See also *Securities and Exchange Annual Reports and Accounts* of the past fifteen years

massively but they also encouraged investors to borrow from the margin accounts maintained by the broker-dealers and from commercial banks. Much of the loans were secured with the existing shares of the investors and those purchased with the loan fund. Investigations by regulators, especially the Central Bank of Nigeria, revealed that substantial borrowing and lending were done by the insiders of banks and securities firms. The loan funds increased the sale tempo on the stock market. The repayment drove down the prices because there was a huge sale of securities that served as collateral for the loans. The systemic impact affected a number of banks that could not recover much of the loans. The negative impact which also caused loss of confidence in those institutions propelled the devaluation of the shares of the - banks. The value of the shares of Oceanic Bank International Plc and Intercontinental Bank Plc, among many others, fell from the region of N33.00 to less than N2.00. Panic sale by investors who were losing confidence in the stock market caused the downward spiraling of stock prices.

My findings and recommendation of 2003 on the failed banks crisis of the 1990s are relevant.⁸⁰ Undue influence by bank controlling shareholders, management and other insiders' abuse of the loan granting process was one of the reasons that accounted for loan default. Many directors of the failed banks granted loans to themselves, associates and corporate bodies in which they had pecuniary and proprietary interest. Records available at the office of the Nigerian Deposit Insurance Company revealed that 80 per cent of the non-performing and bad debts of the failed banks were granted to the directors of those banks. The fact that most of the loan defaulters were incompetent *ab initio* compounded the problem. Had a proper credit rating been done, the fact would have been revealed.⁸¹ However, in cases of this nature, there is no incentive for credit rating. On the face of the transactions, the parties appear to have 'complied' with the regulatory requirements of securitization, but behind the façade of compliance' lies harmful fraud. Cases of this nature reveal that the erring bank officials either have economic self-interest in the loan or the

borrowers are friends or relatives of the officials. Deceptive contrivances of that nature accounted for the recent crises in the Nigerian financial sector and the meltdown of securities value.

Securitization of loans with securities also accounted for loan default. Due to the volatility of the value of securities, lenders could not recover enough from their sale the moment they began to depreciate in value, driven by the pressure of sale by the debtors whose loans have been called in by the lenders.

The funds that have been invested in securities on the Nigerian securities market are in hundreds of trillions of naira. Of this sum are the life-savings and pensions of the investors. Therefore, the need for a more efficacious system of investor protection is paramount. With increased earnings by many Nigerians in the last decade, much has been invested in securities. In "The Legal Nature and Limit of Employee Benefits under Nigerian Contributory Pension Scheme"⁸² appraised the legal, social and economic implication of the contributory pension scheme. With the introduction of that scheme and its enabling law permitting pension fund managers to invest a sizable percentage of the contributed pension in publicly quoted securities, a significant portion of the retirement benefits of employees in Nigeria is out there in the domain of the securities market. The quantum of pension funds invested in securities has grown tremendously over the past thirteen years pursuant to investment of the funds under the Trustee Investment Act, the ISA and the General Rules and Regulations Pursuant to the ISA. Our expectation of good life in retirement must not be cut short by speculative frenzy not driven by market fundamentals. The American securities market, the most regulated in the world, experienced that during the last decade. Nigeria has had a dose of mismanagement and embezzlement of pension funds over the past few years. Our regulatory system must be proactive and anticipatory.

Historically, our securities market grew too slowly to reach the present modest level at which the regulators must strike a healthy balance between capital mobilization and investor protection. Nigerians of the 21st Century have

⁸⁰ Oladele, O.O., "Towards an Efficacious Legal Framework for Debt Recovery in Developing Countries' (2003) 2(1) *Journal of Commonwealth Law and Legal Education* 47-67

⁸¹ *Ibid.* at p.50.

⁸² Oladele, O.O., "The Legal Nature and Limit of Employee Benefits under Nigerian Contributory Pension Scheme" (2006) 1(2) *Capital Market Law and Economic Development Journal* 13-30.

cultivated the culture of investment. The sustenance of that culture as well as the internationalization of our securities market depends on transparency and candour in transactions and regulation as well as the ability of our regulatory system to curtail destructive manipulation presented as creativity.

4. Systemic Protection against Financial Failure of Market Professionals and Institutions

Not too long ago, public hearing by the National Assembly has revealed the employment by corporate insiders of shell company artifice to secure loans from some commercial banks to purchase the shares of those banks and other commercial banks, which they gave as collateral for the loans. The grave consequences that attended those illegal transactions included the inability of the borrowers to repay the loans at the time the value of the underlying securities had fallen drastically. The distress of those banks caused fear ripples of contagion in the Nigerian financial system. While the transaction rigged the securities market, the Central Bank of Nigeria, the apex regulator of the money market, had the difficult task of intervention that resulted in huge bail-outs at significant cost to the public that made viable banks to acquire the ailing ones. In the scheme, the SEC became a contextual 'lame duck'.

CONCLUSION

The Nigerian Capital Market has prospects. Nigeria is in the process of increasing corporate financing through the securities market. More than before there is an increase in capital market activities and market capitalization, which is in trillions currently. The introduction of the contributory pension scheme will continually increase the volume of investment and money in the securities market. As money management gains impetus, the need for enhanced investor protection arises as the potential risk of the investors staking their savings increases.

Our securities regulatory system must address the problem of market rigging - speculation. The securities market plays a vital role of matching lenders with investors. However, the experience of the past two years has revealed that the market was driven not by market fundamentals, but by speculative frenzy. The startling free-fall of securities prices dealt a debilitating systemic impact on the entire financial system and economy. Our regulatory system responded, largely belatedly. But it is clear that the system, while succeeding largely in issuers' transaction has failed in regulating financial intermediaries who are the leading players in the transactions on the securities market. The artifices for fraud not only on the market, but on

genuine retail investors are devised by market professionals in unusual manifestation that our regulators have not been able to track timeously. We must have a system that is able to track unusual price movement and intervene in securities trade on real time basis.

The issue of conflict of interest and insider dealings in the financial system must be addressed. It is amazing that the number of persons prosecuted and penalized for the violations that led to the stock prices crash of the past decade is disproportionate to the magnitude of the loss to investors and the entire financial system. I have argued that our system lacks the courage to penalize offenders in the financial system. In 2007, I anticipated the damaging eventuality of 2008-2010. I recommended rigorous law enforcement and stiff penalties for rule violation in the capital market. What has been done is comparable to ad-hoc fire-fighting that does not appear to have plumbed the depth. It is significant that the SEC General Rules and Regulations of 2013 pursuant to the ISA has made extensive rules on the troubling practices that cause damaging system impact, but the enforcement of those rules must be as purposeful as in advanced markets that spare no villains.

There is the need for the SEC to increase the tempo of investor education. It began it but the impact is widely felt. Even if there are uninformed investors who make wrong choices and fools of themselves, the regulatory authorities have a duty not to allow other persons to make fools of them. It is submitted that disclosure could be mandated in the major Nigerian languages. The mandatory information disclosure system is a sound pedestal and tool for investor protection. However, it must be made to ensure free flow of information to all investors in the form that they could use it for informed investment decisions.

Just as SEC did with the enactment of the 2013 Rules and Regulations have done, Nigeria must continually position herself for global competitiveness in investment attraction by reviewing her laws from time to time to cope with the current challenges to the security of securities. The ingenious zealotry of some securities issuers to conceal information and their outright falsification of financial statements has potential and real systemic impact. The impact could transcend national limit as our securities market goes international. In the era of cross-border promotion of investment, the soundness of the domestic market would continually cease to be measured by the domestic regulatory paradigm, but by regulations and best practices that meet international standards.