

**SECURITIES REGULATION IN AN EMERGING MARKET:
A COMPARISON BETWEEN NIGERIA AND CANADA**

By

ODARO OMONUWA, LL.B., M.B.A.

A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfilment of the Requirements
for the Degree of

MASTER OF LAWS

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Odaro Omonuwa, LL.B., M.B.A.

**A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University
of Manitoba in partial fulfillment of the requirements of the degree
of
Master of Laws**

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To

**The Memory of Dr. G.I.S. Omonuwa, PhD.,
an intellectual.**

ABSTRACT

The worldwide securities industry over the last two decades has experienced unprecedented growth and transformation. During this relatively short period, financial markets have expanded, globalised, integrated, and innovated at breathtaking pace. However, this explosive growth has not come without attendant problems. The huge rewards brought thereby have caused strains on the ability to maintain traditional professional standards, while adjusting to new pressures from deregulated environments and electronic technologies that allow ceaseless development and movement of new products.

The 1990s witnessed more than any other decade the 'struggle' to balance high standards and professional reputation with the pursuit of profitable opportunities in competitive markets. 'Emerging securities markets' have not been left out of these pressures. For developing countries, securities markets offer a vital source of capital for expansion and an important mechanism for market-guided resource allocation. During the 1970s, borrowing from international banks was exploited as a means of achieving this goal. The debt crises of the 1980s and the virtual non-availability of additional voluntary bank loans made clear the necessity for new economic and financial policies. Many governments took steps to promote financial market development, to open financial markets to foreign participation, to relax foreign exchange controls and restrictions on foreign direct investment, and to privatise state-owned enterprises. The continued development of securities markets therefore became of immense importance to these countries.

This thesis attempts to focus generally on the legal, regulatory and institutional environments for investments in African emerging securities markets, with a particular emphasis on the Nigerian securities industry. Within this framework, the primary focus will be on the extent to which the Nigerian securities legislation provides for the protection of investors and market integrity in the Nigerian capital market. Noteworthy is the fact that these 'new frontiers' in most instances adopt regulatory norms and structures applicable to more developed markets, with little cognisance of their peculiar environmental and operational contexts.

My study also attempts to determine how far the Nigerian securities industry can best adopt, and benefit from, established ethical practices in the more mature and developed Canadian securities industry, in hopes of avoiding otherwise negative consequences in the course of Nigeria's development and potential enormous growth in both its institutions and its laws.

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INTRODUCTION

1. THE CAPITAL MARKET AND ITS ROLE

The main purpose of capital markets¹ is to channel savings into investments by transferring funds efficiently from individuals, corporations and governments who have excess funds to those which need funds.² In fulfilling this objective, the capital market plays a direct role in the allocation of resources in society, by making moneys available at a cost determined by the forces of demand and supply. This process, by adding to the nation's stock of capital goods, increases output per worker-hour and ultimately raises the standard of living of a country.³

The capital markets facilitate the above process in two ways. First, savers may buy newly issued long-term instruments that provide business firms with funds to finance capital expenditures. Second, financial institutions, such as savings and loan associations, commercial banks, life insurance companies, investment companies and others use the savings of individuals and business to acquire capital market securities, including mortgages. In both ways, savings are made available for investment purposes.⁴

The mechanism by which a country mobilises savings within the economy and directs those savings to productive uses is central to any process of economic growth.

¹ "Capital markets" in contradistinction to "money markets" are used throughout this thesis to refer to those financial markets dealing with longer-term debt instruments and stocks (usually more than one year's duration).

² Professors David Shaw & Ross Archibald, *The Management of Change in the Canadian Securities Industry: A study of the Canadian Securities Industry by the Toronto Stock Exchange and Undertaken by the University of Western Ontario School of Business Administration*, Study One, 1973.

³ Charles Henning, et al., *Financial Markets and the Economy*, 5th ed. (New Jersey: Simon & Schuster, 1988), 7-9.

⁴ *Ibid.*, 9.

Intermediaries or middlemen who match investors holding surplus funds with those requiring funds conduct the operation of the market and by so doing, assist investors in spreading risks through diversification.⁵

According to Sir William Ryrie of the International Finance Corporation (IFC), contrary to the old “failed” model of economic development which argued that growth could best be stimulated by giving the government preferential access to a country’s savings and that the government, either directly or through state-owned development banks was the best agent for directing funds to productive uses, it is now widely held that market mechanisms are more efficient in both mobilising and allocating funds, and that a healthy private sector calls for an efficient, market-based financial system.⁶

The critical test of a capital market’s performance is therefore in its efficiency of allocation of savings to productive investments. In other words, a market is allocationally efficient if the projects with the highest returns for a given risk receive funding.

The securities market refers to the market where market intermediaries trade publicly offered securities⁷. They are, however, more than just a convenient place to trade securities. Their development fosters economic growth by providing a link between savers and users of capital, and by assisting investors in spreading risks through diversification.⁸ Diversifying across a variety of common stocks provides investors with

⁵ L. Johnson & B. Pazderka, *The Economic and Social Benefits of Stock Markets: Its No Gamble*, (Toronto: The Fraser Institute, 1996), 20.

⁶ See generally, “Private Sector Development in Africa”, address by Sir William Ryrie, Executive Vice-President of International Finance Corporation (IFC), Euromoney Conference, 2 March, 1993.

⁷ Professors David Shaw & Ross Archibald, *supra* note 2, Study Eight. The securities market and the stock market are used interchangeably in this thesis.

⁸ Charles Henning, *supra* note 3, at 20.

an opportunity to offset the risks of individual companies against each other. Investors can therefore utilise the stock market and decide the amount of risk they are willing to bear, either through selecting their own mix of securities or through investing in mutual funds.⁹

According to the International Organisation of Securities Commissions (IOSCO), stock markets are vital to the growth, development and strength of market economies. They support corporate initiatives, finance the exploitation of new ideas and facilitate the management of financial risk. Further, since retail investors are placing an increasing proportion of their money in mutual funds and other collective investments, capital markets have become central to individual wealth and retirement planning.¹⁰

Peter Bernstein suggests a nice analogy for the role of capital markets:

“Without the stock market, the market for corporate ownership would be like the market for houses. The seller of a house offers the entire house, not just a piece of it. Only rarely do brokers use their own capital to buy a house for resale. They have to advertise or resort to more cumbersome methods for finding the other side of the deal: no wonder the realtors earn a commission of 6 percent (the commission on a typical stock transaction is less than 1 percent), and no wonder transactions involve such extended negotiations. After the house has been sold, only the principals and their close friends know what the price was. Transactions are few and far between. With trading so difficult, so expensive, so infrequent, and secret, the buyer and seller seldom know whether the price they settled on was the right price or whether they might have struck a better deal with someone else.”¹¹

⁹ *Ibid.*, at 22. Mutual funds are professionally managed “pooled” funds invested in different companies on behalf of investors.

¹⁰ See the Introduction to the final communiqué of the IOSCO “Objectives and Principles of Securities Regulation” which was endorsed for public release at the annual conference of IOSCO in Nairobi from 12-18 September 1998.

¹¹ Bernstein Peter, *Capital Ideas: The Improbable Origins of Modern Wall Street*. (New York: Macmillan, 1992), 299.

II. EVOLUTION OF CAPITAL MARKET REGULATION

In the early days of commerce, the economic system was basically a barter economy. Goods and services were traded directly for other goods and services, without the intermediary of money. Businesses were conducted as proprietorships or sometimes as partnerships and joint ventures. Generally, the managers and the owners of business were the same individuals. External reporting of the results of operations by those closely held commercial entities was simply not needed. Internal information for planning and control was needed, however, and accounting systems were introduced to help provide that information.¹²

As commercial enterprises multiplied, both in size and number, more and more people were attracted to business opportunities, and the investment of capital resources expanded rapidly. The more aggressive businesses soon realised the financial advantage of encouraging capital investment by people willing to assume the risks of ownership, without being willing or able to assist in management. One advantage in this developing form of business was that ownership and financial interest could be spread over a broad base by issuing securities. Ownership and management thus became separated, and there was a need for a marketplace where equity and debt securities (stocks and bonds respectively today) could be exchanged for invested capital resources. This led to establishment of extensive capital markets, first in Europe and then in the United States.¹³

¹² Fred Skousen, *An Introduction to the SEC*, 5th ed. (Cincinnati, Ohio: South-Western Publishing Co., 1991), 1.

¹³ *Ibid.*, 2.

Two institutional developments in late seventeenth-century England, namely, the beginning of the permanent national debt and the rapid spread of the corporate form of enterprise, caused the volume of English securities transactions to become large enough to give rise to an organized securities market. This new market in turn led almost immediately to other institutional innovations. It took little time for practitioners of a brand new occupation – securities trading, or “stock jobbing” as it was often called – to invent new kinds of transactions. By 1720, the year of the “South Sea Bubble” (the first stock market crash in English history)¹⁴, the market and its participants were established London institutions.¹⁵

The new corporate form of business also increased the need for objective verification of data and created a need for disclosure in the form of more and better information to owners and potential investors. As capital markets increased in size and activity, an irresponsible attitude developed in some corporate officers who took advantage of lax conditions in the securities markets and profited by distortions and manipulations. Governments, sensing some responsibility to protect those who invested in corporations, made faltering attempts to create a working partnership between management and investors and to ensure an adequate supply of capital available for sound economic growth.

¹⁴ The stock of the South Sea Company, which had risen eightfold in the first half of 1720, fell by nearly as much as it had risen in the second half of 1720, dragging the smaller enterprises which had been dependent on its success with it.

¹⁵ S. Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (Cambridge: Cambridge University Press, 1998), 14.

As early as 1285, King Edward I attempted to gain some control over burgeoning capital markets by authorising the Court of Aldermen to license brokers located in London. In the early 18th century, France and England experienced a mania of speculative investment centered on the development of trading companies doing business in the Western Hemisphere. At one point, such investments exceeded three hundred million pounds sterling, in the aggregate more than the value of all the land in Great Britain. Parliament was incensed over the abuses and retaliated with the harsh *Bubble Act* of 1720, holding issuers and brokers liable for losses resulting from dishonest issues of securities.¹⁶

The attitude towards the market engendered by the *Bubble Act* remained latent in English culture in the decades that followed. They would re-emerge during every market downturn for the rest of the eighteenth century, even as participation in the market continued to grow and securities trading grew more familiar. The securities market continued to be perceived, at least by non-participants, as a producer of “lies habitual and incessant.”¹⁷ In the early 19th century, as the corporate form of business organisation became more prevalent, even insiders continued to observe that the number of fraudulent projects issuing shares showed no signs of abating.¹⁸ The image of the market as a place

¹⁶ See generally, Louis Loss, *Securities Regulation*, 2nd ed. (Boston: Little, Brown & Co., 1961), 4.

¹⁷ Samuel Egerton Brydges, *Human Fate* (Great Totham: Charles Clark, 1846), 4.

¹⁸ *Observations on Public Institutions, Monopolies, Joint Stock Companies, and Deeds of Trust* (London: J.M. Richardson, 1807), 6; Anthony Romney, *Three Letters, on the Speculative Schemes of the Present Times* (Edinburgh: Bell & Bradfute, 1825), 3; *The Real Del Monte Mining Concerns Unmasked, and a Few Facts on Stock Jobbing Schemes* (London: Cochrane and M'Crone, 1833), 3; *Ruminations on Railways, No. 1, Railway Speculation* (London: J. Weale, 1845), 5; and *The Railway Investment Guide*, 2nd edn (London: G. Mann, 1845), 3.

where stockjobbers profited only from fleecing the unsophisticated likewise remained strong.

One major critic of the stock market at this time in England was Adam Smith (the so-called father of free enterprise), then lecturing at Glasgow University, who concluded that there was nothing the government could do to prevent such abuses.¹⁹ By the 1770s, Adam Smith was noticing what would much later come to be considered a serious difficulty in policing the behavior of the directors of publicly traded companies.²⁰ “The directors of such companies,” he predicted, “being the managers rather of other people’s money than of their own, it cannot well be expected, that they should watch over it with the same vigilance with which the partners in a private copartnery frequently watch over their own.” Smith’s conclusion was that “[n]egligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company,” and thus that publicly traded corporations would never be able to compete against partnerships.²¹

In North America, securities were not traded on a significant scale until the latter part of the eighteenth century, nearly a century after the development of organized securities trading in England. However, long before they copied the English institutional

¹⁹ Adam Smith, *Lectures on Jurisprudence* (1766, probably delivered 1763-64), ed. R.L. Meek, D.D. Raphael, and P.G. Stein (Oxford: Clarendon Press, 1978), 536-38.

²⁰ Adolf A. Berle, Jr., and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Commerce Clearing House, 1932); and James P. Henderson, “Agency or Alienation? Smith, Mill, and Marx on the Joint-Stock Company,” *History of Political Economy* 18 (1986): 129.

²¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R.H. Campbell and A.S. Skinner (Oxford: Clarendon Press, 1976), 741, 744-45. Smith did not add this part to *The Wealth of Nations* until the third edition, published in 1784, but he appears to have written it by 1774. Gary M. Anderson and Robert D. Tollison, “Adam Smith’s Analysis of Joint-Stock Companies,” *Journal of Political Economy* 90 (1982): 1240.

arrangements. Americans inherited English ideas that would bear upon securities trading. This arose principally because emigrants from England, who brought with them English attitudes towards securities markets, largely populated England's North American colonies.²² Consequently, the pattern of securities legislation in the United States (US), followed the example of Great Britain: widespread abuses, made obvious by a financial crisis, were followed by a series of retrospective investigations leading to the passage of restrictive laws imposed by securities market.

A popular misconception, however, is that securities regulation in the US resulted only from the stock market crash in 1929 and the ensuing years of financial stagnation. Most accounts of securities regulation tend to begin with the *Securities Act* of 1933, or at best with the state "blue sky" laws of the preceding two decades.²³ However, the financial difficulties of the 1930s only provided the last straw, the impetus to pass securities legislation in the US.²⁴

Federal securities legislation had been sought since the late 19th century in the US. In 1885, discussion concerned federal licensing of companies involved in interstate commerce. The *Federal Trade Commission Act* and the *Clayton Act* resulted from efforts at federal control during the first years of the 20th century. The Industrial Commission, established by Congress in 1898, reported in 1902 that public disclosure of material

²² David Thomas Konig, *Law and Society in Puritan Massachusetts* (Chapel Hill: University of North Carolina Press, 1979), 74.

²³ Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation*, 3rd ed. (Boston: Little, Brown, 1995), 9.

²⁴ Fred Skousen, *supra* note 12, at 3.

information of all publicly held corporations should be mandatory and should include annual financial reports.

At about this time, state governments in the US were also making some attempts to bring order to chaotic securities markets. Kansas led the way in 1911 to combat the bleeding of the "Agrarian West" by the "Moneyed East."²⁵ By 1913, twenty-two other states had passed laws aimed at regulating the sale of securities. These laws were: (1) fraud laws, which imposed penalties if evidence indicated fraud had been committed in the sale of securities; and, (2) regulatory laws, which attempted to prohibit the sale of securities until an application was filed and permission was granted by the state.²⁶

In Canada, Manitoba was the first province to enter the field with its *Sale of Shares Act* of 1912. Taken almost verbatim from the *Kansas Act*, this statute applied to secondary as well as primary offerings and either the selling shareholder or the issuing company was required to obtain a certificate from the Public Utility Commission. Other Canadian provinces followed suit in due course, copying the Manitoba legislation verbatim.²⁷ In 1926, the Manitoba *Sale of Shares Act* was replaced by Part IV of the *Municipal and Public Utility Board Act* which provided for a comprehensive licensing requirement for anyone who made or attempted to make a contract in Manitoba for the sale of securities. This Act was the basis for the various security fraud prevention acts²⁸ in Canada, which eventually emanated into the present securities laws.

²⁵ S. Banner, *supra* note 15, at 27.

²⁶ J.K Lasser, and J.A. Gerardi, *Federal Securities Act Procedure* (New York: McGraw-Hill Book Co., 1934), 2.

²⁷ Saskatchewan in 1914, Alberta in 1916, New Brunswick in 1923 and Quebec in 1924.

²⁸ The first of these was the *Ontario Act* of 1928 which drew heavily from the Manitoba experience.

III. THE PURPOSES AND TECHNIQUES OF SECURITIES REGULATION²⁹

Securities regulation refers generally to the laws, rules, regulations, policies and procedures that govern (1) the issuance and distribution of securities, (2) the activities of the participants in the securities markets, and (3) the organisation of the securities markets.³⁰

As money is an essential resource, it is hardly surprising that capital markets are heavily regulated. For any market to work effectively, there must be regulations that punish dishonesty and protect consumers, without limiting the useful choices these consumers can make.

In the hypothetical business world that economists refer to technically as a “perfectly competitive economy”, there would not be much justification on economic grounds for government intervention. The capital market would achieve maximum efficiency through competition, assisted by the existence of perfect knowledge, in the sense of achieving efficiency in resource allocation both in the rest of the economy and within its own operations.³¹

However, an unregulated capital market is not perfect and can sometimes hurt those who use it. This necessitates the intervention of regulators, who in their zeal to protect the people who buy financial products must also not block a productive exchange of resources, thereby limiting the advantages that could be otherwise obtained therefrom.

²⁹ Securities regulation as we know it today, namely the laws imposing a duty of disclosure on public corporations and standards of conduct on the issuers of securities (the latter usually referred to as ‘blue sky’ regulation): Edmund Kwaw, *The Law of Corporate Finance in Canada* (Butterworths: Toronto, 1997), 122.

³⁰ *Ibid.*, 125.

³¹ E.P. Neufeld, *The Financial System of Canada*, (Toronto: Macmillan, 1972), 27.

Modern securities regulation therefore endeavours to strike a balance between the following objectives:

1. ensuring that investors in securities are provided with all relevant information needed to make informed choices as regards available investments;
2. providing a framework within which financial resources and assets will be freely and fairly transferable between various segments of the community; and.
3. providing a system that will promote public confidence in the market and reduce the costs of investor protection.³²

These three objectives are closely related and, in some respects, overlap. Many of the requirements that help to ensure fair, efficient and transparent markets also provide investor protection and help to reduce systematic or market risk.³³ Similarly, many of the measures that reduce systematic risk provide protection for investors.

According to the Kimber Report, one of several reports produced in the early 1960s that addressed the regulation of securities markets in Canada, establishment of the conditions and practices in the capital market which best serve the investing public will normally be consistent with the best interests of the whole economy. For example, disclosure of financial information that depicts adequately the operations and financial position of companies is not only vital to the investing public, but also provides the

³² See *Report of the Attorney General's Committee on Securities Legislation in Ontario (The Kimber Report)* (Toronto: Queen's Printer, March 1965). The International Organisation of Securities Commissions (IOSCO) at its 23rd Annual Conference held in Nairobi in mid-September 1998 adopted the "Objectives and Principles of Securities Regulation" which set out 30 principles of securities regulation. These principles are based upon the three objectives of securities regulation namely, the protection of investors; ensuring that markets are fair efficient and transparent; and the reduction of systemic risk. See "IOSCO conference: Final Communiqué". Financial Regulation Report, October 1998.

³³ *I.e.*, the risk associated with the market as opposed to the risk that is specific to the company or firm.

capital market with the information necessary to make a more satisfactory allocation of resources.³⁴ Further, matters such as thorough surveillance and compliance programs, effective enforcement and close cooperation with other regulators are necessary to give effect to all three objectives.

Arising from the inter-relationship between the above objectives, the two pillars of modern securities regulation, are investor protection and the optimal allocation of financial resources.³⁵ However, investor protection is not aimed at providing a paternalistic protection for investors.³⁶ Thus, although every effort must be made to ensure the public understands the normal business risks of success or failure,

‘[t]his is not to suggest that the public must be protected against itself; rather, it is a matter of ensuring that the investing public has the fullest possible knowledge to enable it to distinguish the different types of investment activity available. In such circumstances, the public would have reasonable assurance that its losses are genuine economic losses, just as its gains are genuine economic gains.’³⁷

Regulation thus aims at ensuring that, for example, the price at which an investor purchases or sells a security should be a fair estimate of the value of the future cash flows it will generate.

In promoting the optimal allocation of financial resources, there are two related objectives, namely, ensuring that capital markets facilitate the mobility and transferability of financial resources and also providing facilities for the continuing valuation of

³⁴ The Kimber Report, *supra* note 32, para. 1.07.

³⁵ *Ibid.*

³⁶ Mark R. Gillen, *Securities Regulation in Canada*, (Scarborough, Toronto: Carswell, 1992), 62.

³⁷ The Kimber Report, *supra* note 32, para. 1.12.

financial assets.³⁸ The methods employed to this end in recent years have included an attempt to ensure the honesty and competence of participants, the promulgation of rules and norms which strive to achieve fairness and accord with the public interest, and the enforced disclosure of information about issuers on terms which make it equally accessible to all investors.

Implicit in the concept of securities regulation is this belief that regulation should facilitate capital formation and economic growth. Nevertheless, inappropriate or excessive regulation may impose an unjustified burden on the market and inhibit market growth and development.

Consequently, in line with the International Organisation of Securities Commissions (IOSCO) recommendations, effective regulation should be consistent with sound economic growth and strive towards ensuring: (1) the removal of all unnecessary barriers to the entry and exit from markets and products; (2) that the markets are open to the widest range of participants who meet the specified entry criteria; (3) that regulatory bodies consider the impact of any requirements imposed in the development of policy; and, (4) that there be an equal regulatory burden on all who make a particular financial commitment or promise.³⁹

³⁸ *Ibid.*; also the "Statement by the Honourable Eric A. Winkler, Minister of Consumer and Commercial Relations on the Introduction of the Securities Act, 1972 for First Reading, June 1st, 1972", Notice, [1972] O.S.C.B. 94.

³⁹ IOSCO Communiqué, *supra* note 32.

In achieving the objectives of securities regulation, there are three basic regulatory techniques traditionally employed in securities laws.⁴⁰ These are anti-fraud measures, registration of persons and of institutions, and registration of securities.⁴¹

Anti-fraud measures define fraudulent or otherwise wrongful conduct, provide civil or criminal penalties for engaging in such conduct, and create investigatory and enforcement tools to identify and suppress it. They are essentially prophylactic or preventative and usually not directly remedial. Their very presence is expected to deter fraudulent activity, presumably in direct proportion to their effectiveness in application. An attempt is made by such measures to combat illicit activity before it has had time to achieve its objectives or become well established, or at any rate to minimise damaging consequences.⁴²

The registration or licensing of persons, firms or institutions participating in the securities industry is designed to ensure that active participants in the business have achieved and maintain a minimum standard of honesty, reputation and competence, and observe minimum standards of fair dealing.⁴³

The third regulatory technique involves the registration of securities. This approach relies heavily on disclosure of information, but it encompasses a broad spectrum

⁴⁰ D. Johnston and K.D. Rockwell, *Canadian Securities Regulation*, 2nd ed. (Toronto and Vancouver: Butterworths, 1998), Chap 1.

⁴¹ Louis Loss, *Securities Regulation*, 6 volumes, 3rd ed. (1960) and supplement (1969).

⁴² Anti-fraud measures only apply to wrongful conduct after it has clearly manifested itself and usually only after some loss or damage has occurred.

⁴³ The classic and oft-quoted statement of the first two items in this list of objectives belongs to Lord Atkin in *Lymburn v. Mayland*, [1932] AC 318 at p. 324: "There is no reason to doubt that the main object sought to be secured in this part of the Act [registration of persons] is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded."

of administrative discretion, which is not confined to requiring the release of pertinent data. Here, registration serves two purposes. First, it provides the public with information about the securities. Second, it allows regulators to monitor the securities and their issuer.

A useful overview of this technique is provided by a survey of the various ways that it can be used, by no means exclusive of one another, at the time of an initial issue of securities. At one end of the spectrum is mere notification. Here the obligation on the issuer is simply to notify a regulatory agency on or before the time of issue. The degree of disclosure may be minimal or somewhat more substantial, depending upon the amount of detail about the issue, which must be contained in the notification statement. The effectiveness of such disclosure is in turn dependent on how the content of the statement is made available to the potential investor.

Further from this purely passive form of registration, comes the concept of "qualification". This essentially means that the issuer, before distributing its securities, must satisfy the regulator that it meets legislative standards in its disclosure of information, whether the disclosure is solely to the regulatory agency itself, or in the case of a scheme involving the widespread dissemination of a selling document, to purchasers and prospective purchasers. Finally, at the farthest extreme from mere notification, some jurisdictions require that the administrator be satisfied regarding the over-all fairness or financial viability of the proposed venture before the distribution may commence.

The same regulatory approach is applied with important consequences to the period subsequent to the initial issuing of the securities while they are traded in secondary markets. Recent years have witnessed the imposition of a variety of substantial

obligations regarding the reporting and dissemination of information in what is referred to as secondary trading. Such provisions are comprised under the general rubric "continuous and timely disclosure". In ensuring adequate and timely regulation, most developed markets have a tradition of allowing market regulation to be done by securities industry practitioners to some extent.⁴⁴

In Canada, securities commissions are only one of many organisations that create and enforce rules to ensure the integrity of capital markets. Stock exchanges, self-regulatory organisations (SROs) and trade associations perform similar functions, seeking to enhance the confidence of potential investors and to stave off increased governmental regulation.⁴⁵ The securities commissions are, however, still responsible for the supervision of the SROs and may hear appeals of their decisions in appropriate circumstances.

In the United States, although every broker-dealer is required to be a member of an SRO, the Securities and Exchange Commission (SEC) retains practically plenary authority to exercise direct control, not only over brokerage firms but also over the SROs themselves. In the United Kingdom, the Securities and Investment Board, a governmental agency in all but name, is increasingly beginning to use its powers under the *Financial Services Act*, 1986, to supervise the market, thus limiting the autonomy of the London Stock Exchange and the Takeover Panel.

⁴⁴ *E.g.*, the UK, US and Canadian markets.

⁴⁵ Membership of the Investment dealers Association of Canada (IDA) is required for registration as an investment dealer and the IDA has rules governing the conduct of its members. Also, the Mutual Fund Dealers Association (MFDA), a similar organisation proposed for mutual fund dealers has just released its draft rules and is expected to be a recognised SRO by January 1, 2001.

IV. A FOUNDATION FOR THE STUDY

The title of my overall thesis specifies the securities industry as the framework for this study. Determining the boundaries of the 'securities industry' poses difficult problems. A broad definition of 'securities' includes all contracts offered in exchange for cash or other benefits, which grant the purchaser a claim on future cash flows or other economic benefits. With this definition, the securities industry embraces the entire capital market.

A narrower definition includes only the types of investments presently traded, mainly stocks and bonds, the dealers trading them and the financial markets in which they are traded. This narrower definition has the advantage of being more closely aligned with the existing market systems in most emerging markets including Nigeria and is thus much more useful in defining the scope of this thesis.

The broader definition poses the problem of unduly increasing the scope of this work and consequently reduces the ability to focus as clearly on the more important regulatory issues that arise in the jurisdictions being studied. Emphasis will therefore be placed throughout this study on the narrowly defined industry and particularly on the market for equities: common and preferred stocks.

This thesis proceeds from the premise that securities markets are essential for the effective development and growth of an economy. Accordingly, the law should not only legitimise these forms of trade but should also provide appropriate mechanisms to facilitate and protect the effectiveness of both markets and investors.

Within the above framework, primary focus is on how far the Nigerian securities regulation⁴⁶ adequately provides for investor protection and market integrity within the Nigerian capital market. This being a law-based thesis, less emphasis has been placed on the extent to which the Nigerian securities laws ensure the optimal allocation of financial resources within the Nigerian economy. Furthermore, in light of a recently published communiqué by IOSCO,⁴⁷ on the "Objectives and Principles of Securities Regulation",⁴⁸ this study also focuses on the extent to which the securities laws in Nigeria comply with these recommendations.

The thesis is expository, critical, and comparative in its approach. The practical problems of securities regulation in Nigeria are examined and compared with the Canadian situation. The comparison relates principally to how Canada has responded to some of the legal problems that tend to hinder effective securities regulation in Nigeria. Finally, the Canadian securities laws, which are significantly developed and functional, are explored to see how far they can be adopted or at least adapted in the Nigerian legal environment, especially where there are perceived problems in the latter.

⁴⁶ *I.e.*, laws, rules, regulations, policies, and procedures that govern (1) the issuance and distribution of securities, (2) the activities of the participants in the securities markets, and (3) the organisation of the securities markets.

⁴⁷ The current membership of IOSCO comprises regulatory bodies from 91 countries who have day-to-day responsibility for securities regulation and the administration of securities laws: *supra* note 32.

⁴⁸ This final document was publicly released at the annual conference of IOSCO in Nairobi held 12-18 September 1998.

V. OUTLINE OF THE THESIS

This thesis is divided into three main sections. The first traces the history, background and evolution of securities regulation in both Nigeria and Canada, while the second deals with the substantive regulations in both jurisdictions. The conclusion dwells on the limitations in the substantive securities laws and principal areas of reform in securities regulation in Nigeria. These three main sections are further explored within the six chapters of the thesis.

Chapter 1 focuses on the Nigerian capital market and the primary regulators in the Nigerian securities industry. It also introduces the general regulatory regime within the securities industry in Canada.

Chapter 2 focuses on the first of the two principal purposes of securities regulation: investor protection and the disclosure provisions in both the Nigerian and Canadian securities laws.

Chapter 3 deals with the second major purpose of securities regulation: the promotion of public confidence in the securities industry. Emphasis here is on the registration and other regulatory requirements of the major participants in both the Nigerian and Canadian securities industry.

In Chapter 4, the regulation of takeover bids is explored. The decision to allocate this chapter to takeover bids stems from its importance as it relates to the potential conflict of interest of directors of target companies in the exercise of their duties in such circumstances. The general protections offered to target shareholders in both Nigeria and Canada are also compared.

Chapter 5 focuses entirely on the enforcement mechanisms in both Nigerian and Canadian securities laws. The adequacy and effectiveness of the Nigerian laws are discussed comparatively with that of Canada, and the perceived shortfalls in the former are highlighted.

The last chapter summarises the major limitations in the Nigerian regulatory regime, particularly those discussed in the first five chapters of the thesis and attempts to outline appropriate proposals for reform.

Chapter 1

BACKGROUND TO SECURITIES REGULATION IN NIGERIA AND CANADA

1.0. AFRICAN EMERGING MARKETS

According to the International Finance Corporation (IFC), a subsidiary of the World Bank, an emerging capital market⁴⁹ is a stock market in a developing country.⁵⁰ This definition of an emerging market employed by the IFC is extremely broad. If a country is a low-income or middle-income economy as classified by the World Bank, it is a developing country; and, if a stock market is in a developing country, it is an emerging market. Thus, IFC's definition of a market as emerging depends upon the level of Gross National Product (GNP)⁵¹ *per capita* of the economy of which it is a part.⁵²

This same market may be quite old, relatively large, highly developed technologically and well integrated into global markets, but still be classified by the IFC as an emerging market. Conversely, if there is a high-income economy in a country changing from a centrally controlled economy to a market economy, its market would not be defined as emerging, even if it was in an early stage of development. In short, according to IFC's definition, it is not the characteristics of the stock market itself that designate it an emerging market, and these markets may therefore exhibit widely different characteristics reflecting their various stages of maturity.

⁴⁹ Money manager Antoine W. van Agtmael takes credit for coining the phrase 'emerging markets' in 1981 when he was an official of the International Finance Corporation. Since then the name has caught on, although people's definitions of it varies.

⁵⁰ *Emerging Stock Markets Factbook*, International Finance Corporation, 1997.

⁵¹ *I.e.* the value of all goods and services produced by the nationals of the country, whether at home or abroad. GNP is sometimes used interchangeably with Gross Domestic Product (GDP).

⁵² *Emerging Stock Markets Factbook*, *supra* note 50.

By this IFC definition, which places primary emphasis on the GNP of a country in determining the level of development of its capital market, every country on the African continent is classified as developing. This is because Africa is the poorest region in the world, accounting only for about 1% of world Gross Domestic Product (GDP).⁵³ Consequently, all the stock markets in Africa are classified as emerging by the IFC. This is not surprising because historically capital markets have not played a significant role in financing the development of African economies.⁵⁴

However, most African countries have recently begun recognising that the market economy holds the key to healthy economic development. They have begun changing their policies and pursuing structural adjustment. The old philosophy which held that developing countries, and especially low-income countries, were somehow different and that normal principles of market economies did not apply there, is finally being laid to rest.⁵⁵

African governments are today focusing on the importance of moving toward more market-oriented economies and developing financial market infrastructures that can mobilise funds from both private and public sectors. Also, to a large extent, previously closed economies have introduced reforms to attract foreign investors.

⁵³ Mr. Tei Mante (Director), Mr. Abdelkadir Allaoua (Regional Economist), IFC's Sub-Saharan Africa Department, 'Emerging markets in Sub-Saharan Africa', World Markets Series Business Briefing.

⁵⁴ Robert A. Clark, "African Securities Markets: A study in the development of Africa's Emerging Securities Markets" (1996) 6(1) *Journal of International Financial Markets, Institutions & Money* 39.

⁵⁵ Over the past three decades the effort to achieve economic growth in Africa had been focused predominantly on the public sector. International donors and aid agencies encouraged these policies. See "The potential for Private Sector Development in Africa". Address by Sir William Ryrie, Executive Vice President IFC, 13 January 1992.

With the relaxing of exchange controls and foreign investment restrictions, securities laws have been enacted or reformed and market institutions, such as stock exchanges and securities commissions, put in place. Emphasis in this new model is now being placed on improving regulatory regimes and trading mechanisms to prepare the markets for an expanded role in economic development.

With continual need for the infusion of funds and the increasing global competition for obtaining such funds from traditional sources such as international aid donors and banks, countries with emerging economies have sought to establish attractive capital markets in order to procure much sought after capital from private sources, frequently from abroad. To appreciate the severity of this global competition for funds, even countries within geographical regions join together for this common purpose.⁵⁶

In Nigeria, the growth of the stock market has been primarily government induced. Efforts are continually being made to improve the enabling environment for the market to thrive, recognising it as a catalyst in socio-economic development. More

⁵⁶ See generally <http://www.mbendi.co.za/exaf.htm#Regional>.

During 1998, authorities in the Central African part of the franc zone consulted the Mauritian stock exchange on the potential for a regional stock market. At the same time, plans for a bourse (exchange) in Gabon were reported to be proceeding under the aegis of the Finance Ministry. The Central African exchange would serve Cameroon, Central African Republic, Chad, Congo Republic, Equatorial Guinea and Gabon, which share a common currency, the CFA franc, and a common central bank. A unified stock market for the east African region of Kenya, Tanzania and Uganda is planned and may be in place by the year 2000. The exchange could have trading floors in all three capitals in the region, with trading being functional between the three centres (while Nairobi already boasts a well established bourse, the other two countries in the region have only recently set up exchanges). The three exchanges have already agreed on the principles of cross border listing and are now focusing on developing regional products. A regional bourse, based in Abidjan, started operating in 1998. The path has been cleared for dual listings on southern Africa's stock markets following several meetings of the regional stock exchanges.

recently, there has been increasing focus on internationalising of the market in a bid to attract foreign investors.⁵⁷

Nigeria in the past had a certain distrust of foreign investment. Reflecting the dependency theory of foreign investment, this led to enactment of 'anti-investment' laws in the 1970s.⁵⁸ The view was that foreign control of significant sectors of the economy tended to impede economic development. However, global recession and heavy debt burdens have created poor economic prospects resulting in the revival of the classical theory of foreign investment: that it is essential to development. Nigeria began to realise that this was one essential way to improve its post-colonial economy.⁵⁹

As a measure to realise optimal economic potentials, and in line with the rapidly changing global economy, a broad range of economic and legislative reforms have been introduced. Policies of deregulation and liberalisation were put in place, between 1986 and 1993, as part of the implementation of the Structural Adjustment Program (SAP).⁶⁰

⁵⁷ The Nigerian Stock Exchange (NSE) has, for instance, made some progress towards the establishment of a more efficient clearing and settlement system of transaction date plus three days (T-3), in line with internationally accepted standards. This mechanism should improve the quality of the market and promote its global competitiveness. In addition to these, a custodian facility is being put in place to facilitate the internationalization of the market. The Securities and Exchange Commission has also been making itself visible in some international organizations to promote global awareness of investment opportunities and reforms in Nigeria.

⁵⁸ Fiona C. Beveridge, "Taking Control of Foreign Investment: A Case Study of Indeginization in Nigeria" (1991) 40 *International and Comparative Law Quarterly* 302.

⁵⁹ Tunde I Ogowewo, "The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market" (1995) 44 *International and Comparative Law Quarterly* 915.

⁶⁰ The Bureau of Public Enterprises Decree No. 78 of 1993 which superceded the Privatization and Commercialization Decree No. 25 of 1988 which provided the first phase of the Federal Government Privatization Program (1988-1993). Also, the Nigerian Investment Promotion Commission Decree No. 16 of 1995 which permits a non-Nigerian or foreign enterprise to freely participate in any Nigerian enterprise as well as to buy and sell any shares of any Nigerian enterprise, in any convertible currency through the Nigerian Stock Exchange in line with the provisions of The Foreign Exchange (Monitoring & Miscellaneous Provisions) Decree No. 17 of 1995.

1.1. THE NIGERIAN STOCK EXCHANGE

Until early 1998,⁶¹ the Nigerian Stock Exchange (NSE) was Nigeria's only stock market; established in 1959 as the Lagos Stock Exchange (LSE), it started trading activities on 5 July 1961. It was incorporated as a company limited by guarantee at the instance of the business community, the Federal Ministry of Finance, The Central Bank, and the Nigerian Industrial Development Bank. Two years after its establishment, the Nigerian Parliament enacted the *Lagos Stock Exchange Act 1961*.⁶² as a means of ensuring that the LSE (as it then was)⁶³ had a monopoly over the business of share dealings in the country, so that the investing public could be protected by a self-regulatory organisation (SRO) with standards which all members were required to comply with.⁶⁴ Securities currently traded on the exchange are stocks - common and preferred, corporate bonds and government bonds.

Although the NSE is an SRO strictly owned and managed by the Nigerian private sector, from its beginnings the government has always had an interest in it. That the

⁶¹ The Federal Government of Nigeria announced in the 1998 annual budget that a new stock exchange is to be opened in Abuja, the federal capital territory. This exchange is to be called the Abuja Stock Exchange (ASE). The NSE which was the only stock exchange before would thus revert back to its old name, the Lagos Stock Exchange (LSE) and remain based in Lagos.

⁶² CAP. 200 Laws of the Federation of Nigeria 1990

⁶³ The Lagos Stock Exchange was transformed to the NSE in December 1977 with branches in Lagos, Kaduna and Port-Harcourt, each operating trading floors.

⁶⁴ It has been argued that the *Lagos Stock Exchange Act*, contrary to what is presently assumed generally, did not place the Exchange on a statutory footing. If this is correct, then, the significance would be that the listing requirements of the Exchange would apply to listed companies and its members by virtue of contract only. Also, it would then be strictly wrong for the Director-General of the Exchange to have been a government appointee since there would then be no enabling legislation to so empower the government to make such appointments. See T.I. Ogowewo, "Transposition of Securities Legislation to an Emerging Market". (1996) 6 *JIBL* 239 at 240.

government was one of its promoters and that an Act of Parliament bearing its name was enacted clearly reflects this interest.

The NSE currently has about 290 securities quoted with a total market capitalisation of three hundred and ninety billion naira (N390 bn).⁶⁵ The companies listed on it are representative of the various sectors of the Nigerian economy.⁶⁶ and most of them have sizeable foreign multinational affiliations. The NSE is an affiliate member of the Federation of International Stock Exchanges (FIBV), an observer member at meetings of IOSCO and also a foundation member of the African Stock Exchanges Association (ASEA).

The Automated Trading System (ATS) has recently been introduced⁶⁷ and data on listed companies performance are published daily, weekly, monthly, quarterly and annually. Market and corporate data are also available on Reuters Electronic Information Network. The on-line code for the NSE is NSXA. The NSE publications constitute important tools for information dissemination, as it is the primary source of most statistical information on the capital market. Regular publications by the Exchange include the Daily Official List, Weekly Stock Market Report, Monthly Statistics.

⁶⁵ About \$5.57 billion CDN as at July 2000.

⁶⁶ Twenty-Four sectors (excluding the SSM), namely: Agriculture, Airlines, Automobile & Tire, Banking, Breweries, Building materials, Chemical & Paints, Commercial/Services, Computer & Office Equipment, Conglomerates, Construction, Engineering Technology, Food/Beverages & Tobacco, Footwear, Healthcare, Industrial/Domestic products, Insurance, Machinery (Marketing), Managed Funds, Packaging, Petroleum (Marketing), Printing and Publishing, Real Estate and Textiles.

⁶⁷ The ATS commenced on 27 April, 1999 and replace the call-over /open outcry trading system previously in operation. The ATS is an order driven system that is aimed at facilitating a significant level of transparency, efficiency and fairness in the stock pricing process.

Quarterly Report, Annual Report and the annual NSE Factbook, which contains information on quoted companies, stockbroking firms and issuing houses in Nigeria.

Trading days and times are Monday to Friday, 11:00 to 13:00. Presently, the settlement cycle is transaction date plus five days (T + 5), but moves are being made to reduce it to internationally approved standards of transaction date plus three days (T + 3). Charges include a 3% commission of the traded value of shares and a 1% Securities and Exchange Commission (SEC) fee. Withholding taxes on dividend remains at 10%; corporate income tax, 35% and capital gains tax, 10%.

The equities market is categorised by the NSE into First and Second Tier. Companies listed in the First Tier Securities Market should have a minimum share capital of at least N20 million and at least 300 shareholders while companies on the Second Tier Securities Market (SSM) should have a minimum share capital of N10 million and not less than 100 shareholders. The listing requirements also differ for both tiers.⁶⁸

The SSM was, on the initiative of the SEC and NSE, introduced in April 1985 with the main objective of providing facilities for raising equity funds by small and medium scale enterprises, mostly indigenous, using the organised capital market mechanism. It is designed specifically for small to medium scale enterprises that are doing well but are handicapped by their size in meeting the more stringent requirements for listing on the first-tier market.⁶⁹

⁶⁸ While a first tier company must have audited accounts for at least five years, an SSM company need only have three years audited accounts. Also, at least 25% of share capital of a first tier company must be offered to the public but only 15% of share capital need be offered to the public in an SSM.

⁶⁹ The SSM was fashioned after the United Kingdom unlisted securities market established in 1980, and was the first of its kind in Africa.

1.2. THE LAWS ON SECURITIES REGULATION IN NIGERIA

In Nigeria, securities market regulation is principally aimed at protecting investors from unfair, unprofessional and improper practices, as well as fostering a competitive, innovative and efficient market with active and wide investor participation. The Nigerian securities regulations derive principally⁷⁰ from the Companies and Allied Matters Decree 1990⁷¹ ('CAMA') and the *Securities and Exchange Commission Act*⁷² (*SEC Act*).

The SEC Act gives statutory backing to the Securities and Exchange Commission ('the SEC'), the apex regulatory body in the Nigerian capital market, and lays down the regulatory framework for the primary and secondary securities markets. The CAMA, on the other hand, prescribes the prospectus requirements for public issues and contains the regulatory framework for unit trusts and tender offers, *i.e.*, takeover bids.

Essentially, while the CAMA generally models itself on the prospectus requirements of British companies acts and a number of other sources,⁷³ the SEC Act draws on the U.S. *Securities and Exchange Act, 1934*. A consequence of the dual laws is that there are sometimes unintended overlaps between these statutes.⁷⁴

⁷⁰ There are other statutes that are a source of norms in this area: *see* for example, *Trustee Investment Act* 1962, CAP. 449 Laws of the Federation of Nigeria 1990.

⁷¹ CAP. 59 Laws of the Federation of Nigeria 1990. Now designated as a 'Decree'. See revised edition (Laws of the Federation of Nigeria) (Supplementary Provisions) Decree 1992.

⁷² CAP. 406 Laws of the Federation of Nigeria 1990. The SEC Act is now designated as a 'Decree'. See Revised Edition (Laws of the Federation of Nigeria) (Supplementary Provisions) Decree 1992. References to the *SEC Act* include the Regulations made thereto pursuant to S. 23 of the Act.

⁷³ Such as Australian, Canadian, Caribbean and Ghanaian company law. The latter is based on Professor Gower's Final Report of the Commission of Enquiry into the Working and Administration of the present company law of Ghana 1961.

⁷⁴ For instance, while the CAMA defines 'securities' in section 650 as including 'shares, debentures, debenture stock, bonds, notes (other than promissory notes) and units under a unit trust scheme', a wider definition exists in section 29 of the *SEC Act* which replicates the definition of the term in US federal

Besides CAMA, the *Trustees Investment Act* 1962 and the *SEC Act*, two other Decrees have been promulgated. These are the Nigerian Investment Promotion Council Decree 16, 1995 (NIPC), and the Foreign Exchange (Monitoring and Miscellaneous) Decree 17, 1995 (FE (M&M) D). Both Decrees abolished the Nigeria Enterprises Promotion Decree and the *Exchange Control Act* to pave the way for direct foreign investment in the market. Under the new laws, all the prior impediments to the free flow of both foreign direct and portfolio investments were removed. The Nigerian economy is now open to everybody, Nigerians and non-Nigerians equally in any enterprise. Equal rights, privileges and opportunities now exist for foreigners to invest in securities in the Nigerian capital market. Dealing members of the Nigerian Stock Exchange (stockbroking firms) can now accommodate foreign shareholders in their equity capital, or go into any form of partnership with foreign stockbroking firms; and Nigerian companies are now allowed multiple and cross border listings on foreign markets, subject to the NSE "Memorandum of Understanding" with such international stock exchanges.

1.2(a). THE NIGERIAN SECURITIES AND EXCHANGE COMMISSION

The precursor of the SEC was an ad-hoc body known as the Capital Issues Committee, initiated by the Central Bank in 1962 with responsibility to regulate on an advisory basis the timing of securities issuances in the capital market, so as not to overtax the absorptive capacity of the market. This Committee, later transformed into a federal

securities laws, and incorporates the 'investment contract' concept, thus making the US 'investment contract' jurisprudence a part of Nigerian laws. *See, Re Proposed Dunis Investment Bond: Approval/Clearance* (1992) 1 SLR 95, 97-98, the Nigerian SEC relied on the US Supreme Court's decision in *SEC v. W.J. Howey Co.* 328 US 293 (1946).

commission by the Capital Issues Commission Decree 1973, had the mandate to protect 'gullible Nigerian investors from possible price manipulation and deceptive information'.⁷⁵ in respect of the prices of shares of public companies affected by the Nigerian Enterprises Promotion Decree 1972. In its new form, its function expanded from just regulating the timing of the flow of securities into the primary market to providing a foundation for investor protection regulation.

In 1975, the Federal Government set up an Industrial Enterprises Panel, whose report highlighted serious abuses in compliance with the Decree, thus slowing down the indiginisation effort of the Government. The Panel recommended the setting up of a Securities and Exchange Commission to replace the Capital Issues Commission. Acting upon this recommendation in 1979, the government promulgated the Securities and Exchange Commission Decree No. 71 of 1979 which established the SEC, with the functions, among other things, of determining the price at which the initial securities of a company were to be sold to the public, the timing and amount of any subsequent issues, registration of all securities proposed to be offered for sale to the public, and generally maintaining a surveillance over the securities market. The Decree was later re-enacted in 1988, with the basic approach of the 1979 Decree retained, but with more powers and duties assigned to the SEC.

The SEC as presently constituted is an independent, bipartisan, quasi-judicial agency of the Nigerian government. Its main objectives are to protect investors' interest

⁷⁵ See, A. Otitì, "Setting the Price/Allotment Pattern" 5 *Securities Market Journal* 10.

and ensure orderly and equitable dealings in securities, as well as to promote capital market growth and development. Its functions *inter alia* are:⁷⁶

1. registration of all securities proposed to be offered for sale to or for subscription by the public or to be offered privately with the intention that the securities shall be held ultimately other than by those to whom the offers were made;
2. maintaining surveillance over the securities market to ensure orderly, fair and equitable dealings in securities;
3. registration of stock exchanges and their branches along with the monitoring of the activities on their trading floors;
4. registration of stock market operators i.e. registrars, investment advisers, securities dealers and their agents and controlling and supervising their activities with a view to maintaining proper standards of conduct and professionalism in the securities business;
5. protecting the integrity of the securities market against any abuses arising from the practice of insider trading;
6. reviewing, approving and regulating schemes for mergers, acquisitions and all other forms of business combinations;
7. stimulating ideas, initiating policy changes and innovation for the growth of the securities market;
8. creating the necessary atmosphere for the orderly growth and development of the capital market; and.
9. undertaking such other activities as are necessary or expedient for giving full effect to the provisions of the *SEC Act*.

Pursuant to Section 23 of the *SEC Act*, it has wide rule-making powers by which to promulgate regulations it considers necessary to give effect to any of the provisions of the *SEC Act*.⁷⁷ In furtherance of these powers, and to assist market operators in meeting the requirements of the Act, the SEC has duly issued guidelines on administrative proceedings: mergers, acquisitions and combinations, prospectuses, registrations, and underwriters and underwriting agreements.⁷⁸

⁷⁶ S.6. *SEC Act*.

⁷⁷ The CAMA also duplicates and extends further the SEC's rule-making power: S.542(1) of the CAMA.

⁷⁸ The SEC cannot however abuse its powers with impunity. Apart from being subject to executive control, it is ultimately subject to the control of the courts through judicial review proceedings. See T.I. Ogowewo.

Also, in carrying out its responsibility of protecting the integrity of the capital market, by ensuring that professional standards are maintained, the SEC has issued a 'Code of Conduct for Capital Market Operators and their Employees', which, according to the SEC, "is necessitated by the need to ensure discipline, enhance professionalism, integrity and protect the interest of clients of market operators and indeed the reputation of their institutions." The codes are intended to complement the rules and regulations of the SEC in a bid to reduce ethical embarrassment within the market. The code of ethics is however merely a guide and each institution is free to add to it, in line with observed practices in the securities industry. However, all market operators and their employees are bound by the code and must sign a copy to be deposited with the SEC. The code to a large extent provides for sanctions on violations of its various provisions, after duly being found guilty under a disciplinary proceeding of a registered SRO⁷⁹ or the SEC, in addition to being liable for any penalty under the law.

According to the SEC "Code of Conduct", when market operators are in doubt about any provisions of the code, clarification should be sought from the SEC.

"Nigeria: Regulatory Conflicts in an Emerging Capital Market". *International Business Lawyer*, June 1997, 271 at 275.

⁷⁹ For example, the NSE.

(b) RELATIONSHIP BETWEEN THE SEC AND THE NSE

The SEC performs its regulatory function of investor protection by employing a number of regulatory devices, such as registration and rule-approval.⁸⁰ The NSE, on the other hand, is juridically a club (*i.e.*, a contractual body) that operates a market, albeit with powers to regulate its members: hence it is called an SRO. But to protect the public interest, the NSE is subject to the SEC's oversight.⁸¹

Section 12(3) of the *SEC Act* sets down the criteria for registration of all stock exchanges. An exchange can only be registered⁸² if the commission determines that it is so organised and has the capacity to carry out the purposes of the Act and the rules and regulations of the SEC. The rules of the exchange are designed among other things to:

- (1) comply with provisions of the Act and the regulations made thereunder;
- (2) promote just and equitable dealings in securities;
- (3) prevent manipulative acts and practices;
- (4) provide for appropriate discipline of its members for violations of its own rules and of the SEC Act and regulations; and,
- (5) ensure a fair representation of its members in the selection of its directors and administration of its affairs.

Rule 11(4) of the SEC's regulations provides that a stock exchange that seeks registration will be denied if the SEC is not of the opinion that the rules of the stock exchange are just and adequate to ensure fair dealing and investor protection.

⁸⁰ See Ss 6(d), 12(1), 13, 14(1)(2); see also reg. 17, 45 and 61.

⁸¹ Before the establishment of the SEC there was a statutory basis for external oversight of the exchange by the Central Bank - see Ss. 5 and 6 of the *Lagos Stock Exchange Act* 1961. However, unfortunately, the NSE disputes the authority of the SEC to regulate it. See 'The Row between SEC and NSE', *New Nigerian* Newspaper, 21 December 1994.

⁸² Apart from the powers that the SEC has over the existing exchange, nothing precludes the SEC from recognizing a new exchange. See the SEC's 'Guidelines For the Establishment of New Stock Exchanges' in *Financial Update* (1993) Vol. 1 (No. 2) 1.

Furthermore, Regulation 11(3)(b) requires a registered exchange to furnish the SEC 'with copies of any amendments to the rules of the exchange forthwith upon their adoption'.

(c) THE NIGERIAN CONSTITUTION AND SECURITIES LAWS

The constitution plays a significant role in ensuring the effectiveness of the laws of a country. It is arguable that one of the problems militating against the introduction of securities laws that may provide for an efficient legal regime of securities markets and interests in Nigeria arises from the very nature of her federalism. There is a great imbalance of legislative powers between the federal or central government and the states. The Nigerian Constitution empowers the federal government to legislate, exclusively, on commercial matters.⁸³ This has led to the argument that over-concentration of legislative powers in the federal government has led to adverse impacts on the commercial and economic growth of the country.⁸⁴

The framers of the Nigerian constitution, by learning from the experience of the American Constitution in force, favoured a centralised legal control of commercial matters because of the fear of the problems associated with the lack of uniformity of laws in the United States, which proceeded from the Tenth Amendment of the constitution.⁸⁵ It

⁸³ See s. 4(2) of the Constitution of the Federal Republic of Nigeria, 1979: s. 4(2) & (3) of the Constitution of the Federal Republic of Nigeria, 1989.

⁸⁴ J.O. Anifalaje, "Constitutional Impediments to the Progress of the Nigerian Commercial Law and the Economy" in Omotola and Adeogun, eds., *Law and Development* (Lagos: University of Lagos Press, 1987) at 44-45.

⁸⁵ For a case where the legal friction between the federal government and the state was tested in the United States, see *McCulloch v. Maryland* 4 Wheat 316 (1819). See also, E.N. Griswold, *Two Branches of the Same Thing* (Maccabean Lecture in Jurisprudence of British Academy, 1962) referred to by Anifalaje, *ibid.*, at 46.

is probable that the fear of not having uniform laws in a country with such a heterogeneous group of people might have compelled the makers of the Nigerian constitution to expand the already overabundant borders of the legislative power of the central government, at the risk of the legal, economic and social progress of the entire country.⁸⁶

A close look at other countries with a federal system of government will reveal the legislative empowerment of the state, regional or provincial government in relation to commercial matters. It is argued that federalism must assume a certain reality in the states' separate identities in economic matters.⁸⁷ For instance, in Canada s. 92(13) of the *Constitution Act, 1867*, vests the provincial legislatures with the power to make laws in relation to "Property and Civil Rights in the Provinces" and this power ensures that the provinces have sufficient field to legislate on commerce and the like, for the general economic growth of the provinces and the entire country.⁸⁸

The power of the provinces to legislate on commercial matters obviously creates problems with regard to the uniformity of laws, which is enjoyed by Nigeria where the central government has exclusive legislative jurisdiction on this matter. But it can be argued that the disadvantage of lack of uniformity of laws is out-weighed by the

⁸⁶ J.O. Anifalaje, "Constitutional Impediments to the Progress of the Nigerian Commercial Law and the Economy", *ibid.*

⁸⁷ R. Whitaker, *Federalism and Democratic Theory* (Kingston, Ontario: Institute of International Governmental Relations, Queen's University, 1983) at 38-39.

⁸⁸ The provision on property and civil rights has been described by Hogg to be by far the most important of the provincial heads of power. He also argues that the provincial residuary power in s. 92(16) over "all matters of a merely local or private nature in the province" has turned out to be relatively unimportant, because the wide scope of "property and civil rights in the provinces" has left little in the way of a residue of local or private matters. See, P.E. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Thomson Professional Publishing, 1992) at 537, 540.

advantage of enabling the provinces to legislate on this essential aspect of the economy - commerce.

The strength of the federal parliament under the Nigerian constitution is quite obvious in the exhaustive provisions of the exclusive legislative list of the federal parliament. With these provisions there is inevitable whittling away of the states' legislative powers, which results in a gradual but steady shift towards unitary system of government in a federal set up.⁸⁹ Summarising the implications of the present constitutional hindrance, Anifalaje observed:

Incidentally, it would seem that there is a significant correlation for instance, between the stupendous economic growth together with the rapid development of commercial laws and the Tenth amendment of the United States on the one hand, and between the relative economic stagnation together with the lack-lustre development of commercial laws and the exclusive central control of commerce in Nigeria on the other hand.⁹⁰

⁸⁹ See J.O. Akande, "Legislatures and their Powers" in *National Association of Law Teachers Proceedings on Law and Development: The Nigerian Draft Constitution (1977)* at 41-42; Anifalaje, *supra* note 84 at 59.

⁹⁰ *Ibid.*, at 63. The reference to the United States would apply to Canada with equal force.

1.3. AN OVERVIEW OF SECURITIES REGULATION IN CANADA⁹¹

1.3(a). HISTORICAL BACKGROUND

Until the second decade of the twentieth century, securities legislation in Canada had largely followed the British model. The first Canadian statute that introduced the concept of disclosure was the *Joint Stock Companies Act, 1877*.⁹² This statute followed the English *Companies Act* of 1867 in its disclosure provisions and provided that:

84. ... [e]very prospectus of a Company and every Notice inviting Persons to subscribe for Shares in any Joint Stock Company, shall specify the Dates and the Names of the Parties to any Contract entered into by the Company, or the Promoters, Directors, or Trustees thereof, before the Issue of such Prospectors or Notice, whether subject to Adoption by the Directors of the Company, or otherwise; and any prospectus or Notice not specifying the same shall be deemed fraudulent on the Part of the Promoters, Directors and Officers of the Company knowingly issuing the same, as regards any person taking Shares in the Company in the Faith of such Prospectus, unless he shall have had Notice of such Contract.

The disclosure provisions of the 1877 statute were copied by most of the Canadian jurisdictions, including Nova Scotia, New Brunswick, Prince Edward Island, and the Northwest Territories. Other jurisdictions, including Ontario and British Columbia, also adopted the disclosure provisions of later English statutes.⁹³

The accuracy of statements in prospectuses for the sale of securities was however arguably mitigated by the English decision in *Derry v. Peek*⁹⁴ where an action based on a misrepresentation in a prospectus was dismissed on the basis that the plaintiff had to

⁹¹ Mark R. Gillen, *Securities Regulation in Canada* (Toronto: The Carswell Co., 1992) 51-53.

⁹² S.C. 1877, c. 43.

⁹³ These later English statutes included the *Companies Act* of 1890, (U.K.) 53 and 54 Vict., c. 62 and the *Company Act* of 1900, (U.K.) 63 & 64 Vict., c. 48.

⁹⁴ (1889), 14 App. Cas. 337 (H.L.).

show fraud and had failed to do so. The court stated that fraud would be proven when it was shown that the misrepresentation was made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false.⁹⁵ This examination of intent made it difficult to sustain an action against directors for misrepresentations in a prospectus. In 1890, the English *Companies Act* was amended to deal with the above situation by providing for liability on the part of directors of a corporation in the event of a misstatement in a prospectus without proof of intention.⁹⁶ This principle was later adopted in Canada and still applies today in Canada.

With the passage of the “Blue Sky” laws in a number of American states (beginning with Kansas in 1911), Canadian securities law began to reflect that attempt at preventing securities fraud. The *Manitoba Sale of Shares Act* of 1912⁹⁷ required that any company not organised in Manitoba had to obtain a license to sell shares in Manitoba. It required that certain documents dealing with the financial status of the company be filed before a license is given.⁹⁸ Other provinces enacted similar legislation.⁹⁹

⁹⁵ See the decision of Lord Bramwell at 14 A.C. 350-53 and the decision of Lord Herschell at 14 A.C. 360-76.

⁹⁶ *Directors Liability Act, 1890*, 53 & 54 Vict. c. 64.

⁹⁷ S.M. 1912. c. 75. Manitoba was the first province to adopt this legislation.

⁹⁸ *Ibid.* s. 2.

⁹⁹ See generally, J. Peter Williamson, *Securities Regulation in Canada*. (Toronto: University of Toronto Press, 1960), at 12-13.

Ontario's *The Security Frauds Prevention Act* in 1928¹⁰⁰ became the model for most provinces through the 1930s.¹⁰¹ In 1947, Ontario enacted a new form of securities legislation¹⁰² which required specified elements to be included in a prospectus for any distribution of securities to the public.¹⁰³ This statute differed from the earlier fraud prevention statute, in that it did not just try to deal with frauds after the fact (requiring a proof of intent). It gave purchasers a statutory right of action in which they did not have to prove intent or reliance. However, the legislation dealt only with disclosure on the distribution of securities. It did not provide for ongoing disclosure of information to support secondary market trading.

Modern securities regulation in Canada has been considerably influenced by the Kimber Report. Its recommendations included requirements for ongoing disclosure, including the distribution of periodic financial statements, mandatory proxy solicitations and reporting of insider trading.¹⁰⁴ The *Ontario Securities Act* of 1966 adopted many of the Kimber Report's recommendations and that Act (known as the '*Uniform Act*') was subsequently adapted to all of the western provinces in their legislation.¹⁰⁵ However, the Ontario Merger Report of 1970, on reassessing the then existing securities laws, made

¹⁰⁰ S.O. 1928, c.24. This Act required the licensing of stock brokers and provided for investigations into securities 'frauds' - s. 3.

¹⁰¹ Williamson, *supra* note 99, at 24.

¹⁰² S.O. 1947, c. 98.

¹⁰³ *Ibid.*, ss. 43, 44, and 45.

¹⁰⁴ The Kimber Report, *supra* note 32. Parts II, IV and VI.

¹⁰⁵ S.O. 1966, c. 142.

recommendations which eventually led to the 'closed system' statute in 1978.¹⁰⁶ This statute also offered the model for most of the other provinces and laid strong emphasis on continuous disclosure for the purpose of secondary market trading; however, it allowed for a closed system of trading whereby a select group of persons who are presumed not to need the protection provided by the extensive disclosure contained in prospectuses, financial statements, mandatory proxy solicitations, and so on.

(b) THE CURRENT REGULATORY FRAMEWORK

In Canada, unlike Nigeria, securities regulation is primarily dealt with under provincial law.¹⁰⁷ In furtherance of the powers of the provinces to legislate with respect to 'property and civil rights',¹⁰⁸ the various provinces have enacted securities statutes and concomitant regulations and the courts have upheld their validity even where there is overlapping but not conflicting federal law.¹⁰⁹ They have also been held to be binding on persons outside the province.¹¹⁰ Although Parliament has not passed a statute such as the

¹⁰⁶ S.O. 1978, c. 47.

¹⁰⁷ This also includes the law of the three territories - Yukon territories, Northwest Territories and Nunavut as of 1 April, 1999. Various federal legislation however affect trading in securities such as ss. 380(2), 382, 383, 384 and 400 of the Criminal Code. See, P. Anisman & P.W. Hogg, *Constitutional Aspects of Federal Securities Legislation: Proposals for a Securities Market Law for Canada*, Vol. 3, (Ottawa: Minister of Supply and Services, 1979) at 143-44.

¹⁰⁸ S.92(13) of the *Constitution Act*, 1982, enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c.11. The 'property and civil rights' power has been interpreted to include dealings in property, contracts, and the regulation of business, trades and professions: P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: The Carswell Co., 1985) at 454-55.

¹⁰⁹ See, for example, *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 18 B.L.R. 138, 44 NR 181.

¹¹⁰ P. Anisman & P.W. Hogg, *supra* note 107 at 145-46, noting *R. v. McKenzie Securities Ltd.* (1966) 56 D.L.R. (2d) 56 (leave to appeal denied, sub nom. *West v. R.*, [1966] S.C.R. ix).

various provincial acts regulating trading in securities, there are several heads of constitutional power under which it might do so.¹¹¹

In the past, there was some question as to whether provincial securities laws applied to federally incorporated corporations. The current position is that a law, which has the effect of incapacitating a federally incorporated corporation from operating in a province, is void as regards the federally incorporated corporation.¹¹² Consequently, corporations incorporated under the federal residual power in s. 91 of the *Constitution Act, 1867* cannot be prevented from issuing securities by the provincial regulatory authorities in furtherance of the provincial powers in s. 92(13) relating to property and civil rights in the provinces.

It is to be observed that the difficulty with any attempt in Canada to have a uniform legislation in this area is the presence of two legal systems in the country - the civil law system in the province of Quebec and the common law system in the other provinces.

The securities acts and the regulations passed under the securities acts leave considerable adjudicative and administrative discretionary powers to panels of commissioners or an administrator. There are also SROs that have their own rules and decision making powers. The rules, decisions and policies of these regulatory bodies are an important part of the overall regulatory regime for securities.

To complement the securities statutes and their regulations made by the provinces and territories, there are other sources of securities regulation. The first is the body of

¹¹¹ Anisman & Hogg, *supra* note 107, at 153-220.

¹¹² *A.G. Manitoba v. A.G. Canada*, (1929) 1 W.W.R. 136 (Man., J.C.P.C.).

National Policy Statements (NPS) adopted by all jurisdictions. These generally interpret the legislation and set guidelines to (1) implement certain policies and (2) regulate the conduct of participants and securities trading.¹¹³

In addition to the NPS adopted by all jurisdictions, each jurisdiction also has a set of Local Policy Statements (LPS)¹¹⁴ that performs the same function as the NPS, but on the provincial level. The use of policy statements in Canada was called into question by the decision of the Ontario Court of Justice (General Division) in *Ainsley Financial Corporation et al. v. Ontario Securities Commission et al.*¹¹⁵ which held that a specific policy established by the Ontario Securities Commission (No. 1.10 respecting the sale of “penny stocks” in Ontario) was beyond its powers as being “legislative” in nature. This decision, which was upheld by the Ontario Court of Appeal on a slightly different basis, has led the Ontario Legislature to grant the Ontario Securities Commission the power to make rules that have the force of law, to sidestep the *Ainsley* problem. Other jurisdictions have followed this lead.

Finally, the various securities commissions also issue Blanket Orders, Rulings, and Notices that are intended, on the one hand, to clarify, amend, and modify certain aspects of the securities statutes, and on the other hand, to make policy.

¹¹³ Approximately 50 National Policy Statements and 13 Uniform Act Policy Statements have been adopted across Canada through the Canadian Securities Administrators, an informal organisation in place since the 1930s consisting of the securities regulators of all ten provinces and the two territories.

¹¹⁴ These indirectly have the force of law because the various securities commissions require compliance by those who wish to trade in securities.

¹¹⁵ (1993), 14 O.R. (3d) 280 (General Division).

Cooperation among provincial securities administrators has been an important characteristic of the regulation of securities markets in Canada. The impetus for cooperation appears to be in part "a desire to avoid inconsistent requirements which would create impediments to the efficient functioning of the securities market and thus undermine rather than promote the ultimate purposes of legislation, namely, enhancement of the raising of capital by corporate issuers."¹¹⁶

¹¹⁶ P. Anisman, "The Regulation of the Securities Market and the Harmonization of Provincial Laws" in R. Cumming, *Harmonization of Business Law in Canada*, (Toronto: University of Toronto Press, 1986) at 77. Another impetus for inter-provincial co-operation may be a desire to forestall any pressure for federal legislation of securities markets, as this would have the effect of further restricting provincial powers.

Chapter 2

SECURITIES LAWS AND INVESTOR PROTECTION

2.0. INTRODUCTION

Most of the world's major securities regulatory systems strike a balance somewhere between the two extreme positions of investor protection. One extreme posits that investors should be protected from all possible risks, including "business risks" or "economic risks", *i.e.*, the level of risk inherent in a particular investment, which might be evaluated simply by answering the question, "is the investment a good deal?" At the other extreme is minimal protection: absent overt fraud, investors are on their own to discover and evaluate investment risk. Among emerging markets, the critical question remains whether regulatory authorities should opt for a disclosure and/or merit-based approach in securities offerings conducted in their markets.¹¹⁷

As reiterated in the Kimber Report, the idea was not that "the public must be protected against itself".¹¹⁸ Investors should be protected by disclosure which would allow them to make informed decisions.¹¹⁹

In a disclosure framework all material information¹²⁰ normally should be disclosed in the form of written offering materials. This information should include, for

¹¹⁷ Marc I. Steinberg, "Emerging Capital Markets: Proposals and Recommendations for Implementation" (Winter 1996), 30(4) *The International Lawyer* at 715.

¹¹⁸ *Report of the Attorney General's Committee on Securities Legislation in Ontario supra* note 32 at para. 1.12.

¹¹⁹ *Ibid.* However, some discretion to assess the merit of securities offered under a prospectus has been an element of most securities regulation since its inception in the early part of the 20th century. This discretion with respect to the merits of the securities being offered is referred to as "blue sky" discretion. The term originated in the United States where states adopted securities laws that were said to protect against "eastern industrialists selling everything including the blue sky". See generally, Mark R. Gillen, *Securities Regulation in Canada, supra* note 91, at 112.

example. (1) material historical information relating to such elements as assets, earnings, nature of operations, and managerial self-dealing, (2) the purposes for which the proceeds derived from the offering will be used, (3) reasonably accurate financial statements prepared in accordance with recognised accounting practices and auditing standards, and (4) forward-looking developments, events, and contingencies that are reasonably likely to occur and to have a material financial effect on the enterprise.¹²¹

By contrast, merit regulation enables the securities authority, even if there is accurate and full disclosure, to prevent the offering from being conducted if it is determined that such offering is unfair, unjust or inequitable.¹²²

For emerging markets, it has been suggested that a disclosure approach should be adopted to the exclusion of a merit-based system.¹²³ According to proponents of this view, the risk exists that adherence to merit regulation in such markets will only serve as a subterfuge for government assessments of character, integrity and goodness.¹²⁴ Nonetheless, adoption of a disclosure approach alone leaves a gap that needs to be filled. Although a disclosure-based system calls for revelation of material insider dealings, such a system fails to address the propriety of even blatantly unfair insider rip-offs. If attractive

¹²⁰ Material information may be defined as (1) such information that a reasonable investor would consider important in the making of a decision to buy or sell or (2) such information that is deemed price sensitive. See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); Australian Corp. L. 1002G.

¹²¹ Gower Report (U.K.) on *Review of Investor Protection* (Part I-1984, Part II-1985).

¹²² Richard B. Tyler, 'More about Blue Sky' 39 *Wash. & Lee L. Rev.* 899 (1982). Also, SEC, *Report of SEC's Advisory Committee on Corporate Disclosure* (1977).

¹²³ John J.A. Burke, 'The Estonian Securities Market Act: A lesson for Former Republics of the Soviet Union', 27 *Vand. J. Transnational L.* 545, 550 (1994).

¹²⁴ *Ibid.*

profits are anticipated, many astute investors will purchase the subject securities regardless of unfair insider dealings.¹²⁵

Irrespective of investor nonchalance, a regulatory system should not stand dormant. Moreover, the problem is exacerbated after the offering is completed, especially when the insiders sell substantial amounts of stock in the offering while retaining a sufficient percentage to retain control over the enterprise. In such a scenario, these insiders would have a greater incentive to unduly benefit themselves at the expense of the enterprise and unaffiliated security holders.¹²⁶

In emerging markets, when issuers elect to tap unsophisticated investors for funds on a widespread basis, the need for disclosure and surveillance should prevail. Being uninitiated investors, they are more easily induced to part with their funds on the basis of false hopes and outright lies. Although sound regulation cannot prevent the overly gullible from being manipulated, it can minimise the degree of investor intoxication enveloping such offerings.¹²⁷ According to Burke, requiring sufficient disclosure and implementing adequate surveillance against fraud should deter sharp practices. If a regulatory authority has been established, the filing with such authority of the applicable disclosure documents transmitted to investors should be mandated.¹²⁸

¹²⁵ Stanley Siegel, *The Long March to a Market Economy: An Examination of the New Company and Securities Laws of the People's Republic of China*, in *Emerging Finance Markets and the Role of International Finance Organizations*, 497 (J. Norton & M. Andenas eds., 1996).

¹²⁶ M. Steinberg, *supra* note 117 at 729.

¹²⁷ Joel Seligman, "The Historical Need for a Mandatory Corporate Disclosure System", 9 *J. Corp. Law* 1 (1983).

¹²⁸ *Supra* note 123 at 579-84.

2.1. DISCLOSURE AND THE PROSPECTUS REQUIREMENT IN NIGERIA

Nigerian securities regulations, in ensuring that investors are protected, require disclosure on the initial distribution of securities and to some extent continuous disclosure to support secondary market trading.¹²⁹ It regulates bids for securities made for the purpose of effecting a takeover and bids for securities made by the issuer of the securities itself. It also regulates the persons who are involved in securities activities. Penalties exist for fraud, negligence and misrepresentation; and regulators can stop trading in particular securities if they conclude the issuer, promoters or dealers are acting improperly.

Consequently, the concept of disclosure remains a central aspect of Nigerian securities regulation. The objective of such disclosure is to provide investors with as much information about businesses in which they seek to invest, so that such investors may make informed choices. Currently, this objective of disclosure is achieved in Nigerian, as in most other jurisdictions, by the imposition of a prospectus requirement before any sale of securities to the public. The prospectus is a document containing statutory mandated, material information about a particular issuer of securities to assist prospective investors in their decision to purchase its securities.¹³⁰ Furthermore, if there is a 'significant'¹³¹ change in any matter contained in the prospectus, or if any 'significant' new matter arises after preparation of the prospectus for submission, supplementary information must be included in the prospectus.

¹²⁹ Nigerian securities laws have not been adequately developed to provide for secondary market trading. The existing laws mostly provide for primary disclosure.

¹³⁰ It also provides information relevant to valuing the securities.

The prospectus requirement is expressly provided for under the CAMA and the *SEC Act*. S. 548(1) of the CAMA provides:

...it shall not be lawful to issue any form of application for securities in a public company¹³² unless the form is issued with a prospectus which complies with the provisions of section 550 of this Act...¹³³

Section 9(1) of the *SEC Act*, in addition to requiring the filing of a prospectus, provides for the further registration of the securities with the SEC:¹³⁴

“All securities proposed to be offered for sale to or for subscription pursuant to section 6(b)¹³⁵ of this Act shall be registered with the Commission by the issuer filing an application for registration with the Commission, accompanied by a draft prospectus, under such terms and conditions as the Commission may by rules and regulation prescribe.”

The test that the prospectus is required to meet is one of full, true, and plain disclosure of all material facts that relate to the securities issued or proposed to be distributed.¹³⁶

Section 550(1) of CAMA provides that the prospectus must state the matters specified in

¹³¹ Interpreted the same way as ‘material’ information. See *supra* note 120.

¹³² By Sections 22 and 24 of CAMA, a public company in contradistinction to a private one has more than fifty members, and does not have any restrictions on the transfer of its shares in its articles of association. It can also make an invitation to the public to subscribe to its shares and debentures.

¹³³ S. 553 provides exemptions when the prospectus requirement may be done away with, while s. 550 provides the contents of every prospectus issued.

¹³⁴ S. 547 of CAMA also provides for registration of securities issued to the public.

¹³⁵ S. 6(b) deals with registration of all securities proposed to be offered for sale to or for subscription by the public, or to be offered privately with the intention that the securities shall be held ultimately other than by those to whom the offers were made.

¹³⁶ The purpose of a prospectus is to inform investors. Therefore, the information set forth in the prospectus must be presented in a clear, concise, and understandable fashion. The term “material” limits the information to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered. See, *SEC Guidelines on Administrative Proceedings: Mergers, Acquisitions and Combinations: Prospectuses; Registrations Underwriters and Underwriting Agreements*, at p. 20.

Part I¹³⁷ of its Schedule 15 and set out the reports specified in Part II¹³⁸ of that Schedule. The said Parts I and II have effect subject to the provisions contained in Part III.¹³⁹

Since the disclosure requirement by means of a prospectus is triggered when a transaction involving a “security” amounts to an “invitation to the public”,¹⁴⁰ before determining when a prospectus would be required under Nigerian laws, the definition of ‘securities’ must be properly addressed. A consequence of the dual securities laws, with different sources in Nigeria is that there are unintended overlaps between both statutes, as regards the definitions of securities by the statutes. While Section 650 of the CAMA defines ‘securities’ as including “shares, debentures, debenture stock, bonds, notes (other than promissory notes) and units under a unit trust scheme”. Section 29 of the *SEC Act* defines securities broadly as:

any note, stock, treasury stock or certificate, government bond, debenture, participation in any profit sharing agreement or in any oil or gas or other mineral royalty or lease, any subscription, transferable share, investment contract, certificate of deposit for a security, or rights or interest (described whether as units or otherwise) under any unit trust scheme, or in general any instrument commonly known as “security” but shall not include currency or any note, draft bill of exchange or banker’s acceptance which has a maturity at the time of issuance of not exceeding nine month, exclusive of the days of grace, or any renewal thereof the maturity of which is likewise limited.¹⁴¹

¹³⁷ These basically list information pertaining to the issuer’s proprietorship, management and capital structure.

¹³⁸ Auditors and Accountants Reports.

¹³⁹ The SEC further provides in its guidelines *supra*, for certain statutory and general information to be disclosed in the prospectus.

¹⁴⁰ In accordance with s. 6(b) of the *SEC Act* and s. 548 of CAMA.

¹⁴¹ This SEC definition replicates that of the US federal securities laws, and thus makes the ‘investment contract’ jurisprudence in US and Canadian securities laws part of the Nigerian securities laws. Hence in *Re Proposed Dunis Investment Bond: Approval/Clearance* [1992] 1 SLR 95, 97-98, the Nigerian SEC relied on the US Supreme Court’s decision in *SEC v. W.J. Howey Co.*, 328 US 293 (1946) where an ‘investment contract’ was defined as:

Section 545 of CAMA defines the phrase “invitation to the public” and it encompasses the Canadian definition of “primary distribution” or “distribution” to the public.¹⁴² It provides:

- ... an invitation shall be deemed to be made to the public, if an offer or invitation to make an offer is-
- (a) published, advertised or disseminated by newspaper, broadcasting, cinematograph, or any other means whatsoever;
 - (b) made to or circulated among any persons whether selected as members or as debenture holders of the company concerned or as clients of the persons making or circulating the invitation or in any other manner;
 - (c) made to any one or more persons upon the terms that the persons to whom it is made may renounce or assign the benefit of the offer or invitation or of any securities to be obtained under it in favour of any other persons;
 - (d) made to any one or more persons to acquire any securities dealt in upon any stock exchange or in respect of which the invitation states that application has been or shall be made for permission to deal in those securities in any stock exchange.

2.1(a). EXEMPTIONS TO THE PROSPECTUS REQUIREMENT

The CAMA provides for certain instances when the filing of, or compliance with, the statutory contents of the prospectus need not be complied with. These exemptions fall broadly under statutory and discretionary exemptions.

... a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed by the enterprise.”

¹⁴² Formerly, Canadian securities acts required a prospectus when there was a “distribution to the public”. Uncertainty associated with the meaning of the term made planning difficult and may have led to a number of issues being sold without a prospectus in situations where prospectus information and statutory liability might have been appropriate. To rectify this, an approach known as the “closed system” has been adopted in most Canadian securities acts. The “closed system” approach is to bring all distributions of securities within the ambit of securities regulation and then grant specific exemptions. Mark R. Gillen, *Securities Regulation in Canada*, *supra* note 91 at 102.

Statutory exemptions include instances where the application form for securities was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares¹⁴³ or in relation to shares that were not offered to the public.¹⁴⁴ Also the statutory contents of the prospectus do not apply when the issue of securities is to existing shareholders of a company, whether or not an applicant for the shares has the right to renounce in favor of other persons,¹⁴⁵ or when the securities issued are or will be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange.¹⁴⁶ Further, when a prospectus has been registered with the SEC within six months of the issue, there is no need for a new one at the actual time of the issue as long as mention is made of the earlier prospectus issued.¹⁴⁷ Also exempted from the prospectus requirement is the sale of any shares by or under the supervision of the court.¹⁴⁸

Section 553 of CAMA provides for discretionary exemptions where, in light of the size and other circumstances of the issue of securities, and any limitations on the number and class of persons to whom the offer is to be made, compliance with the strict prospectus requirements contained in schedule 15 would be unduly burdensome. To obtain the benefit of such an exemption, an application would have to be made to the

¹⁴³ S. 548(1)(a).

¹⁴⁴ S. 548(1)(b).

¹⁴⁵ S. 551(a).

¹⁴⁶ S. 551(b). S. 556 extends this exemption to the securities previously issued by companies associated with the issuer. This provision does not exist in the Canadian securities laws and could be a potentially significant regulatory loophole.

¹⁴⁷ S. 555 CAMA.

¹⁴⁸ S. 543(1) CAMA.

SEC for a certificate of exemption and the stock exchange where the security is traded or quoted is duly notified.

(b) CONSEQUENCES OF FAILURE TO FILE A PROSPECTUS

Subsections 543(2) and (3) of CAMA provide for penal and civil sanctions respectively for failing to file with the SEC and duly deliver to a purchaser a prospectus where a prospectus is required. They provide that:

- (2) If any invitation to the public is made in breach of subsection (1)¹⁴⁹ of this section all persons making the invitation and every officer who is in default or any body corporate making the invitation shall be guilty of an offence and liable on conviction in the case of a body corporate to a fine not exceeding N5, 000 and in any other case to imprisonment for a term not exceeding 2 years or to a fine not exceeding N500 or to both such imprisonment and fine.
- (3) If, as a result of any invitation to the public in breach of subsection (1) of this section any person acquires or disposes of any securities or deposits money with any company, he shall be entitled to rescind such transactions and either in addition to or instead of rescinding, to recover compensation for any loss sustained by him from any person who is liable whether convicted or not, in respect of the breach.

Also, in furtherance of the administrative powers of the SEC pursuant to sections 15 and 26¹⁵⁰ of the *SEC Act*, the SEC may impose any of the several administrative sanctions on the defaulting party who either failed to file a prospectus as required or filed one which did not comply with the strict requirements of the law. For instance, it could order (1) compliance with the delivery obligation; (2) that trading in the security cease;

¹⁴⁹ Subsection (1) makes it unlawful for any person to fail to file a prospectus when required or to file one that does not comply strictly with the requirements of the law.

¹⁵⁰ Section 26 of the *SEC Act* is the general penalty provision for violations of the *SEC Act*.

- (3) a denial of exemptions from the requirements of the securities act or regulations; or
 (4) a reprimand or suspension, cancellation, or restriction of registration for trading.¹⁵¹

In *SEC v. Afribank Nigeria Plc. & FBN (Merchant Bankers) Limited*,¹⁵² the respondents were invited to appear before the Administrative Hearing Committee (AHC) of the SEC to explain why a material fact, to wit, the management of Afribank had decided to embark on a Head Office project, was not disclosed in the prospectus issued by the bank during its privatisation in 1993. The AHC after hearing the parties decided, *inter alia*:

- (a) FBN (Merchant Bankers) Limited was suspended for 3 months from functioning as an Issuing House; and
- (b) Afribank (Nig.) Plc. was suspended from performing Registrars' function for 3 months and was barred from performing the functions of an in-house registrar.

(c) LIABILITY FOR PROSPECTUS MISREPRESENTATION

Both the CAMA¹⁵³ and the *SEC Act*¹⁵⁴ provide for both civil and criminal liabilities for misrepresentations contained in the prospectus. A representation is a statement of past or present facts that induces a party to enter into a contract with the person who makes the representation.¹⁵⁵ The statutory liabilities also extend to omissions of material facts in the prospectus.¹⁵⁶

¹⁵¹ *SEC Guidelines*, *supra* note 136 at 4.

¹⁵² The Securities and Exchange Commission Report and Accounts for the year ended 31st December, 1994 at 73.

¹⁵³ Ss. 562, 563 and 564, CAMA.

¹⁵⁴ Section 28 of the *SEC Act*.

¹⁵⁵ *Horsfall v. Thomas* (1862), 1 H. & C. 90, 158 E.R. 813 (Exch. D.); *Smith v. Chadwick* (1884), 9 App. Cas. 187 (H.L.).

Section 562(1) provides that directors and promoters of the company who consented to act in that capacity and duly authorised the issue of the prospectus are liable to pay compensation, to all persons who subscribe for shares or debentures on the faith of the prospectus, for the loss or damage they may have sustained by reason of any untrue statement included in it.

Section 563(1) provides for criminal liability of any officer of the company who authorized the issue of the prospectus containing an untrue statement. It stipulates that on conviction upon an indictment, such officer is liable to either a term of imprisonment not exceeding two years or to a fine not exceeding five thousand naira¹⁵⁷ or to both the fine and imprisonment. Such person could however be convicted summarily and in this instance the penalty would be a maximum jail term of three months or a maximum fine of five hundred naira¹⁵⁸ or both.

Also, an argument can be made that a shareholder may also seek injunctive relief and possibly damages for misrepresentations contained in a prospectus by virtue of the implication of regulation 7(1) to the *SEC Act* (the SEC's anti-fraud provision).¹⁵⁹ This may not be entirely obvious, since regulation 7(1) does not by its terms create an express

¹⁵⁶ See, *SEC v. Afribank*, *supra* note 152.

¹⁵⁷ About \$100 CDN.

¹⁵⁸ About \$10 CDN.

¹⁵⁹ Made pursuant to section 23 of the *SEC Act*. This regulation is discussed in more detail in the next section below.

civil remedy or penal sanction.¹⁶⁰ Nevertheless, it has been contended that a private right of action is implicit in the regulation for the following reasons:¹⁶¹

Firstly, under the common law, where there is a statutory prescription unsupported by a civil or penal remedy, the presumption is that a civil right of action accrues to the person who is indemnified by the transgression of the prescription.¹⁶² Justice Oputa in the Nigerian Supreme Court decision in *Bello v. AG. Oyo State*¹⁶³ observed that, "the maxim *ubi jus ibi remedium* is so fundamental to the administration of justice that where there is no remedy provided by either the common law or by statute the Courts have been urged to create one."¹⁶⁴

Secondly, following the decision of the Nigerian Court of Appeal in *Societe Generale de Surveillance S.A. v. Rastico Nigeria Limited*,¹⁶⁵ it would appear that Nigerian law is very liberal in allowing suits for breach of statutory duty and a plaintiff

¹⁶⁰ While it is the case that s. 26 of the *SEC Act* penalises a breach of any of the provisions of the Act, thereby giving rise to the possible suggestion that a breach of any of the SEC's regulations' (such as reg. 7(1)), which are made pursuant to s. 23 of the Act, assumes the status of a breach of the parent statute, it is submitted that this view cannot be correct. The resolution of this issue of statutory interpretation calls for an enquiry as to whether there is such a legislative intent. The *SEC Act* indicates in no uncertain terms that penalties for a breach of the SEC's regulations are to be stipulated in the regulations themselves. (S. 23(2) provides that any rule or regulation made under S. 23(1) may, where appropriate, prescribe penalties for a violation. Since those regulations fail to prescribe any penalties, it then follows that the general penalty in S 26 will be of no relevance to a violation of the regulations.

¹⁶¹ T. Ogowewo, "The Role of Target Management in a Tender Offer: The Position in Nigerian Law". (1996) 40(1) *J.A.L.* at 16 - 18.

¹⁶² *Ashby v. White*, (1703) 2 Ld Raym 938.

¹⁶³ (1986) 5 N.W.L.R. 828.

¹⁶⁴ *Ibid.*, at 890.

¹⁶⁵ (1992) 6 N.W.L.R. 93.

need not show that the primary intention of the statute is to protect his class.¹⁶⁶ But even if such a showing were necessary, it would not be a difficult task for the shareholder to argue that he falls within a class for whose benefit regulation 7(1) was promulgated.

Thirdly, section 27 of the *SEC Act* indicates that a violation of Regulation 7(1) was not meant to go unpunished.¹⁶⁷ One can thus infer that even though the regulation imposes neither a penal nor civil remedy, the courts are likely to imply a civil remedy.¹⁶⁸

2.1. THE ANTI-FRAUD PROVISION UNDER NIGERIAN LAW¹⁶⁹

The anti-fraud provision in the Nigerian securities law, Regulation 7(1) made pursuant to Section 23 of the *SEC Act* remains the most potent tool for ensuring investor protection under the Nigerian laws. The regulation provides:

It shall be unlawful for any person involved in securities trading to directly or indirectly -

- (a) employ any device, scheme or artifice to defraud or is capable of defrauding any person or institution;
- (b) make, utter or present any untrue statement of a material fact;
- (c) omit to disclose a material fact necessary in order not to render any statement misleading in the light of circumstances under which the statement was made:

¹⁶⁶ This is unlike English law where the plaintiff has to show that the statutory obligation or prohibition was imposed for the benefit or protection of a particular class of individuals that he falls under. See *Lonrho v. Shell Petroleum Co. Ltd. (No. 2)*, (1982) A.C. 173.

¹⁶⁷ S. 27 provides as follows: "The Federal High Court shall have jurisdiction for the trial of offences and violations arising under this Act and under the rules and regulations made thereunder and of all suits brought to enforce any liability or duty created by the provisions of this Act."

¹⁶⁸ According to a leading authority on statutory interpretation, "if there is clearly no criminal sanction, the inference is stronger that a civil sanction is intended". See, F. Bennion, *Statutory Interpretation: a Code* (London, 1992), 45.

¹⁶⁹ The Canadian laws do not have an express anti-fraud provision identical to the Nigerian provision, and so primary comparison here is to the U.S. anti-fraud provision, more particularly as the Nigerian provision was copied from that of the U.S.

- (d) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of or dealing in any security; or.
- (e) deal in the securities of a company of which a person is an insider.

This regulation is patterned essentially along the lines of rule 10b-5 promulgated under section 10(b) of the U.S. *Securities and Exchange Act*, 1934.¹⁷⁰ The U.S. progenitor. Rule 10b-5 has been described as a catch-all clause to prevent manipulative devices.¹⁷¹ Its purpose remains to enable the US SEC to deal with new manipulative devices in the securities markets that did not exist or were not known in 1934.

Regulation 7(1) is however much more potent than Rule 10b-5. in that while Rule 10b-5(a) is limited to proscribing the employment of any device, scheme, or artifice to defraud in connection with the purchase or sale of any security, regulation 7(1)(a) goes further by making it unlawful to employ any of those means *capable of* defrauding any person or institution. In other words, even if a scheme is employed which, although it does not defraud, is nevertheless capable of defrauding, there will be a breach of Regulation 7(1)(a). Also, unlike rule 10b-5, insider dealing is now expressly characterised as a manipulative and deceptive act in regulation 7(1)(e).

A consideration of regulation 7(1) indicates that regulation 7(1)(b) and (c) and arguably (d) do not require a showing of *scienter*.¹⁷² Indeed in *Ernst & Ernst v.*

¹⁷⁰ 15 USCA 578j(a).

¹⁷¹ Thomas G. Corcoran, a speaker for the drafters in congress: Hearing on HR 7852 and HR 8720 before the House Committee on Interstate and Foreign Commerce, 73rd Cong. 2d Sess., 115 (1934).

¹⁷² Admittedly, one cannot with all confidence say the same for Reg.7 (1)(a), where words such as 'device', 'scheme' and 'artifice' are used. Such words carry a connotation of craft or overreaching.

Hochfelder,¹⁷³ the Supreme Court of the U.S. acknowledged that this was the case with regard to rule 10b-5(b) and (c). If *scienter* is not required, a person whose conduct has misled or deceived would nevertheless be held to have infringed regulation 7(1) regardless of fault.¹⁷⁴

2.1(a) THE REGULATION OF INSIDER TRADING IN NIGERIA

Insider trading can be broadly defined as “purchases or sales of securities of a company effected by or on behalf of a person whose relationship to the company is such that he is likely to have access to relevant material information concerning the company not known to the general public”.¹⁷⁵

The notion on which the prohibition of insider trading is based is that trading should be based on “equal access to information”.¹⁷⁶ However, some commentators have in the past considered insider trading as a justified perk for insiders.¹⁷⁷

¹⁷³ (1976) 425 US 185, at 193. Here, *scienter* was defined as “mental state embracing intent to deceive, manipulate or defraud”.

¹⁷⁴ However, it is possible that Nigerian courts may call on precepts of the tort of deceit to impose an internal requirement of *scienter*. Under the standard espoused in *Derry v. Peek*, at 374, the false representation must be made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false. This standard has been accepted in Nigeria: *Abba v. Mandilas & Karaberis Ltd.* (1964) 2 ALR Comm. 241.

¹⁷⁵ The Kimber Report, *supra* note 32 at para 2.01.

¹⁷⁶ P Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives* (Canberra: Australian Government Publishing, 1986) at 1. Also see, *Tongue v. Vencap Equities Alberta Ltd.* (1996), 39 Alta. L.R. (3d) 29, (1996) 6 W.W.R. 761 (C.A.) at 766: “... the very purpose of the insider trading regulation is to prevent the insider from putting the outsider into a guessing game with the insider holding a sure hand.”

¹⁷⁷ For example, see E. Szockyj, *The Law and Insider Trading: In Search of a Level Playing Field* (Buffalo: William S. Hein & Co., 1993) at 5.

According to the Kimber Report,

'The ideal securities market should be a free and open market with the prices thereon based upon the fullest possible knowledge of all relevant facts among traders. Any factor which tends to destroy or put in question this concept lessens the confidence of the investing public in the marketplace and is, therefore, a matter of public concern.'¹⁷⁸

It is fair to assume that investors do not want to invest in a company where insiders are known to be trading using inside information. This also decreases their desire to invest in securities in general because they have less confidence in the efficiency and fairness of the capital markets.¹⁷⁹

Under the common law, it is only in instances where a fiduciary relationship exists between the insider and the other party to the transaction, would such person who deals with an insider in ignorance of the special facts be able to obtain any protections from the law. Even then, the only statutory sanctions against the insider under the common law are criminal, which lie in the absence of civil remedies.¹⁸⁰ The common law, in recognising the fiduciary duties owed by insiders of the company to the company itself, has failed to recognise the same for shareholders of the company.¹⁸¹

In the 1902 English case of *Percival v. Wright*¹⁸² the Court of Appeal clearly held that a director owed no fiduciary duty to a shareholder and therefore could purchase with

¹⁷⁸ The Kimber Report, supra. note 32 at para. 2.02.

¹⁷⁹ E. Szockyj, supra note 177 at 6.

¹⁸⁰ The criminal law, although statutory, was deemed inadequate to protect investors, the standard of proof for conviction being proof beyond a reasonable doubt was usually difficult to meet. See however, *R. v. Littler* (1972), 41 D.L.R. (3d) 523, which was based on the new statutory regime.

¹⁸¹ *Regal (Hastings) Ltd. v. Gulliver* (1942) 1 All E.R. 378, (1967) 2 A.C. 134n (H.L.)

¹⁸² (1902) 2 Ch. 421.

impunity the latter's shares while in possession of favorable confidential information about the company. As a result of the limitations of the common law, most jurisdictions, in a bid to protect investors adequately against insider trading, expressly provide in their securities laws for regulations and sanctions.

Insider trading is expressly proscribed under both Chapter V of Part XVII of the CAMA and Regulation 7 in the SEC Act.

A consequence of this dual proscription under the Nigerian laws is that, there is now, rather confusingly, a conflicting definition for the offense. While the CAMA establishes express civil¹⁸³ and criminal¹⁸⁴ liability, the *SEC Act* does not. Further, while a five per cent shareholder is presumed to be an insider under the SEC's regulations,¹⁸⁵ section 614 of the CAMA simply defines an insider as an individual who at any time in the preceding six months has been knowingly connected with the company as a director, officer or employee of that company or a related company.

By regulations 7(2) and 29 of the *SEC Act*, "insider trading" occurs when a person or group of persons who are in possession of some confidential and price-sensitive information not generally available to the public, utilise such information to buy or sell securities for the benefit of himself, itself or any person, whether knowingly or unknowingly.

¹⁸³ S. 620

¹⁸⁴ S. 621

¹⁸⁵ Reg. 7(3)(v).

Both S.614 of CAMA and regulation 7(3) of the *SEC Act* define an “insider” as an individual:

- (a) who is connected with the company during the preceding six months in one of the following capacities:
 - (i) a director of the company or a related company;
 - (ii) an officer of the company or a related company;
 - (iii) an employee of the company or a related company;
 - (iv) a person in a position involving a professional or business relationship to the company, as above;
 - (v) **a shareholder who owns five per cent or more of any class of securities or any person who can be deemed to be an agent of any of the above listed persons;**¹⁸⁶ and.
- (b) who by virtue of having being connected with the company as mentioned above in (a) above has obtained unpublished price-sensitive information in relation to the securities of the company.

Regulation 63 to the *SEC Act*¹⁸⁷ further provides that the offence of insider trading applies not only to dealings at a recognised stock exchange but extends to off-market dealings in advertised securities; so long as:

- (a) the person who deals in these securities shall qualify as a insider;
- (b) the person shall be an individual, not a company;
- (c) the person shall have knowingly been connected with the company during the preceding six months;
- (d) the person shall have obtained the information by virtue of having been connected with the company;
- (e) it shall be reasonable to expect the person not to disclose the information except for the performance of his duties;
- (f) the information shall be unpublished price sensitive information in relation to securities.

¹⁸⁶ The CAMA leaves the highlighted provision out of its definition.

¹⁸⁷ The Interpretations to the Regulations.

2.1(b). LIABILITY FOR INSIDER TRADING

The CAMA provides civil¹⁸⁸ and criminal liability¹⁸⁹ for the contravention of its insider trading provisions.

Section 620 of CAMA provides civil liability for insider trading; and an insider found guilty is:

- (a) liable to compensate any person for any direct loss suffered by that person 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; and,
- (b) accountable to the company for the direct benefit or advantage received or receivable by him as a result of the transaction.

The implication of these provisions is that an insider need not be a party to the securities transaction. If he counsels another person to deal in the securities, he is liable to the other party.

Section 621 of CAMA provides for criminal liability of either imprisonment for two years on conviction for insider trading or a fine of five thousand naira (N5, 000)¹⁹⁰ or both such fine and imprisonment.

Also, insider trading is expressly characterized as a manipulative and deceptive act in regulation 7(1)(e). As reiterated earlier, even though this regulation imposes neither a penal nor civil remedy, the courts are likely to imply a civil remedy. This is particularly so as section 27 of the SEC Act indicates that a violation of Regulation 7(1) was not meant to go unpunished.

¹⁸⁸ Section 620 of CAMA.

¹⁸⁹ Section 621 of CAMA.

¹⁹⁰ About \$60 CDN.

Despite the fairly detailed insider trading prohibitions in Nigerian securities laws, it is quite surprising that there has not been any SEC prosecution for violations thus far. This lack of prosecution points to more endemic problems associated with the enforcement of the securities laws in Nigeria.¹⁹¹

¹⁹¹ Discussed in more detail in Chapter 5.

2.2. DISCLOSURE REQUIREMENTS IN CANADA

In Canada, the objective of disclosure in the various securities statutes is achieved by the imposition of a prospectus requirement before a sale of securities to the public. In the absence of statutory and discretionary exemptions, most of the securities statutes in Canada provide that:

No person or company shall trade in a security, either on his own account or on behalf of any other person or company, where the trade would be in the course of primary distribution to the public of the security, until there have been filed with the commission both a preliminary prospectus in respect of the offering of the security and receipts thereafter obtained from the director.¹⁹²

In turn, "primary distribution to the public" in relation to trading in securities is defined in Section 1(1) of *The Manitoba Securities Act (MSA)* as:

- (a) trades that are made for the purpose of distributing to the public securities issued by a company and not previously distributed to the public; or
- (b) trades in previously issued securities of a company for the purpose of distributing those securities to the public where the securities form all or part of, or are derived from, the holdings of any person, company or any combination of persons or companies holding a sufficient number of the securities of that company to materially affect control of that company:

whether the trades are made directly to the public or indirectly to the public through an underwriter or otherwise, and includes any transaction or series of transactions involving a purchase or sale or a repurchase or resale in the course of or incidental to such distribution.

The above provision is intended to ensure that the prospectus requirement covers both initial public offerings and secondary distributions from "control blocks".¹⁹³ This

¹⁹² MSA, s.37 (1); O.S.A. s. 53.

¹⁹³ A "control person" or block is defined as a person (or group of persons) who has (have) sufficient control over voting rights to materially affect the control of the issuer. In certain Canadian jurisdictions, a holding of 20% is deemed, in the absence of evidence to the contrary, to be sufficient to materially affect the control of an issuer. See A.S.A. s. 1(c.2); B.C.S.A. s.1(1); O.S.A. s. 1(1); S.S.A. s. 2(1)(K).

becomes necessary because both issuers of securities and individuals who control an issuer are in unique positions with respect to the affairs of an issuer, and thus should be required to disclose in a prospectus all material facts relating to the issuer and its business when seeking funds from the public.

Noteworthy is that although the concept of "public" is central to the *MSA*, the term is not defined therein. Recourse has to be had to case law in defining the term. Generally speaking Canadian judges have approached the term in two ways. The first is to define it in a "needs to know" analysis. Simply put, the public are those who do not have access to the information of an issuer of securities and thus "need to know" the information required to be contained in a prospectus.¹⁹⁴ The second approach is one that looks at the nature of the relationship between an issuer and an individual to determine whether the individual is a "close friend or business associate" and, as such, not a member of the public.¹⁹⁵ Thus, where there are "common bonds" between the issuer and an investor, for example, as would exist between, on the one hand, an issuer and an officer, director of the issuer, and on the other hand, an issuer and a spouse or child of an officer or director of the issuer, the presumption is that substantial disclosure is not required to protect such an investor.

¹⁹⁴ *SEC v. Ralston Purina Co.* (1953), 346 U.S. 119

¹⁹⁵ *R v. Piepgrass* (1959), 29 W.W.R. 218 (Alta. C.A.). See also, *R. v. McKillop* (1971), 4 C.C.C. (2d) 390. These two cases indicate that a trade in securities will be considered to be a trade to the public (1) irrespective of the number of persons who avail themselves of the opportunity to purchase the shares or securities and (2) if there are no common bonds between the purchaser and the issuer.

2.2(a) EXEMPTIONS

Most Canadian securities statutes provide other ways of distributing securities that do not involve complying with the elaborate prospectus disclosure requirement. The basic principles underlying the exemptions from the prospectus requirement are the need to provide investors who require the information about the securities and the issuer with adequate disclosure before trading is commenced, and the need to provide such disclosure on an ongoing basis to such investors. The exemptions lie at the core of what is usually referred to as the "closed system" which exists to protect investors who, because they are either not sophisticated investors or do not have common bonds with the issuer, need to know the information that is required to be disclosed in a prospectus.

Under the *MSA* for example, the exemptions can be broadly divided into (1) statutory exemptions and (2) discretionary exemptions from The Manitoba Securities Commission (MSC).

1. Statutory Exemptions - These fall under two broad categories, namely:

- (i) those based on the nature of the trade: and.
- (ii) those based on the nature of the security involved.

A. Trade based exemptions - These can be further grouped under three classes:

(i) Those exempt under S. 19(1) of the *MSA* and include:

- (a) isolated trades:
- (b) trades to or between registered underwriters:
- (c) a trade by a company:
 - (i) as a stock dividend;
 - (ii) on winding up: or

- (iii) on the conversion of a convertible security, if no commission is paid;
- (d) in connection with a rights offering, if not objected to by the director of the MSC;
- (e) a trade pursuant to a statutory amalgamation, arrangement or merger;
- (f) a trade in connection with a take over bid;
- (g) a trade by a company of its own securities to directors, officers or employees of the company or of an affiliate if:
 - (i) trades to employees are not induced by expectation of employment or continued employment;
 - (ii) options granted by a public company are authorised by the shareholders; and,
 - (iii) trades in exchange for mining, oil or gas claims or properties are escrowed, if required by the director.

(ii) "Private Placement" exemptions are set forth in S. 19(3) of the *MSA* and S. 90 of the regulations thereto - These exempt trades made for the purpose of investment (and not for resale) where the "aggregate acquisition cost" to the investor exceeds \$97,000. While S. 19(3) applies to trades made other than to individuals, S. 90 of the Regulation applies only to trades to individuals.

(iii) "Limited offering regulation" exemptions are set forth in S. 91 of the regulation to the Act. This section exempts:

- (a) trades to an unlimited number of "related purchasers" and up to 15 "informed purchasers" as defined in S. 89 of the Regulation; and,
- (b) trades to an unlimited number of "related purchasers" and up to 50 "sophisticated purchasers" as defined in S. 89 of the Regulation.

B. Security based exemptions - These are set out in S. 19(2) of the Act and include:

- (a) debt instruments
 - (i) of or guaranteed by certain governments;
 - (ii) the repayment of which is secured by taxes
 - (iii) of or guaranteed by a bank, trust company or a loan company or an insurance company; or,
 - (iv) of or guaranteed by the World Bank;
- (b) guaranteed investment certificates of a trust company;

- (c) negotiable promissory notes or commercial paper of a term of not more than one year, if each note or commercial paper traded to an individual has a denomination or principal amount of not less than \$50,000;
- (d) mortgages or other encumbrances unless secured by a bond, debenture, or issued under a trust deed;
- (e) securities evidencing indebtedness due under any conditional sales contract or other title retention contract, if the securities are not offered for sale to the public;
- (f) debt instruments issued by a person or company organised exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes;
- (g) securities issued by a cooperative;
- (h) shares or memberships in a credit union and debt instruments issued by a credit union;
- (i) securities of a private company where the public is not solicited;
- (j) securities issued and sold by a prospector for the purpose of financing a prospecting expedition;
- (k) securities issued by a prospecting syndicate where the securities are sold by the prospector, if the prospecting syndicate agreement is approved by the director; and,
- (l) securities of a prospecting syndicate within the meaning of Part VI, issued by the prospecting syndicate, where the prospecting syndicate agreement is approved by the director and the securities are sold to not more than 50 persons or companies.

2. **Discretionary Exemptions** - In addition to the statutory exemptions referred to above, the MSC also has the power to issue discretionary exemptions pursuant to S. 20 of the *MSA* and, in effect, under S. 59 of the *MSA*. Under S. 20, the MSC is granted broad authority to exempt "...any trade, intended trade, security, person, company or distribution, as the case may be, from all or any provisions of this Act or the regulations."

(b) CONTINUOUS DISCLOSURE

Under Canadian law, once the distribution of securities has ended, the securities statutes impose a duty of continuous disclosure on an issuer.¹⁹⁶ “Continuous disclosure” refers to the duty of an issuer to make public disclosure of the state of its affairs on an ongoing or continuous basis. The rationale for this duty includes, *inter alia*:

- (a) to provide holders of the securities of a corporation with current information with which to make investment decisions regarding:
 - (i) whether to sell or hold the shares that they hold; or
 - (ii) whether to purchase additional shares;
- (b) to provide new investors with a method of evaluating the corporation’s securities as a basis for making a decision as to whether to purchase shares;
- (c) to make it possible for anyone who desires to determine the value of a corporation’s securities and a potential price of a new issue; and
- (d) to ensure efficiency in the structure and organisation of the capital markets and to deter fraud.¹⁹⁷

The framework for continuous disclosure in Canada is provided by rules in the securities statutes that ensure that an issuer makes public disclosure of its affairs in a variety of circumstances. These rules provide for:

- (i) timely disclosure of material changes;
- (ii) the use of a detailed form of proxy, as well as information circulars for the solicitation of proxies;
- (iii) financial disclosure; and
- (iv) prohibition of insider trading.

¹⁹⁶ The duty of continuous disclosure applies only to the category of issuers usually referred to in the securities statutes as “reporting issuers” *i.e.* those issuers whose securities are traded to persons who need to know the information that the issuers are required to disclose: M. Gillen, *Securities Regulation in Canada*, *supra* note 91 at 147.

¹⁹⁷ D.L. Johnston, *Canadian Securities Regulation* (Toronto: Butterworths, 1977), 240; V.P. Alboini, *Canadian Securities Regulation*, Vol. 2 (Toronto: Carswell, 1984), S. 18. See also *McLaughlin v. S.B. McLaughlin Associates Ltd.* (1981), 14 B.L.R. 46 at 59 (O.S.C.).

(i) Timely disclosure¹⁹⁸ - Simply put, this is a duty to make a public disclosure when a material change occurs in the affairs of the corporation. It includes the following:

- (a) issuing and filing a press release that discloses the nature and substance of the material change; and,
- (b) filing a report of the material change not later than ten days after the occurrence of the material change.

The statutes generally define “material change” to mean a change that (a) is likely to have a significant influence on the value or the market price of the securities of the issuer; and (b) is not generally known.¹⁹⁹ However, not all changes that have a significant effect on the market price or value of the securities of a corporation will be a material change.²⁰⁰ *Pezim v. British Columbia (Superintendent of Brokers)* illustrates that what constitutes material change is not closed and depends on the circumstances of each transaction, as well as the nature of the industry in which the issuer is involved.

National Policy No. 40, in an attempt to provide some certainty in this area, expands this requirement and provides a non-exhaustive list of what could, in various instances, constitute reportable “material information”.²⁰¹ The definition of “material information” is not restricted to “changes” in the business operations or capital of the

¹⁹⁸ OSA, s. 75(1); ASA, s. 118; QSA, s. 73. Manitoba however does not have this provision and provides in s. 55 for the filing of an amendment to the prospectus only where there is a material change during the period of distribution to the public of a security.

¹⁹⁹ This additional requirement is found in the QSA, s.74.

²⁰⁰ According to Alboini, supra, note 81 at para. 18.1.1, the material change must be “a change in the business, operations, or capital of the issuer”. See generally, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

²⁰¹ The result of this is that the definition of “material change” has been extended to include “material information”. These policies go beyond the technical requirements of existing securities legislation by requiring immediate disclosure by way of press release of “material information” and notification to the relevant securities regulator in advance of issuing any such press release so that a determination may be made by the regulator whether to halt trading in the issuer’s securities.

issuer and, thus, is broader than the statutory requirement to disclose “material changes” in the securities legislation of most provinces. However because the determination of what is material remains subjective and is dependent on the particular issuer’s affairs, it is the reporting issuer who has to determine what information is relevant and must be reported.

(ii) Proxy Solicitations - Prior to the enactment of proxy solicitation requirements in various statutes in Canada, the provisions that governed the solicitation of proxies were very lax.²⁰² The current proxy rules, in a bid to reduce management powers, influence and their use by management to obtain blanket approval for any policies that they wished to put in place, generally specify:

- (a) the requirements for the form of proxy; and
- (b) the information that must be included in the proxy or “information circular”.

Most jurisdictions specify that when voting security holders are being notified of a meeting, the management of the reporting issuer must send a proxy form by prepaid mail to all such voting security holders. This form must permit the security holder to appoint someone, apart from the person selected on the proxy form, to be the proxy holder. Also, the form should permit the security holder to vote not only for, but also against, any matter identified in the notice of the meeting or in the information circular.²⁰³

²⁰² R. Crete, *The Proxy System in Canadian Corporations: A Critical Analysis* (Montreal: Wilson & Lafleur, 1986).

²⁰³ The information circular should be detailed in its description of the matters to be voted on so that the security holders can make independent and informed decisions.

Regulations to the statutes specify a variety of information that should be included in the information circular. These include:

- (i) any interest of the persons who are soliciting the proxies;
- (ii) the names of those who have holdings whether direct or indirect of more than one hundred per cent of the voting rights, where this is known;
- (iii) interests of any insiders in any material transactions; and.
- (iv) the names of those who are paying the cost of soliciting the proxies.

(iii) Regular financial disclosure - This involves the preparation and filing of annual audited financial statements within 140 or 170 days after the end of the issuer's financial year²⁰⁴ and interim financial statements, which do not have to be audited, quarterly.²⁰⁵

The annual financial statements must include:

- (a) an income statement;
- (b) a statement of retained earnings;
- (c) a balance sheet; and.
- (d) a statement of changes in financial position.

The statutory periodic disclosure requirements are supplemented by securities commission guidelines, which do not have the force of law but are intended to indicate the manner in which the securities commissions would exercise their discretion. Pursuant to such policies in Ontario, Quebec, Saskatchewan and British Columbia, a reporting issuer, other than a foreign issuer is required to prepare and file with the relevant provincial securities commission and to make available to the public an Annual Information Form ("AIF").

²⁰⁴ The ASA (s. 121(1)); BCSA (BC Reg. 479/95 as am., s. 136); NSA (s. 79(1)); NSSA (s. 84(1)); OSA s. 78(1); QSA (s. 75); and SSA (s. 87(2)) require that financial statements be filed within 140 days of the end of the financial year. The MSA (s. 120(1)) requires that this be done within 170 days.

²⁰⁵ ASA, subs. 120(1); BC Reg. 479/9, as am., s. 135(1); MSA, s. 129(1); NSA s. 78(1); NSSA s. 83(1); OSA s. 77(1); QSA s. 76; and SSA s. 86(1).

The AIF must include a Management Discussion and Analysis (MD&A) section which includes a narrative of the reporting issuer's financial condition and results of operation. Several securities commissions require MD&A to accompany the financial statements and prescribe disclosure guidelines.²⁰⁶

(iv) Prohibition of insider dealing - This involves the imposition of reporting requirements and trading prohibitions on the insiders of reporting issuers and special relationship persons. Generally, under the securities statutes, the following three activities are prohibited:

- (a) the purchase or sale of securities by a special relationship person or company who or that has knowledge of a material fact or a material change with respect to the reporting issuer, where this material fact or material change has not been previously disclosed;²⁰⁷
- (b) the provision of information (or tipping) by the reporting issuer or a special relationship person or company to another person, other than in the ordinary course of business, of a material fact or material change regarding the reporting issuer before such material fact or material change is generally disclosed;²⁰⁸ and,
- (b) the passing of undisclosed material information or material change, except in the ordinary course of business, by a person or company that is proposing to make a takeover bid for the securities of the reporting issuer, or to become a party to a business combination or amalgamation with the reporting issuer, or to acquire a substantial portion of the property of the reporting issuer, before such material fact or material change is generally disclosed.²⁰⁹

²⁰⁶ The MD&A is intended to give investors the ability to look at the issuer through the eyes of management by providing both a historical and prospective analysis of the issuer's business.

²⁰⁷ ASA, s. 119(2); BCSA, subss. 68(1)(a), (b), and (c); MSA, s. 112(1); NSA s. 77(1); NSSA s. 82(1); OSA s. 76(1); and SSA s. 85(3).

²⁰⁸ ASA, s. 119(3); BCSA, s. 68(2); MSA, s. 112(2); NSA s. 77(2); NSSA s. 82(2); OSA s. 76(2).

²⁰⁹ ASA, subss. 119(4)(a); BCSA, s. 68; MSA, s. 112(3); NSA s. 77(3); NSSA s. 82(3); OSA s. 76(3); and SSA s. 85(5).

“Special Relationship Person or Company” is defined in the various securities as:

- (i) insiders, associates, and affiliates of a reporting issuer;²¹⁰
- (ii) insiders, associates, and affiliates of
 - (a) a person or company that is proposing to make a takeover bid for the reporting issuer’s securities; or.
 - (b) a person or company that is proposing to become a party to a business combination or amalgamation with the reporting issuer;²¹¹
- (iii) tippees;²¹²
- (iv) persons who used to be in a special relationship with the reporting issuer and obtained knowledge of material facts or material change while in that capacity;²¹³ and.
- (v) persons who are directors, officers, or employees of:
 - (a) a reporting issuer;
 - (b) a person who is proposing to make a takeover bid for the securities of the issuer, to become a party to a business combination with the issuer, or to acquire a substantial part of the issuer’s assets; or.
 - (c) a person engaged in, or proposing to engage in, any business or professional activity with, or on behalf of, the reporting issuer.²¹⁴

Under Canadian laws, the penalties that may be imposed upon directors and officers for breach of the insider trading rules vary from jurisdiction to jurisdiction. Generally depending on the jurisdiction, directors and officers convicted of trading on the basis of undisclosed material information or of providing such information to other persons may be subject to (1) imprisonment for up to five years less a day, (2) a fine of up

²¹⁰ ASA, subs. 9(a)(i); BCSA, subs. 3(a)(i); MSA, subs. 112(5)(a)(i); NSA, subs. 77(5)(a)(i); NSSA, subs. 82(5)(a)(i); OSA, subs. 76(5)(a)(i) and SSA, subs. 85(1)(a)(i).

²¹¹ ASA, subss. 9(a)(ii) and (iii); BCSA, subss. 3(a)(ii) and (iii); MSA, subss. 112(5)(a)(ii) and (iii); NSA, subss. 77(5)(a)(ii) and (iii); NSSA, subss. 82(5)(a)(ii) and (iii); OSA, subss. 76(5)(a)(ii) and (iii) and SSA, subss. 85(1)(a)(ii) and (iii).

²¹² ASA, s. 9(e); BCSA, s. 3(e); MSA, subs. 112(5)(e); NSA, subs. 77(5)(e); NSSA, subs. 82(5)(e); OSA, subs. 76(5)(e) and SSA, subs. 85(1)(e).

²¹³ ASA, s. 9(c); BCSA, s. 3(d); MSA, subs. 112(5)(d); NSA, subs. 77(5)(d); NSSA, subs. 82(5)(d); OSA, subs. 76(5)(d) and SSA, subs. 85(1)(d).

²¹⁴ ASA, s. 9(c); BCSA, s. 3(c); MSA, subs. 112(5)(c); NSA, subs. 77(5)(c); NSSA, subs. 82(5)(c); OSA, subs. 76(5)(c) and SSA, subs. 85(1)(c).

to the greater of \$1 million or four times the profit made or loss avoided as a result of the contravention or (3) both a fine and imprisonment.

In addition to fines and imprisonment, directors and officers who contravene insider trading provisions may be subject to further penalties imposed by the regulatory bodies. These include the removal of exemptions, cease trade orders, orders prohibiting individuals from acting as directors or officers of a company and costs sanctions.

Also, provincial securities statutes make directors and senior officers who are in a special relationship with a reporting issuer and who breach the insider trading rules civilly liable in damages to persons who sell securities to or purchase securities from someone who traded on the basis of material confidential information received from the director or officer (a "tippee"). However, to date, there appear to have been no civil actions in which damages have been recovered under the insider trading and tipping civil liability provisions of provincial securities statutes.²¹⁵

Lastly, directors and officers who have engaged in tipping or trading on the basis of material confidential information will also be accountable to the corporation for, and will be required to disgorge, any benefit or advantage received, or receivable, as a result of the trade or communication.

²¹⁵ In response to the lack of statutory civil remedies under Canadian securities law for misleading and untimely continuous disclosure, in March of 1997 the Corporate Disclosure Committee (the "Allen Committee") release a final Report, entitled "Responsible Corporate Disclosure: A Search for Balance" (the "Allen Report"). The Allen Report recommended the creation of a limited statutory regime whereby issuers and others who are responsible for misleading continuous disclosure may be liable in civil actions brought by injured investors to recover their damages. The most dramatic and controversial aspect of the Allen Report is its creation of a form of "strict liability." The Allen Report recommends that where a plaintiff brings a claim for misrepresentation or untimely disclosure, the plaintiff will be deemed to have relied on the faulty disclosure in buying or selling the securities in issue. This reverses the usual burden of proof standard for civil cases.

2.4. CONCLUSION

On a comparison of the Nigerian securities legislation with the Canadian legislation in the principal area of disclosure, one may conclude that the Nigerian disclosure laws are extensive and commendable, having being implanted from both the United States and the United Kingdom laws. However, as has been noted elsewhere, '[a] capital market is not created and sustained merely by passing the necessary laws'.²¹⁶ In fact laws, if not properly understood by regulators and operators, may even negatively affect the development of the market. This appears to be the situation in Nigeria.

The anti-fraud provision, regulation 7(1), made pursuant to the SEC Act, patterned along the lines of rule 10b-5 promulgated under section 10(b) of the US Securities and Exchange Act 1934 is a prime example of such a norm that was copied from a jurisdiction with an advanced capital market. This provision, as presently framed, will be prodigious in generating litigation, since the limiting factors of rule 10b-5 are absent.²¹⁷ Surprisingly enough, not one case exists where regulation 7(1) has been invoked in the Nigerian courts. That such a powerful regulation has been in abeyance for this long goes to show that either Nigerian lawyers are very unfamiliar with securities laws or alternatively the law is difficult to invoke in practice in Nigeria. If the former is the case, then one can assume that when it is eventually stumbled on, it may be used in a wide range of situations: such as in cases of pure corporate mismanagement - blurring the

²¹⁶ P.N. Pillai, 'Securities Regulation in Malaysia: Emerging Norms of Governmental Regulation' (1986) 8 *Journal of Comparative Business and Capital Market Law* 39, 42.

²¹⁷ T.I. Ogowewo, "Transposition of Securities Legislation to an Emerging Market". (1996) 6 *JIBL* 239 at 249.

division between company law and securities laws, and possibly to attack legitimate but novel transactions, or even to regulate the substantive fairness of a transaction.

Also, as stated earlier, the laws in Nigeria have not yet been well developed to provide for "continuous disclosure" to support secondary market trading. As a result of this, the management of companies still have extensive influence and powers over the companies to the exclusion of the shareholders. The current sanctions available to regulators provide an inadequate deterrent to disclosure violations in Nigeria and the existing remedies available to investors in the secondary markets are so difficult to pursue and establish that they are, as a practical matter, largely academic. To this extent, the continuous disclosure regulations in Canada could be adopted to make for a proper development of the secondary market in Nigeria.

Consequently, the Nigerian laws could be amended to adopt a statutory "strict liability" model as recommended by the Allen Report in Canada. Such a provision would add a significant deterrent to misleading disclosure by providing a remedy by which injured investors can seek at least partial compensation for disclosure violations without unduly penalizing innocent market participants. This would encourage minority class action suits, by making them more accessible in Nigeria and thereby solving to some extent the related problem of Nigerian shareholders being widely dispersed and having small shareholdings.

Chapter 3

THE REGULATION OF SECURITY MARKET PARTICIPANTS

3.0. INTRODUCTION

The second cornerstone of investor protection in securities regulation is achieved by regulating financial intermediaries such as brokers, dealers, underwriters, portfolio managers and advisers, who are the principal actors in the industry. The regulation of these market operators is aimed at developing and maintaining public confidence in the markets by addressing such issues as pressure selling, conflicts of interest, professional competence, and the risk of business failure.

Financial intermediaries remain essential players in the securities industry. They provide needed liquidity, structuring of transactions, and, at times, capital to emerging securities markets. Their roles may range from an investment banker, orchestrating a distribution of securities on behalf of an issuer, to that of a broker acting as agent for clientele, or a dealer engaging in transactions for its own account. Because of their function in the structuring and consummation of securities deals, financial intermediaries, particularly investment bankers, often control the red or green light to the successful completion and marketing of securities deals.²¹⁸

With this power comes the risk of abuse. Thus, financial intermediaries may engage in improper conduct such as stock manipulation, insider trading, charging undisclosed and excessive commissions, and a broad range of other unfair practices. They may also run afoul of standards relating to financial integrity. Failure to retain adequate

²¹⁸ See, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 380 (2d Cir. 1973); Marc I. Steinberg, *Securities Regulation: Liabilities and Remedies* para 5.04(4) (1996).

capital, accurately record trades, and provide effective settlement and clearing mechanisms will wreak havoc not only on the delinquent operator, but, if severe, upon the affected market.²¹⁹

Also, if investors cannot fully assess the quality of securities market actors, the problem of adverse selection²²⁰ may further plague activities in the industry. The less financially responsible, less honest, and less competent operators who can operate at lower cost may drive more financially responsible, more honest and more competent ones out of the industry. The risk of substantial loss from dealings with these less competent operators may, in the long run, cause investors to discount the value of the services provided by industry members, or the value of the securities themselves. In short, investors will “lose confidence” in securities markets.

In light of the above, securities markets, and more particularly emerging ones, must oversee financial intermediary practices from both fraud and financial integrity perspectives. Regulations that set and enforce standards of financial responsibility, honesty and competence are the means by which most jurisdictions strive to maintain proper ethical standards and professionalism, coupled with ensuring improved allocation efficiency in the securities industry.

Registration by such financial intermediaries as investment advisers, brokers, and dealers with the applicable government regulator or SRO should be mandated.

Compulsory registration enables the regulator to qualify those meeting defined standards.

²¹⁹ Ralph E. Jenvey, *Regulation of the Securities and Commodities Markets* paras. 4.01-.02 (1992).

²²⁰ Adverse selection is said to occur to the extent that buyers are unable to distinguish higher quality from lower quality products. In such circumstances, the lower quality products will tend to drive out the higher quality products, a variant of the sixteenth century, Thomas “Coresham’s law” relating to currencies.

acts as a tracking procedure for identifying subject intermediaries under its oversight authority, and serves as a fee-generating vehicle for costs incurred.

These fees (as well as tax levied on brokerage commissions) also may be used to establish a system of investor insurance to provide protection against catastrophe should a broker-dealer become insolvent or abscond from the jurisdiction.²²¹

To induce financial intermediaries to follow specified requirements and to redress instances of misconduct, the applicable regulator must also have sufficient enforcement powers.²²² These powers should cover the broad range of prospective noncompliance.

Irrespective of the adoption of relatively comprehensive procedures with respect to financial intermediaries situated within its borders, vigilance also needs to be directed at cross-border broker-dealer practices. In today's rapidly changing technological world, there exists the continual threat of fraud by financial intermediaries and other market participants from locations abroad, having adverse ramifications in the affected local securities market. To help guard against such cross-border abuses, understandings of cooperation should be entered into with securities authorities from other nations.²²³

²²¹ Gregory S. Crespi, "The Reach of the Federal Registration Requirements for Broker-Dealers and Investment Advisers", 17 *Sec. Reg. L.J.* 339 (1990); David A. Lipton, "A Primer on Broker-Dealer Registration", 36 *Cath. U.L. Rev.* 899 (1987).

²²² Enforcement mechanisms are discussed in more detail in Chapter 5.

²²³ Michael D. Mann et al., "Developments in International Securities Law Enforcement and Regulation", (1995) 29 *Int'l Law* 729; Harvey L. Pitt & David Hardison, "Games Without Frontiers: Trends in the International Response to Insider Trading", (1992) 55 *Law & Contemporary Problems* at 192.

3.1. REGULATION OF MARKET PARTICIPANTS IN NIGERIA

3.1(a) THE REGISTRATION REQUIREMENT

Registration is generally considered to be the first step in market regulation and has remained one of the most important and perhaps effective means of ensuring that investors are protected within the Nigerian capital market.

As observed by Lord Atkin in *Lymburn v. Mayland*,²²⁴ the purpose behind the imposition of registration requirements is to ensure “that persons who carry on the business of dealing in securities shall be honest and of good repute and in this way ... protect the public from being defrauded.”²²⁵

Section 6(d) of the *SEC Act* ascribes the registration functions to the SEC by expressly mandating the SEC to register,

“stock exchanges or their branches, registrars, investment advisers, securities dealers and their agents and controlling and supervising their activities with a view to maintaining proper standards of conduct and professionalism in the securities business.”²²⁶

Also, Section 14(1) of the SEC Regulations further provides that,

“A broker or dealer or any agent of a broker or dealer or any investment adviser or registrar shall not effect any transactions in, or induce or attempt to induce the purchase or sale or transfer of, any security unless such a broker or dealer or his agent or investment adviser or registrar is registered...”

Consequently, no person or company shall:

- (a) trade in any security unless that security is registered and the person or company is registered as a Broker/Dealer or as a dealing clerk or as a stockbrokerage firm; and,

²²⁴ [1932] A.C. 318 (P.C.).

²²⁵ *Ibid.*, at 324.

²²⁶ The CAMA does not have any equivalent provision.

- (b) act as Issuing House.²²⁷ Investment Adviser. Broker/Dealer. Registrar. Stock Exchange. Portfolio Manager. Management company. underwriter. etc., unless an application for registration has been made in accordance with the SEC Act and the Regulations and the person or company has received written notice of the registration from the SEC and, where the registration is subject to terms and conditions, the person or company has complied with such terms and conditions.²²⁸

In carrying out its responsibilities of ensuring the proper protection of investors and fair dealings in securities transactions, the SEC has the power to examine the records and affairs of, and to call for information from, any market operator as necessary to give effect to provisions of the *SEC Act*.²²⁹

Also, the SEC may, if in its opinion the public interest and the protection of investors so require, and after notice and opportunity for hearing have been given to the affected person, suspend for a period of not exceeding twelve months or, with due approval, revoke the registration of a security or any person registered pursuant to the *SEC Act*.²³⁰

(b) OTHER REQUIREMENTS

Apart from the registration requirements, Nigerian securities laws contain other specific provisions and guidelines, which seek to regulate the activities of the principal institutions/participants in the securities industry, namely: (i) The Stock Exchange; (ii)

²²⁷ Issuing Houses are financial intermediaries that float large issues of securities on behalf of issuers of securities. This terminology is not used in Canada, but the functions of Issuing Houses are to a large extent identical to those of Investment Dealers in Canada.

²²⁸ SEC guidelines, *supra* note 136 at 28.

²²⁹ Reg. 5.

²³⁰ Section 24, *SEC Act*.

Registrars: (iii) Investment Advisers/Portfolio Managers: (iv) Brokers/Dealers and (v) Underwriters.

(i) THE STOCK EXCHANGE

A stock exchange is an organised market where buyers and sellers through stockbrokers competitively “bid” and “offer” for listed securities.²³¹ It provides facility for transactions in securities issued by governments, companies and institutions.

Regulation 11(1) to the *SEC Act* expressly provides for registration of “all stock exchanges and branches thereof with the SEC”. An exchange is registered only if it appears to the SEC that the exchange is organised in a manner as to comply with provisions of the rules and regulations stipulated by it and that the rules of the stock exchange are designed among other things to:

- (a) comply with the SEC Act and regulations made thereunder;
- (b) promote just and equitable dealings in securities;
- (c) prevent manipulative acts and practices;
- (d) provide for appropriate discipline of its members for violations of its own rules and of the SEC Act and Regulations; and
- (e) ensure a fair representation of its members in the selection of its directors and administration of its affairs.²³²

Furthermore, regulation 11(3)(b) requires a registered exchange to furnish the SEC “with copies of any amendments to the rules of the exchange forthwith upon their adoption”. Also, the exchange is required by law to file with the SEC copies of a report of

²³¹ S. 29 of the *SEC Act* defines the “Exchange” as the Nigerian Stock Exchange and any other exchange registered by the SEC which constitutes, maintains or provides a market place of facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions performed by a stock exchange as the term is generally understood, and includes the market place and market facilities maintained by such exchange.

²³²Section 12. *SEC Act* and Reg. 11(4). See also SEC guidelines, *supra* note 136, para. 3.2. at 30.

any proposed amendment, or repeal of or any addition to, its rules not less than thirty days (or such shorter time as authorised by the SEC) before any action is taken on such amendment, repeal or addition by the exchange.²³³

In accordance with Section 13(1) of the *SEC Act*, even after the exchange is registered and has commenced activities, written quarterly reports on its activities for each quarter must be submitted by it to the SEC.

From the above, it is clear that the responsibility for regulating the Stock Exchange in Nigeria is vested in the SEC. The SEC is the apex investment protection body in the capital market, and it carries out its responsibilities by employing a number of regulatory devices, such as registration, rule-approval and administrative reviews of the activities of the stock exchange.

Regulation 61 to the *SEC Act* also provides that any market operator directly affected by any direction, order or decision made under any by-law, rule or regulation of the exchange or any of its branches may apply to the SEC for a hearing and review, pursuant to Section 6(f) of the *SEC Act*.²³⁴

(ii) REGISTRARS

The *SEC Act* defines "registrars" and brings them under the control of the SEC. "Registrar" is defined as a company registrar engaged in the keeping of the register of

²³³ Reg. 45(1).

²³⁴ Section 6(f) of the *SEC Act* charges the SEC with the duty of acting as the apex regulatory organisation for the Nigerian capital market including the NSE and its branches to which it would be at liberty to delegate powers.

members and shareholders and performing other auxiliary functions for his company or other companies or institutions.²³⁵

The SEC Regulations provide that all applications for registration as registrars must be filed with the SEC.²³⁶ Registrars are further charged with the responsibility of returning surplus moneys due to subscribers or purchasers of securities within fourteen days of the allotment of shares²³⁷ and also of issuing share certificates to allottees of shares within thirty days of the allotment.²³⁸ They are also charged with certain responsibilities regarding entries in the registers kept by them and are obligated to maintain current records of all their transactions²³⁹ for a period of not less than six years, which must be made available at all times for examination by the SEC.²⁴⁰

(iii) INVESTMENT ADVISERS AND PORTFOLIO MANAGERS

“Investment Adviser” is defined as any person who, for compensation, engages in the business of advising others either directly or through publication or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities.

²³⁵ Section 29, *SEC Act*; Reg. 63. Auxiliary services include confirmation of signatures of transferors in case of the transfer of shares, despatch share/stock certificates to their respective owners after allotment, issue interest and dividend warrants and forward notices of meetings together with Annual Reports and Accounts to shareholders/stockholders. SEC guidelines, *supra* note 136 at 33.

²³⁶ Regulation 23(1).

²³⁷ Reg. 26. Late payments accrue interest in accordance with Reg. 26(2).

²³⁸ Reg. 27.

²³⁹ Reg. 29.

²⁴⁰ Reg. 30.

or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities but does not include:

- (a) a bank, or any bank holding company, which is not an investment company;
- (b) any lawyer, accountant, engineer or teacher or other professionals whose performance of such service is solely incidental to the practice of their profession;
- (c) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor;
- (d) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation; or
- (e) any person whose advice, analyses or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the Federal Republic of Nigeria.²⁴¹

“Portfolio Managers” are advisers registered for the purpose of managing the investment portfolio of clients through discretionary authority granted by the client²⁴² and are required to submit with the SEC before registration evidence of a fidelity bond or an undertaking to obtain such a bond.²⁴³

Investment Advisers must be registered with the SEC²⁴⁴ and are required to maintain and keep accurate and current books and records relating to their investment advisory business, in accordance with Regulation 20 to the *SEC Act*. Such books and records are to be maintained and preserved in a readily accessible place for a period of not less than five years from the end of the year when the last entry was made.

²⁴¹ Reg. 63

²⁴² SEC guidelines. *supra* note 136 at 36.

²⁴³ *Ibid.*, at 34.

²⁴⁴ Reg. 17.

(iv) BROKERS AND DEALERS

“Brokers” are defined as persons engaged in the business of effecting transactions in securities for the account of others. “Dealers” on the other hand are persons engaged in the business of buying and selling securities for their own account, through a broker or any person, so long as they buy and sell securities for their own account, either individually or in some fiduciary capacity but not as part of a regular business.²⁴⁵

Both brokers and dealers are required to file applications for registration with the SEC and must include with their applications a statement of their financial condition, in such detail as will disclose the nature and amount of their assets, liabilities and net worth as of a date within sixty days of the date on which the statement is filed. Also, all such applications must be accompanied with an oath or affirmation deposing to the correctness of the information contained in their application.²⁴⁶

Once the registration of a broker or dealer is suspended or revoked pursuant to Section 24 of the *SEC Act*, such a market operator shall not be able to effect any transactions in or induce the purchase or sale of securities on the Nigerian Stock Exchange, unless the SEC has re-registered such person.

The SEC guidelines provide further that brokers and dealers seeking registration must also sign an undertaking to obtain prior approval of the SEC in respect of any underwriting agreement for an issue.

²⁴⁵ S. 29, *SEC Act*; Reg. 63.

²⁴⁶ Regulations 13 and 14.

(v) UNDERWRITERS

Underwriters are in the business of insuring the sale of an issue of securities and can be typically defined as persons or companies who agree to purchase securities with a view to distributing them,²⁴⁷ or who offer for sale or sell securities in connection with a distribution.²⁴⁸ The SEC defines underwriting within the Nigerian context as an arrangement whereby an underwriter undertakes for a permissible commission to pay an issuer of a security at a predetermined date, an amount based on the price of the shares determined by a pricing authority with a view to resale and not as a form of investment.²⁴⁹

Although there are no express provisions in Nigerian securities laws governing the registration of underwriters, in practice they are bound by the same registration requirements governing brokers and dealers in light of the similarity in their functions. More particularly, the SEC guidelines provide that no person may act as an underwriter in any public issue of securities unless the SEC registers such a person, and that all underwriters must comply with the provisions of Sections 7 and 9 of the *SEC Act*.²⁵⁰

²⁴⁷ *I.e.*, acting as principal.

²⁴⁸ *I.e.*, acting as agent.

²⁴⁹ SEC Guidelines on Administrative Proceedings, *supra* note 136 at 38.

²⁵⁰ *Ibid.*, the SEC guidelines further provide registration requirements similar to those required for brokers and dealers at 39–40.

3.2. REGULATORY PROBLEMS AND CONFLICTS IN NIGERIA

A consequence of the inadequate delineation of the regulatory and functional roles of the SEC and the NSE has led to occasional regulatory conflicts within the Nigerian securities industry.²⁵¹ In 1995, the SEC instituted legal proceedings against the NSE following the NSE's refusal to list the shares of WTN plc on the ground that the issuing house (Eko International Bank), being a commercial bank, was legally not competent to act as an issuing house.²⁵² The matter was however settled out of court when the Minister of Finance intervened. In 1996, the NSE again ignored the decision of the SEC nullifying all transactions recorded in the equity of Owena Bank plc, even though the SEC was of the view that such trading amounted to a violation of section 14(4) of the *SEC Act* which prohibits the trading in unregistered securities.

The issue that led to the litigation masks a deeper regulatory problem in the regulatory system, to wit, the undermining of self-regulation. Once the rules of an exchange are approved (or deemed to be approved) by the SEC, then it would be wrong for the SEC to dispute its subsequent correct application by the Exchange. So in the matter that led to *Securities and Exchange Commission v. The Nigerian Stock Exchange*²⁵³, since under the NSE's rules an issuing house must be a member of the Exchange, as Eko Bank was then not a member of the Exchange, it could not act as an

²⁵¹ See 'SEC, NSE Move Towards Show Down', National Concord 20 March 1996. See also, C Onwuekwe, "Admission into Membership of the Nigerian Stock Exchange: Fight of Two Unequals" (1995) 2 *Lawyer's Bi-Annual* (No. 2) 250.

²⁵² *Securities and Exchange Commission v. The Nigerian Stock Exchange*: Suit No. FHC/CS/1066/94. The matter was however eventually settled out of court when the Minister of Finance intervened by convening a meeting of the parties and directing that the NSE should comply with the SEC order by listing the affected securities within a specified period.

²⁵³ *Ibid.*

issuing house under the rules of the Exchange - rules which, incidentally, should be taken to have been approved by the SEC under regulation 11.

It shows that the SEC has in some respects failed to give full expression to the idea of self-regulation. Certainly, its actions in the matter depict it as a body that has come to view its status (the highest regulatory body in the Nigerian capital market) as conferring on it absolute or plenary control over all aspects of the capital market that fall within the ambit of its enabling statute, the *SEC Act*. This is, of course, wrong. The NSE should be able to regulate a fair degree of its own activities without the SEC's intervention. This, after all, is the essence of self-regulation within a statutory framework, and the legislative intent behind the enactment of the *SEC Act* is consistent with this. The same can be said of the CAMA, which builds self-regulation into the statutory regime dealing with public offers.²⁵⁴

²⁵⁴ S. 553 CAMA, which allows the NSE to grant a certificate of exemption where a public offer of securities is made.

3.3. REGULATION OF MARKET OPERATORS IN CANADA

The overseeing of stock markets in Canada is mostly a self-regulatory process.

While in principle the activities of participants are regulated by provincial securities commissions, these bodies themselves have typically delegated much of their authority to the exchanges and to the Investment Dealers Association (IDA).

With few variations, the securities statutes of the various Canadian jurisdictions generally provide that no person or corporation can engage in a trade in securities in a variety of capacities unless registered with the appropriate regulatory body, in accordance with the relevant securities statutes, and complies with any terms and conditions that may be imposed.²⁵⁵ The prohibited trading capacities specified in the various securities statutes include brokers, security issuers, dealers, underwriters, advisers, and salespersons.

A person who trades, underwrites or advises without registration can be subject to penal sanctions,²⁵⁶ and the purchaser is entitled to a rescission of the agreement and recovery of any purchase price paid.²⁵⁷ Also, registrants are subject to regulatory requirements, and noncompliance with these requirements can lead to suspension or cancellation of registration.²⁵⁸

²⁵⁵ A.S.A. s. 54(1); B.C.S.A. s. 20(1); M.S.A. s. 6; N.B.S.A. s. 5(1); Nfld.S.A. s. 26(1); N.S.S.A. s. 31(1); N.W.T.S.A. s. 4; O.S.A. s. 25(1); P.E.I.S.A. s. 2; Q.S.A. s. 148; S.S.A. s. 27(1); Y.S.A. s.3.

²⁵⁶ A.S.A. s. 161(1)(c); B.C.S.A. s. 138(1)(c); M.S.A. s. 136(1)(c); N.B.S.A. s. 41(1); Nfld.S.A. s. 122(1)(c); N.S.S.A. s. 129(1)(c); N.W.T.S.A. s. 49(c); O.S.A. s. 122(1)(c); P.E.I.S.A. s. 28(1); S.S.A. s. 131(3)(c); Y.S.A. s.46(c).

²⁵⁷ *Ontario (Securities Commission) v. British Canadian Commodity Options Ltd.* (1979), 93 D.L.R. (3d) 208 (Ont. H.C.). See also *Re Kelemen (Settlement Agreement)* (1996), 10 C.C.L.S. 161 (Alta. Sec. Comm.).

²⁵⁸ A.S.A. s. 56(1); B.C.S.A. s. 144(1)(f); M.S.A. s. 8(1); N.B.S.A. s. 12(1)(c); Nfld.S.A. s. 28(1); N.S.S.A. s. 33(1); N.W.T.S.A. s. 10(1); O.S.A. s. 27(1); P.E.I.S.A. s. 3(5); Q.S.A. s. 152; S.S.A. s. 29(1); Y.S.A. s.8.

All of the securities statutes provide that, upon an application for registration, a specified regulatory official²⁵⁹ may grant registration if, in the opinion of the official, the applicant is suitable for registration and the registration is not objectionable. The various registration provisions then vest in the regulatory official a considerable amount of discretion to determine the suitability or otherwise of any registration.

Although most of the securities statutes do not expressly provide the criteria which may determine the suitability of any registration by the regulatory official, the various regulations made pursuant to the statutes provide certain requirements that need to be satisfied by an applicant for registration. These include generally, (1) capital requirements,²⁶⁰ (2) record keeping and reporting requirements,²⁶¹ (3) business practice requirements,²⁶² (4) segregation of funds,²⁶³ (5) proficiency and qualification requirements,²⁶⁴ and (6) financial statements and audit requirements.²⁶⁵ Further, most registrants involved in trading in securities must contribute to a contingency fund, *e.g.* the

²⁵⁹ This regulatory official may be the Director, the Registrar, or the Administrator of the appropriate regulatory body in the relevant province.

²⁶⁰ Alberta Reg. 46/87, as am., s. 23; B.C. Reg. 479/95, as am., ss. 19-20; N Reg. 805/96, as am., s. 95; and R.R.S. c. S-42.2, Reg. 1, as am., s. 19(1). In order to be registered, an applicant for registration is required to have a minimum net free capital to meet its obligations. Securities administrators may also require the registrant to post a bond in an amount considered appropriate to protect the interests of the registrant's clients.

²⁶¹ A. Reg. 46/87, as am., s. 29; B.C. Reg. 479/95, as am., s. 26; N Reg. 805/96, as am., s. 101; and R.R.S. c. S-42.2, Reg. 1, as am., s. 25.

²⁶² B.C. Reg. 479/95, as am., s. 30; N Reg. 805/96, as am., s. 104; and R.R.S. c. S-42.2, Reg. 1, as am., s. 18.

²⁶³ A. Reg. 46/87, as am., s. 32-33; B.C. Reg. 479/95, as am., s. 30; N Reg. 805/96, as am., s. 104; and R.R.S. c. S-42, Reg. 1, as am., s. 28.

²⁶⁴ B.C. Reg. 479/95, as am., ss. 60; N Reg. 805/96, as am., s. 111; and Y Reg. O.I.C. 1976/176, as am., s. 7.

Canadian Investor Protection Fund which is intended to provide protection to clients in the event of a business failure of the registrant.

The registration requirements are intended to address concerns with respect to such matters as the financial stability and competence of industry participants, and potential conflicts of interest between industry participants and their clients. Compliance with the requirements intended to address these concerns is enforced through penal sanctions and a variety of administrative sanctions including reprimand, suspension, cancellation of registration and restrictions on the registrant.

To ensure the professional competence of market operators, courses are offered to market operators by associations such as the Canadian Securities Institute, the Investment Dealers Association, and the Institute of Chartered Financial Analysts.²⁶⁶ There are also minimum apprenticeship periods. For instance, to become a dealer one normally needs to (1) complete the Canadian Securities course, (2) complete the Canadian Investment Finance course, (3) complete the first year of the Canadian Financial Analysts course, and (iv) have done financial analysis for at least five years with three of those years under the supervision of an advisor responsible for the administration of investment portfolios having an aggregate value of at least \$1m.

Brokers and advisors are also required to comply with the “know your client” rules before giving advice to or managing the portfolio of a particular client. These rules provide that they are supposed to know the investment needs and objectives of the client

²⁶⁵ A. Reg. 46/87, as am., s. 30; B.C. Reg. 479/95, as am., s. 43; N Reg. 805/96, as am., s. 110; and R.R.S. c. S-42.2, Reg. 1, as am., s. 26.

²⁶⁶ See A. Reg. ss. 41-45; B.C. Reg. ss. 59-62; Nfld. Reg. ss. 111.112; N.S. Reg. s. 41, 42; O. Reg. s. 110, 111; P.E.I. Reg. s. 39; S. Reg. s. 37, 38.

in order to give advice or make decisions that are consistent with such needs and objectives.

(i) STOCK EXCHANGES

In Canada, the stock exchanges are the major self-regulatory organisations (SROs) with respect to the regulation of securities markets.²⁶⁷ These are the Toronto Stock Exchange, the Canadian Venture Exchange (CDNX),²⁶⁸ and the Winnipeg Stock Exchange.²⁶⁹ They are non-profit organisations created by statutes to facilitate trading in securities through the members of the exchange. To carry on the business as stock exchanges in a province, they must be recognised by the respective provincial securities commission.²⁷⁰

The exchanges pass by-laws and rules to govern the qualifications and continued fitness of members, set requirements for the listing of securities of issuers and the conditions to be met by listed issuers to maintain their listing, and define the manner in which trading in listed securities is to be conducted by their members. The exchanges also issue policy statements providing guidelines as to how they will exercise the discretion left to them by their by-laws or rules.

²⁶⁷ Other SROs include the Investment Dealers Association (IDA), the Canadian Securities Institute, the Investment Funds Institute of Canada, the Institute of Chartered Financial Analysts, Clearing agencies and depository institutions.

²⁶⁸ The CDNX was established with the merger of the Vancouver and Alberta Stock Exchanges on November 29, 1999.

²⁶⁹ The Winnipeg Stock Exchange is scheduled to merge into the CDNX in October 2000.

²⁷⁰ See A.S.A. s. 52; B.C.S.A. s. 12; M.S.A. s. 139; Nfld.S.A. s. 24; N.S.S.A. s. 30; O.S.A. s. 23; Q.S.A. s. 169; S.S.A. s. 25.

The various provincial securities commissions have powers to review and make decisions respecting a by-law, rule or other regulatory instrument or policy, or a direction, decision, order or ruling made under a by-law, rule or policy of a stock exchange.²⁷¹ They may also review and make decisions on the procedures or practices of a stock exchange, or may review and make decisions on the manner in which a stock exchange carries on business, the trading of securities on or through the facilities of a stock exchange, a security listed and posted for trading on a stock exchange, or issuers whose securities are listed and posted for trading on a stock exchange, to ensure that the issuers comply with the securities act and regulations.²⁷²

(ii) INVESTMENT ADVISERS

The various provincial securities acts provide that a person cannot act as an adviser unless that person is registered with the appropriate regulatory body as an adviser. The prohibition also applies to persons who act on behalf of registered advisers. With the exception of the *Quebec Securities Act*,²⁷³ all the other statutes that provide for the registration of advisers define "adviser" as a person or company who (1) engages in the business of providing advice, or (2) holds himself, herself, or itself out as engaging in the business of providing advice as to the investing in or the buying or selling of securities. This definition indicates that, to establish that a person or corporation has violated the

²⁷¹ A.S.A. s. 52(3) and s. 179; B.C.S.A. s. 14; M.S.A. s. 139(2) (re stock exchanges); Nfld.S.A. s. 21(2) and s. 24(2); O.S.A. s. 20(2) and s. 23(2); S.S.A. s. 21(6) and s. 25(2). Similar review powers are vested in the Quebec Securities Commission under Q.S.A. s. 177-80.

²⁷² *Ibid.*

²⁷³ The QSA, like the Nigerian legislation, does not include a "holding out" provision in its definition of adviser.

provision, it is not necessary to show that the person or corporation actually engages in the business of providing advice as to investing in or buying of securities. It is enough if such operator holds himself, herself, or itself out as being in the business of providing such advice.

Although the various statutes do not provide the definition of “engaging in the business of”, one can however make the argument that a person engages in a business of providing advice if that person obtains some remuneration for providing the advice.²⁷⁴

Under Canadian laws, the function of advising is usually divided for the purposes of regulation into the categories of investment counseling,²⁷⁵ market commentaries or portfolio management.²⁷⁶

(iii) UNDERWRITERS

Most Canadian securities acts expressly prohibit a person or corporation from acting as an underwriter, unless the person or corporation is registered as an underwriter with the appropriate securities regulatory body.

In the statutes, an underwriter can act either as principal or as an agent in the sale of securities. These statutes further provide that the term “underwriter” also extends to

²⁷⁴ This is consistent with the definition in the Nigerian legislation. Most of the statutes however exempt from registration persons whose advisory role is only incidental to their principal business or profession.

²⁷⁵ An “investment counsel” is a person who engages in the business of advising others as to the investing in or buying of specific securities, or who engages in giving continuous advice as to the investment of funds on the basis of the particular objectives of each client. See A. Regs. s. 17(b); B.C. Regs. s. 14(a); M.S.A. s. 1(1); Nfld. Regs. s. 87(2); N.S. Regs. s. 14(a); O. Regs. s. 87(2); S. Regs. s. 11(b).

²⁷⁶ See generally, A. Regs. s. 17; B.C. Regs. s. 14; Nfld. Regs. s. 87; N.S. Regs. s. 14; O. Regs. s. 87; Q. Regs. ss. 190-194; S. Regs. s. 11.

persons or corporations who participate either directly or indirectly in the distribution of securities by an underwriter.

(iv) DEALERS AND BROKERS

Canadian securities acts generally do not make a distinction between brokers and dealers. Both functions are normally covered under the term "dealer", and most of the statutes define a "dealer" as "a person who trades in securities in the capacity of principal or agent".²⁷⁷ The various acts prohibit a person from trading in securities as a dealer unless the person is registered, on the one hand, as a dealer, a registered officer, or a partner of a registered dealer, or, on the other hand, as a salesperson.

In some securities statutes, the registration requirement also covers brokers.²⁷⁸ *The Manitoba Securities Act* defines "broker" as:

"a person or company trading in securities in the capacity of an agent that is a member of a stock exchange in Manitoba recognised by the commission, or any person or company trading in securities in the capacity of an agent that is recognised by the commission as a broker."²⁷⁹

(v) SALESPERSONS

The various securities statutes prohibit persons from acting as salespersons unless they are registered. While the securities acts of Manitoba, the Northwest Territories and the Yukon Territory define "salesperson" as an individual who is registered as a salesperson under the Act, the other statutes define "salesman" or "salesperson" as an

²⁷⁷ A.S.A. s. 1(d); B.C.S.A. s. 1(1) "dealer"; M.S.A. s. 1(1) "broker-dealer"; Nfld.S.A. s. 2(1); N.S.S.A. s. 2(1)(i); O.S.A. s. 1(1); Q.S.A. s. 5 "dealer"; S.S.A. s. 2(1)(n).

²⁷⁸ MSA, s. 6(1); NBSFPA, subs. 5(1)(a); PEISA, s. 2(1); NWTSA, s. 4; and Y TSA, s. 3.

individual employed by a broker²⁸⁰ or a dealer,²⁸¹ to make trades on behalf of the dealer or broker in securities or exchange contracts or both.

(vi) SECURITIES ISSUERS

Another category of persons required by some securities statutes, namely those of Manitoba, Northwest Territories, Prince Edward Island, and the Yukon Territory, to register before it can trade in securities, is the securities issuer. A security issuer is defined in these statutes, in similar terms, as a person who trades in its own securities.

(vii) MUTUAL FUND DEALERS

Mutual funds are investment vehicles which “pool” contributions from a number of investors and place them under professional management for reinvestment in a “basket” of securities to diversify and spread risk. A “mutual fund dealer” is defined as a person who trades exclusively in the securities of mutual funds.

Mutual funds are targeted by specialised governmental regulation, generally through the provincial Securities Acts, but in more detail through National Policy Statements and National Instruments. They have been self-regulated, to an extent, through the Investment Funds Institute of Canada (IFIC).

Current regulation of mutual fund dealers in Canada is primarily by registration of such dealers under applicable provincial and territorial legislation. The categories

²⁷⁹ MSA, s. 1(1).

²⁸⁰ In New Brunswick and Prince Edward Island.

²⁸¹ In the other jurisdictions, a salesperson is employed by a dealer.

available for registration may apply to persons and companies who only distribute mutual funds, or may include other categories such as securities dealers and brokers who either distribute a wider range of financial products or are members of SROs. In addition, persons or companies who are also registered in other financial sectors including insurance brokers and agents may distribute mutual funds.

The result of the above regulatory approach to the distribution of mutual funds in Canada is that there is a wide diversity of standards, rules and regulations applicable to mutual fund dealers depending on the nature of the entity and the jurisdictions in which they carry on business.

In 1997 the Canadian Securities Administrators ("CSA") requested the mutual fund industry to develop a regulatory structure that would address certain concerns identified for the mutual fund industry in Canada. Arising from this request, the Mutual Fund Dealers Association of Canada ("MFDA") was established as an SRO with the objective of both representing mutual fund dealers in the provinces and territories of Canada and promoting the protection of investors and the public interest.²⁸²

²⁸² In June 2000, the MFDA submitted its application for recognition as an SRO in the Provinces of Alberta, British Columbia and Ontario. The MFDA should be commencing operations on 1 January, 2001 after it receives formal recognition as an SRO by members of the CSA.

3.4. CONCLUSION

One important distinction between the regulation of market operators in Nigeria and in Canada is in the bodies that carry out the regulation. While in Nigeria, the SEC is a central governmental body and the apex regulatory jurisdiction in the Nigerian capital market, in Canada the regulation of market operators is essentially a self-regulatory process.²⁸³

It is generally the practice in most developed markets for members of the industry to regulate themselves. In Canada, regulation of market operators is principally carried out by the Investment Dealers Association in conjunction with the various stock exchanges.²⁸⁴ In the United Kingdom, there is the Institute of Security Analysis apart from the well-organised stock exchanges. In the United States of America, there are the Associations of Securities Dealers as well as the Institute of Securities Dealers. However, in the absence of any formal professional association for securities dealers in Nigeria, they are regulated by the stock exchange.²⁸⁵ Aspiring securities dealers have to undergo a period of training on the exchange and pass a written as well as an oral test. All securities dealers undertake to uphold the Memorandum and Articles of Association of the stock

²⁸³ In Canada, while in principle the activities of participants are regulated by provincial securities commissions, these bodies have typically delegated much of their authority to the exchanges and to the Investment Dealers Association. Mutual fund dealers are however still directly regulated by the securities commissions.

²⁸⁴ The MFDA is set to commence operations as an SRO for mutual funds dealers in January 2001.

²⁸⁵ In Nigeria, the Okigbo Report on the Financial System recommended in 1976 that the securities dealers and stockbrokers should set up National Association of Securities Dealers. This body is yet to be formed although the *SEC Act* in S. 12(4) empowered the SEC to license such a body. If such a body were formed, it might take over from the stock exchange the function of examining security analysts and stockbrokers.

exchange and to abide by its rules and regulations. These rules and regulations prescribe the relationship of the members, *inter se*, and with the exchange and the public.

Despite these differences, and regardless of the type of regulation in place, what is important is the fact that adequate powers are provided to the regulatory body to both police and enforce violations of the regulations.²⁸⁶ Such powers include, for example, (1) investigatory authority, such as the ability to issue subpoenas demanding production of relevant documents and the appearance of individuals under oath; (2) enforcement authority, enabling the regulator to seek either directly, or efficiently through a different regulatory source, remedial relief (such as injunctions, disgorgement, and the appointment of a receiver) as well as punitive measures (including civil fines, forfeitures, and criminal prosecutions); and, (3) the wherewithal to secure judicial relief, such as criminal contempt, in the event of a subject person's noncompliance with an order previously imposed.²⁸⁷

The Nigerian regulatory authorities do not currently have the wherewithal to adequately monitor and control the participants in the industry. As discussed in more detail in Chapter Five, although the laws seem to be in place for adequate regulation, in practice there is still a lot that needs to be addressed, particularly in the areas of funding and the availability of skilled personnel.

²⁸⁶ Regulatory powers and enforcement is described in detail in Chapter 5.

²⁸⁷ Marc I. Steinberg & Ralph C. Ferrera, *Securities Practice: Federal and State Enforcement* (1985 & 1995 supp.).

Chapter 4

TAKEOVER BID REGULATION

4.0. INTRODUCTION

A takeover bid is a general offer to all or most shareholders of a company to purchase shares of a particular issuer, the result of which will be that that offeror (“bidder”) will obtain sufficient shares to control the offeree issuer (“target”).²⁸⁸

Takeovers play an important role in corporate governance in that they are instruments for changing corporate ownership, policies and control.²⁸⁹ They are initiated mostly by entrepreneurs who seek out firms whose assets are undervalued by the market because the incumbent managers do not use them in the most efficient manner.²⁹⁰ It is usually effected by an acquisition of shares to give the acquirer sufficient voting power to control the target, either through purchase of a controlling block of shares (or several blocks of shares that together amount to a controlling block), or by purchasing the shares of numerous shareholders through a general offer to all, or most shareholders.²⁹¹

²⁸⁸ Mark R. Gillen, *Securities Regulation in Canada*, *supra* note 91 at 305. Essentially, its mechanics involve the bidder making a public declaration to all relevant security holders of the target company, that if they tender their securities to a designated depository within a limited period, they will receive a premium that is irresistible, in the added value in excess of the prevailing market price of the securities. If the bidder obtains enough securities to gain control, the bidder will use the securities to vote out the existing board and install its own.

²⁸⁹ These observations apply with equal force to both Nigeria and Canada.

²⁹⁰ Lewis D. Johnson & Bohumir Pazderka, *The Economic & Social Benefits of Stock Markets*, *supra* note 5 at 51.

²⁹¹ Gillen, *supra* note 91 at 304. The takeover may also be effected by way of a proxy contest, in which a dissident shareholder, or group of shareholders, seeks the proxies of other shareholders to obtain control over sufficient votes to change the board of directors and thereby the management. It may occur as a result of an amalgamation, whereby two corporations are combined to form a new corporation, or simply by purchase of all the assets of the firm to be taken over.

After the takeover, the new owners usually replace the existing managers and revamp the corporate strategy.²⁹² Since a bid frequently leads to the ouster of management and, therefore, the loss of corporate perquisites, power and prestige, managers have an incentive to resort to the exercise of management power to thwart the offer.²⁹³ An array of defensive measures²⁹⁴ are used as embattled managers fight to keep their jobs. In such situations, there is the "omnipresent spectre that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders".²⁹⁵

The strongest type of defence usually employed by management is the "poison pill". It takes a number of forms, but the common element is imposition of some costs on the bidding firm, for example by forcing it to dilute its equity holdings (by issuing new shares to shareholders other than the raider), revoking or diluting its voting rights (through a pre-determined change in voting powers triggered by the raider's arrival), or forcing it to assume unwanted financial obligations.²⁹⁶

Management may also attempt to prevent hostile takeovers by implementing the same measures that would be expected after the takeover, such as taking on more debt or selling off some divisions of the firm. Some of these actions increase the value of the

²⁹² Lewis D. Johnson and Bohumir Pazderka, *supra* note 5 at 51-51.

²⁹³ Consequently, takeovers by their very nature could be friendly or hostile. A hostile tender offer has been described as the most dramatic occurrence in corporate life: see, D. Johnson, *Canadian Securities Regulation*, (Toronto: Butterworths, 1977) 318.

²⁹⁴ Such as shark repellents, pac-man, poison pills, lock-ups, crown jewels disposals, share dilution and litigation. A "crown jewel" defence arises where the target attempts to discourage the bidder by selling off the assets which the bidder is seeking. Poison pills or shareholder rights plan are shares issued to existing shareholders of the target in advance to make the target less attractive to the acquirer.

²⁹⁵ *Uncoal Corp. v. Mesa Petroleum Co.* 493 A. 2d 946, 954 (1985).

²⁹⁶ Lewis D. Johnson and Bohumir Pazderka, *supra* note 5 at 54.

firm, so even the threat of a takeover is potentially good for shareholders. In some cases, management have been known to modify corporate charters to make a change in control of the firm more difficult, or to lobby for a change in legislation in favour of incumbent management.

Consequently, a fundamental problem in the regulation of takeovers is the creation of a power balance between the parties involved. This is often referred to as the need to create a level playing field. If a level playing field can be maintained, shareholders of the target company will be given an 'equal opportunity', either to participate in the benefits offered by the "raider" company, or to reject them. This is an established objective of all 'developed' takeover legislations.

An important factor in the creation of this power balance is the power of target management to resist the advances of the "raider" company. This power is controlled not so much by specific statutory provisions as it is by general fiduciary rules. It is the case that the testing ground for directors' duties has mostly been in the context of a tender offer because of the inherent conflict between interest and duty, which directors face in such situations.

4.1. REGULATION OF MERGERS, ACQUISITIONS AND COMBINATIONS IN NIGERIA²⁹⁷

Mergers and Acquisitions in Nigeria are governed generally by both the *SEC Act*²⁹⁸ and the *CAMA*.²⁹⁹ While the SEC Act specifically requires prior approval of the SEC before any such business combinations take place, the *CAMA* on the other hand provides a more exhaustive and detailed regulatory framework to ensure particularly that investors are adequately protected in the event of any "reconstructions", "mergers"³⁰⁰ and "takeovers"³⁰¹ of companies.

Under the *CAMA*, a take-over bid is deemed to be made by a person who, either himself or through his agent, despatches a bid; or by two or more persons jointly or in concert who either themselves, or through their agent, despatch a bid, to shareholders at approximately the same time in order to acquire a control position in the shares of an offeree company.³⁰²

²⁹⁷ Since takeovers are obviously the most important and dramatic of the business reconstructions coupled with the fact that they have the most far reaching effect on the life of the corporation, more emphasis in this chapter is on the regulation of takeovers.

²⁹⁸ S. 8.

²⁹⁹ Chapter 4, Part VII (ss. 590-613) of the *CAMA*.

³⁰⁰ Any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate: s. 590 of *CAMA*.

³⁰¹ The acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company: s. 590 of the *CAMA*.

³⁰² S. 595 of *CAMA*.

The *SEC Act*³⁰³ requires its prior approval of any reorganisation entered into by a company³⁰⁴ and further provides that it shall only approve a merger, acquisition or combination if it finds that:

- (a) such acquisition, whether directly or indirectly, of the whole or any part of the equity or other share capital or of the whole or any part of the assets of another company, is not likely to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise; or.
- (b) the use of such shares by voting or granting proxies or otherwise shall not cause substantial restraint of competition or tend to create monopoly in any line of business enterprise.³⁰⁵

Section 8 (3) exempts holding companies acquiring shares solely for the purpose of investment and not for the purpose of using the shares by voting or otherwise to cause or attempt to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise from the prior review and approval of the SEC. Thus, the outcome of any inquiry or review of a transaction covered by Section 8 depends on whether the Commission finds that the resultant transaction is likely to have substantial anti-competitive effect on any line of business enterprise, or is likely to create a monopoly.

Section 8 applies generally to (a) Nigerian (wholly owned) companies, public or private; (b) Alien companies - companies in which foreigners participate - public or

³⁰³ S. 8, *SEC Act*.

³⁰⁴ S. 596 of *CAMA* restates this need for the SEC approval as regards take-over bids. As regards take-over bids, the SEC examines the likely effect of the take-over bid, if successfully made, on the economy of Nigeria or on any policy of the federal government with respect to manpower and development.

³⁰⁵ S. 8(2) of the *SEC Act*. This provision is comparable to that provided by the *Competition Act* in Canada. Canada's current *Competition Act* governs all Canadian antitrust matters and, with few exceptions, applies to all businesses in Canada. The Act's stated purposes are to maintain and encourage competition in Canada, promote efficiency and adaptability, and ensure equitable opportunities for small and medium-sized business.

private: and, (c) Every merger, acquisition or combinations between or among companies, involving acquisition of shares or assets of another company.

In order to legally consummate a merger, acquisition or combination, the following three steps are essential:

- (1) filing a pre-merger notification;
- (2) filing a formal application for approval of the proposed merger; and
- (3) complying with post-approval requirements.

A pre-merger notification may be filed by submitting to the SEC a report which must contain the following information and documents and documents:

- (a) letters of intent signed by the merging companies;
- (b) a detailed description of the proposed transaction including all the background studies relating to the merger and the justifications for it;
- (c) detailed information about the product line of the companies;
- (d) a list of the major competitors in that product market and the market position or market share of each company (including the merging companies);
- (e) the structure and organisation of the merging companies;
- (f) revenue information about the operations of the merging companies;
- (g) the latest financial statements of the companies;
- (h) an analysis of the effect of the acquisition on the relevant market including the post acquisition market position of the acquiring or surviving company.

A more detailed formal application seeking the approval of a proposed merger,

acquisition or combination must be filed after the receipt of a favourable response to the pre-merger notification from the SEC. Also, after approval is granted, the merging companies must comply with the post approval requirements namely, the submission of:

- (a) a resolution of the shareholders of the affected companies agreeing to the terms of the merger;
- (b) the court's order sanctioning the scheme of arrangement;
- (c) a clearance letter from Federal Board of Inland Revenue; and
- (d) the notification of the completion of the merger exercise.

Although there has been takeover activity in the Nigerian corporate environment, most takeovers have been traditionally effected by means of schemes of arrangements and not through tender offers. Since Nigerian shareholders are mostly dispersed and have small holdings,³⁰⁶ shareholder interest and voting have always been beset by the problem of collective action³⁰⁷ and free-riding.³⁰⁸ This has resulted largely in the ineffectiveness of internal corporate governance devices,³⁰⁹ and the increasing awareness of the role of the tender offer as an instrument of corporate governance.³¹⁰

³⁰⁶ The share ownership pattern in Nigeria as at 31 December 1993 was as follows:

<i>Category of Investors</i>	<i>No. of shares (m)</i>	<i>%</i>
Individuals	5,898.22	43.59
Institutional Investors	2,932.06	21.67
Federal Government	446.53	3.30
States and Local Governments	852.11	6.30
Sub-total	10,128.83	74.86
Foreign	3,400.83	25.14
Total	13,529.75	100

See statement of the Director-General of the Securities and Exchange Commission at a Conference of Zonal Shareholders Associations, held in Abuja. Reported in the *Business Times*, 12 December 1994, 22.

³⁰⁷ In a company with a large number of shareholders entitled to vote, since no shareholder may expect his votes to decide a contest, no shareholder has the appropriate incentive to study the firm's affairs and therefore make informed decisions.

³⁰⁸ *I.e.*, where a shareholder acts and thus incurs costs in changing policy or management, the shareholders who do not contribute to this investment will share in the benefits that have been brought about by the change.

³⁰⁹ Such as the proxy machinery, non-executive directors, auditors and derivative suits, in constraining the divergence between the interests of owners and managers. Non-executive directors and auditors do not seem to be particularly good monitors in Nigeria. One interesting recent phenomenon, however, has been the role of the Nigerian Shareholders Solidarity Association in monitoring management by means of its active participation during general meetings of companies. See "Shareholders give firms' directors ultimatum on AGM", *Business Times*, 14 August 1995, 30.

³¹⁰ The conditions favourable to a market in corporate control now seem to be in place in Nigeria in 2000, and recent developments involving takeovers by stock market purchases indicate the emergence of a nascent

4.2. THE POSITION OF DIRECTORS IN NIGERIAN COMPANY LAW

In Nigerian company law, unless the articles of a company provide otherwise, management powers are vested in the directors.³¹¹ Under common law, it is customary to place directors in various legal categories when describing them. Such categorisations help in defining their duties and establishing their legal position. The Nigerian Supreme Court in *Yalaju-Amaye v. A.R.E.C. Ltd.*³¹² summed up the position in its description of directors as “trustees, agents and fiduciaries of the company.” This view is codified in Section 283 of the CAMA.³¹³ The significance of this is the recognition by statute that a director is a fiduciary.³¹⁴ Directors are required to act in good faith³¹⁵ and to exercise their powers in what they believe to be the best interests of the company.³¹⁶ They are to

competition in corporate governance. Traditionally, take-overs in Nigeria have always been friendly and were informed by a desire to realise synergies and not to replace incumbents. This has begun to change. Of late, there have been successful attempts to gain control of blue-chip companies by means of stock market purchases: an indication that the acquisition was perhaps not motivated by considerations of synergy. See *Alaye Investments v. Owena Bank* reported in *New Nigerian Newspapers*, 15 December 1994, p 13, where management in fact resisted crassly by refusing to register the shares in favour of the purchaser. Also see G. Gbede, *A guide to Mergers and Acquisitions in Nigeria*, Lagos, 1992, 1-2 where the author emphasises the displacement potential of the tender offer.

³¹¹ Section 63 (3) of the CAMA. Although this provision codifies the decision in *Atewologun v. Metro Motors Ltd.* (1978) LRN 46 at 49, it goes further by providing a statutory base for management power. This is similar to the position in most Canadian jurisdictions: see ss. 97 and 98 of the *Manitoba Corporations Act* which provide that the directors direct the management of the business of the corporation, subject to any Unanimous Shareholder Agreement.

³¹² [1990] 4 N.W.L.R. 422 at 463.

³¹³ Section 283(1) provides that: “Directors are trustees of the company’s moneys, properties and their powers ... and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own sectional interests.” Subsection 2 provides that directors are presumed to be agents of the company when acting within their authority and on behalf of the company.

³¹⁴ Section 279(1) provides: “A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.” See also, *Okeowo v. Miglore* (1979) 11 S.C. 138, 245-255.

³¹⁵ Sections 279(1) and 282(1).

³¹⁶ Section 279(3).

exercise the duty of care, diligence and skill that a reasonably prudent director would exercise in comparable circumstances.³¹⁷

Furthermore, they are enjoined not to exercise their powers for a collateral purpose³¹⁸ and to avoid a conflict of their personal interest with any of their duties.³¹⁹

Finally, they must not make a secret profit from their position.³²⁰

4.3. THE DUTIES OF DIRECTORS IN A TENDER OFFER

The legal obligations of directors in the context of a tender offer in Nigeria fall into two categories: bid specific duties and general directorial duties. The former are those specifically addressed to the tender offer process, whilst the latter will necessarily circumscribe the actions of directors when exercising their powers of management. There are also other constraints outside the ambit of these duties that are relevant to the actions of the directors of the target company (the 'target directors'). For example, the company will not be able to embark upon a share re-purchase programme as a means of defeating the bidder.³²¹

³¹⁷ Section 282.

³¹⁸ Section 279(5) provides "A director shall exercise his powers for the purposes for which he is specified and shall not do so for a collateral purpose, and the power, if exercised for the right purpose does not constitute a breach of duty, if it, incidentally, affects a member adversely."

³¹⁹ Section 280(1) provides that "The personal interest of a director shall not conflict with any of his duties as a director under this Act."

³²⁰ Section 280(2). This is a consequence of the fiduciary position of the director: *Nasr v. Berini-Beirut Riyad (Nig.) Bank Ltd.* [1969] 2 A.L.R. Comm. 7.

³²¹ Section 160(1) of CAMA prohibits such purchases: it is however possible in certain restricted cases for a company to purchase its own shares. See ss. 160(2) and 161.

4.3(a) BID SPECIFIC DUTIES

Target directors have no common law duty of comment upon notice of a bid, because it is a contractual matter between the bidder and the target shareholder.³²² Shareholders of the target company (the ‘target shareholders’) have a right recognised by statute³²³ to sell their shares to whomsoever they choose. Although no common law duty of comment exists, where directors take it upon themselves to advise their shareholders on the merits or otherwise of a bid, they are under a duty to be honest and not to mislead.³²⁴

In Nigeria, the common law position has been bolstered by statute which imposes upon the target directors a duty to comment on a bid. While recognising that the decision, whether or not to tender, is grounded in notions of property, the statute acts on the premise that shareholders are entitled to receive the advice of their directors before exercising their property rights. The directors of the target are consequently required by Section 602(2) to send a directors’ circular to the target shareholders and the SEC³²⁵ within ten days of the date of the bid. The circular, which must be approved by the board,

³²² *Levenburg v. Merrill, Lynch, Pierce, Fenner & Beane* 54 N.W. 2d 626 (1952). See also, P. Davies, *The Regulation of Take-Overs and Mergers* (London, 1976) 23.

³²³ *Re Smith, Knight and Co.* (1868) 4 Ch. App. 20. Section 115 of the CAMA provides: “The shares or other interests of a member in a company shall be property transferable in the manner provided in the articles of the company.” A public company cannot restrict the transfer of its shares: see ss. 24 & 22(2) of the CAMA.

³²⁴ *Gething v. Kilner* (1972) 1 W.L.R. 337.

³²⁵ The SEC has as one of its functions the duty of reviewing, approving and regulating mergers, acquisitions and all forms of business combinations: see ss. 6(g) and 8 of the *SEC Act*, 1988. The SEC also exercises regulatory power in regard to tender offers under Chapter IV of the CAMA.

is to contain the recommendations of a majority of the target directors.³²⁶ The directors in issuing this circular will have to be mindful of their duties. Accordingly, it has to be issued in good faith, with care and diligence and not be misleading. The general criminal liability imposed by Section 622 of the CAMA may also be relevant where directors make any untrue statement of a material fact or omit to state a material fact. Furthermore, where the directors are negligent with regard to any representation which they make, when making their recommendation to the shareholders whether to accept or reject the tender offer, they may be liable to shareholders for such negligent misstatements under the *Hedley Byrne* principle.³²⁷

Besides advising the target shareholders, the directors' circular also has a disclosure function. It enables the target shareholders to evaluate the quality of advice they receive from their directors. This is of prime importance where such directors are to receive 'golden handshakes'. Thus, Section 602(6) requires that the circular include particulars of any payment to be made to an officer or former officer of the target company by way of compensation for loss of office, or of any office in connection with the management of the company's or a subsidiary's affairs, or as consideration for or in connection with his retirement from any office.

Section 602(6) duplicates the requirements in Section 273 of the same Act, although Section 602(6) is wider in its coverage. It will, however, be necessary for target

³²⁶ S. 602(5). Where a director dissents from any view expressed in the circular, such a director is entitled to indicate his opinion or disagreement in the circular, provided that the reasons for such a disagreement or opinion are set out: s. 602(4).

³²⁷ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. This case is authority for the fact that fiduciaries owe a duty of skill and care to those who rely on their statements and are thus liable where those statements turn out to be wrong, if they were negligent in making the statements.

directors to pay heed to provisions in Sections 273 and 274, where any such payments are made or proposed. Section 273 provides that, where any payment is to be made to a director by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, it is the duty of the director to ensure that particulars of the proposed payment and the amount are included or sent with the circular³²⁸: a failure to do so leads to criminal liability.³²⁹ Any such proposed payment should also be approved by the target shareholders at a meeting summoned for that purpose, before shares are transferred in pursuance of the offer. Where no such approval has been obtained, or where the director does not ensure that target shareholders receive a circular with full particulars of the proposed payment and amount, any sum received by him on account of the payment shall be deemed to have been received in trust for any shareholders who have tendered their shares. The expenses incurred by the director in distributing the sum among such shareholders shall be borne by him and not retained out of that sum.³³⁰

As can be seen, the role given to target directors in a tender offer in Nigeria is limited to one of commenting on the bid. That target directors are not given a veto over the bid or other blocking powers, such as the powers they wield in other transactions such as a scheme of arrangement³³¹, highlights a legislative intent of guaranteeing shareholder sovereignty.

³²⁸ Section 273(1)

³²⁹ Section 273(2)

³³⁰ Section 273(3)

³³¹ *Re Savoy Hotel Ltd.* [1981] Ch. 351.

(b) GENERAL DIRECTORIAL DUTIES

Lord Greene in *Re Smith & Fawcett Ltd.*³³² stated the general position of directors under English law:

“They must exercise their discretion bona fide in what they consider, not what a court may consider is in the interests of the company, and not for any collateral purpose.”

Consequently, their powers must be exercised for the benefit of the company.³³³ Also, a power must not be applied for a purpose foreign to the power.³³⁴

In Nigeria, before enactment of the CAMA, the *Re Smith & Fawcett* formulation was applied. The Supreme Court in *Tika-Tore Press v. Abina*³³⁵ held that fiduciary powers are to be exercised for the benefit of the company; an allotment of shares for an improper purpose was, therefore, held to be a breach of fiduciary duty, albeit ratifiable.

The “proper purpose” doctrine as applied by English courts strictly circumscribes directorial defensive measures implemented in the face of an unwelcome bid. *Hogg v. Cramphorn*³³⁶ emphasises that once “an essential element” of any scheme adopted by directors is to ensure the maintenance of control in their hands, it will be caught by the doctrine. Even if the directors act in good faith, and are of the view that the bidder will be injurious to the company, such a belief would not save any exercise of their powers to defeat the bidder.

³³² [1942] Ch. 304 at 306.

³³³ *Punt v. Symons & Co. Ltd.* [1903] 2 Ch. 506, 515.

³³⁴ *Mills v. Mills* [1937-1938] 60 C.L.R. 150 at 185.

³³⁵ (1973) 4 S.C. 63. See also *F.A.T.B. v. Ezeagbu* [1994] 9 N.W.L.R. 149.

³³⁶ [1967] Ch. 254, (1966) 3 All E.R. 420.

In Canada, there have been more far-reaching developments in this area. The Supreme Court in *Teck Corporation v. Millar*³³⁷ has taken a different approach. Berger, J., was of the view that unlike the approach enunciated in *Hogg*,

“Directors ought to be allowed to consider who is seeking control and why. If they believe that there will be substantial damage to the company’s interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper.”³³⁸

He, however, cautioned that there must be reasonable grounds for this belief. In doing so, the directors will be entitled to consider the reputation, experience, and policies of the bidder.

In Nigeria, as stated earlier, directors’ duties have found statutory expression under the relevant laws. Hence, a director is required by the CAMA to “act at all times in what he believes to be in the best interests of the company as a whole”, and to exercise [his] powers honestly in the interest of the company and all the shareholders”.³³⁹ This formulation may lead to the view that, insofar as directors can show that they acted bona fide and for the benefit of the company, any defensive measures may escape scrutiny under the “proper purpose” doctrine. Therefore, the *Tika-Tore* decision is continually relevant in this area. Thus, in Nigeria, it appears that directors have considerable leeway when fending off hostile offers. Section 279(3) of the CAMA contains a provision that

³³⁷ (1972) 33 D.L.R. (3d) 288.

³³⁸ *Ibid.*, at 315; Presently, it should be noted that the *Re Smith & Fawcett* expression of directors’ duties is qualified by the “proper purposes” test.

³³⁹ Section 283(1).

seems to empower directors to move beyond the parochial view of the existing shareholders of the target. It provides that:

“A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such a manner as a faithful, diligent, careful and ordinarily skilled director would act in the circumstances.”

The position in Nigeria may now be that directors should have an eye on both the interests of target shareholders and the interests of the company as a separate corporate entity. Indeed, Section 283(1) provides *inter alia* “directors ... shall exercise their powers honestly in the interest of the company and all the shareholders”. Directors may now implement defensive measures if they can show that in doing so they are acting in the best interests of the company as a commercial entity. Section 279(3) would certainly avail directors who resist a bidder that has improper motives pertaining to its treasury or business plans, since they can claim to be acting to preserve the assets of the company. Indeed, it would seem that once targeted directors can show a conflict over corporate policy between them and the bidder, they may resist a change in control, insofar as they act with fidelity and care.

It will not be an overstatement to say that target directors in Nigeria have more leeway than that afforded to their counterparts in Canada and in the United States under the business judgment rule,³⁴⁰ and consequently there will be considerable prospects for defensive action. When one considers the implication of the application of the *Re Smith &*

³⁴⁰ The approach of the American courts is not to interfere with or impugn the directors' decision if it was informed and honestly motivated, *i.e.*, not affected by self-interest. The courts will not substitute their own business judgment for the directors'.

Fawcett test in *Teck*, and other emerging trends.³⁴¹ Section 279(3) of the CAMA will be a potent weapon in the hands of directors. In respect of a charge that they were not faithful, all that such a management needs to rebut the claim is to show that in resisting a bid, they were seeking either to preserve the assets of the company or to further its business or to promote the purposes for which the company was formed. These are not insurmountable obstacles. Directors, it would seem, can justify their defensive measures by claiming to be acting in the interests of the company as a separate entity.

The above notwithstanding, the scope for defensive share issues may be reduced by the power of the SEC to determine the timing and amount of securities to be issued.³⁴² Such an exercise of regulatory power, whilst within the ambit of the relevant provision, is strictly speaking beyond the purpose for which the power was granted. This power was granted to the SEC to ensure that saturation in the primary securities market, which increases the risk of under-subscription, does not arise. It should also be noted that the scope for the use of weighed voting rights as a defensive action is reduced by its virtual abolition in Section 116 of the CAMA. All shares are now to carry one vote only.

³⁴¹ For example, in Australia, McPherson, J., in *Pine Vale Investments Ltd. v. McDonnell & East Ltd.* [1983] 8 A.C.L.R. 199 seemed to support the proposition that directors may apply their powers to defeat a takeover bid. In 347883 *Alberta Ltd. v. Producers Pipelines Inc.* (1991), 35 B.L.R. 149, the Saskatchewan Court of Appeal in Canada held that the tests in *Teck* did not go far enough in giving principles for determining whether or not the defensive strategy was reasonable in relation to the threat posed. The court concluded.

“... when a corporation is faced with susceptibility to a take-over bid or an actual take-over bid, the directors must exercise their powers in accordance with their overriding duty to act bona fide and in the best interests of the corporation even though they may find themselves, through no fault of their own, in a conflict of interest situation. If, after investigation, they determine that action is necessary to advance the best interests of the company, they may act, but the onus will be on them to show that their acts were reasonable in relation to the threat posed and were directed to the benefit of the corporation and its shareholders as a whole, and not for an improper purpose such as entrenchment of directors.”

³⁴² Under s. 7(1)(b)(c) of the *SEC Act*, 1988.

Having given directors considerable leeway to resist a bid, it is noteworthy that the CAMA also places target shareholders in a strong position to challenge directorial action perceived to be inimical to their interests. Even though the possibility of ratification of most defensive actions³⁴³ may make it difficult for shareholders to commence a derivative action under the codified “fraud on the minority” exception³⁴⁴ to the rule in *Foss v. Harbottle* (which is also codified),³⁴⁵ there are other avenues for challenging management’s resort to defensive action.

Noteworthy is the statutory derivative action, which was copied from Canada.³⁴⁶ It would appear strange that the Nigerian Law Reform Commission, having suggested codification of the rule in *Foss v. Harbottle* and its exceptions, also went ahead to recommend the introduction of a statutory derivative action. The result of this is that a shareholder who sues in respect of a corporate right can do so under either any of the appropriate statutory exceptions to *Foss v. Harbottle* or the statutory derivative action provisions in Section 303. And since Section 303(2) requires that leave of the court must first be obtained before bringing a statutory derivative action, litigating shareholders can

³⁴³ See *Bamford v. Bamford* [1970] Ch. 212, where it was held that a defensive improper share issue can be ratified. This statement was followed by the Nigerian Supreme Court in *Tika-Tore Press v. Abina*, *supra* note 43, and by the Court of Appeal in *F.A.T.B. v. Ezeagbu*, above, n. 215. If ratification is permissible, a derivative action under the codified “fraud on the minority” exception may not be allowed.

³⁴⁴ Section 300(d) codifies this common law exception: see *Burland v. Earle* [1902] A.C. 83 and the Nigerian case of *S.E. Ltd. v. Ponmile* [1986] 2 N.W.L.R. 516, 526. In *Ponmile*, the Court of Appeal pointed out that it is not every case of fraud on a company that comes within the exception: that to come under the exception, there must be wrongdoer control.

³⁴⁵ Section 299. This section provides that where an irregularity has been committed in the course of a company’s affairs, or any wrong has been done to the company, only the company has the right to sue. See, *Gombe v. P.W. (Nig.) Ltd.* [1995] 6N.W.L.R. 402. This general rule is subject to the well known exceptions to *Foss v. Harbottle* codified in s. 300(a)(b)(c)(d), in addition to two further exceptions in s. 300(e) and (f) that do not read well with the earlier part of s. 300.

³⁴⁶ *I.e.*, the *Canadian Business Corporation Act*, 1985, C-44.

avoid this requirement by simply bringing the action under any of the relevant statutory exceptions to *Foss v. Harbottle* contained in Section 300. A practical consequence of this is that two routes for suing derivatively now exist: the *ultra vires* or “fraud on the minority” derivative suit in Sections 39(2) and 300(d), and the Section 303 derivative suit.

In Canada, after the introduction of the statutory derivative action, the plaintiff in *Shield Development Company v. Snyder*³⁴⁷ attempted to bring a common law derivative action. Canada did not make the mistake of codifying the exceptions to the rule in *Foss v. Harbottle*, after introducing the statutory derivative action, so as to avoid seeking leave of the court. McKay, J., said:

The legislation [the statutory derivative action provisions] does not expressly prohibit the bringing of a common law derivative action but, in my view, such an action is prohibited by necessary implication. I am unable to see how the two remedies can exist side by side without confusion to an intolerable degree.³⁴⁸

What the above shows is that the Nigerian Law Reform Commission did not fully understand the rule in *Foss v. Harbottle* and its exceptions, before recommending their codification and the adoption of the statutory derivative action.

³⁴⁷ [1976] 3 W.W.R. 44.

³⁴⁸ *Ibid.*, at 52.

4.4. TAKEOVER BID REGULATION IN CANADA

In Canada, takeover bids are regulated largely by provincial securities legislation which prescribes detailed rules offerors must follow. Also, the *Canadian Business Corporations Act* (CBCA), some provincial Corporation Acts and to some extent the *Canadian Competition Act* also contain provisions which regulate takeovers in Canada. Defensive tactics, on the other hand, are regulated by National Instrument 62-202.³⁴⁹ This Instrument sets out a general framework that balances the interests of the offeror against those of the target's management and board in order to ensure that target shareholders can make an informed decision on whether to sell their shares.

According to Gillen,³⁵⁰ as the popularity of takeover bids grew as an acquisition technique in Canada, there were several complaints about the problems it created for shareholders of the target companies.³⁵¹ Regulations to govern takeover bids thus had to be put in place to ensure that target shareholders were adequately protected from the sharp practices and exploitation of the acquiring shareholders. This legislation basically provides for the production of adequate information, enough time to assess that information, the preclusion of first-come first-served offers, withdrawal rights to avoid the lock-up of shares, and the payment of equal consideration for shares tendered.³⁵²

³⁴⁹ Formerly National Policy 38.

³⁵⁰ *Supra* note 287 at 303.

³⁵¹ In most instances, the acquirer would make a hostile takeover bid which was open for only a short period of time. This has two advantages for the acquirer: (i) it cuts out competing bids; and (ii) it precludes target management from engaging in defensive tactics designed to prevent the takeover (*i.e.* the takeover bid defenses).

³⁵² *Canadian Securities Regulation, supra* note 288 at 312.

Reviews of takeover bid regulation in Canada have led to amendments designed to expand the potential for competing bids for target shares and to protect target shareholders from being forced to surrender their shares for less than fair market value.

Firstly, the legislation requires the sending of a bid to all shareholders in the province where a takeover is made. The takeover bid circular must also be filed with the provincial securities commission and sent to the offeree issuer.³⁵³

The circular would include information that presumably would be useful to offeree shareholders in deciding whether to tender their shares at the offer price, or to hold on to the shares in the hope of:

- (i) sharing in the gain that would accrue after the change in control; or,
- (ii) getting a subsequent competing offer.

The takeover bid circular must provide the following information:

- (i) the name of the offeror;
- (ii) the name of the offeree issuer;
- (iii) ownership and trading in offeree issuer shares by the offeror or insiders of the offeror;
- (iv) the method and time of payment for the shares of the offeree issuer;
- (v) the source of any funds to be used for payment;
- (vi) arrangements between the offeror and the directors or senior officers of the offeree issuer;
- (vii) whether the offeror intends to purchase shares subject to the bid in the market;
- (viii) information indicating a material change in the offeree issuer since the last interim or annual financial statement of the offeree issuer;
- (ix) material facts relating to the offeree issuer; and,
- (x) appropriate prospectus information if the offer is a share exchange offer.

³⁵³ See, A.S.A. s. 140; B.C.S.A. s. 92; M.S.A. s. 91; Nfld.S.A. s. 101; N.S.S.A. s. 106; O.S.A. s. 100; Q. Regs. s. 180; S.S.A. s. 109.

The shareholders are then given further information by way of a directors' circular, which must be provided within ten days of the making of the takeover bid. The directors must give reasons for:

- (i) their recommendation to accept or reject a bid, or
- (ii) why they are not making a recommendation.³⁵⁴

The directors' circular provides offeree shareholders with information relating to the bid.

With respect to their recommendation, it includes other information that would indicate any interest the directors or senior officers have in the transaction, including:

- (i) their ownership of and trading in securities of the offeree issuer;
- (ii) whether they have accepted or intend to accept the offer;
- (iii) any arrangement or agreement between the offeror or offeree issuer and the directors or senior officers of the offeree issuer to make a payment to directors or senior officers owing to loss of office upon the takeover;
- (iv) interests of directors or senior officers of the offeree issuer in any material contract to which the offeree is a party; and
- (v) any information indicating a material change in the affairs of the offeree issuer or any material facts about the offeree issuer known to the directors.

There is potential civil liability for false statements or omissions in a takeover bid circular or directors' circular.³⁵⁵

To enable the shareholders adequate time to assess the information, the various provincial securities regulations provide that securities can be deposited under a takeover bid for a minimum of twenty-one days from the date of the bid.³⁵⁶ The shares cannot be

³⁵⁴ See, A.S.A. s. 138(2); B.C.S.A. s. 91(2); M.S.A. s. 90(2); Nfld.S.A. s. 100(2); N.S.S.A. s. 105(2); O.S.A. s. 99(2); Q.S.A. s. 134; S.S.A. s. 108(2).

³⁵⁵ See, A.S.A. s. 169; B.C.S.A. s. 115; M.S.A. s. 97; Nfld.S.A. s. 131; N.S.S.A. s. 139; O.S.A. s. 131; Q.S.A. ss. 222-225.1; S.S.A. s. 139. The scheme of these civil liability provisions is similar to that for misrepresentations in a prospectus.

³⁵⁶ See, A.S.A. s. 135(c); B.C.S.A. s. 87(b), and B.C. Regs. S. 163.8(a); M.S.A. s. 86(c); Nfld.S.A. s. 96(b); N.S.S.A. s. 101.2; O.S.A. s. 95.2; Q.S.A. s. 147.3; S.S.A. s. 104(3).

taken up for twenty-one days and shares deposited within that period can be withdrawn at any time prior to its end. However, in 1996 a Committee commissioned by the IDA to review Take-over Bid Time Limits (“the Zimmerman report”) considered the present 21-day minimum deposit period and related time limits for formal take-over bids under Canadian securities laws to see if it properly balanced the interests of acquirors and acquirees and recommended that (1) the minimum deposit period for formal take-over bids and the prohibition against taking up shares deposited should be extended from 21 to 35 days; and (2) the time period for delivery of a director’s circular to shareholders should be extended from 10 to 15 days after the mailing of the bid.³⁵⁷

To cater to situations where a controlling shareholder or group of shareholders might be made an offer to the exclusion of others, provincial securities legislation requires that a takeover bid be made to all holders in the province of the securities sought.³⁵⁸ The legislation also sets out the principle that the offeror must offer identical consideration to all members of the class of equity securities sought.³⁵⁹ Further, first-come first served offers are not allowed. Instead, where the bid is for less than all the shares and where a greater number of shares than requested are deposited under the bid, they must be taken up *pro rata*.³⁶⁰

³⁵⁷ The Zimmerman Report has already been legislated in Ontario. In other provinces, it has not yet been implemented, but is generally supported.

³⁵⁸ See, A.S.A. s. 135(a); B.C.S.A. s. 87(a); M.S.A. s. 86(a); Nfld.S.A. s. 96(a); N.S.S.A. s. 101(1); O.S.A. s. 95.1; Q.S.A. s. 127, 128; S.S.A. s. 104(2).

³⁵⁹ See, A.S.A. s. 136(1); B.C.S.A. s. 89(1); M.S.A. s. 88(1); Nfld.S.A. s. 98(1); N.S.S.A. s. 103(1); O.S.A. s. 97(1); Q.S.A. s. 145; S.S.A. s. 106(1).

³⁶⁰ See, A.S.A. s. 135(i); B.C.S.A. s. 87(g); M.S.A. s. 86(g); Nfld.S.A. s. 96(g); N.S.S.A. s. 101.7; O.S.A. s. 95.7; Q.S.A. s. 142.2; S.S.A. s. 104(8).

4.5. CONCLUSION

Targeted directors of Nigerian companies have considerable scope for resisting tender offers. Even though the Chapter IV regulatory scheme in the CAMA consigns to them a mainly advisory function, the embellished *Re Smith & Fawcett* formulation of directors' duties in Section 279(3) of the CAMA has succeeded in giving them authority to resist. As the only constraint that may have limited them in this respect, the "proper purposes" doctrine may not accomplish much, considering the changes introduced by the CAMA. All that incumbents may now need, to resist lawfully, is to show a conflict over corporate policy between the bidder and the target. That is not an insuperable task, because a tender offer is generally made when a bidder disagrees with the incumbent's corporate policy.

Another point worthy of note is the effect of Section 287(3), which permits *ex post* gifts, and Section 280(3), which would seem to permit directors to keep "necessary benefits". Nothing could be further from Justice Cardozo's enunciation of the fiduciary's standard of conduct in *Meinhard v. Salmon*,³⁶¹ where he said that they are "held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Also, the attempted reversal of *Percival v. Wright*, and the codification of *Allen v. Hyatt*, coupled with adoption of the Canadian statutory derivative action, while at the same time keeping the rule in *Foss v. Harbottle* and its derivative action exception, indicate that the authors of the CAMA clearly ignored or perhaps lacked a sound grasp of

³⁶¹ 164 N.E. 545, 546 (1928).

some basic and fundamental principles of company law. Reform is definitely now imperative.

In comparison, the Nigerian securities laws do not provide for extensive regulation of “takeovers” as the term is applied in Canada. This perhaps is because of the fact that the Nigerian jurisprudence relates more to friendly and not “hostile” acquisitions of companies, unlike is the case in Canada. The Nigerian laws provide particularly for the regulation of mergers of companies and in this respect is comparable to the *Canadian Competition Act* and other anti-trust laws. Emphasis in the *SEC Act* is on the prevention of monopolies and the protection of small and medium sized companies while the CAMA makes provisions for the protection of minority shareholders in the event of any such acquisitions.

Chapter 5

ENFORCEMENT MECHANISMS

5.0. INTRODUCTION

Inherent in the concept of securities regulation and perhaps most important is the necessity for an adequate legal and institutional framework for the enforcement of the laid down rules and regulations. According to IOSCO, the three main prerequisites for the enforcement of securities regulation are:

1. the regulator should have comprehensive inspection, investigation and surveillance powers;
2. the regulator should have comprehensive enforcement powers;
3. the regulatory system should ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance program.³⁶²

Consequently, securities regulators should not only be capable of barking, but must also actually bite whenever necessary. This is particularly important in the case of emerging securities markets. In order to induce investors to be willing participants in these markets, enforcement mechanisms must be in place to help engender much-needed confidence in market integrity. Where sharp practices prevail (or are perceived), mechanisms should be implemented to enforce applicable law and to deter fraud.

Thus, the applicable regulator should have within its enforcement arsenal a wide array of weaponry, deploying the appropriate mechanisms to disarm its intended targets. Although granting such enforcement powers may lead to overzealousness on occasion, containing internal reviews by relatively detached personnel along with independent

³⁶² IOSCO, Objectives and Principles of Securities Regulation, Part 11 para. 8.1 publicly released at the annual conference of IOSCO in Nairobi during September 12th – 18th, 1998. See, <http://www.iosco.org/> at <http://risk.ifci.ch/144470.htm>, and *supra* note 23.

scrutiny by a judge or hearing examiner, should discourage much of the overreaching that otherwise might ensue.³⁶³

However, in view of the investment risks associated with most emerging markets, there is widespread recognition that enforcement powers should be finely tuned and used only where clearly necessary. Otherwise, legitimate and well-heeled financial intermediaries will take their activities elsewhere, leaving the affected country without essential players in its capital market structure.³⁶⁴

Irrespective of a market's level of sophistication, funding and resources for adequate oversight pose a continuing dilemma. When demands are high for such crucial matters as education, health care, defense, and infrastructure, the zeal for pursuing inside traders and stock manipulators more effectively by appropriating generous funds is not surprisingly chilled. This dilemma is exacerbated for emerging securities markets with pressing human and societal demands.³⁶⁵

Yet, sufficient funding and resources are key to the success of a securities oversight framework. The most rigorous statutes have little impact if the country lacks funds to hire, retain, and school the requisite number and variety of personnel to competently administer the regulatory regime. Hence, without the necessary human and

³⁶³ Marc I. Steinberg, *supra* note 117 at 736.

³⁶⁴ Hal S. Scott & Philip A. Wellons, "Emerging Markets: Privatization and Institutional Investors", in *International Finance: Transactions, Policy and Regulation* at 1000-04.

³⁶⁵ Marc I. Steinberg, *supra* note 117 at 721.

financial resources, even egregious violations go undetected and the most elaborate regulatory framework proves futile.³⁶⁶

Clearly, the personnel employed by the subject regulators must be competent and qualified. They must have the requisite education and training to administer the pertinent framework. Sending employees abroad to acquire the necessary acumen should be a matter of priority, as should inviting experts from abroad to lend their insights.³⁶⁷ Also, there should be a "critical mass" of employees in both numbers and specialties. In addition to adequate support staff, attorneys, accountants, financial analysts, and investigators should be retained. Personnel alone are not sufficient. Given the ingenuity of those bent on fraud, the requisite technology must be available to the enforcers. Of course, the degree of technology demanded will depend on the complexity of the particular securities market.

With vigorous investigatory and enforcement powers, competent oversight personnel in both number and specialty, and the use of appropriate technology much can definitely be accomplished.

³⁶⁶ Franso H. van Zyl, "South Africa: Insider Trading Regulation and Enforcement". (1994) 15 C. Law 3, at 92.

³⁶⁷ John J.A. Burke, "The Estonian Securities Market Act: A Lesson for Former Republics of the Soviet Union". (1994) 27 *Vand. J. Transnat'l L.* 578, n. 111.

5.1. ENFORCEMENT MECHANISMS UNDER NIGERIAN LAWS

Nigerian securities legislation makes provision for its enforcement through a variety of techniques. Specifically, the *SEC Act* and the *CAMA*³⁶⁸ provide for several types of official sanctions against persons who violate their provisions, and specify in some cases the procedures to be followed in enforcing them.³⁶⁹ These include penal sanctions, administrative sanctions, statutorily created civil causes of action. More than one of these sanctions may apply in a given situation.³⁷⁰

In furtherance of its goal of ensuring discipline and enhancing professionalism within the capital market the SEC has also issued a “code of conduct for capital market operators and their employees”.³⁷¹

This code of conduct is binding on all operators in the market and their employees and provides that all disputes among them will initially be referred to the relevant SRO or other organisation established for the resolution of disputes between members. If this body is not able to resolve a dispute to the satisfaction of the parties involved, such dispute is then referred to the Administrative Hearing Committee (AHC) of the SEC. Under normal circumstances, it is only where the AHC is also unable to resolve such

³⁶⁸ The *CAMA* in s. 541 provides that the SEC shall administer the relevant provisions of the *CAMA* regarding dealings in company securities.

³⁶⁹ The rules governing formal proceedings before the commission are designed to establish procedural safeguards which protect the rights and interests of all parties: SEC guidelines on Administrative Proceedings; Mergers, Acquisitions and Combinations; Prospectuses; Registrations; Underwriters and Underwriting Agreements. *supra* note 136 at 2- 5.

³⁷⁰ The outcome of SEC investigation may serve as the prelude to other types of governmental proceedings.

³⁷¹ The code of conduct also provides for sanctions for its violations and any operator found guilty under a disciplinary proceeding shall be suspended or expelled from the capital market and may in addition be liable for any other penalty prescribed by the law.

dispute to the satisfaction of all the parties involved that a court action can be instituted in respect of such dispute.

The SEC has statutory authority to carry out surveillance and conduct investigations to determine whether there has been or there is about to be a violation of the *SEC Act*. This authority includes power to compel production of books and records from any person or company subject to the *SEC Act*. Where preliminary investigations by the SEC point to possibility of fraudulent violations of the *SEC Act*, the matters are usually referred to the Federal Investigation and Intelligence Bureau (FIIB) for further investigations.³⁷²

Section 15(1) grants the SEC authority to examine the records and affairs of and to call for information from and on any person or company directly or indirectly covered by the provisions of the *SEC Act*. If from such investigation it is found that there is an attempt to thwart the provisions of the *SEC Act* or of any rules and regulations made thereunder, the SEC is empowered to declare the irregular transactions null and void and to take appropriate measures to rectify such irregular transactions.³⁷³

Generally, when information comes to the attention of the SEC through complaint or otherwise that a violation has or may have occurred, it first conducts an informal inquiry. This initial inquiry is done by means of written correspondence, telephone contact or meeting with the parties directly. If the inquiry reveals the existence of a violation or possible violation, a formal order of investigation is recommended to be

³⁷² The FIIB is a governmental body established to investigate allegations of fraud in Nigeria primarily within the banking and financial industry.

³⁷³ Section 15(2), *SEC Act*.

carried out by the SEC. Any such formal investigative proceedings are generally conducted privately, to avoid unwarranted injury to the reputations of the persons being investigated. A witness compelled to testify or produce evidence is entitled to see a copy of the formal order of investigation and such witness or party summoned may be accompanied or represented or advised by a lawyer.

Section 28 expressly requires the SEC to investigate allegations of violations of or probable violations of provisions of the *SEC Act*, rules and regulations. It authorises the SEC to require the alleged violator to file written statement under oath as regards the facts and circumstances of the subject matter of the investigation.³⁷⁴

If the SEC's investigations show that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of the *SEC Act*, or any rules and regulations made thereunder, it may bring an action in the courts to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order may be granted without the necessity of a bond.³⁷⁵ Upon an application of the SEC, the courts also have jurisdiction to issue writs of *mandamus* commanding any person to comply with the provisions of the *SEC Act* or any rule and regulations made thereunder.³⁷⁶

The SEC may also transmit such evidence as may be available concerning such acts or practices to the Attorney-General of the Federation who may institute the

³⁷⁴ Section 28(1).

³⁷⁵ Section 28(2).

³⁷⁶ Section 28(4).

necessary criminal proceedings under the *SEC Act*.³⁷⁷ The SEC adopts a practice of allowing persons under investigations to submit written statements describing their actions and promising where necessary to behave better in the future and such statements may be made public by the SEC as part of the process of resolving their involvement in the investigation.

If the SEC determines that a public investigation is warranted, and the records show implications of wrong doing by any person, that person must be given a reasonable opportunity for cross-examination and for production of rebuttal testimony or documentary evidence.³⁷⁸ For the protection of the public, the production of certain books and records related to the business which are required by law to be kept is mandatory and this demand is not subject to any privileges as in judicial proceedings.

5.1(a) PENAL SANCTIONS

Penal sanctions potentially involve a term of imprisonment. There are three categories of penal offences under Nigerian laws: (1) general offences; (2) offences by directors and/or officers; and (3) insider trading and/or tipping offences. Anyone who commits an offence in any of these categories is liable to a maximum fine of one hundred thousand naira (N100, 000)³⁷⁹ and/or a maximum prison term of five years. In accordance with Section 26 of the *SEC Act*, "Any person who:

- (a) willfully violates any provisions of this Act: or

³⁷⁷ Section 28(3).

³⁷⁸ The SEC records the proceedings of any investigation.

³⁷⁹ About \$1.700 CDN.

- (b) willfully, in any registration statement, application, report, account, record, or other document filed or sent pursuant to this Act or the keeping of which is required under this Act makes or causes to be made any untrue statement of a material fact or omits to state any material fact necessary to make the statement from being misleading in the light of the circumstances under which they were made,

shall be guilty of an offence and liable on conviction to a fine of not more than N 100,000.00 (One Hundred Thousand Naira) or imprisonment for five years or to both such fine and imprisonment”.

The language of (b) above encompasses the statutory definition of “misrepresentation”, while (a) is a catch-all provision. Therefore, any contravention of any part of the *SEC Act* could be punished by means of a penal sanction. Also, directors and officers who authorize, permit or acquiesce in the commission of a penal offence are liable for the offence, regardless of whether their corporation or firm has been charged or found guilty.³⁸⁰

(b) STATUTORY CIVIL LIABILITY

The civil liability provisions of the *SEC Act* and the *CAMA*, augment but do not replace existing common-law remedies.³⁸¹ S. 562 of the *CAMA* provides for civil liability for loss or damage sustained by investors against directors and promoters of the company in respect of untrue statements in prospectus and statements in lieu of

³⁸⁰ The use of the word “wilful” connotes however that the prosecution must necessarily prove that the director or officer knew that a penal offence was committed. The United States Supreme Court has held that “when used in a criminal statute (wilfully) means an act done with a bad purpose; without justifiable excuse; ... without ground for believing it is lawful...”. See *United States v. Murdock*, 290 U.S. 389, (1933). Read literally, this creates the confluence of “wilfully” and “knowingly.” Marc Steinberg & Ralph Ferrera, *supra* note 287 para. 6:05 (1990).

³⁸¹ These common law remedies include civil actions for rescission or damages with respect to misrepresentations in prospectuses or other disclosure documents and with respect to transactions which are in violation of the securities acts. They also include civil actions with respect to brokers, advisers and portfolio managers for breach of contract, for negligence or for breach of fiduciary duties.

prospectus.³⁸² Also, s. 620 of CAMA provides for civil actions for compensation to persons who suffer loss and an accounting to the company for the direct benefit or advantage received or receivable, in respect of insider trading.

Section 25 of the *SEC Act* further creates a specific private right of action arising from false and untrue statements in an application for securities or trading registration. It provides that notwithstanding the other provisions of the Act, if any application for registration under the Act contains an untrue statement of a material fact or omits a material fact necessary to make the statements in the application from being misleading, any person acquiring such security (without knowledge of the untruth or omission at the time of acquisition) may sue (a) every person who signed the application for registration; (b) every person who was a director of (or performing similar functions) or partner in the company or enterprise at the time of the filing of the part of application of registration upon which liability is asserted; and/or (c) every accountant, engineer or appraiser, or any person whose profession gives authority to a statement made by him which is used in connection with such registration process.

(c) ADMINISTRATIVE SANCTIONS

If upon carrying on its investigations, the SEC uncovers evidence of a violation of the *SEC Act*, it may order an administrative hearing to determine responsibility for the violation and to impose sanctions. Such an administrative proceeding can only be brought against (a) persons or firms registered with the SEC (e.g. broker-dealer, investment adviser, issuing house, registrar, stock exchanges or securities dealers), or (b) with respect

³⁸² Ss. 563 and 564 provide for criminal liability.

to securities registered with the SEC, or (c) any other person or institution covered under the provisions of the *SEC Act*.

Although administrative hearings are used generally to determine possible or alleged violations of any provision of the *SEC Act* or Regulations, usual types of cases, which warrant such hearings, include (i) sale of unregistered securities to the public in violation of s. 9 of the *SEC Act*, (ii) misleading or untrue statements in registration, application, or prospectus, (iii) dealing in securities by unregistered brokers, dealers, investment adviser, etc., (iv) employing unethical, manipulative or deceptive device or conduct in securities transactions, (v) denial of registration or refusal to register stock exchanges, broker or dealer, (vi) suspension or revocation of registration of securities or of securities dealers, and (vii) insider dealing cases.³⁸³

The rules of procedure applicable to hearings before the SEC are construed liberally to carry out the objectives of the *SEC Act* and other laws administered by the SEC and to assist parties in obtaining fair, fast and inexpensive settlement of cases brought before the SEC.

Section 16 of the *SEC Act* permits the SEC, subject to the approval of the National Council of Ministers, to compound offences.³⁸⁴ Respondents may during the period of hearing, make offers of settlement, consenting to lesser sanctions in exchange for saving the expense and prolonged adverse publicity of a protracted proceeding.

³⁸³ SEC guidelines, *supra* note 136 at 5.

³⁸⁴ This power of the SEC is made subject to section 160 of the Constitution of the Federal Republic of Nigeria (which relates to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any person in any court of law).

The SEC, in an administrative proceeding, may impose any of the following sanctions (a) censure or warning; (b) nullification of irregular transactions;³⁸⁵ (c) limitations on the registrant's activities;³⁸⁶ or (d) suspension or revocation of registration.³⁸⁷

In *Chief M.A. Omisade v. Jimi Lawal and Lord Chief Ifegwu*³⁸⁸, a complaint was laid by the petitioner, Chief M.A. Omisade, *inter alia*, that the respondents who were members of the then board of Alpha Merchant Bank were unilaterally allotted shares without the Commission's approval. The AHC after considering all the facts and evidence before it held all irregular allotment of shares null and void. Persons affected by the nullification were advised to return their share certificates to the company's registrar for cancellation.³⁸⁹

In *Unit One Industries Plc. v. Trust Securities Limited*,³⁹⁰ the petitioners complained to the SEC that the respondents who acted as issuing house had failed to remit to it the proceeds of its public issue of 1992 within the time stipulated by the SEC. The issuing house had also failed to give the issuer any accurate statement as to the actual

³⁸⁵ Section 15(2).

³⁸⁶ Section 14. The SEC could deny registration or refuse to issue certificate of registration if it finds that a broker or dealer, or its agents or an investment adviser or registrar has not satisfied the requirements of this section.

³⁸⁷ Section 24. The SEC is however required to give adequate notice and opportunity for hearing to an affected person before suspension or revocation of the registration of the person or of a security.

³⁸⁸ SEC Periodicals. *The Securities and Exchange Commission - Report and Accounts for the year ended 31st December, 1994* at 71.

³⁸⁹ With regard to whether the two directors used their position as directors of the bank to acquire those shares, the AHC found that Mr. Jimi Lawal (the Managing Director) could have used his position to his (undue) advantage while there was nothing to show that Lord Ifegwu, the other director, did likewise.

proceeds of the said issue. During the hearing, it was disclosed that certain shares purportedly allotted were unpaid for. The AHC directed as follows:

- (a) share certificates in respect of such shares not paid for by the chairman of the petitioner, members of his family, and members of staff of the petitioner were to be returned and cancelled;
- (b) the respondent should take up the shares not paid for as agreed by the parties;
- (c) the respondent was suspended from engaging in capital market activities until it complied with the above orders and also its registration status is reviewed by the Commission;
- (d) the respondent should forward to the petitioner as well as the Commission appropriate statement of account with regard to the proceeds.

In *SEC v. Afribank Nigeria Plc. & FBN (Merchant Bankers) Limited*.³⁹¹ the respondents were invited to appear before the AHC to explain why: (1) a material fact, to wit, the management of Afribank had decided to embark on a head office project without disclosing this information in the prospectus issued by the bank during its privatisation in 1993 and (2) multiple applications were entertained and processed for allotment by the respondents during the privatisation of the bank. The AHC after hearing the parties decided as follows:

- (a) FBN (Merchant Bankers) Limited was suspended for three months from functioning as issuing house;
- (b) Afribank (Nig.) Plc was suspended from performing registrars' function for three months;
- (c) Afribank (Nig.) Plc was barred from performing in-house registrars' function;
- (d) the allotment of the 17,425,000 shares irregularly was nullified.

³⁹⁰ SEC Annual Reports, 1994, p. 71-72. See also *Union Dicon v. Negotiable Finance Limited; AMH Continuation Limited.*; and *SEC v. Financial Trust Company Nigeria Limited* at p. 74.

³⁹¹ SEC Annual Reports, 1994, p. 73.

In *SEC v. Equity Securities Limited*,³⁹² after an administrative hearing, it was decided by the AHC that the respondent be given time to make up its paid-up capital as issuing house and file a valid fidelity bond. The respondent later wrote to the SEC that it would discontinue its function as an issuing house. However, the SEC discovered that it had not even fulfilled registration requirements for its other registered function of broker/dealer. The AHC then reviewed its earlier decision and barred the respondent from all capital market activities until all SEC requirements for registration must have been fulfilled.

In *SEC v. Pace Investment Limited*,³⁹³ the Special Services Department of the Presidency issued a security clearance report that the information supplied by two of the sponsored individuals of the respondent in respect of their educational qualifications could not be confirmed. The respondent was therefore invited to the AHC to clarify the position. The AHC ordered as follows:

- (a) that registration of Pace Investment Limited be withdrawn; and
- (b) that the matter be referred to the Federal Investigation and Intelligence Bureau (FIIB) for investigation of the educational claims of the two sponsored individuals affected.

In *SEC v. Investment and Capital Development Co. Ltd.*,³⁹⁴ the Federal High Court directed the SEC to investigate and report to it on a scheme of arrangement entered into between the respondent and its creditors. The SEC carried out the investigation and in the process found that the respondent, among others, was financially insolvent and

³⁹² SEC Annual Reports, 1994, p. 76.

³⁹³ SEC Annual Reports, 1994, p. 74.

³⁹⁴ SEC Annual Reports, 1994, p. 75.

incapable of meeting its financial obligations to its creditors. However since the SEC registered the respondent as a capital market operator the matter was referred to the AHC which took the following decisions:

- (a) the registration certificate granted the respondent and its sponsored individuals to perform the functions of issuing house and broker/dealer in the capital market be withdrawn;
 - (b) the company's sponsored individuals were barred from participating in the capital market in any capacity unless cleared by the Commission; and
 - (c) notice of the withdrawal of the registration certificate and the ban on the sponsored individuals to be published in the newspapers.
-

5.2. ADMINISTRATIVE SANCTIONS UNDER CANADIAN LAWS³⁹⁵

Under Canadian securities laws, administrators are given the power to make a wide range of orders to encourage compliance with the securities act or regulations. These powers typically include:

1. Compliance - securities administrators are given the power to order that a person comply with, or cease contravening, a provision of the act or regulations or a decision of the securities administrators:³⁹⁶
2. Cease trade - this involves the power to order that all persons, class of persons, or particular persons cease trading in a specified security or class of securities:³⁹⁷
3. Denial of exemptions - important exemptions are provided from the application of securities acts with respect to registration, prospectus filing requirements and takeover bid regulations. Securities administrators have the power to remove these exemptions with respect to the persons specified in an order by the securities administrator:³⁹⁸

³⁹⁵ Although the Canadian laws also make provision for penal and civil sanctions for breaches of the securities laws, emphasis here would be on the administrative sanctions because they are in my view more relevant to this discourse, as they better highlight the difference in the two regulatory regimes.

³⁹⁶ A.S.A. s. 164 (an application to court); B.C.S.A. s. 144(1)(a) (the provision also applies to a by-law, rule, policy or decision of a stock exchange or self-regulatory organisation); M.S.A. s. 152 (an application to court), s. 62; N.B.S.F.P.A. s. 23 (an application to court); Nfld.S.A. s. 126 (an application to court); N.S.S.A. s. 134(1)(a) (the provision also applies to a by-law, rule, policy or decision of a stock exchange or self-regulatory organisation); O.S.A. s. 126 (an application to court); Q.S.A. s. 272.1; S.S.A. s. 133.

³⁹⁷ A.S.A. s. 165; B.C.S.A. s. 144(1)(b); M.S.A. s. 148; N.B.S.F.P.A. s. 18; Nfld.S.A. s. 127; N.S.S.A. s. 134(1)(b); N.W.T.S.A. s. 37; O.S.A. s. 127; P.E.I.S.A. s. 19; Q.S.A. s. 265; S.S.A. s. 134; Y.S.A. s. 32.

³⁹⁸ A.S.A. s. 166; B.C.S.A. s. 144(1)(c); M.S.A. s. 19(5); Nfld.S.A. s. 128; N.S.S.A. s. 134(1)(c); O.S.A. s. 128; P.E.I.S.A. s. 13(2); Q.S.A. s. 264; S.S.A. s. 135.

4. Resignation or prohibition from acting as director or officer;³⁹⁹
5. Prohibition of or required dissemination of information;⁴⁰⁰ and.
6. Reprimand of registrant or suspension, cancellation or restriction of registration.⁴⁰¹

These administrative orders can generally be made on a temporary basis without a hearing, where the securities administrator considers that the length of time required to hold a hearing could be prejudicial to the public interest.⁴⁰² A hearing is however required before the imposition of a final order.⁴⁰³

The power of securities commissions to impose sanctions, such as cease trade orders and removal of exemptions, where it “considers it to be in the public interest” to do so has been interpreted quite broadly. In *Re C.T.C. Dealer Holdings Ltd. et al. and Ontario Securities Commission et al.*⁴⁰⁴ it was decided by the Ontario Divisional Court that so long as the commission was acting *bona fide* in the public interest, there need not

³⁹⁹ A.S.A. s. 166.1; B.C.S.A. s. 144(1)(d); N.S.S.A. s. 134(1)(d).

⁴⁰⁰ B.C.S.A. s. 144(1)(e); N.S.S.A. s. 134(1)(e).

⁴⁰¹ A.S.A. s. 56; B.C.S.A. s. 144(1)(f); M.S.A. s. 8; N.B.S.F.P.A. s. 22, 23; Nfld.S.A. s. 28; N.S.S.A. s. 33; N.W.T.S.A. s. 10; O.S.A. s. 27; P.E.I.S.A. s. 18, 19; Q.S.A. s. 273; S.S.A. s. 29; Y.S.A. s. 8(2).

⁴⁰² A.S.A. s. 21; B.C.S.A. s. 144(2); M.S.A. s. 148(2); Nfld.S.A. s. 127(3), 128(2); N.S.S.A. s. 134(2); O.S.A. s. 127(3), 128(2); S.S.A. s. 134(3), 135(2). However, the application of a temporary order is typically limited to 15 days, but the administrator can order an extension of the order until a hearing can be held.

⁴⁰³ See, A.S.A. s. 165(2), 166(2), 166.1(2); B.C.S.A. s. 144(1); M.S.A. s. 148(2); Nfld.S.A. s. 127(3), 128(2); N.S.S.A. s. 134(1); O.S.A. s. 127(3), 128(2); S.S.A. s. 134(3), 135(2). Section 146 of the B.C.S.A. gives the commission or superintendent the power to make a cease trade order without a hearing where a person fails to file a record that is required to be filed or furnished, or fails to file or furnish adequate information in a record that is required to be filed or furnished. The order applies until the person files or furnishes the required information.

⁴⁰⁴ 59 O.R. (2d) 79. See also *Re Canfor Corp.* (1995), 18 O.S.C.B. 475 at 483 (OSC); and *In the matter of Canadian Tire Corporation et al.* (1987), 10 O.S.C.B. 858.

be any concurrent breach of any of the provisions of the act, regulations or policy statements before the commission could exercise its discretion under this head.

5.3. ORDERS TO FREEZE PROPERTY

In Canadian jurisdictions the securities acts specifically empower the regulatory authorities in certain circumstances to order the freezing of a person's property in the jurisdiction. For instance, where, in respect of a person for which an investigation is proposed, ongoing or has been concluded, an administrative order (such as a cease trade order) is proposed or has been made, or criminal proceedings are about to be or have been instituted, an order can be made requiring a person to continue to hold funds, securities or other property that it holds on deposit and which belongs to the person subject to the investigation, order or proceeding. The securities commission can also order that the person subject to the investigation, order, or proceeding refrain from withdrawing any funds, securities, or other property or to hold all funds, securities or other property of clients or others in trust for an interim receiver or trustee.⁴⁰⁵

Although the Nigerian securities laws do not expressly empower the SEC to freeze properties of persons being investigated, the SEC or anyone aggrieved by the actions of the operator can still apply to the courts to get an order to so freeze the operator's property within the jurisdiction pending the outcome of the investigation or litigation. However implicit in this procedure is the fact that it would take a longer time to obtain such orders and the courts have the discretion to grant such application or not.

⁴⁰⁵ A.S.A. s. 37; B.C.S.A. s. 135; M.S.A. s. 26; N.B.S.F.P.A. s. 24; Nfld.S.A. s. 17; N.S.S.A. s. 29c; N.W.T.S.A. s. 24(1); O.S.A s. 16; P.E.I.S.A. s. 20; Q.S.A. s. 249; S.S.A. s. 17; Y..A. s. 20(1).

Consequently a fraudulent operator could always take steps to dissipate the property in issue before the court orders are obtained.

5.4. JUDICIAL REVIEW AND THE RIGHTS OF APPEAL

Section 19 of the *SEC Act* provides a right of appeal to the Minister of Finance to any person aggrieved by any decision of the SEC relative to an application made by the person under the Act. The Minister may, after considering the appeal, confirm or modify the decision of the SEC, and this decision is the final administrative remedy.

The *SEC Act* does not expressly provide for a right of appeal to the courts by a person aggrieved with the decision of the SEC. This no doubt is a procedural oversight. In other jurisdictions with more developed regulatory systems, there exists to a large extent the avenue for the appeal of the regulator's decisions to the courts.⁴⁰⁶

In Canadian jurisdictions, any person directly affected by a decision of the securities commission, other than decisions with respect to exemptions from prospectus requirements, or also, under some acts, exemptions from registration requirements,⁴⁰⁷ can

⁴⁰⁶ E.g., in the United Kingdom, the *Financial Services Act* (FSA) establishes a Financial Services Tribunal to hear appeals from decisions of the Securities and Investments Board (SIB) affecting investment firms. By s. 97 of the FSA, a person or firm may appeal to the Tribunal if the SIB (1) refuses an application for authorisation, (2) withdraws or suspends authorisation, (3) directs a firm not to employ a person, (4) publishes a statement concerning a person's misconduct, or (5) exercises its powers of intervention with respect to an investment business. In the United States, each of the federal securities laws provides for judicial review of final Commission orders in the Court of Appeals for the District of Columbia or in the court of appeals for the circuit in which the party resides or has its principal place of business. See, section 25(a)(1) of the *Exchange Act*, 15 U.S.C. para. 78y(a)(1) (1994); section 9 of the *Securities Act*, 15 U.S.C. para. 771 (1994).

⁴⁰⁷ See, e.g., A.S.A. s. 26(1); B.C.S.A. s. 149(1); Nfld.S.A. s. 10(1); N.S.S.A. s. 26(1); S.S.A. s. 11(1). Under N.W.T.S.A. s. 13 if registration is refused, suspended or cancelled there is an appeal to the Supreme Court which may confirm, reverse or modify the decision.

appeal the decision of the commission to the court.⁴⁰⁸ The court may grant a stay of the decision of the commission until the disposition of the appeal.⁴⁰⁹ The court is empowered to direct the commission to make any decision or to do any act the commission is authorised and empowered to do under the act or regulations and the commission is required to act accordingly.⁴¹⁰

Despite the silence of the Nigerian securities legislation on the right of appeal to the courts from the decisions of the SEC, one can perhaps safely conclude however that the SEC being an administrative governmental body is amenable to judicial review proceedings under the Application for Judicial Review Procedure.⁴¹¹ This is a specialised procedure under the rules of court through which the courts ensure that public bodies do not abuse their powers. Consequently, public law remedies like *certiorari*, *mandamus* and *prohibition* should be available against the decisions of the SEC.

The SEC cannot therefore abuse its powers with impunity. Apart from being subject to executive control, it is ultimately subject to the control of the courts through judicial review proceedings. There should be no reason why a person cannot apply for a judicial review of the SEC's decisions or rules if they are considered to be illegal.

⁴⁰⁸ See, e.g., A.S.A. s. 26(1) (to the Court of Appeal); B.C.S.A. s. 149(1) (to the Court of Appeal); M.S.A. s. 30(1) (to the Court of Queen's Bench); Nfld.S.A. s. 10(1) (to the Supreme Court Trial Division); N.S.S.A. s. 26(1) (to the Trial Division); O.S.A. s. 9(1) (to the Divisional Court); Q.S.A. s. 324 (to three members of the Provincial Court); S.S.A. s. 11(1).

⁴⁰⁹ See, e.g., B.C.S.A. s. 149(2); M.S.A. s. 30(8); Nfld.S.A. s. 10(2); N.S.S.A. s. 26(2); O.S.A. s. 9(2); Q.S.A. s. 329; S.S.A. s. 11(8).

⁴¹⁰ A.S.A. s. 26(6)(c); B.C.S.A. s. 149(4); M.S.A. s. 30(6); Nfld.S.A. s. 10(5); N.S.S.A. s. 26(5); O.S.A. s. 9(5); S.S.A. s. 11(6).

⁴¹¹ See Order 43 of the various State High Court Rules (Uniform Procedure Rules); Order 53 of the Lagos State High Court Civil Procedure Rules; and in the case of the Federal High Court, the applicable rules will be determined by the terms of section 9 of the Federal High Court Act.

irrational, or tainted with procedural impropriety.⁴¹² This is particularly the case as the Supreme Court of Nigeria has admonished administrative agencies that, during the pendency of suits involving them, they should refrain from taking action that may 'ridicule the court's decision'.⁴¹³

In reviewing decisions in this area, the courts should however be sensitive to the developmental needs of the capital market, as a wide doctrine of reviewable error (which follows from an acceptance of the *Anismanic* doctrine)⁴¹⁴ could be counter productive in such markets. To this end, there should also be a greater use of remedial discretion by the courts.

In Canada, while the Securities Acts provide for appeals to the courts, the expertise and independence of the commissions result in considerable deference being shown to their decisions. The necessity for curial deference to the decisions of securities commissions was emphasised by the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)*⁴¹⁵. Here, the Supreme Court overturned a decision of the B.C. Court of Appeal and refused to interfere in the findings of the B.C. Securities Commission on two grounds. First, the B.C. Securities Commission had special knowledge and sophistication that courts do not have and second, it was "the

⁴¹² *Stitch v. Attorney-General of the Federation* (1986) 5 NWLR 1007.

⁴¹³ *Attorney-General of Anambra State v. Okajor* (1992) 2 NWLR 396 at 430.

⁴¹⁴ *Anismanic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147. See *NPA v. Panalpina* (1973) NCLR 9. *Cf Oduwole v. Famakimwa* (1990) 4 NWLR 239, 252, where the notion that all errors of law are jurisdictional was rejected.

⁴¹⁵ (1994), 4 C.C.L.S. 117 (S.C.C.) at 122-155.

Legislature's intent to confer a broad public interest mandate on the B.C. Securities Commission to carry out its role".

5.5. CONCLUSION

The enforcement mechanisms under both the Nigerian securities laws and the Canadian laws are very similar. They both provide the regulators with a wide array of powers to ensure that the various laws are properly enforced and not brought to ridicule by securities market participants. The major differences, however, in the two jurisdictions lie in the extent to which the laws are given practical effect. Other noticeable differences arise from the developmental stages of both countries.

Firstly, the Nigerian SEC like most other governmental agencies is to some extent bogged down with bureaucracy. A regulatory authority must be empowered to make decisions and give orders as quickly as possible, with minimal delay. The Canadian laws recognise this need and make specific provision for the securities commissions to generally make administrative orders on a temporary basis without a hearing. However, there is no equivalent provision in the Nigerian laws. The implication of this lacuna in Nigerian laws is that irrespective of the urgency involved in any particular case, the SEC still has to make an application to the courts before it can obtain an interim order prior to its administrative hearings.

Secondly, there is no express power given to the SEC to enable it to freeze a person's property within the jurisdiction. Although the same end can still be achieved by means of a court order, but as reiterated earlier, this procedure is beset with the attendant problems of loss of time and the possibility of a fraudulent operator dissipating the property in issue or fleeing the jurisdiction before such order is obtained, or both. To instill confidence in the markets and to ensure adequate investor protection, the powers of

the SEC should be expanded to include the power to impose adequate interim and final orders in the public interest where appropriate.

Thirdly, to ensure that the SEC does not abuse its powers and become 'above the law', there needs to be an express provision in the Nigerian laws entitling any person aggrieved with certain decisions of the SEC to appeal such decision to the courts or some other independent and specialised tribunal. The current right of appeal only lies to the Minister of Finance whose decision is the final.⁴¹⁶ Although the right of judicial review exists, but the limitation of this remedy is primarily in the fact that where the courts determine that the commission's decision was wrong, they cannot substitute their own decision for that of the commission but can only order that the matter be sent back for a re-hearing.⁴¹⁷ This invariably leads to the loss of more time in effecting corrective measures where required.

Lastly, while s. 26(a) of the *SEC Act* is commendable as it provides for a catch-all provision for criminal liability for any violation of the provisions of the Act, it is questionable whether criminal enforcement of violations of the Act is the most effective approach. The experience of many emerging countries, including Nigeria, is that there have been few if any criminal convictions for illegal practices like insider trading despite the existence of detailed insider trading prohibitions (although the practice continues to

⁴¹⁶ Section 19 of the *SEC Act*. An argument can perhaps be made that the Minister of Finance is not an impartial appellate body since his appointment is governmental and he is not totally detached from the SEC. The principles of natural justice require that an adjudicator not be a judge in his own cause (*nemo iudex in causa sua*).

⁴¹⁷ The common law rule is that a right of appeal is statutory in nature: no right of appeal exists unless it is specifically provided for in a particular statute. In contrast, the process of judicial review is conducted in accordance with the inherent jurisdiction vested in courts of superior jurisdiction to grant prerogative remedies: Gerald H. Gall, *The Canadian Legal System*, 3rd ed., (Toronto: Carswell, 1990) at 368.

occur with some frequency).⁴¹⁸ To buttress this view, the heavier burden of proof in a criminal as compared to a civil proceeding perhaps has prompted judges and juries to refrain from criminally convicting based on circumstantial evidence.⁴¹⁹ From a prosecutor's viewpoint, financial frauds like insider trading or stock manipulation are not necessarily subject to direct evidence: circumstantial evidence often remains essential for a conviction.

In the light of the above, it certainly is not suggested that the SEC should abandon criminal enforcement efforts. Rather what is being suggested here is that civil remedies should be made more available and invoked on a frequent basis. Successful enforcement actions in civil suits will encourage compliance, stimulate securities efforts in other contexts, and facilitate a consensual understanding of sanctionable behavior. Criminal enforcement in this scenario should become the "heavy club" to be swung against those deemed sufficiently blameworthy to deserve imprisonment.

⁴¹⁸ See *supra* note 366 (South Africa). Australia's experience thus far has been similar: Roman Tomasic, "Insider Trading Law Reform in Australia", (1991) 9 *Comp. & Sec. L. J.* 121.

⁴¹⁹ T.E. Bostock, "Australia's New Insider Trading Laws", (1992) 10 *Comp. & Sec. L. J.* 165.

Chapter 6

PROPOSALS FOR REFORM

6.0. INTRODUCTION

It cannot be over-emphasised that a congenial legal environment provides for and contributes to the effective development and functioning of capital markets. This is particularly important in the case of emerging markets that have to compete for a finite amount of private investment in an increasingly competitive world. They must persuade astute investors to impart capital in their respective countries rather than in seemingly countless other venues that provide greater comfort. This no doubt is an uphill task and key inducements to investors in these markets should inevitably include: the realistic lure of impressive profits, liquidity and negotiability of investment, control over one's investment, and perhaps most importantly, regulation that promotes market integrity and ethical business practices (without unduly infringing upon privacy concerns and entrepreneurial creativity).⁴²⁰

With the repeal of the *Exchange Control Act 1962*⁴²¹ and the last of the indigenisation statutes - the *Nigerian Enterprises Promotion Act 1989 (NEP Act)*,⁴²² the Nigerian government no doubt set the wheels in motion for the internationalisation of the Nigerian capital market. This obviously was a sensible policy decision as it sought to make the Nigerian investment market more accessible and attractive to foreign investors.

⁴²⁰ Pardy, "Institutional Reform in Emerging Securities Markets", in *Policy Research Working Papers, Country Economics Department, The World Bank*, WPS 907 (1992).

⁴²¹ Exchange Control (Repeal) Decree 8 of 1995.

However, certain aspects of Nigerian company and securities law may still be seen as reinforcing the perception of a restrictive investment regime. Also, the securities regulations have not quite been very effective in providing substantial comfort to investors.

There is little doubt that some reforms are needed in Nigeria. It is however outside the scope of this paper to discuss all aspects of the securities laws that need reform in Nigeria. The proposals for reform that are discussed below are based mainly on the deficiencies in the regulatory regime that have previously been identified in this study and also on some other fundamental problems in the substantive laws mitigating against the proper development of the securities industry in Nigeria.

⁴²² Nigerian Enterprises Promotion (Repeal) Decree 7 of 1995.

6.1. LIMITATIONS IN THE SUBSTANTIVE LAWS

The SEC Act still reflects the old indigenisation policy. Hence, restrictions are placed on share transfers in companies with alien membership.⁴²³ If these restrictions were in place because the *SEC Act* was enacted before the last policy reversal reflected in the *NEP Act*, it is surprising that the CAMA, which was enacted a year after the *NEP Act*, failed to reflect this reversal in policy.⁴²⁴ With the repeal of the *NEP Act*, it is time for those provisions in the SEC Act and the CAMA to be finally expunged.

Another aspect of Nigerian company law that contributes to the perception of a restrictive investment regime is the requirement that foreign companies that wish to operate in Nigeria have to be incorporated as Nigerian companies.⁴²⁵ The utility of this requirement is questionable. A company that operates in a country is not immune to its laws merely because it is incorporated elsewhere.⁴²⁶ Tax laws, industrial safety laws, pollution laws and all other laws that apply to companies do not apply to indigenous companies only. They apply to companies that do business in the country. In *Offshore International S.A. v. Federal Board of Inland Revenue*⁴²⁷ Justice Omo-Eboh of the then Federal Revenue Court held that a company incorporated in Panama, having its principal office in Texas and no place of business in Nigeria, was nevertheless liable to Nigerian

⁴²³ Section 7(1) of the *SEC Act* 1988.

⁴²⁴ *E.g.*, the appraisal rights of dissenting members (in a company having foreigners) on a reconstruction through voluntary liquidation are not dependent on valuation by agreement. Quite the contrary, the SEC does the valuation: s. 538(4) of the CAMA.

⁴²⁵ Section 54 of the CAMA.

⁴²⁶ *Newby v. Van Oppen and Colt's Patent Firearms Manufactory Co.*, (1872) L.R. t Q.B. 293.

⁴²⁷ (1976) 1 N.T.C. 385.

company tax in respect of income received in the United States in US dollars from a contract to drill oil wells in Nigeria. The basis of this decision was that, since the plaintiff had entered into contracts to carry out an activity in Nigeria, it was engaged in trade or business in Nigeria.

Apart from the taxation point, it is also important to bear in mind that a company is subject to the jurisdiction of Nigerian courts not because of incorporation in Nigeria but by virtue of the fact that it is present within the jurisdiction of the court. Under the common law the basis of jurisdiction of the courts is presence, and doing business in a place is equivalent to presence.⁴²⁸

The re-incorporation requirement was adopted in Nigeria in 1968 (when the Companies Decree was promulgated) when newly independent countries viewed the assertion of sovereignty as a matter of great importance. Hence there was a symbolic value to the re-incorporation in the host State. In 1990, a year after the enactment of the *NEP Act*, the CAMA was enacted. The requirement of re-incorporation was left intact, even though, as observed earlier, foreign companies doing business in Nigeria are not controlled by the State by virtue of being incorporated in Nigeria.

⁴²⁸ *Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag*, (1914) 1 K.B. 715.

6.2. REGULATORY REFORM

6.2(a) INSTITUTIONAL REFORM

The institutional framework for securities regulation in Nigeria as presently constituted needs limited reform. The SEC remains the apex regulatory body in the Nigerian capital market and oversees the other institutions and operators in the market. However, the independence and accountability of the SEC are matters of concern. According to IOSCO, the independence of securities regulators is enhanced by a stable source of funding. Also, the IFC recommends that securities commissions operate independently from the Ministry of Finance. In Nigeria, the President of the country appoints the chairman of the SEC and five other members are appointed by the National Council of Ministers on the recommendation of the Minister of Finance.⁴²⁹ Further, the SEC is accountable to the Ministry of Finance, which must also approve its budget. Thus with the SEC's funding controlled by the government, it is questionable if its independence can be reflected in practice.

Also, the legal structure of the NSE, which remains the principal SRO in the Nigerian capital market, is unclear. While the NSE is contractually a club that operates a market and with powers to regulate its members, the Nigerian Government has always had an interest in it. This is reflected in the fact that the government was one of its promoters and also that an Act of Parliament bearing its name was enacted.⁴³⁰ This governmental interest has contributed in no small way in obscuring the role of the NSE as

⁴²⁹ S. 2, *SEC Act*.

⁴³⁰ The *Lagos Stock Exchange Act*, 1961.

an SRO and its subjection to the SEC. Some operators therefore view the NSE as a governmental institution and thus equate its status to that of the SEC.⁴³¹

To resolve the existing confusion above, it is time for the repeal of the *Lagos Stock Exchange Act, 1961*. This statute has been superseded by the *SEC Act* and is irrelevant to the present structure, law, institutions and overall framework of the capital market.

Further, it is generally the practice in most developed securities markets for members of the industry to regulate themselves. In Canada for instance, the regulation of market operators is principally carried out by the various stock exchanges in conjunction with the Investment Dealers Association. Also, the Mutual Funds Dealers Association is set to commence operations as a SRO for mutual funds dealers soon.

In Nigeria, despite the recommendation of the Okigbo Report on the Financial System in 1976 that the securities dealers and brokers should set up a National Association of Securities Dealers and also the provision in S. 12(4) of the *SEC Act* which expressly empowers the SEC to register such a body, this body is yet to be formed. It is recommended that such a body be established and registered by SEC as a SRO to take over from the NSE the function of registering security analysts and stockbrokers. This will be in line with the recommendations of IOSCO, which stresses the need for the appropriate balance to be maintained between self-regulation and governmental regulation, particularly in emerging markets.

⁴³¹ This confusion was responsible for *Securities and Exchange Commission v. The Nigeria Stock Exchange*, Suit No. FHC/CS/1066/94, discussed *supra* in Chapter 3.

(b) INVESTOR PROTECTION

To ensure adequate protection of investors in the Nigerian capital market, the disclosure requirements have to be kept in line with the trends in more developed markets and internationally. While the present laws in Nigeria are extensive, there however needs to be in place a proper regime of continuous disclosure to support secondary market trading to ensure the protection of shareholders. This is particularly necessary as Nigerian shareholders are widely dispersed and generally have small shareholdings. Presently, the management of companies exercises extensive influence and control over the companies to the exclusion of the shareholders.⁴³²

Also, the Nigerian laws could be amended in line with the Allen Report in Canada to adopt a "strict liability" model in instances of misleading disclosure which serves to provide a remedy by which injured investors can seek partial compensation for disclosure violations. This model would encourage small investors to bring class actions suits by making such suits more accessible in Nigeria.

Further, as regards tender offers, target directors still have considerable scope for resisting tender offers in Nigeria. Directors remain in a potential conflict of interest position when dealing with takeover bids and selfish directors can misuse the power given to them by S. 279(3) of CAMA for their own end without regard to the best interests of the investors/company. At present, the law consigns to them a mainly advisory function and all the directors need to resist lawfully any such takeover bids is to

⁴³² In the absence of adequate statutory provisions to protect shareholders from management powers and influence, one interesting phenomenon that has arisen in Nigeria has been the Nigerian Shareholders Solidarity Association and its role in monitoring management. This association has played a leading role by making its presence felt during general meetings of companies and has acted as a restraining influence on directors: "Shareholders give firms' directors ultimatum on AGM", *Business Times*, 14 August 1995, at 30.

show a conflict over corporate policy between the bidder and the target. This obviously is not an insuperable task as this is usually the reason for the takeover bid in the first place.

Consequently, it is recommended that any defensive actions should, wherever possible, be put to the shareholders for approval. The law should provide that any defensive tactics that result in shareholders being deprived of the ability to respond to a takeover bid or to a competing bid are unlawful. As reiterated in the *Canadian Producers Pipelines Inc. case*.⁴³³

“Since the shareholders have the right to decide to whom and at what price they will sell their shares, defensive action must interfere as little as possible with that right. Accordingly, any defensive action should be put to the shareholders for approval where possible, or for subsequent ratification if not possible”.⁴³⁴

(c) ENFORCEMENT MECHANISMS

Laws that are not enforced are as good as an absence of laws. The Nigerian securities laws are very detailed and to a large extent comprehensive as they were substantially copied from the United States and the United Kingdom securities laws.

That the enforcement mechanisms of the Nigerian securities laws are wanting is confirmed by the paucity of cases that have been decided by the courts or the SEC to reach a conclusion as to the need for reform in the enforcement of securities violations in Nigeria.

⁴³³ (1991) 4 W.W.R. 577.

⁴³⁴ *Ibid.*, at p. 595. This is in line with the Canadian position as provided for in National Policy # 38 (now known as National Instrument 62-202).

The SEC remains the principal administrative body responsible for investigating and prosecuting violations of the securities legislation. However, like all governmental agencies, the SEC is to some extent bogged with bureaucracy. There needs to be a provision in the Nigerian laws which empowers the SEC to make decisions on urgent matters on an interim basis before completing investigations where appropriate. The current position is that irrespective of how urgent a matter is, the SEC still has to make applications before the courts for interim remedies. Also, the powers of the SEC should be extended to allow it to freeze the assets of defaulters where appropriate both before and after a hearing.

Further, the Nigerian laws should be amended to expressly provide for the right of appeal of administrative decisions of the SEC to the courts or at the very least to an independent body or tribunal where appropriate. Currently, an appeal only lies to the Minister of Finance whose decision is final. This does not provide for a fair and impartial disposition of disputes, as the Minister of Finance cannot be an impartial umpire. The minister is connected with the SEC and is also a governmental appointee.

BIBLIOGRAPHY

- G. Anderson and R. Tollison. "Adam Smith's Analysis of Joint-Stock Companies"(1982) *Journal of Political Economy*.
- J. O. Anifalaje. "Constitutional Impediments to the Progress of the Nigerian Commercial Law and the Economy". Omotola and Adeogun eds., *Law and Development* (Lagos: University of Lagos Press. 1987).
- A. Anand, D. Johnston and G. Peterson. *Securities Regulation: Cases, Notes and Materials* (Toronto: Butterworths Canada Ltd., 1999).
- S. Banner. *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (Cambridge University Press. 1998).
- L. Bear and R. Maldonado-Bear. *Free Markets, Finance, Ethics and Law* (New York: Prentice Hall. 1994).
- J. Behrman. *Essays in Business and the Professions* (New Jersey: Prentice Hall. 1988).
- P. Bernstein. *Capital Ideas: The Improbable Origins of Modern Wall Street* (New York: Macmillan. 1992).
- F.C. Beveridge. "Taking Control of Foreign Investment: A Case Study of Indeginisation in Nigeria" (1991). 40 *International and Comparative Law Quarterly* 302.
- S. Bok. *LYING: Moral Choice in Public and Private Life* (New York: Pantheon Books. 1978).
- S. Brittan and A. Hamlin, eds., *Market Capitalism and Moral Values* (London: Edward Elgar. 1995).
- S. Brydges. *Human Fate* (Great Totham: Charles Clark. 1846).
- J.A. Burke. "The Estonian Securities Market Act: A Lesson for Former Republics of the Soviet Union". (1990) 27 *Vand. J. Transnational Law* 545.
- Canadian Business Corporation Act*. 1985, C-44.
- R. A. Clark. "African Securities Markets: A Study in the Development of Africa's Emerging Securities Markets" (1996). 6(1) *Journal of International Financial Markets, Institutions & Money*.
- Companies and Allied Matters Act*. 1990 (Federal Republic of Nigeria. Official Gazette No. 2 Vol. 77).

Constitution Act, 1867 (U.K., 30 & 31 Victoria, c.3.).

Constitution of the Federal Republic of Nigeria, 1979.

Constitution of the Federal Republic of Nigeria, 1989.

M. Fadiman. *Market Shock: More than Fifty Insiders Tell How to Survive and Profit from Today's Global Financial Revolution* (New York: John Wiley and Sons, Inc., 1994).

Financial Times. "Heat turned on Self-Regulation". 28 July 1995.

G. Gall. *The Canadian Legal System*, 3rd ed.. (Toronto: Carswell, 1990).

A. Gart. *Regulation, Deregulation and Reregulation: the Future of the Banking, Insurance and Securities industries*. (New York: John Wiley and Sons, Inc., 1994).

F. Gill. *Securities Law Administration, Litigation, and Enforcement* (Section of Business Law, American Bar Association 1997).

M. Gillen. *Securities Regulation in Canada*. (Ontario: Carswell, 1992).

J. Hatch and M. Robinson. *Investment Management in Canada*, 2nd ed.. (Scarborough, Ontario: Prentice-Hall Canada Inc., 1989).

C. Henning, et al., *Financial Markets and the Economy*, 5th ed. (New Jersey: Simon & Schuster, 1988).

W. Hoffman, J. Kamm, R. Frederick and E. Petry Jr., *Emerging Global Business Ethics* (Westport, Connecticut: Quorum books, 1994).

P.E. Hogg. *Constitutional Law of Canada* (Toronto: Carswell, Thomson Professional Publishing, 1992).

International Finance Corporation, Yearly Indexes on Emerging Stock Markets.

International Finance Corporation, Emerging Stock Markets Factbook, 1997, 1998 and 1999.

L. Johnson and B. Pazderka. *The Economic and Social Benefits of Stock Markets: Its No Gamble*. (Toronto: The Fraser Institute, 1996).

D. Johnston. *Canadian Securities Regulation*. (Toronto: Butterworths, 1977).

- D. Johnston and K.D. Rockwell. *Canadian Securities Regulation*. 2nd ed. (Toronto and Vancouver: Butterworths. 1998).
- Kirkpatrick & Lockhart LLP. *The Securities Enforcement Manual: Tactics and Strategies*. (Section of Business Law. American Bar Association 1997).
- D. Konig. *Law and Society in Puritan Massachusetts* (Chapel Hill: University of North Carolina. 1979).
- E. Kwaw. *The Law of Corporate Finance in Canada* (Toronto: Butterworths. 1997).
- Lagos Stock Exchange Act*. Cap 200. Laws of the Federation of Nigeria. 1958.
- J. Lasser and J. Gerald. *Federal Securities Act Procedure* (New York: McGraw-Hill Book Co., 1934).
- R. Lippke. *Radical Business Ethics* (Maryland: Rowman & Littlefield. Inc., 1995).
- L. Loss. *Securities Regulation*. 2nd ed. (Boston: Little. Brown & Co., 1961).
- L. Loss. *Securities Regulation*. 6 volumes 3rd ed. and supplement (Boston: Little. Brown & Co., 1969).
- L. Loss and J. Siegelman. *Fundamentals of Securities Regulation*. 3rd ed. (Boston: Little. Brown & Co., 1995).
- A. MacMillan. *An Introduction to Canadian Financial Markets: An Analytical Approach*. (Scarborough. Ontario: Prentice Hall. 1989).
- G. Mairzadeh. "Self-regulation of investment companies and advisers: a proven solution to a contemporary problem". (1997) 16 *Annual Review of Banking Law* 451-516.
- H. Manne. *Insider Trading and the Stock Market* (New York: Free Press. 1966).
- M. Miller. *Financial Innovations and Market Volatility*. (Cambridge. Massachusetts: Blackwell Inc., 1991).
- S. Miller. "Self-Regulatory organisations and the securities industry. Does membership have its privileges?" (1991) 19 *Securities Regulation Journal* 3-18.
- J. Moore. "What is Really Unethical about Insider Trading". (1990) *Journal of Business Ethics* 9.
- E.P. Neufeld. *The Financial System of Canada* (Toronto: MacMillan. 1972).

NSE Publications. *Listing Requirements: Rules Governing Listing on The Nigerian Stock Exchange*.

O. Obayomi. "Recent developments in securities laws in Nigeria". (1996) 11 *Journal of International Banking Law*. 128-132.

T. Ogowewo. "The shift to the classical theory of foreign investment: opening up the Nigerian market". (1995) 44 *The International and Comparative Law Quarterly*. 915-926.

T. Ogowewo. "Transposition of securities legislation to an emerging market: the case of U.S. Federal securities law and Nigeria". (1996) 11 *Journal of International Banking Law*. 239-249.

T. Ogowewo. "The Role of Target Management in a Tender Offer: The Position in Nigerian Law". (1996) 40 *J.A.L.* No. 1.

T. Ogowewo. "Regulatory Conflicts in an Emerging Capital Market". (June 1997) *International Business Lawyer* 271-275.

Otiti. "Setting the Price/Allotment Pattern" 5 *Securities Market Journal* 10.

A. Peters and A. Feldman. "The changing structure of the securities markets and the securities industry: implication for international securities regulation". (1988) 9 *Michigan Yearbook of International Legal Studies* 19-52.

P.N. Pillai. "Securities Regulation in Malaysia: Emerging Norms of Governmental Regulation" (1986) 8 *Journal of Comparative Business and Capital Market Law* 39.

N. Poser. *International Securities Regulation* (Little, Brown and Company, 1991).

M. Price. *Emerging Stock Markets: A Complete Guide to New Markets around the World* (New York: McGraw-Hill, Inc., 1994).

S. Rao and J. Hamilton III. "The Effect of Published Reports of Unethical Conduct on Stock Prices". (1996) *Journal of Business Ethics* 15.

Report of the Attorney General's Committee on Securities Legislation in Ontario (The Kimber Report) (Toronto: Queen's Printer, March 1965).

Report of the Canadian Joint Securities Industry Committee on Conflicts of Interest. September 1997.

Report of the Committee established to develop an Exchange Offering Prospectus Process for Manitoba. June 26, 1997.

H. Scott and P. Wellons. "Emerging Markets: Privatization and Institutional Investors". in *International Finance: Transactions, Policy and Regulation*. 1000-1004.

Securities and Exchange Commission Act. Cap 406 Laws of the Federation of Nigeria. 1988.

Securities and Exchange Commission Regulations. Cap 406 Laws of the Federation of Nigeria. 1988.

Securities and Exchange Commission. "Code of Conduct for Capital Market Operators and their Employees".

Securities and Exchange Commission. "Guidelines on Administrative Proceedings: Mergers, Acquisitions and Combinations: Prospectuses: Registrations: Underwriters & Underwriting Agreements".

Securities and Exchange Commission. "Report and Accounts for the year ended 31st December 1997".

Securities and Exchange Commission Quarterly. Vol.12. No. 4. (December 1995).

D. Shaw and R. Archibald. *The Management of Change in the Canadian Securities Industry: A Study of the Canadian Securities Industry by the Toronto Stock Exchange and Undertaken by the University of Western Ontario School of Business Administration*. Study One. 1973.

L. Silk and D. Fogel. *Ethics and Profits: The Crisis of Confidence in American Business*. (New York: Simon and Schuster. 1976).

F. Skousen. *An Introduction to the SEC*. 5th ed. (Cincinnati, Ohio: South-Western Publishing Co., 1991).

A. Smith. *Lectures on Jurisprudence*. ed. R.L. Meek. D.D. Raphael, and P.G. Stein (Oxford: Clarendon Press. 1978).

A. Smith. *An Inquiry into the Nature and Causes of the Wealth of Nations*. ed. R.H. Campbell and A.S. Skinner (Oxford: Clarendon Press. 1976).

R. Smith and I. Walter. *Street Smarts: Linking Professional Conduct with Shareholder Value in the Securities Industry* (Boston, Massachusetts: Harvard Business School Press. 1997).

E. Sternberg. "Business in the Moral Haze". *Financial Times*. 28 July 1995.

- E. Steinberg. *Just Business: Ethics in Action*. (Boston: Little, Brown, 1994).
- M. Steinberg. "Emerging Capital Markets: Proposals and Recommendations for Implementation". (1996) 30 *The International Lawyer*, n. 4. 715-738.
- M. Steinberg and R. Ferrera. *Securities Practice: Federal and State Enforcement* (1985 & 1995 supp.).
- B. Sudweeks. *Equity Market Development in Developing Countries*. (New York: Praeger, 1989).
- The Canadian Securities Course Textbooks and Workbook*. 1998.
- D. Thompson. *Greed: Investment Fraud in Canada and around the Globe*. (Toronto, Ontario: Penguin Group, 1997).
- Trustee Investments Act*, Cap 449. Laws of the Federation of Nigeria. 1958.
- G. Walker and B. Fisse. *Securities Regulation in Australia and New Zealand*. (Oxford: Oxford University Press, 1994).
- Wall Street Journal*. "Disputes Arise over the Value of Insider Trading" (17 Nov. 1986).
- R. Whitaker. *Federalism and Democratic Theory* (Kingston, Ontario: Institute of International Governmental Relations, Queen's University, 1983).
- O. Williams, F. Reilly and J. Houck. *Ethics and the Investment Industry* (Maryland: Rowman & Littlefield, Inc., 1995).
- J.P. Williamson. *Securities Regulation in Canada* (Toronto: University of Toronto Press, 1960).
- F. Van Zyl. "South Africa: Insider Trading Regulation and Enforcement". (1994) 15*C. Law* No. 3.