How Secure Are Securities?

by

Professor Olayiwola Owoade Oladele

LL.B (Hons.), LL.M (Ife), LL.M (Georgetown), Ph.D (Ife), Barrister of the Supreme Court of Nigeria, Professor of Business Law and Provost, College of Law

Wednesday, 16th February, 2011
I. INTRODUCTION

Mr. Vice-Chancellor, Sir, on this occasion of the second in the series of the inaugural lectures of Osun State University, I stand before you to ask and proffer an answer that will provoke answers to the question: How secure are securities? I stand to situate the economic in the grammatical, and both within the legal. If grammatically, “secure” means “safe and sound”, what then determines the intrinsic and extrinsic nature as well value of the delicate merchandise called “securities” in the annals of financial regulation?

Human quest for profitability and postponement of consumption has found expression in the merchandise we know as securities. The latter have no inherent value of their own, but they entitle their owners to make claims upon the assets and earnings of the issuer. When investors subscribe to or buy them, they primarily project their anticipation of profitable earnings on the expectation that the issuer’s business will be profitable. In addition, they expect that public listing of the securities will enable them to trade at a profit in the securities market. In this simple calculus, “buy, hold and dispose at a profit in the future” would fulfil the expectation of the securities holders, all other things being equal. But all other things might not be equal. The securities’ issuer might have traded at a loss. With securities quoted on the stock exchange, there could have been manipulation of the regulatory system, the market or prices of securities, cutting short the expectation of the investors.
Trade in securities listed on the securities market or stock exchange involve a compulsory intermediation of market professionals, including broker-dealers, who do not live in a state of ‘detached altruism’ but operate in the realm of enlightened self-interest. They trade, not only for customers/investors’ account, but for their own account. In this setting, the value and security of investors’ stake or securities depends not only on the soundness of their initial investment judgment but also on other people’s choices that drive the forces of demand and supply. Market professionals could manipulate prices and engage in other market rigging transactions. Corporate insiders could trade on the basis of confidential price-sensitive information. Investors themselves could be driven by fad to invest in unprofitable securities. These choices also make securities secure or insecure.

The fortunes of securities obviously begin with the investors’ choice but are processed by the issuer through market institutions and professionals as well as economic forces. Empirical studies have established that these forces are susceptible to manipulation by the sharp and knowledgeable market participants to the loss of the genuine investors. Such a manipulation has grave consequences that make securities insecure. From the Great Depression and the market collapse of the United States in October 1929 to the meltdown by a third in value of substantial listed Nigerian shares in 2008, there has been a battle between securities and insecurity. The hydra-headed abuses that take security out securities and led to the Great Depression were summed up by the United States House of Representatives as follows:
During the post-war decade some 50 billion of new securities were floated in the United States. Fully half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless. These cold figures spell tragedy in the lives of thousands of individuals who invested their life savings, accumulated after years of effort, in these worthless securities. The floatation of such a mass of essentially fraudulent securities was made possible because of the complete abandonment by many underwriters and dealers in securities of those standards of fair, honest, and prudent dealing that should be basis to the encouragement of investment in any enterprise.

Alluring promises of easy wealth were freely made with little or no attempt to bring to the investor’s attention those facts essential to estimating the worth of any security. High pressure salesmanship rather than careful counsel was the rule in this most dangerous enterprise.¹

In the last decade, diverse abuses recurred, resulting in the collapse of giant corporations and disappearance of savings in the United States and Europe as well as melting down the values of securities in Nigeria to a life and future threatening extent. This lecture reflects on my involvement in the quest for securing securities through regulatory and institution means in my intellectual engagement through the past twenty-five years.

II.  THE LEGAL MEANING OF SECURITIES AND ITS IMPLICATION

In the scheme of investors’ protection the legal meaning of ‘securities’ is important because not all that appear to be securities are so. However, when they are adjudged to be securities, they attract vast registration obligation under the applicable statute. In Nigeria, the principal statute on securities is the Investments and Securities Act, 2007 (“ISA”).\(^2\) The ISA defines securities as –

(a) debentures, stocks or bonds issued or proposed to be issued by a government;

(b) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate;

(c) any right or option in respect of any such debentures, stocks, shares, bonds or notes; or

(d) Commodities futures, contracts, options and other derivatives, and the term securities in this Act includes those securities in the category of the securities listed in (a)-(b) above which may be transferred by means of any electronic mode approved by the [Securities and Exchange Commission] and which may be deposited, kept or stored

---

\(^2\) ISA, 2007
with any licensed depository or custodian company as provided under this Act.³

The United States federal Securities Acts define securities to include stock, bonds, debentures, notes and transferable shares, all of which clearly are financial instruments, and evidences of indebtedness, investment contracts as well as certificates of interest in profit-sharing agreement of a generic nature.⁴

It is interesting to note however that even to a mind schooled in the learned engagement of lawyering, the word ‘securities’ could still defy understanding. Thus, in The legal meaning of securities and the implication of securities registration,⁵ I appraised judicial interpretations of the word ‘securities’. That appraisal, which was transatlantic because of paucity of Nigerian cases on the subject, revealed that despite the seemingly self-explanatory definitions in the statutes, it is not always clear what securities are. Among other things, these decisions have held that not all instruments described as ‘stock’ are securities.

³ S. 313, id.
⁴ Securities Act of 1933 (hereinafter referred to as Securities Act) s.2 (1), and Securities Exchange Act of 1934 (hereinafter referred to as Exchange Act) s.3 (a) 10.
In *United Housing Foundation v. Forman* the United States Supreme Court held that “economic reality” is central to the definition of securities. In that case, a cooperative housing corporation required the residents of its housing units to buy “shares” in the corporation so as to secure housing. No matter the number of shares they held, the residents were entitled to one vote each in the cooperative. The corporation treated the shares as a refundable deposit so that the shares were non-negotiable. Whenever a member left the cooperative, he was obligated to sell his shares to the corporation at the original price. The court held that the cooperative’s “stock” were not securities. Therefore the members could not successfully sue the corporation under Rule 10b-5 of the Securities Act for fraudulent rent increase. The court remarked that the shares did not have any of the characteristics of a stock investment. It added that the members were not entitled to dividends contingent on profits; the voting rights were not proportionate to the number of shares that the members held; the shares were not negotiable; and the shares could not appreciate in value.

Probing a dynamic equivalent, are the shares of a typical cooperative and thrift society in Nigeria securities? To my legally trained mind, they are not. Its shareholder is entitled to dividends contingent on profits and the voting rights of the members may be proportionate to the number of the shares they hold, but the shares are not negotiable or fungible and they may not appreciate in value.

---

In the case of *Reves v. Ernst & Young*\(^7\) the United States Supreme Court held that the demand notes that the Farmer’s Cooperative of Arkansas and Oklahoma issued are ‘securities’ within the meaning of section 3(a)(10) of the Securities Exchange Act of 1934. To reach that decision, the court applied four tests. First, it examined the factor that motivated “a reasonable seller and buyer” to enter into the transaction. It found that the seller intended to raise money to finance a business enterprise, and the buyer intended to realize profit from her purchase. Second, it examined the distribution plan and found “common trading for speculation or investment.”\(^8\) Third, it considered the reasonable expectation of the investing public, and fourth, the absence of another regulatory scheme that reduced the risk of the instrument and negated the application of the Securities Acts.

This lecture limits “securities” to all the types defined by section 315 of the ISA except debentures, stocks and bonds issued or proposed to be issued by a government. Government securities as relatively secure because they are backed by the full faith and credit of the government. They are not objects of speculation, but the value of their earnings are curtailed by inflation. They are suitable for the risk-averse investors, but their earnings are low, compared with the potential income from equities or common stock.

---

\(^7\) 494 U.S. 56 (1990).

\(^8\) *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943).
It is significant that in Nigeria at the time of this lecture, derivatives such as option, put and futures are still largely at conceptual stage. There will be fresh interpretational problems by the time these and other derivatives are widely traded on our securities market.

III. THE IMPLICATION OF SECURITIES

Once a financial product is classified as security, some legal consequences follow: First, it must be registered before the issuer offers it to the public. Second, mandatory disclosure attaches to the sale and trading of the instrument (unless the security is exempted, for example, government securities). Third, stringent anti-fraud rules apply that are more favourable to the plaintiff that the common law rules on fraud. Fourth, the intermediaries that handle transactions in it are subject to continuous regulatory oversight of the SEC.

---

9 An ‘option’ is “the right, but not [an] obligation, to buy or sell a specific amount of a given stock, commodity, currency, index, or debt, at a specified price during a specified period of time” – Bakare, Remilekun, *The financial market glossary*, 2nd ed., Lagos, Remilekun Bakare, 2004, p.159.

10 A ‘put’ is “an option contract that gives the holder the right to sell a certain quantity of an underlying security to the writer of the option, at a specified price up to a specified date.” – Bakare, Remilekun, *ibid.* at p.176.

11 Futures contract is an “agreement to buy or sell a given amount of a commodity or financial instrument at a specified price in a specified future month [whereby] the seller of a futures contract agrees to deliver the item to the buyer of the contract, who agrees to purchase the item” – Bakare, Remilekun, *ibid.*, at p.100.

In *The legal meaning of securities and the implication of securities registration*\textsuperscript{13} appraised registration as a statutory means by which regulators protect corporate investors.\textsuperscript{14} The registration enables the Securities and Exchange Commission (“SEC”), the apex regulatory authority for the securities market, to certify the securities as fit for investment. Through the process, the SEC appraises the price-worthiness of the securities and subjects them to the disclosure requirements of securities statutes.\textsuperscript{15} The ISA requires all public companies

---

\textsuperscript{13} *Op. cit.*

\textsuperscript{14} *Ibid.* at 77, 82-89.

\textsuperscript{15} While ISA 2007 regulates securities dealings in Nigeria, the Securities Act of 1933 (15 U.S.C. S. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. S. 78a et seq.) and the Sarbanes-Oxley Act of 2002 are the principal federal statutes that regulate the United States’ securities market. These statutes in their respective jurisdictions confer on the SEC of the relevant jurisdiction rule making powers. Pursuant to section 313(1) of the ISA, the Nigerian SEC has made extensive rules on securities and the Nigerian securities market. The United States Securities Act has its own *General Rules and Regulations* (17 CFR 230___) while the Securities Exchange Act of 1934 has *Rules and Regulations under the Securities Exchange Act of 1934* (17 CFR 240__). In the same jurisdiction, the Sarbanes-Oxley act that came into force on July 30, 2002 in response to the Enron and similar giant corporations collapses seeks to re-establish investors’ confidence in the American securities market. In section 3(a), the Act gives the American SEC the general authority to adopt implementing and clarifying “rules and regulations as may be necessary for appropriate in the public interest or for the protection of investors, and in furtherance of the Act. The American statutes and rules are as elaborate and complex as the market, and their interpretation provide a guide for the understanding of the Nigerian statute and rules that have not been subjected to much judicial interpretation.
offering securities and investments for sale to the public to register them with the SEC under the terms and conditions contained in the Act as may be supplemented by regulations prescribed by the SEC from time to time.\textsuperscript{16} The registration statement to be filed with the SEC shall be signed by each issuer, its chief executive officer(s), its principal financial officer and every person named in its official documents as a member of its board of directors, or, if the issuer is a foreign person, by its duly authorized representative.\textsuperscript{17} The SEC determines the documents and information to be provided by the issuer, an issuing house, stockbroker or any other person that it authorizes to offer to the public securities for sale or subscription.\textsuperscript{18} The documentation enables the SEC to make available to investors full and fair disclosure of information that is material to public distribution of securities.

In \textit{Information equalisation and candour in public offers of securities in Nigeria},\textsuperscript{19} my appraisal of the information that the SEC requires of issuers revealed that it is both industry specific and general. The general information include a clear description of the issuer’s business, property and management, the rights and privileges of the securities being offered, as well as the current capital structure of the issuer company. The registration documentation must also include extensive certified financial statements as well as record of

\textsuperscript{16} Section 54(1).
\textsuperscript{17} Section 54(2).
\textsuperscript{18} Section 55(2)
earnings for a number of specified years. The issuer’s management must include its analysis and review of the business capital needs and financial health. The issuer’s underwriters, officers and other experts (accountants, solicitors, etc) must exercise due care and honesty in preparing the registration documents so as to avoid liability for omissions and misstatements.

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

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

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

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

For effective investor protection, the ISA prohibits the issue, transfer, sale or offer for subscription or sale of securities without prior registration. Consequently, any person that violates the prohibition commits an offence and is liable on conviction to a fine of ₦1,000,000 or to a term of imprisonment for 3 years or to both such a fine and imprisonment. The SEC may, in lieu of a prosecution, impose a penalty of ₦1,000,000 and a further sum of ₦5,000 for every day during which the violation continues.


21 Section 54(6), id.

22 Section 54(7).
While the ISA as well as the *Rules and Regulations*\(^{23}\) made pursuant to it are strict on registration of securities, evidence abound that abuse of procedure, especially by knowledgeable and highly placed insiders of the securities market could negate the purpose and intent of regulation and regulators. In the course of my research on *Securities information disclosure and legal protection of investors in Nigeria*\(^{24}\) on December 14, 2006, I unearthed such an abuse of gross proportion during an unstructured interview that I conducted at the SEC. I gathered confidentially that a prominent public limited company, conceived by its promoters to be a Nigerian mega corporation, violated and abused the rules and procedure for private placement of securities. The rules and procedure require every company proposing to privately place its securities with select to first submit its placement memorandum to the SEC for vetting and approval. That vetting allows the SEC to verify the basis for the facts and figures in the memorandum. Without filing the memorandum with the SEC, the company unilaterally fixed the price of its shares and privately placed the shares with a select group of investors. It subsequently processed its shares through the SEC for initial public offer (“IPO”) and public listing on the Nigerian Stock Exchange in January 2007. The company based the IPO price per unit of the shares on its unilateral pricing of the shares at the private placement stage. The IPO price was

\(^{23}\) Securities and Exchange Commission, *Rules and Regulations made pursuant to the Investments and Securities Act, 1999.*

about 90 per cent higher. At the IPO, the select investors who were corporate insiders unbundled their holding on the unsuspecting public at a huge profit, even when the company had not had a sound footing in business. Sadly, within twenty-four months of the IPO, the value of the shares fell by 75 per cent on the stock exchange. It was significant that the then Director-General of the Nigerian Stock Exchange, the lead self regulatory organisation in Nigeria securities market was also the Chairman of the Nigerian ‘mega corporation’ at the material time. Her being the chief regulator of Nigeria’s most prominent self-regulatory organisation who had descended into the arena of the regulated situated her in a conflict of interests’ position. In her position, the will to enforce securities regulation was easily weakened if not totally lost. It is also significant that up till the time of this lecture, no regulator has penalised the wrongful conduct. If the regulators had penalised the issuer, it should not have had such a quick access to the securities market so as to devalue the funds that the public invested in it. Today, the shares of that public limited company are hardly worth the paper on which they are written.

For the protection of investors and in the interest of the public, the SEC could exercise its power under section 36 of the ISA to suspend or prohibit further trading in securities for violation of statutory provisions. It then should notify the securities exchange, capital trade point or self regulatory organisation of the prohibition which may last for between 14 and thirty days at a time. A violation of the prohibition attracts a penalty of N1,000,000 and a further fine of N50,000 for every day during which the contravention continues. The
SEC could, after the second period of prohibition, revoke the registration with it of either or both the issuer (body corporate) and securities exchange, capital trade point or other self-regulatory organisation. It may also apply to the Federal High Court under the Companies and Allied Matters Act for the winding up or receivership of the issuer company and the securities exchange, capital trade point or other self regulatory organisation. SEC’s action in this wise puts the security or insecurity of the securities out of the hands of the investors and into the hands of the issuer and the securities market authorities. This is because suspension locks in the value of the securities and deprives the holders of the power to utilise the value.

25 ISA, section 36(4). In *Re Securities and Exchange Commission, Owena Bank (Nig.) Plc. v. Nigerian Stock Exchange* (1999) S.E.C. Law Report 1, a case decided on a similar provision under the repealed 1989 Securities and Exchange Act, Cap 406, Laws of the Federation of Nigeria 1990, the Supreme Court of Nigeria interpreted the power of SEC to suspend or revoke securities registration. Dominion Trust Limited had lodged a complaint with the SEC that Owena Bank (Nig.) Plc. failed to honour the transfer of 23.7 million shares of its shares that Dominion Trust transacted on the floor of the Nigerian Stock Exchange. The Supreme Court held that the SEC had the power to suspend the registration of any person’s security for a period of twelve calendar months and no more. In the alternative, it could, with the approval of the Minister of Finance, revoke the registration of such securities if there are compelling reasons under its enabling Act. It is significant that the drafters of the current legislation reduced the suspension period at a time to 14 to 30 days. They believed that the once and for all period of 30 days was inimical to the investors that the law seeks to protect because the former law would have locked in the value of their securities for one year, thereby depriving them of getting value for their money.
IV. INEQUALITY OF SECURITIES INFORMATION AND ITS NEGATIVE IMPACT OF INSECURITY

In "The bases of securities information disclosure",26 I evaluated the capacity and effectiveness of the existing regulatory system to sustain market integrity and investor protection in Nigeria through information disclosure and compliance enforcement in the light of theoretical underpinnings. My study revealed that despite the regulatory and institutional effort to make information available to investors, there usually is inequality of information between securities issuers and investors. This phenomenon known as informational asymmetry is greater in the relationship between retail investors without expertise in finance on one side and issuers and securities market professionals on the other side. Even finance experts investing in securities could suffer the diluting adverse effect of informational asymmetry in the hands of corporate insiders who abuse non-public price-sensitive information in insider securities trade.

Louis Loss,27 who introduced the term “securities regulation” when he adopted it as the title of the first edition of his treatise on the subject,28 considered the protection of investors as an important objective of securities regulation. This is because a system of “private capital” is unimaginable without the instrumentality of securities whose “very nature makes them a ready device for preying on the unsophisticated

26 Oladele, O.O., “The bases of securities information disclosure” (2010) ISLJ 49-66
27 Loss, L. Trends in corporate governance and investor protection, op cit.
and the gullible. This creates the general problems of fraud, share-pushing (to use a British term), and market manipulation.”29 From these, there arise the problems of keeping numerous shareholders informed, giving them a “corporate franchise that is as effective as their political franchise” and protecting them “...against the selfish use of inside information by their corporate representatives or by persons in control of their companies.”30

Securities statutes seek to achieve the objective of investor protection through the philosophies of regulation and disclosure.31 The philosophy of regulation is a “statutory formulation of substantive standards that must be satisfied before securities may be offered for sale.” These standards, among other things, not only seek to prevent illegality and fraud, but they also seek to ensure that the privilege of offering securities to the public is based upon the regulator’s finding that the proposed business plan is ‘fair, just and equitable’.32 The philosophy of disclosure had its origin in the prospectus provisions of the English Companies Act of 1844.

29 Loss, L. op. cit., p.33.
30 Ibid., p.34.
31 Ibid., p. 36.
32 Ibid. This is what Loss describes as “the home-grown regulatory or merit philosophy of most of the blue sky laws of the fifty states in the United States as well as the District of Columbia and Puerto Rico. The blue sky laws are directed at promoters who “would sell building lots in the blue sky in fee simple” – Mulvey, “Blue Sky Law” 36 Can. L.T. 37 (1916). These laws have anti-fraud provisions and, among other things, condition offering of securities on a finding by the bureaucracy that the issuer’s proposed business plan is “fair, just and equitable.”
Nigeria has a unitary system of securities regulation. The system combines the philosophies of mandatory information disclosure and candour of the disclosure. True to federalism, the United States has a dual system of federal and state securities regulation. The federal government chose the disclosure philosophy when it enacted Securities Act of 1933, while it preserved the states’ statutes with their ‘regulatory or merit’ philosophy. Loss has been of the opinion that “Congress...did not take away from the citizen ‘his inalienable right to make a fool of himself.’ It simply attempted to prevent others from making a fool of him.” Curiously, the Securities Act of 1933 borrowed the anti-fraud provisions of the Blue Sky law of New York and combined them with the prospectus provisions of the United Kingdom’s Companies Act of 1929. Loss’ work offers an excellent tool for the understanding of the investor protection philosophies of the ISA of Nigeria.

As far back as 1967, Morton and Booker posited that the purpose of securities regulation is to facilitate the working of securities markets in financing businesses. However, Professor Anderson submitted that securities regulation has two purposes, namely the protection of investors against the fraud and other abuses in the securities markets as well as that of providing useful information to assist investors in making buy,

33 Ibid.
34 Ibid., p. 37.
35 Morton and Booker, “The paradoxical nature of federal securities regulations” 44 Den. L.J. 479 (1967)
sell, and hold decisions in securities. Concerning these purposes, the belief is that “… a disclosure law would provide the best protection for investors. In other words, if the investor had available to him all the material facts concerning a security, he would then be able to make an informed judgment whether or not to buy.”37 With due respect, Anderson’s work assumed that disclosure automatically leads to informed investment decision. To that extent, it left out the important issue of the target of the disclosure and their ability to make sense out of the disclosed information. I submit that one of the most significant challenges to securities regulation in Nigeria is that a huge population of the target of disclosure are largely uninformed in this matter, and are unable to make sense out of the most exhaustive and truthful disclosure.38

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

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

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

In another scholarly contribution, Bernard Black submitted that the value of the securities that investors hold is predicated on the quality of the information that they receive on the issuer’s candour. One important means that legal systems adopt in protecting investors is mandatory disclosure

40 Ibid., p. 92.
of information by securities issuers. The United Kingdom’s Companies Consolidation Act of 1845 was the first to establish the system of mandatory disclosure of information.

The United States Congress adopted mandatory disclosure of securities information when it enacted the Securities Act of 1933 in response to its securities market crash of 1929. Senate hearings on the crash showed remarkable evidence of unethical and fraudulent conduct by investment bankers and corporate promoters. The practices comprised conflicts of interest, manipulation of stock prices through devices like market rigging and corporate insider dealings. In the period that preceded the crash, improved standard of living caused corresponding increase in demand for securities. Confronted by this phenomenon, investment bankers who were underwriters abandoned ethical standard of banking and encouraged corporations to offer highly spurious, speculative and fraudulent securities to uninformed investors.\textsuperscript{43}

Proponents of disclosure are of two schools namely, the mandatory disclosure and voluntary disclosure groups. Mandatory disclosure rules compel securities issuers to continually disclose specific information for a meaningful evaluation of their securities before they are issued and when they are traded in the market. The justification offered for this mode is that without compulsion, some securities issuers would misrepresent information or refuse to make disclosure.

The major proponents of mandatory disclosure include Oladele,\textsuperscript{44} Louis Loss and Joel Seligman,\textsuperscript{45} Franco,\textsuperscript{46} as well as Abugu.\textsuperscript{47} My thesis is that securities issuers have no incentive to voluntarily disclose information. In the face of the ingenious overzealousness of some of them to conceal or falsify information, mandatory disclosure, coupled with stiff sanction for infringement is highly commended.

Abugu argued that a company’s past performance and future prospect should determine the value of its securities. He added that there, however, is the problem of getting the information to the investors to enable them make well thought through investment and to decide on their existing investment.\textsuperscript{48} He added that ready availability of the information that affects the value of securities makes a securities market efficient. “The ultimate aim of regulation therefore, is to prevent or minimize abuses, which might

\textsuperscript{44} Oladele, O.O. (2007) \textit{Securities information disclosure and legal protections of investors in Nigeria} at 244.


\textsuperscript{48} Abugu, Joseph, \textit{op. cit.}, pp. 59-60.
distort information and therefore the value of securities and thereby mar investor’s confidence and the market integrity."  

When I joined the debate in my 2008 contribution titled “Should corporate governance disclosures and controls in Nigeria be permissive or mandatory?” I submitted that they should be mandatory. They offer an objective paradigm for antifraud prohibitions and penalty of false and misleading information, market manipulation, insider trading and other fraudulent practices.

Financial market regulators in contemporary times face the challenge of establishing and maintaining a framework that facilitates capital flow domestically and in cross-border transactions. Public companies are characterized by divorcement of ownership from control, and they require huge capital which they raise from investors on the capital market. The latter phenomenon continually assumes a global dimension with the internationalization of the major securities markets and the quest of the emerging ones, such as Nigeria to position, themselves for their share of the market.

A factor that is often cited for the success of the capital flow system in the major capital markets of the Common Law jurisdiction such as the United States and United Kingdom is the comprehensive mandatory disclosure required of firms that raise capital by issuing securities. The disclosure required of them covers their historical performance, assets, operations, risks, funding and management. This pivotal

49 Ibid., p.60.
50 Oladele, O.O., “Should corporate governance disclosures and controls in Nigeria be permissive or mandatory?” (2008) 19(6) I.C.C.L.R. 200-209
mandatory disclosure is periodically supplemented or updated and audited by independent accounting firms that the law requires to be independent.\textsuperscript{51}

Nigeria, an emerging market, operates a system of mandatory information disclosure. This, as the Committee on Corporate Governance of Public Companies submitted, is currently reinforced by a policy of “...establishing high standards of corporate governance...based on voluntary compliance coupled with disclosure, which should prove more effective than a strictly statutory code.”\textsuperscript{52}

Public companies compete for the funds of the investing public. It follows that companies with more transparent and effective corporate governance will have a competitive edge domestically and in the international capital markets. Informed investment decisions invariably turn on how well companies observe transparent and effective corporate governance. Thus, I hold strongly that the view that corporate governance controls, including disclosure, would be more effective if they are voluntary rather than mandatory is highly unsustainable. Conceptually, the trend globally is for principles of corporate governance to be initially persuasive, expecting that they invariably would translate into legislation and requirements for listing on securities market. The

\textsuperscript{51} See generally, Daines, Robert and Jones, “Mandatory disclosure, asymmetric information and liquidity” http://www.law.northwestern.edu/colloquium/law – economics/Daines visited on 22/12/05, at p.1

Organisation for Economic Co-operation and Development (OECD) posited that the principles offer reference points, and could “... be used by policy makers as they examine and develop the legal and regulatory frameworks for corporate governance that reflect their own economic, social, legal and cultural circumstances, and by market participants as they develop their own practices.”

The United States has adopted the practice of moving from the permissive to the mandatory system of corporate governance controls and disclosure. It has enacted into law many of the OECD principles. A World Bank survey finds the United States to have the best securities market, financial reporting and corporate governance systems in the world. These systems thrive on the adoption of best practices by public companies within the existing legal and regulatory framework. In spite of the success of the systems, accounting scandal and self-dealing by corporate insiders have occurred. These led to the collapse of Enron, Arthur Anderson, Tyco, ImClone, WorldCom and Adelphia that caused investors untold losses. The collapse also raises much apprehension of systemic failure, and serves as a warning to major and emerging markets for a rethink of their securities

---

regulation. It is significant that the resultant financial disaster affected the shareholders, creditors and employees of the companies more than the directors, and gives fresh urgency to the issue of trust in corporate governance and securities transaction.\textsuperscript{56}

The United States responded promptly to the threat when Congress enacted the Sarbanes-Oxley Act, officially titled “Public Company Accounting Reform and Investor Protection Act of 2002.”\textsuperscript{57} The Sarbanes-Oxley Act, that is meant to enhance the accuracy and reliability of corporate disclosures, covers issues such as auditors’ independence and their oversight, corporate responsibility, and enhanced financial disclosure. In the United States the Act is reputed to be “…the most important piece of legislation affecting corporate governance, financial disclosure, and the practice of public accounting since the United States securities laws of the early 1930s.”\textsuperscript{58} In its effort to restore investors’ confidence, it also enhances the role of audit committees and charges the management with more responsibilities for corporate disclosures and financial statements. The Act has substantially enacted what were initially proposed as changes to the securities market listing standards, best practices and


\textsuperscript{57} Public Law 107 – 204, 116 Stat. 745.

\textsuperscript{58} IBM, Innovations in corporate responsibility 2004-2005, at p.9, also available at WWW.IBM.COM/IBM/RESPONSIBILITY.
rulemaking by the American SEC. It opted for mandatory corporate governance discloses and internal controls instead of permissiveness.

The provisions of the Sarbanes-Oxley Act are, among other things, to

1. strengthen the independence of auditing firms by
   • establishing a new regulatory body to oversee public company auditors;
   • redefining the relationship between auditors and their clients; and
   • placing direct responsibility for the audit relationship on audit committees;

2. Improve corporate disclosure by
   • establishing new disclosure requirements for issuers of securities; and
   • accelerating reporting deadlines

3. Increase the responsibility of management by
   • requiring certification of periodic reports by Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs);
   • holding the CEO and CFO responsible for misstatements due to misconduct;

---

• imposing new obligations and responsibilities on audit committees;
• banning most loans to officers and directors; and
• increasing a variety of criminal penalties and enforcement measures for securities-related offences;

4. Improve the objectivity of research by

• addressing conflicts of interest securities analysts may have with investment banking function of broker/dealers; and

5. Regulate the conduct of securities lawyers by

• requiring minimum standards of professional conduct for lawyers appearing or practicing before the SEC.\(^60\)

In *Issues in professional responsibility of corporate lawyers*,\(^61\) I appraised the all important role of corporate in-house lawyers in regulatory compliance by their client, the company. By so doing, I took the inquiry beyond appearance before the courts, tribunals and regulatory authorities to the realm of pre-emptive right counselling rooted in integrity for the benefit of all corporate constituents. I submitted that the Rules of Professional Conduct for legal practitioners in Nigeria appear over time to have adequately regulated the general

\(^{60}\) Ibid.
practice of law in Nigeria. Sadly, by contemporary global standard, they are grossly inadequate in guiding and regulating the practice of corporate lawyers. Among other defects, they do not address their status, duties and liability as well as other ethical issues that relate to regulatory compliance by companies.  

Effective counselling of corporate clients requires more than the lawyer’s knowledge of substantive and procedural law. The counsel has a duty, that should be statutory and extant, to guide his client to avoid the immorality of the market place like a plague. Justice Stone (1934) in a speech at the University of Michigan expressed the well-founded concern that corporate lawyers tend to be “the obsequious servant[s] of business ... tainted with the morals and manners of the market place in its most anti-social manifestations.” Such tainted lawyers tendentiously forget their important role of counselling their clients to take lawful and legitimate decisions. Instead, they lapse into implementing the illegitimate desires of their clients. In the process, Justice Stone concluded, “the loss and suffering inflicted on individuals, the harm done to the social order founded upon business and dependent upon its integrity, are incalculable.

Taking a cue from the incontrovertible submission above, in securities offering, the lawyer and other professionals that prepare the relevant documents and filings that picture the issuer’s business, financial situation and management should

---

62 Ibid., p.2.
64 Unpublished speech, 1934.
keep in mind that the information they put in public domain would affect the decision and fortune of investors. Many corporate lawyers exhibit professional competence in these matters. However they encounter what Langevoort (1997) described as “epistemological difficulty” in client information gathering that neither legal scholarship nor the rules of professional conduct have adequately addressed. He expressed the difficulty as “cognitive bias that comes of the proximity of the corporate lawyer to his client, the company. He added, and rightly so, that a lawyer that a corporate body retains for continuous counselling and statutory reporting obligations is potentially well situated to know his client intimately. However, he is susceptible to blending into his client’s management group culture. The implication of this situation for professional responsibility is that a corporate “…lawyer may find herself cognitively overdependent on the client for factual references, and thus unable to exercise the kind of objective legal judgment necessary to arrive at sound [corporate information] disclosure decisions. It is significant that the United States is not alone in the effort to improve corporate governance practices by individual companies so as to strengthen the international financial markets. The OECD, which had been working assiduously in that area, published in 1999 the OECD Principles of Corporate Governance (OECD Principles, 1999). That compendium

66 Ibid. at 630-631.
67 Ibid. at 636.
specifies the basic “best practices” that any publicly held company ought to follow to be able to sustain investor confidence and attract long-term capital domestically and on cross-border basis.

The *OECD Principles* have been meticulously reviewed up till 2004 (*OECD Principles*, 2004) in line with global developments and experience.\(^69\) The preamble to the updated *OECD Principles, 2004* submits:

> International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full benefits of the global capital market, and if they are to attract long-term ‘patient’ capital, corporate governance arrangements must be credible and well understood across borders.\(^70\)

The OECD principles have become “an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. They have advanced the corporate governance agenda and provided specific guidance for legislative and regulatory initiatives in OECD and non-OECD countries.”\(^71\) In ensuring effective corporate governance

---

\(^69\) *Ibid.*, at p.3. The OECD Steering Group on Corporate Governance did the review by the authority of OECD Ministers and with the co-operation of the World Bank and other sponsors. It had the benefit of a survey of how member countries have addressed corporate governance issues and challenges. It also relied on experiences in non-OECD economies.


\(^71\) *Ibid.*, at p.3.
framework, they cover six core areas. These are the basis for corporate governance, the rights of shareholders and key ownership functions, the equitable treatment of shareholders, the role of stakeholders in corporate governance, disclosure and transparency, and responsibilities of the board.\textsuperscript{72} The \textit{OECD Principles} fundamentally concludes that good corporate governance, including high quality timely accounting and financial disclosures, engender investor protection and confidence in companies.\textsuperscript{73}

A very significant challenge to the system of mandatory disclosure is the economists’ “Efficient Capital Market Theory (ECMT)” that gained prominence from the theoretical formulations of Eugene Fama in the 1960s.\textsuperscript{74} Though the literature on this theory is vast, the core of the ECMT is that all active securities markets are “efficient.”\textsuperscript{75} That is, all publicly

\begin{footnotesize}
\textsuperscript{72} \textit{OECD Principles}, 2004, pp.17-25. The annotations to these principles are on pages 29-66.

\textsuperscript{73} Kung, Felicia H. “The rationalisation of regulatory internationalisation” 33 \textit{Law & Pol'y Int'l Bus.} 443 at 478 (2002).


\textsuperscript{75} Fama describes an efficient market as a “market where there are large number of rational profit maximizers actively competing with each other trying to predict future market values of individual securities, and here important current information is almost freely available to all participants…In that market competition among the many intelligent participants lead to a situation where, at any point in time, the actual prices of individual securities already reflect the effects of information based both on the events that have already occurred and on events, which, as of now,
available information is swiftly “impounded” in the prices of securities. Thus, the best position for most investors is that the market prices of securities reflect all available information. The market is fair, and the best evidence of securities’ value is the market price. Therefore, it is useless to attempt to make more than normal profit in securities transactions or to trade to beat the market.\textsuperscript{76}

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

\begin{quote}
On their face, these theories leave little or no room for the present disclosure system. Admittedly, not all theorists or participants in the investment world accept them, but certain conclusions seem inescapable. Diversification leaves the small investor with so little investment in any particular company that it is scarcely worth his while to wade through the enormously complicated disclosures, financial
\end{quote}

the market expects to take place in the future. In other words, in an efficient market, at any point in time, the actual price of a security will be a good estimate of its intrinsic value” – Fama, E. “Random walks in stock prices” (1965) 9-10 Fin. Analyst J. 22. For an evaluation of the ECMT, see generally Abugu, J. \textit{op. cit.} pp. 213-231.

\textsuperscript{76} Kripke, H. “Fifty years of securities regulation in search of a purpose” (1984-1985) Corp Prac Comm 545 at 563. For an introduction to the EMCT, see Kripke, H. “A search for a meaningful disclosure policy” 31 \textit{Bus. Law} 293.

\textsuperscript{77} Kripke, \textit{op. cit.}, at p.564.
and otherwise, in the annual report and prospectus disclosure system, or in the proxy system.\textsuperscript{78}

There is a substantial opposition to the ECMT in the available studies.\textsuperscript{79} A group of financial economists, known as the \textit{noise theorists}, are of the conviction that

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

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

\textsuperscript{78} \textit{Ibid.}

\textsuperscript{79} Abugu, J. \textit{op. cit.} at pp. 221-231 gives a summary of some of the critique.

\textsuperscript{80} Fox, Merritt, B. “Securities disclosure in a globalizing market: Who should regulate whom” 95 Mich. L. Rev. 2498 at 2536 (1997).

\textsuperscript{81} Shiller, Robert, J., “Do stock prices move too much to be justified by subsequent changes in dividends?” 71 Am. Econ. Rev. 421, 433-34 (1981). \textit{See also} Black, Fischer, “Noise” 41 J. Fin. 529 (1986); De Long, Bradford \textit{et
Fox is of the opinion that noise theory predicts a worse consequence than the ECMT does for the uninformed and speculative investors. They tend to buy when stock prices are too high and sell when prices are too low, thereby providing profits for the informed investors. He concluded that it is “questionable whether the concept of fairness should be expanded to condemn this wealth transfer...given the availability to uninformed investors of a strategy – a randomly chosen diversified portfolio – that permits participation in the benefits of equity investing without risking such losses.”\textsuperscript{82}

The quest for voluntary disclosure has been gaining momentum in recent years. The proponents of voluntary disclosure have challenged the need and value of requiring mandatory disclosure from issuers of securities. They argued that securities markets provide adequate incentives for issuers of securities to voluntarily disclose “socially optimal levels firm specific” information.\textsuperscript{83} The issuer’s management, they argued, has motivations to establish a reputation with securities markets of truthfulness and integrity. They added that mandatory disclosure is expensive and burdensome as it offers little useful information to investors that economic self-interest of the issuers would not have persuaded them to


\textsuperscript{83} Franco, J.A., \textit{op. cit}. at p.230.
disclose. Scholars of this persuasion include Easterbrook, Fischel, Stigler, Benston, Ross and Mahoney.

---


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

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


88 Stephen Ross in his seminal essay “Disclosure regulation in financial markets: Implications of modern finance theory and signalling theory in issues in financial regulation” 177 (F.R. Edwards ed., 1979), p. 193 argued that in the absence of disclosure statute, strong market forces tend to lead to disclosure. Therefore, corporate managers have an incentive to maximise the value of their firm. A non-performing management team is susceptible to removal through proxy contest or hostile takeover. Corporate managers are then driven by the ambition to receive good “report cards”.

89 Mahoney, Paul G., “Mandatory disclosure as a solution to agency problems” 62 *U. Chi. L. Rev.* 1047 (1995). This article argued that mandatory disclosure requirements were purposed to address more narrowly defined
The philosophical thrust of the mandatory disclosure initiative could be appreciated in the light of the opinion of scholars such as Adolf A. Berle and Gardner C. Means. Scholars of this persuasion argued persuasively that neither the members of the financial sector nor the directors of public companies were subject to liability, concerning the investing public, for breach of their fiduciary duties. This was significant because at the time the United States Congress passed the 1933 Act, American securities markets were self-regulatory, and under that system, the investing public had no legal remedy against corporate managers for breach of their fiduciary duties.

The Federal Government of Nigeria, as a deliberate policy choice, decided to have an officially regulated securities market and a system of mandatory disclosure of material information. Just as the United States, it responds to the need for investor protection through policies and regulations. It has statutes and regulations as well as an intricate set of public and private institutions, discussed hereinafter, meant to reasonably assure investors that the issued securities are authentic and worth investing in. Our securities statute and the regulations made pursuant thereto require extensive disclosure with severe sanctions for misleading and false information. They are enforced through securities regulators with professionally competent staff, and adequate budget to fight securities fraud. This effort is supplemented by

agency problems associated with offering of securities and not to promote informational efficiency of securities markets.

accounting rules that seeks to reduce the propensity of securities issuers to fudge their financial reports. It also is complemented by the input of ‘reputational intermediaries’ such as investment bankers and securities lawyers. The investment bankers investigate the issuers of the securities that they underwrite. This is because their reputation depends on not selling fraudulent or overpriced securities to investors. Solicitors to securities issues have the duty to ensure that the issuers’ offering documents comply with the statutory disclosure requirements and to counsel their clients against making overly optimistic statements that could be false and misleading. The purpose is to maintain the integrity and transparency of the securities market and reduce the problem of adverse selection of securities by attracting honest issuers and driving out, or at least reducing the dishonest ones.\textsuperscript{91} However, in Nigeria, stock prices crashed by two-thirds between 2008 and 2009. What happened? The ‘informed’ rigged and manipulated information, the market and the ‘uninformed’.

V SECGURITIES VALUE SECURING THROUGH INFORMATION EQUALISATION AND PRESERVATION IN TRADING TRANSACTIONS

Trading transactions offer an important domain for capital gains by investors. At the same time, they are prone to abuses, manipulation and impropriety that devalue securities. In \textit{“Disclosure in secondary securities transactions in

\textsuperscript{91} Ibid., p. 93.}
Nigeria”, 92 I evaluated the law on manipulative and fraudulent devices in secondary securities transactions in Nigeria in the light of developments in the United Kingdom and the United States. I found the law largely adequate but argued for procedural and remedial reforms as well as more vigilance by regulators and law enforcers.

Outstanding securities are publicly traded on the secondary securities market such as a stock exchange or an over-the-counter (“OTC”) market. 93 The secondary market is a forum for dealings (resale and purchase) in securities that were originally issued in the primary market. 94 The market stands in contradistinction to the primary market, and impacts the

---

93 OTC market is one in which the participants conduct securities transactions through a telephone and computer network connecting dealers in securities rather than on the floor of the exchange. OTC securities are not listed on an organised exchange. They are those of companies that do not meet the listing requirements of the stock exchange. It is significant that globally, even companies that qualify for exchange listing progressively patronise the OTC market to benefit from multiple trading by many securities dealers instead of being confined to the floor of the stock exchange. The OTC market has written rules that are enforced mainly by the National Association of Securities Dealers (NASD). Nigeria is in the process of establishing an institutionalised OTC market and NASD regulatory system of the kinds that are available in countries such as the United States and Japan. In these and other countries with similar systems, daily newspapers publish prices of the OTC securities separately from the prices of exchange listed securities. See generally, Downes, J. and Goodman, J.E. (eds.), Dictionary of finance and investment terms, “Over the Counter (OTC)”, Hauppauge, NY, Barron’s Educational Series, Inc., 1998, p.427.
94 Rule 208 of SEC Rules and Regulations made pursuant to the Investments and Securities Act (ISA), 1999.
fortune of corporate investors and the health of the economy by distorting economic indices. It may be manipulated and subjected to deceptive contrivances. The bubble of the market burst terribly and progressively in Nigeria in the period between 2008 and 2010. When it did, the value of most outstanding securities especially of financial institutions plummeted by two-thirds. In the face of our supposedly responsive securities market regulation, innovative manipulative and deceptive contrivances occurred by the hands securities professionals. The contrivances also badly affected the fortunes and rating of major banks in Nigeria. What went wrong is best appreciated in the light of the regulatory framework for the prevention of the same.

The Research and Market Development Division of the SEC in Nigeria sums up the function and importance of the secondary securities market in the following words:

*Its basic function is fostering and formalizing transfers of existing securities among investors... Functionally, the secondary market thus provides liquidity to investors by enabling them to convert their securities into cash. The ease with which securities can be converted into cash is an important determinant of the efficiency of the secondary market. It is also an important factor in stimulating investors’ interest in the capital market as a whole. The secondary market therefore, indirectly facilitates the savings and investment process and ultimately the economic growth and development of a nation.... Although funds are not, and cannot be mobilized in a secondary market
(such as a stock exchange) for investment purposes, the existence of an active secondary market encourages public participation in new issues of corporate bodies. Besides the provision of liquidity, an efficient secondary market provides real-time information on listed securities and promotes price discovery.\textsuperscript{95}

Arising from this important function, the Companies and Allied Matters Act (CAMA)\textsuperscript{96} requires certain disclosure obligations of all companies in annual and other periodic filings with the Corporate Affairs Commission (CAC). The information in these filings is of significance to shareholders in that they cover issues such as corporate governance controls, profit maximization and investor protection. In addition, the ISA and securities market rules, in seeking to protect investors, employ means suitable for equitable, transparent and orderly trade relations between market participants, including investors, in the securities that are publicly traded on the market. The means adopted include ensuring mandatory periodic disclosures by the securities issuers and their intermediaries to regulatory authorities, the candour of their disclosures, prohibition of market manipulation devices and dealings in securities by corporate insiders.

A company that has registered its securities with the SEC under the ISA becomes “a reporting company” that must

\textsuperscript{96} Cap C20, Laws of the Federation of Nigeria 2004.
make two kinds of filings with the SEC. The first filing is to sustain and update its registration. The second consists of annual returns, quarterly returns as well as special ongoing reports of significant events and changes affecting the company. Where the securities are listed on a Securities Exchange, the company must also send the returns and reports to the listing and quotation department of that Exchange. Unlike the prospectus that must be delivered to the investors, the periodic filings are delivered to the SEC and the appropriate securities exchange, but they are available for the use of securities professionals trading for their own accounts or for customers’ accounts. The securities investors may benefit from the information disclosed in the filings if they trade through professionals to whom they have to pay commission.

All public companies are obliged to report on a continuous basis all material changes in their activities and operations. The information that they must disclose include the nature and results of any material reclassification, merger or consolidation of the companies or any of their notable subsidiaries, acquisitions or dispositions of material assets other than in the ordinary course of business, any material changes in the companies’ products or services, name changes, bankruptcy or receivership proceedings involving the company or any of its significant subsidiaries, and a director’s controversial resignation.97

97 See generally schedule IV to the SEC Rules and Regulations. The forms for all the reports are in Schedule III.
The Nigerian securities law prohibits false trading of securities and market rigging transactions. The information that the ISA and *SEC Rules and Regulations* make available to investors in secondary securities transactions is to ensure fair and transparent dealings. Therefore, they prohibit the creation and doing of anything that may give a false or misleading appearance of active trading in any securities on a Securities Exchange or Capital Trade Point or a false or misleading appearance with respect to the market for, or the price of any security.  

In the same vein, where there is no intention to change the beneficial ownership of the securities traded, it is unlawful for a person to employ deception to “maintain, inflate, depress or cause fluctuations in the market price of the securities.”

To strengthen the protection that is available under the law to the genuine investors, a person shall also not stand at the sale and purchase ends of securities transactions so as to raise, lower, maintain or stabilise the prices of securities with the intention of luring other persons to purchase or sell the securities. Every false trading, market rigging and manipulative transaction is an offence which is punishable on conviction with a fine of at least ₦500,000 in addition to nullification of the transaction.

It is unlawful for a person to make or disseminate a false or misleading material statement which is capable of inducing

---

98 *Section 105(1) of the ISA.*
99 *Section 105(3)(a), ibid.*
100 *Section 82, Ibid.*
101 *Section 106(5), Ibid.*
other persons to sell and purchase securities or is capable of raising, lowering, maintaining or stabilizing the market price of securities.\textsuperscript{102} However, the trigger of liability here is that the person must have made the statement without caring whether the statement or information was true or false. In the alternative, he must have known, or be in the position in which he ought reasonably to have known that the statement or information is materially false or misleading.

To strengthen the candour of disclosure in secondary securities transactions, the ISA also makes it illegal for a person to knowingly create false or misleading material information with the intent or attempt to deceive another person to deal in securities by

(a) making or publishing any statement, promise or forecast that he knows to be materially misleading, false or deceptive; or

(b) any dishonest concealment of material facts; or

(c) recklessly making or publishing dishonestly or otherwise, any statement, promise or forecast which is misleading, false or deceptive; or

(d) recording or storing in or by means of any mechanical, electronic or other device any materially false or misleading statement to induce another person to deal in securities;

\textsuperscript{102} Section 107, ibid.
(e) making any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.$^{103}$

In addition to the foregoing, it is unlawful to circulate, authorize, or be involved in the circulation of any "statement or illegal information to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained by reason of any transaction entered into or other act or thing done in relation to securities of that body corporate..." or related body corporate. The persons who could be liable in this regard are those related to those involved in the transactions, and those who have received or expect to receive consideration or other benefit for the circulation or authorization of the circulation of the statement or information.$^{104}$

A contravention of the provisions above is an offence punishable with a fine of a minimum of ₦500,000 (five hundred thousand naira), or an amount equivalent to double the amount of the profit derived by him or loss averted by him, or imprisonment for a term of not more than seven years, or both the fine and imprisonment.$^{105}$ However, it is significant that the impact of materially false or misleading information on investors is grave, and the anticipated gain of

---

$^{103}$ Section 108(1), ibid.
$^{104}$ Section 109, ibid.
$^{105}$ Section 115, ibid.
the offender could be substantial. Therefore, the minimum fine should be reviewed upward to the point that there will be no incentive to deceive because the pain of the deception outweighs the gain.

The civil remedy for violating the provisions above, including market rigging and manipulation as well as the creation of false information, are not direct. They are consigned to the omnibus provision of section 116 of the ISA which appears to cover all liabilities under Part X of the ISA on trading in securities. The section provides –

(1) A person who is liable under this Part of [the ISA] shall pay compensation at the order of the [SEC] or the [Investment and Securities] Tribunal as the case may be, to any aggrieved person who, in a transaction for the purchase or sale of securities entered into with the first-mentioned person or with a person acting for or on his behalf, suffers a loss by reason of the difference between the price at which the securities would have been likely to have been dealt in such a transaction at the time when the first-mentioned transaction took place if the contravention had not occurred.

(2) The amount of compensation for which a person is liable under subsection (1) of this section is the amount of the loss sustained by the person claiming the compensation or any other amount as may be determined by the [SEC] or the Tribunal.
While acknowledging the need for private remedies, some scholars of securities regulation are of the view that the law should impose private remedies on violators minimally to make it socially optimal. This, they add, is because the fear of liability hovers over not only on those involved in sharp practices but also honest participants in securities dealings.\textsuperscript{106} I disagree with this position.

To recover the compensation, a commendable procedure, that the Nigerian law has not provided but, which is available in some advanced common law jurisdictions such as the United States, is class action. This affords numerous investors, including those with small holdings, who have suffered from common false and misleading information, an economically viable means of enforcing their rights. The condition precedent here is that the class representative must establish among other things that his claim and those of the other members of the class share the same questions of law and fact (commonality test), and his claim is substantially typical of those of the class so as to conclude that he is competent to represent the class (typicality test). Once the action passes as class action, all potential members of the class are notified so that they could opt out of the class action, if they so wish, and not be affected by \textit{res judicata}.\textsuperscript{107}

A combination of criminal and civil liability for false and misleading information inducing secondary securities


\textsuperscript{107} \textit{Ibid} at 971-972. \textit{See also} Coffee, J, “Understanding the plaintiff’s attorney: the implications of economic theory for private enforcement through class and derivative actions” 86 Colum. L. Rev. 669 (1986).
transactions will strengthen the SEC’s enforcement regime and the protection of a large proportion of investors who acquire their securities in secondary market transactions. Civil remedies ought not to be restricted to the harm arising from primary offering misstatements and insider dealings.

In addition to the other provisions of the ISA on truth in disclosure and the avoidance or omission of material statements, section 86 of the ISA and Rule 110 of the *SEC Rules and Regulations* that are omnibus provisions. It is significant that the drafters of the section and Rule adopted almost verbatim the provisions of section 10(b) and Rule 10b-5 of the Securities Exchange Act, 1934 of the United States.

Section 110 of the ISA makes it unlawful “for any person directly or indirectly in connection with the purchase or sale of securities to

\( (a) \) employ any device, scheme or artifice to defraud;

\( (b) \) to engage in any act, practice or course of business which operate or would operate as a fraud or deceit upon any person; or

\( (c) \) make any untrue statement of a material fact or to omit to make a material fact necessary in order to make the statements made in the light of the
As a supplement, Rule 110 of the *SEC Rules and Regulations* provides that a participant in securities trading must not

(a) employ any device, scheme or artifice to defraud or 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 the circumstances under which the statement was made;

(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 he is an insider.

Taken together, the provisions are the core of antifraud prohibitions designed to prevent disclosures found on manipulation, deceptive devices and contrivances.

---

108 Section 108(e) of the ISA
Long before the enactment of the ISA, the general law on fraudulent misrepresentation in Nigeria, that is the English Common Law, applied to deceit in securities transaction. In *Derry v. Peek*\(^{109}\) Lord Herschell defined fraudulent misrepresentation as a false statement “made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.” In the Nigerian case of *Abba v. Mandilas Karaberis Ltd.*,\(^{110}\) the court, following *Derry v. Peek*, declared that mere non-belief by the maker in the truth of the representation indicated fraud or positive dishonesty. The court quoted with approval the following passage from *Halsbury’s Laws of England*:

\[
\text{...[I]t may now be taken as established beyond all question that, whenever any man makes a false statement which he does not actually and honestly believe to be true, that statement is, for the purpose of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately; indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of such belief.} \quad \text{\textsuperscript{111}}
\]

\(^{109}\) *Derry v. Peek* (1889) 14 App. Cas. 337, 374.
\(^{110}\) 2 A.L.R. Comm. 241.
\(^{111}\) 3\textsuperscript{rd} edition, p. 845.
Section 108(e) of the ISA and Rule 110 of the *SEC Rules and Regulations* have clearly gone beyond the Common Law of deceit in securities transactions.\(^{112}\) This is similar to the significant advancement of the law in the United Kingdom where the Financial Services and Markets Act 2000 (FSMA) places criminal sanctions on market abuse in section 397 in part XXVII. The section creates two offences. The first is the offshoot of section 12 of the Prevention of Fraud (Investments) Act 1939. The offence is committed by making a statement, promise or forecast knowing it to be misleading or recklessly, without caring about the truth, for the purpose of inducing someone to enter into or to refrain from entering into an investment agreement or to exercise or refrain from exercising a right conferred by an investment. A person also commits the offence if, for a like purpose, he dishonestly conceals material facts. The section deploys a term of imprisonment for up to seven years as the penal sanction for the offence.

The beauty of the United Kingdom law is that it dispenses with intent and requires that only recklessness be proved. Conversely, in the United States, there is the need to prove *scienter*, a “mental state embracing intent to deceive,

---

\(^{112}\) In *Santa Fe Industries v. Green* 430 U.S. 462, 474-476 (1977) the United States’ Supreme Court interpreted the phrases “any device, scheme, or artifice to defraud” and “any act, practice, or course of business which operates or would operate as a fraud.” The court held that ‘manipulation’ means any conduct “artificially affecting market activity” such as wash sales or matched orders. It added that deception occurs only when there is an omission or misrepresentation. (Although American cases are non-binding precedents to Nigerian courts, they give useful insight into the direction the latter may go if the similar phrases in the Nigeria law fall for interpretation).
manipulate, or defraud.”¹¹³ This requires a proof that the defendant “was aware of the true state of affairs and appreciated the propensity of his statement or omission to mislead.”¹¹⁴ There is no violation of the provisions where the manipulation or deception arises from an innocent misrepresentation or omission. Also, negligence on the part of the defendant would ordinarily not result in liability¹¹⁵ However, recklessness, ranging from the weak form of “carelessness approaching indifference”¹¹⁶ to the strong one of “an extreme departure from the standards of ordinary care”, would ground liability.¹¹⁷

The second offence created by the United Kingdom’s FSMA is committed through an act or conduct which creates a false or misleading impression of the price or value of an investment so as to induce a person to acquire or dispose the investment or refrain from doing so.¹¹⁸ Here, all that must be established is that the accused acted for the purpose of creating a misleading impression. There is no need to show his knowledge or recklessness. The accused could avoid conviction if he proved that he reasonably believed that the impression was not misleading.¹¹⁹

¹¹⁴ Palmiter, op. cit. at 231.
¹¹⁵ Ernst & Ernst v. Hochfelder, op. cit.
¹¹⁷ Ibid.
¹¹⁸ Section 397(3).
¹¹⁹ Section 397(5)(a). See also paragraphs (b) and (c) for other defences.
Misrepresentation and omission to state material facts as well as the liability that flows from them have drawn from the elements of Common Law deceit and rescission of contract. These elements are materiality of fact, *sciente*, reliance, loss causation and damages.\(^{120}\)

Materiality

Due to the cost of information and the need to ensure that investors are not befuddled with information, the ISA places emphasis on materiality of fact. A person shall not “make, utter or present any untrue statement of a material fact” or “omit to disclose a material fact necessary in order not to render any statement misleading in the light of the circumstances under which the statement was made.”\(^{121}\) However, the ISA is not clear on the paradigm for determining a material fact in secondary securities transactions.\(^{122}\) Therefore retail investors in Nigeria need the proactive protection of the regulators, the apex of which is the SEC, though the stipulation of line items of material facts. While the United States’ Supreme Court, for example, has interpreted the word ‘*material*’, the interpretation, with all due respect, is hardly helpful to a retail investor without expertise


\(^{121}\) ISA section 86 (c) and rule 110 of the *SEC Rules and Regulations*.

\(^{122}\) Conversely, in primary securities offering, the ISA specifies line items that the issuer must disclose. They are in Part I of the Third Schedule to the Act and the reports in Part II of that Schedule.
in investment matters. In *TSC Industries, Inc. v. Northway, Inc.*,\(^{123}\) that court held as follows:

An omitted fact is material if there is substantial likelihood that a reasonable shareholder would consider it important ...This standard is fully consistent with...general description of materiality as a requirement that “the defect has a significant propensity to affect the ...process.” ...What the standard does contemplate is a showing of substantial likelihood that, under all circumstances, the omitted fact would have assumed actual significance in the deliberations of reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.\(^{124}\)

Even if Nigeria chooses to adopt the United States’ approach, it may not be easy for an investor without expertise in financial matters to determine the material fact the non-disclosure of which would alter the “total mix” of information. Thus, this lecture recommends that the Nigerian SEC, in the exercise of its rule making powers, should create a list that will give a clear idea of what securities issuers and intermediaries must regard as material information. This will be similar to the power of the UK Financial Services Authority

\(^{123}\) 426 U.S. 438, (1976), *revg.* 512 F. 2d 324 (1975)

\(^{124}\) Ibid. at 449.
is to “… prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behavior amounts to market abuse.”¹²⁵ We recognise that materiality may depend on the facts of each case. Therefore, the category may not be closed.

Materiality is also of essence in insurance contracts. The insured person has a duty to disclose all material facts. In Nigeria, before the enactment of the Insurance Act 2004, a fact was regarded as material if it would influence the judgment of prudent insurer in fixing the premium or in deciding whether or not to take the risk. However, under the 2004 Act, a fact is material only if the insurer specifically demands that it be disclosed by the insured. In securities regulation, let the rules create a list of material information that is amenable to new challenges.

Fact

The ISA does not define “fact”. However, the word has been described in the United States as “an existing state of things or something that has happened.”¹²⁶ In that jurisdiction, as a general rule, promises and predictions are not actionable, although they may turn out to be inaccurate. However, if made in bad faith or without plausible basis, they become

¹²⁵ Section 119 of the Financial Services and Markets Act 2000 (FSMA).
actionable as “facts”. The United Kingdom’s FSMA also makes actionable promises and forecasts that are knowingly misleading or recklessly made, without caring about its truth offences.

**Sciente**

To succeed in criminal proceedings under section 86 of the ISA and rule 110 of the *SEC Rules and Regulations*, the prosecution must, in addition to proving his *actus reus*, prove the defendant’s *mens rea*.

**Reliance**

It is generally important to also prove reliance on misrepresentation in section 86 cases. Reliance implies that the aggrieved party took or did not take some action out of trust or confidence in a person or state of affairs. Reliance in the sense of an actual and subjective causal connection between the challenged conduct and a plaintiff’s injury is a carry-over from the Common Law fraud action.

The position when the defendants breach their duty to disclose material information is unclear under the Nigerian law. It is noteworthy that the courts in the United States have dispensed with the proof of reliance in such cases. The fact that the undisclosed information is material is an indication

---

127 See *Luce v. Edelstein*, 802 F.2d 724, 730 (9th Cir. (1974) and *Eisenberg v. Gagnon*, 766 F.2d 770, 775 (3rd Cir. 1985).
128 Section 397.
129 Matheson, John, H. *op. cit.* at 374. This is the position in the Court of Appeal of Nigeria’s decision in the case of *Udogwu v. Oki* (1990) 5 NWLR (Pt. 153) 721, 731.
that a reasonable investor would have considered it vital and would have acted differently had the defendant disclosed the information. In *Affiliated Ute Citizens v. United States*, the United States’ Supreme Court held that

> [u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered it important in the making of this decision….This obligation to disclose and this withholding of a material fact establish the requisite element of causation.131

In reaching that decision, the Supreme Court created a presumption of reliance in all cases of omission once the duty to disclose and the materiality of the undisclosed information were established. However, the court did not indicate whether or not the defendant could rebut the presumption of reliance. It is certain that the burden shifted to the defendant to prove the plaintiff’s non-reliance instead of the plaintiff having to prove reliance.

The United States’ courts have also established a rebuttable presumption of reliance on false or misleading representation in connection with publicly traded securities by regarding the representation as a “fraud on the market”.132 Under this, all that is required of the plaintiff is not reliance on the

---

misleading statements, but allegations of reliance on a “distorted market”. It is presumed that material misinformation artificially distorts the market prices of securities, and the investors rely on the misinformation. The investors need not have access to the information to make investment decisions because they could rely on the market to reflect the misinformation in the prices of the securities. In essence, if the investors knew that there was a fraud on the market, they would not have traded at the prevailing price.

The fraud on the market presumption finds an ally in the Efficient Capital Market Theory (ECMT). The latter posits that concerning widely traded securities, market prices reflect all publicly available information (and misinformation) about the securities. However, to prove derivative reliance that is its operative pedestal, the plaintiff must establish that the misrepresentation affected the price of the securities; that he relied on the integrity of the market price when trading; and when the truth was disclosed, the prices of the securities reacted adversely. Conversely, a defendant may rebut the presumption of reliance so as to avoid liability under the “fraud on the market theory” by establishing either that the alleged misrepresentation in fact did not affect the prices of the securities, or that the plaintiff would have traded regardless of the misrepresentation.

Judicial authorities equate reliance on the market with direct reliance on misrepresentations. “In both cases, defendants’ fraudulent

---

133 See e.g., Lipton v. Documation, Inc., 734 F.2d 740, 742-43 (11th Cir. 1984).
134 Ibid. at 746. See also Blakie v. Barrack, 524 F.2d 891, 905-06 (9th Cir. (1975), cert. denied, 429 U.S. 816 (1976).
statements or omissions cause plaintiffs to purchase stock they would not have purchased absent defendants’ misstatements and/or omissions.”136

Causation

A plaintiff who desires to recover under section 86 of the ISA must establish that the defendant’s misinformation induced him into the transaction that was the proximate cause of his loss. The procedure in the United States, which is in pari material, is for him to prove two kinds of causation.137 First, he must show transaction causation, that is, that “but for” the defendant’s fraud, he would not have entered the transaction or would have entered it on the basis of different terms. Second, he must show loss causation, that is, that the fraud was the proximate cause of the loss complained of. The defendant will not be liable if the plaintiff’s loss arises from extraneous causes. This is seen in the insightful statement of Judge Posner on loss causation under the American law in Bastian v. Petren Research Co.138 as follows:

Loss causation is an exotic name...for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant’s wrongdoing, the plaintiff would not have incurred the harm of which he complains. Like a stock market crash, the collapse of oil prices in the early 1980’s

136 Peil v. Speiser, 806 F.2d 1154, 1161 (3rd Cir. 1986).
137 In the United States, the dual approach to causation was first introduced in Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974), cert. denied, 421 U.S. 976 (1975).
138 892 F.2d 680, (7th Cir. 1990).
reverberated throughout the economy. Since the United States is a net importer of oil, the reverberations were for the most part good ones. But there were some losers. No social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through offering memoranda with fine-tooth comb in the hope of uncovering a misrepresentation. Defrauders are a bad lot and should be punished, but Rule 10b-5 does not make them insurers against national economic calamities. If the defendants’ oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendant’s fraud and have no claim to damages.\textsuperscript{139}

Due to the problems associated with practical application of the loss causation rule, the court has held that “[p]laintiffs are not required to meet a strict test of direct causation...; they need only show ‘some causal nexus’ between [the] improper conduct and plaintiffs’ losses.”\textsuperscript{140}

\textsuperscript{139} Ibid. at 685.  
\textsuperscript{140} Abbey v. Control Data Corp., 933 F.2d 616 (8\textsuperscript{th} Cir.) cert denied, 502 U.S. 967 (1991).
A violation of sections 105-114 of the ISA may be the issue of both criminal and civil proceedings. A natural person who violates it commits an offence and is liable on conviction to a fine of ₦500,000 (five hundred thousand naira) or to imprisonment for a term of at most seven years. An offending body corporate is liable on conviction to a fine of ₦1,000,000 (one million naira). In both instances, the culprit could be made to refund an amount that is double the profit that he made or the loss that he averted. As a deterrent measure, the penalties ought to be reviewed upward in view of the profit that could be realized through deception and misrepresentation as well as the consequential injury to the victim.

In addition, once a plaintiff has proved his claim in a civil action under section 108 and the SEC Rules and Regulations, the court traditionally should award damages, equitable relief, or both, depending on the particular case. However, the ISA prescribes payment of compensation by the defendant at the order of the SEC or the Investment and Securities Tribunal, as may be appropriate, to the aggrieved person, who, in a transaction for the purchase or sale of securities contracted with the liable person. The measure of compensation is the difference between the price at which the plaintiff transacted and the price at which the plaintiff could have transacted had there been no fraud or misrepresentation.\(^\text{141}\)

Non-disclosure and insider trading in securities

\(^{141}\) ISA, section 116.
Securities regulation in Common Law jurisdictions including the United Kingdom, United States and Nigeria impose a duty on corporate insiders to disclose information or to abstain from utilizing undisclosed information for gain. This duty arises in a public company whenever the company or its representative trades its securities. The duty has its root in the policy of sustaining fiduciary relationships by imposing disclosure or candour obligation on those in relationships of trust and confidence.

The FSMA of the United Kingdom has commendable provisions on market abuse. Market abuse is any “... behaviour (whether by one person alone or by two or more persons jointly or in concert which

\[(a)\]\quad \text{occurs in relation to qualifying investments traded on a market to which [section 118] applies;}

\[(b)\]\quad \text{satisfies any one or more of the conditions set out in subsection (2); and}

\[(c)\]\quad \text{is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.}\text{\textsuperscript{142}}

\text{\textsuperscript{142} Section 118(1)}}
Section 118(2) sets out the conditions as follows:

(a) *behaviour that is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected;*

(b) *behaviour that is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or so as to the price or value of, investments of the kind in question;*

(c) *if a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question.*

The Financial Services Authority (FSA) may impose a penalty as “it considers appropriate” on a person who has engaged in market abuse or encouraged another person to do so.\(^{143}\) It may, in the alternative, publish a statement that the person has engaged in market abuse.\(^{144}\)

---

\(^{143}\) Section 123(1).
\(^{144}\) Section 123 (3).
The ISA has ample provisions on insider trading.\textsuperscript{145} Among other things, it empowers the SEC to maintain fair and orderly market in securities, and to protect the securities market against any abuses arising from the practice of insider trading.\textsuperscript{146} The root of these provisions is traceable to the company law philosophy of employing disclosure and publicity as tools for containing unethical and illegal dealings in securities.\textsuperscript{147} The provisions of the ISA go beyond the limitations of Common Law and early Nigerian company law statutes in penalizing insider trading in securities.\textsuperscript{148} The underpinning of the prohibition is that any person in possession of undisclosed price-sensitive information must

\textsuperscript{145} See sections 111-116.
\textsuperscript{146} Section 12(k) & (n).
\textsuperscript{148} “Common law disclosure requirements are limited both in scope and operation. The rules concerned are those designed for discovery and disclosure of relevant matters by a company during litigation with its shareholders; disclosure of promoters’ and directors’ interests and information relating to business propositions which the shareholders are invited to discuss at general meetings. Beyond these, there is no positive duty to disclose at common law” – Akanki, \textit{ibid.} at 13. Nigerian Companies Acts of 1922 and 1968 had no provisions prohibiting insider trading. It is significant, therefore that the courts, up till the enactment of the CAMA in 1990, relied on the principles of common law and equity on fair dealing and prohibition from secret profits of persons in fiduciary relationship with the company. These principles also forbid the use by corporate officers of the company’s confidential information. See generally, \textit{Percival v. Wright}, [1902] 2 Ch. 421; \textit{Allen v. Hyatt}, [1914] 30 TLR 444; \textit{Breiss v. Wooley} [1954] AC 333; and \textit{Diamond v. Oreamuno}, 24 N.Y. 2d 424; 248 N.E., 2d 910 (1969).
either disclose it or refrain from trading in it or instructing others to do so.

“‘Insider trading’ occurs where a person or group of persons who are in possession of some confidential and price sensitive information not generally available to the public, utilises such information to buy or sell securities for the benefit of himself, itself or any person.”149 From this definition, the person trading does not have to be truly a corporate ‘insider’, but he must have a special relationship with the company found on trust and confidence. Included in the categories of persons with such special relationships are “primary insiders” who are the directors and other officers as well as agents the company. Others are “secondary insiders” or “tippees”150 who are persons who, directly or indirectly, knowingly obtain unpublished price sensitive information from the persons who are connected with the company, knowing that the connected persons hold the information by virtue of their being so connected with the company, and it is reasonable to expect that they would not divulge the information except for the proper performance of their official duties.151

“Insider” means a person who is connected with the company whose securities are traded on the basis of unpublished price sensitive information] during the preceding six months in one of the following capacities:

149 Section 315 of the ISA.

150 These are persons to whom insiders have given unpublished price sensitive information for the improper purpose of exploiting the information for their personal gain.

151 See section 112 of the ISA.
(i) A director of the company or a related company;

(ii) An officer of the company or a related company;

(iii) An employer of the company or a related company;

(iv) An employee of the company, involved in a professional or business relationship to the company;

(v) Any shareholder of the company who owns 5 per cent or more of any class of securities or any person who is or can be deemed to have any relationship with the company or member; and

(vi) members of audit committee of [the] company152 and other persons who, by virtue of being so connected has obtained unpublished price sensitive information in relation to the securities of the company.153

A person who is prohibited from dealing on a securities market in any securities is also prohibited from counselling or procuring another person to deal in those securities, knowing or having reasonable cause to believe that person would deal in those securities. He also must not pass the information to any other person if he knows or has reasonable cause to

---

152 Section 315, *ibid.*
153 Rule 110(3) (a) & (b) of the *SEC Rules and Regulations.*
believe that other person will utilise the information for the purpose of dealing or of counselling or procuring any other person to deal in those securities.\textsuperscript{154}

The following persons in the following circumstances are not prohibited from dealing in securities while they have unpublished price sensitive information:

(a) A person who does any particular thing otherwise than with a view to the making of a profit or the avoidance of a loss (whether for himself or another person) by the use of that information;

(b) A person who enters a transaction in good faith in the performance of his functions as a liquidator, receiver or trustee in bankruptcy;

(c) An individual who does anything in the course of his business as a stockbroker, having obtained a price sensitive information, provided the information is of the kind which it would be reasonable to expect him to obtain, and he deals in the securities in good faith in the ordinary course of that business;

(d) An individual who, does a thing relating to particular securities in good faith in the course of a business in circumstances in which it would be reasonable to expect him to obtain the price sensitive information;

\textsuperscript{154} Sections 111 (6) of the ISA.
(e) An individual who does something to facilitate the completion or carrying out of a transaction in good faith.\footnote{155}

Sanctions for insider trading

The ISA provides criminal and civil sanctions for insider trading. A person who contravenes the provisions of the ISA on insider dealing, that is, sections 111 and 112, is guilty of an offence, and on conviction is liable to a term of imprisonment not exceeding seven years or a fine of $\text{₦}500,000$ (five hundred thousand naira) or to both the fine and term of imprisonment.\footnote{156} If the offender is a body corporate, the fine shall be not less than $\text{₦}1,000,000$ (one million naira). In the alternative to the fine, either of the convicts could be made to pay an amount equivalent to twice the amount of the profit derived or loss averted by the use of the information obtained in contravention of the ISA.

In addition to the criminal sanction, there are civil remedies that directly accrue to the persons whose interests the insider has injured. The remedies consist of payment of compensation and accounting for the benefit made from the transaction. An insider who contravenes the provision of section 111, or any person who contravenes the provision of section 112 of the ISA is guilty of an offence and is liable on conviction to compensate any person for any direct loss suffered by that person as a result of the transaction unless

\footnote{155} Section 113, \textit{ibid}.  
\footnote{156} Section 115, \textit{ibid}.  

70
the latter knew the insider information or could have known the information at the time of the transaction if he had exercised reasonable diligence. In addition the guilty insider is accountable to the issuer of the securities for the benefit or advantage received or receivable under the transaction.

Significantly, conviction for insider dealing in securities is hardly in our law reports. Insider dealing is an intricate web of conspiracy that operates on a code of silence because the insiders who mutually benefit from it will not blow the whistle.

V. FROM THEORY AND REGULATION TO THE NIGERIAN DYNAMIC EQUIVALENT OF SECURITY INSECURITY

For a closing roadmap, I have identified for evaluation four of the core objectives that securities regulation seeks to achieve. First, it seeks to ensure certainty of contract and protect property right of investors in securities. Second, it seeks the disclosure by publicly quoted companies of the material information that affects the value of their securities. Third, it aims at protecting investors from unfair practice by corporate insiders and securities market professionals. Fourth, it targets systemic protection against financial failure of market professionals and institutions.157 In the light of these objectives, how well has the Nigerian securities regulatory system fared in protecting the value of securities?

Ensuring Certainty of Contract and Protecting Property Right of Investors

---

Nigeria has elaborate regulatory and institutional framework for ensuring certainty of contract and protecting property right of investors in securities. In my 2005 appraisal of the regulatory and institutional framework of our securities market titled “Nigerian capital market regulations”\textsuperscript{158} I found that the institutional framework for securities regulation in Nigeria were adequate and comparable to those of the similar emerging and developed securities markets in the Common Law system. Oladele and Ogunleye (2006) in “The conceptual basis and limit of self-regulation by securities market in Nigeria and the United States”\textsuperscript{159} appraised the dual system of securities regulation by the Government and Self-Regulatory Organisations (SROs) to establish its systemic justification and demerits.

At the apex of the regulatory structure of the Nigerian securities market is the SEC. However, the law allows market institutions to provide the first layer of regulation by regulating themselves. Hence, they are called Self-Regulatory Organisations (SROs) and are in turn regulated by the SEC. The SROs are the Nigerian Stock Exchange (“NSE”), an official market for trade in publicly listed securities, The Central Securities Clearing System Limited (“CSCS”), a subsidiary of the NSE as well as its clearing house and depository, the Abuja Stock Exchange (“ASE”) as well as its subsidiary, the


Securities Clearing and Depository Limited ("SCDL") and the National Association of Securities Dealers ("NASD").

The justification for self-regulation is that SROs have the expertise to provide detailed regulation, deal with ethical and moral issues in the market in a more responsive way, eliminate regulatory tensions and ensure participation by the regulated. Phillip Parker identifies the advantages of the self-regulatory model as the technical expertise and flexibility of the SROs, cost savings to government as well as the acceptability of the SROs’ rules over those of government regulators. He adds pertinently:

Market professionals who are actively engaged in the business may have a better understanding of many technical aspects of exchange regulation... An SRO may have a greater ability to adapt to new developments in the securities markets.... Because the members of an SRO elect its directors and have an opportunity to participate in the rule-making process, there may be a greater willingness to comply with the rules governing their conduct.\(^{160}\)

However, against the advantages, Parker identifies as disadvantages conflict of interest, antitrust implications, and due process concern. He further elaborates as follows:

Because a securities exchange is both a business venture and a regulatory body, there is always a

danger that the rules will not be enforced in circumstances where the enforcement would be detrimental to business.... Because the members of an SRO are collectively regulating their own behaviour, there is a danger of collusive behaviour that ultimately hurts customers.... A member’s right to conduct business can be taken away by individuals exercising a form of governmental power. A member may have all of the procedural rights, however, that would apply if the government were the disciplinary body."

Sadly but truly however, the framework has failed in some important areas. There is clear evidence that issuers, insiders and market operators manipulate the institutional framework in ways that devalue investors’ securities and affect their property right. Permit me, Mr. Vice-Chancellor, to mention two of the SROs whose procedure could be manipulated to the harm of investors. They are the NSE and the CSCS.

Central Securities Clearing System Limited facilitates clearing and settlement of trade in securities so that investors could realise and pass value of securities easily through sale and purchase. The Bank for International Settlements (BIS) and the International Organisation of Securities Commissioners of Securities Regulators (IOSCO) stipulate the development of an efficient securities trade clearing and settlement system within each member jurisdiction. Participants in the securities market should set up the system with clearing and depository facilities, and it must aim at a settlement period of the

161 Ibid.
transaction day plus a maximum of three days (T+3). The securities regulators of the Group of Thirty (G30), in its report on securities settlement systems, had recommended a clearing and settlement period of (T+3) for the major markets, and (T+5) for emerging markets. It is commendable that Nigeria has achieved the T+3 period.

In response to the recommendations above, the leading SRO in Nigeria, the NSE established the Central Securities Clearing System Limited (CSCS) in 1992. The CSCS facilitates the exchange of stock and bond holdings as well as offers custodian services. As a clearinghouse, it facilitates the validation, delivery and settlement of securities transactions. The NSE holds 51 per cent of its shares while stockbrokers, stock registrars, investment bankers and other market participants hold the remaining 49 per cent.

The Nigerian SEC must register all securities clearing settlement depository and custodial agencies before they

---

163 The Group of Thirty (G.30) is a ‘think-tank’ of 30 high-level individuals drawn from central banks, commercial banks, economists and finance ministries of countries which include Australia, Austria, Belgium, Canada, France, Germany, Italy, Japan, Singapore, Spain, Switzerland, United Kingdom and United States. The group made nine core proposals on securities trade clearing and settlement systems which the member-countries of IOSCO, including Nigeria, have been complying with since the 1990s. See Hal S. Scott and Phillip A. Wellons, *International Securities Regulation*, New York, Foundation Press (2002), pp. 416-418.
could operate. Importantly, each of the agencies must have a paid up capital of \(\mathbf{\text{₦500 million (five hundred million naira)}}\),\(^{165}\) and post a fidelity bond of at least 25 per cent of the paid up capital for the protection of investors. Its sworn undertakings are identical to those of the other SROs, and it must inform the SEC of the internal control measures in respect of access to demobilised securities.\(^{166}\)

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

Mr. Vice-Chancellor, I opened a CSCS account though my stockbroker, applied for the shares of a leading commercial

---

\(^{165}\) About US $4 million.

\(^{166}\) Rule 25, SEC Rules and Regulations
bank and indicated on the application form my CSCS account number to which the shares should be promptly credited. Curiously, the issuer bank issued me a share certificate which reached me late through the postal system. The value of my shares increased remarkably, recording for me an appreciation of ₦7.00 per unit within weeks. I made to dematerialise the shares so that I could sell them off through the CSCS. The Registrar of the issuer queried my signature as irregular. Thus the value of my shares was locked in through the inconvertibility of the certificate which the issuer had no business issuing me in the first instance. We were at it during the weeks that followed, during which many institutional and other investors as well as market professionals were selling off their stock in a frenzy that drove the price lower that the ₦33.00 I bought each unit at the issuer’s public offering. It was only when the price dropped to ₦28.00 that the Registrar unilaterally accepted my signature as regular and credited my CSCS account. I had been deprived of the opportunity to sell my shares at a considerable profit and I had lost ₦5.00 per unit on my investment. Whither the security of my securities?

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

Requiring Disclosure by Publicly Quoted Companies of Material Information that affects the Value of their Securities
The Nigerian securities regulatory system has failed partially to keep numerous corporate investors informed of the material securities information and the rights that attach to the corporate securities that they have invested in against the backdrop of the propensity of securities issuers to conceal and mystify material information. It has not solved the problem of informing retail investors who, more often than not, lack the means and technical ability to have, understand and utilise material securities information. The contents and complexity of the required information have addressed the problem of a disclosure system that best protects institutional investors who are sophisticated and have the means to obtain as well as verify information. Like the major securities markets such as the United States and United Kingdom, it makes disclosure mandatory and also prescribes the information which securities issuers must disclose. In addition, it increases the content and quality of the required information in response to real and anticipated market crashes as well as fraud on investors from time to time.\textsuperscript{167} The contents and complexity of the information disclosed as well as incidences of fraud on the investors show clearly that the unsophisticated targets of the disclosure have not benefited from the protection it offers. The assumption that all investors could evaluate securities disclosure concentrates on the functioning of the Nigerian securities market as a capital raising forum without adequately addressing the protection of all investors, informed and uninformed.

The registration statement in securities offering is in public domain once the issuer has filed it with the SEC and the latter has registered it. Of this statement, the prospectus is the material part that every investor is entitled to. It usually is a document of about forty pages in glossy and expensive print. According to a Director at the SEC and the head of its Lagos Zonal Officer\textsuperscript{168} as well as a senior officer of the Nigerian Stock Exchange who has served for some years as Principal Manager in the Listing and Quotation Department\textsuperscript{169}, although every prospective investor is entitled to a copy of the prospectus, the cost of making it available to all of them is so prohibitive that it could not be available to all of them. In addition, even if the issuer made it available to all prospective investors, the ones who would end up investing in the issuer’s securities would be a relatively small percentage of the recipient. Either way, there is a disincentive to the circulation of a prospectus to all prospective investors.

The field interviews that I conducted confirmed that the prospectus is a highly technical document containing legal and accounting information that could not be understood by a person who is well educated but not in finance, accounting

\textsuperscript{168} Okereke, Chris O. Unstructured interview conducted by me in Lagos on October 3, 2006. Okereke is a highly placed official of the SEC who served on the joint Committee (of the SEC and CAC) on Corporate Governance of Public Companies in Nigeria. The report of the committee forms the basis and substance of \textit{Code of Corporate Governance in Nigeria} (October, 2003).

\textsuperscript{169} Momoh, Mohammed, Unstructured Interview conducted at an examination session of the Chartered Institute of Stockbrokers (CIS), held in Lafia Hotel, Ibadan on October 20-21, 2006
and law at the same time. As such, even for persons with requisite technical expertise, it does not make light reading and understanding. In the United States, an attempt to make the prospectus intelligible to the average investor through plain English has failed. It cannot succeed in Nigeria because English language is not only a second language to as many as three hundred and sixty local languages, but many are uneducated. It is mythical to hold that an average investor could understand and effectively use prospectus and other securities disclosures to make “an intelligent investment decision.” He lacks the ability to understand complex financial information supplied in a typical registration statement. Only professionals could make an effective use of it.

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

171 Ibid.
It is submitted that the impossibility of reducing securities information disclosure into plain, understandable and valuable language rightly justifies the application of filtration theory in Nigeria. By this theory, the average investors could benefit from securities disclosure only after they have filtered it through professionals. Findings from interviewees in the course of my research confirmed the findings of Homer Kripke, an emeritus professor of securities regulation, who studied the response of the American public to securities disclosures in the period between 1933 and 1970. He came to the conclusion that the public did not make securities decisions based on the SEC prospectus disclosure requirements.\(^{174}\) Therefore, he has described the informational function of the United States securities regulation as creating “the myth of the informed layman.”\(^{175}\) He consequently submitted, employing the ‘filtration theory’ that a layperson could only benefit from mandated disclosure “after a process of filtration through professionals, directly in the form of investment advice or management and indirectly through their effect on the market.”\(^{176}\) This line of thought has established that the value of widely traded securities is best

---


\(^{176}\) Kripke, Homer “Fifty years of securities regulation in search of a purpose” 1984 -1985 *Corp Prac Comm* 547 at 561.
estimated as the market price determined through the interplay of sellers and buyers.\textsuperscript{177}

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

The investors who do not understand the prospectus buy shares whose prices indicate that the issuers are trading profitably, paying dividends and allotting bonus shares to the shareholders. To such investors, securities are as good as their prices. In this attitude, they easily find allies in investors who buy securities on impulse, the noise traders who buy because buying is the perceived trend, and the “dart throwers” who simply gamble through investment. It is significant that of all the retail investors in securities in the past seven years that I interviewed purposively, none of them invested due to the

information that the issuers disclosed. Motivated by increased income, they followed the fad to invest in securities whose prices were rising.

The average investor requires education and reorientation. Significantly, the ISA charges the SEC to promote investors’ education and the training of all categories of intermediaries in the securities industry.\textsuperscript{178} The IOSCO, of which Nigeria is a member, also has objectives and principles of investor education, compliance with which it monitors in member countries on regular basis.\textsuperscript{179} It is significant that the SEC has held almost thirty public enlightenment campaigns around the states of the Federation on the opportunities in the Nigerian securities market. It has also launched a television network programme to educate investors and other stakeholders in the securities market.\textsuperscript{180} The SEC should collaborate intensely with SROs for an elaborate and sustained education of investors not only to engender their interest in the market and promote the growth of the economy, but to ensure that they are adequately informed and protected. The SEC and the CAC have taken another

\textsuperscript{178} ISA, section 8(p).

\textsuperscript{179} IOSCO held a seminar/training programme on “Methodology for assessing implementation of the objectives and principles of securities regulation and investor education” in Madrid, Spain from November 17-21, 2003. It is significant that two members of staff of the Nigerian SEC attended the seminar/training programme – See Securities and Exchange Commission, \textit{Securities and Exchange Commission annual report and accounts}, 2003.

\textsuperscript{180} Ibid. See also \textit{Securities and Exchange annual reports and accounts 2000, 2001 and 2002}. 83
significant step in acknowledging that investors need to be informed and active in protecting themselves. The *Code of Best Practices* to be followed by publicly quoted companies and for all other companies registered in Nigeria with multiple stakeholders, issued in 2003 provides *inter alia* that

(a) The company or the board [of directors] should not discourage shareholder activism whether by institutional shareholders or by organized shareholders’ groups. Shareholders with larger holdings (institutional and non-institutional) should act and influence the standard of corporate governance positively and thereby optimize stakeholder value.

(b) Information made available to institutional shareholders should also be made available to other shareholders at the same time in such manner as to ensure that neither group enjoys preferential treatment.\(^{181}\)

To strengthen the practice enjoined by this provision, both the SEC and the CAC need to be proactive in sensitising the investors, particularly non-institutional or retail ones, to their

rights and the use to which they could put the information made available to them by publicly quoted companies.

Both Okereke and Momoh\textsuperscript{182} recommended that retail investors who are not knowledgeable enough to understand the disclosure should invest in mutual funds managed by securities professionals who would have analysed and filter the disclosure before making informed investment decisions for and on behalf of the uninformed and unsophisticated. If they utilise this option, they do not have to take the trouble of information gathering and analysis, and they pay little for quality investment since each of them is a minute part of a pool of many benefiting investors. It is submitted that the SEC should remain vigilant and be more proactive in regulating and monitoring mutual funds managers. With the introduction of the contributory pension scheme, there has been a tremendous increase in mutual funds. The vigilance of the SEC will go a long way in ensuring that investors in this pool of mutual funds do not suffer from the overreaching of the fund managers of the kind that led to the United States securities market crash of 1929 and the resultant Great Depression.

Protecting Investors from Unfair Practice by Corporate Insiders and Securities Professionals

Between 2008 and 2009, genuine investors on the one side and naive ones driven by fad have suffered damaging impact of gross devaluation of their securities through violation of two core provisions of the ISA on investor and systemic

\footnote{182 Footnotes 169 and 170.}

85
protection. The first was the violation of section 105 of the ISA. That section prohibits the creation or doing of something that may create a false or misleading appearance of active trading in any securities on a securities exchange or capital trade point or with respect to the market price of such securities. It also prohibits the straddling of the sale and purchase ends of the same security as well as devices meant to maintain, inflate, depress, or cause fluctuations in the market price of any securities.

Conversely, findings subsequent to the market crash of the past three years revealed that market professionals employed the prohibited devices in ingenious ways that appeared legal. Those devises ended up driving the prices of some securities excessively up and depressing them by as much as 92 per cent when the bubble burst. They abused and violated the margin requirement provision of section 104 of the ISA which seeks to prevent excessive use of credit for the purchase of securities by dealers and member companies. Broker-dealers did not only borrow massively but they also encouraged investors to borrow from the margin accounts maintained by the broker-dealers and from commercial banks. Much of the loans were secured with the existing shares of the investors and those purchased with the loan fund. Investigations by regulators, especially the Central Bank of Nigeria revealed that substantial borrowing and lending were done by the insiders of banks and securities firms. The loan funds increased the sale tempo on the stock market. The repayment drove down the prices because there was a huge sale of securities that served as collateral for the loans. The systemic impact affected a number of banks that could not recover
much of the loans. The negative impact which also caused loss of confidence in those institutions propelled the devaluation of the shares of the banks. The shares of Oceanic Bank International Plc and Intercontinental Bank Plc among many other fell from the region of N33.00 to less than N2.00. Panic sale by investors who were losing confidence in the stock market caused the downward spiralling of stock prices.

My findings and recommendation of 2003 on the failed banks crisis of the 1990s are relevant. In “Towards an efficacious legal framework for debt recovery in developing countries”\textsuperscript{183} Undue influence by bank controlling shareholders, management and other insiders abuse of the loan granting process was one of the reasons that accounted for loan default. Many directors of the failed banks granted loans to themselves, associates and corporate bodies in which they had pecuniary and proprietary interest. Records available at the office of the Nigerian Deposit Insurance Company revealed that 80 per cent of the non-performing and bad debts of the failed banks were granted to the directors of those banks. The fact that most of the loan defaulters were incompetent \textit{ab initio} compounded the problem. Had a proper credit rating been done, the fact would have been revealed.\textsuperscript{184} However, in cases of this nature, there is no incentive for credit rating. On the face of the transactions, the parties appear to have ‘complied’ with the regulatory


\textsuperscript{184} \textit{Ibid.} at p.50.
requirement of securitisation, but behind the façade of ‘compliance’ lies harmful fraud. Cases of this nature reveal that the erring bank officials either have economic self-interest in the loan or the borrowers are friends or relatives of the officials. Deceptive contrivances of that nature accounted for the recent crises in the Nigerian financial sector and the meltdown of securities value.

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

The funds that have been invested in securities on the Nigerian securities market are in hundreds of trillions of naira. Of this sum are the life-savings and pensions of the investors. Therefore, the need for a more efficacious system of investor protection is paramount. With increased earnings by many Nigerians in the last decade, much has been invested in securities. In “The legal nature and limit of employee benefits under Nigerian contributory pension scheme”,\(^\text{185}\) I appraised the legal, social and economic implication of the contributory pension scheme. With the introduction of that scheme and its enabling law permitting pension fund managers to invest a sizable percentage of the contributed pension in publicly quoted securities, a significant portion of the retirement benefits of employees in Nigeria is out there in the domain of

the securities market. Our expectation of good life in retirement must not be cut short by speculative frenzy not driven by market fundamentals. The American securities market, the most regulated in the world, experienced that during the last decade. Nigeria had a dose of it during the past couple of years. Our regulatory system must be proactive and anticipatory.

Historically, our securities market grew too slowly to reach the present modest level at which the regulators must strike a healthy balance between capital mobilisation and investor protection. My evaluation of its legal framework and economic performance from inception till the mid-eighties in “The legal framework of the Nigerian Securities market” revealed that its initial driving philosophy was capital mobilisation. When the securities market began business as the Lagos Stock Exchange in 1961, only nine securities (3 equities and six government securities) were listed on it. A decade later, the figures stood at 14 equities, six industrial loan stocks and 32 government securities. In 1975, listed securities rose to 86 and stood at 107 at the end of 1978. As at the middle of 1985, the market had listed 175 securities with a total market capitalisation of N5.5 billion. At the last quarter of 1988, the Exchange listed 186 securities comprising 103 equities, 81 industrial loan stock and 52 Federal Government development stocks. At the time of this lecture, the market capitalisation stood in the region of 800 trillion naira.

187 Ibid. at p.69.
In “Impacts of the Nigerian Enterprises Promotion Act on the Nigerian Securities Market”,\textsuperscript{188} I established that the growth of the securities market from inception through the 1980s had been due to government action and measures. The most effective initiative of that era was the indigenisation exercise through the 1972 and 1977 Enterprises Promotion Acts. The initiative quadrupled the numbers of securities and securities holders on the Nigerian securities market. However the globalisation of trade and investment replaced indigenisation with investment promotion. From the paucity of the securities traded on the market and the unwillingness of companies to disclose full and accurate corporate information, possibly for fear of taxation,\textsuperscript{189} two of the factors that accounted for the slow growth of the market, Nigerians of the 21\textsuperscript{st} Century have cultivated the culture of investment. The sustenance of that culture as well as the internationalisation of our securities market depends on transparency and candour in transaction and regulation as well as the ability of our regulatory system to curtail destructive manipulation presented as creativity.

VI Conclusion

Mr. Vice-Chancellor, Sir, Nigeria is in the process of increasing corporate financing through the securities market. More than


before there is an increase in capital market activities and market capitalization which is in trillions at the time of this lecture. The introduction of the contributory pension scheme will continually increase the volume of investment and money in the securities market. As money management gains impetus, the need for enhanced investor protection will arise as the potential risk of the investors staking their savings increases.

Our securities regulatory system must address the problem of market rigging speculation. The securities market plays a vital role of matching lenders with investors. However, the experience of the past two years experience has revealed that the market was driven not by market fundamentals but by speculative frenzy. The startling free-fall of securities prices dealt a debilitating systemic impact on the on the entire financial system and economy. Our regulatory system responded, largely belatedly. But it is clear that the system, while succeeding largely in issuers’ transaction has failed in regulating financial intermediaries who are the leading players in the transactions on the securities market. The artifices for fraud not only on the market but on genuine retail investors are devised by market professionals in unusual manifestation that our regulators have not been able to track timeously. We must have a system that is able to track unusual price movement and intervene in securities trade on real time basis.

The issue of conflict of interest and insider dealings in the financial system must be addressed. It is amazing that the number of persons prosecuted and penalised for the violations that led to the stock prices crash of the past two
years is disproportionate to the magnitude of the loss to investors and the entire financial system. I have argued that our system lacks the courage to penalise offenders in the financial system. In 2007, I anticipated the damaging eventuality of 2008-2010. I recommended rigorous law enforcement and stiff penalties for rule violation in the securities market. What has been done is responsible fire-fighting that does not appear to have plumed the depth.

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

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

Mr. Vice-Chancellor, Sir, I appreciate your encouragement and input in my research engagement of the past ten years. I am indebted to the U.S. State Department as a Fulbright Fellow, the Georgetown University Law Centre that found me worthy to be a Georgetown Scholar, my professors and mentors at the Obafemi Awolowo University, Ile-Ife and Georgetown University, Washington DC where I gained insight into securities regulation and global securities markets as well as my friends at the SEC and NSE at diverse times. I deeply appreciate my darling wife, Oluremi Abiodun Oladele who keeps me on track academically and domestically. I have fond memories of my parents, Deacon George and Deaconess Dorcas Oladele, teachers of teachers with limited financial but vast intellectual resources for the sacrifice they made to keep me well educated. All glory, laud and honour I give to my LORD Jesus Christ.

Distinguished ladies and gentlemen, I thank you for listening.

REFERENCES


Akanki, E.O. “The history of company law” 11 *Nigeria Journal of contemporary law* 105


Black, Bernard (1998) “Information asymmetry, the internet and securities offering” 2 Journal of Emerging and Small Business Law, (Summer)


Brandeis, L.D. (1914) Other people’s money and how bankers use it.


Daines, Robert and Jones, Charles M. “Mandatory disclosure, asymmetric information and liquidity: the impact of the 1934” http://www.law.northwestern.edu/colloquium/law-economics/daines visited on 22/12/05.


_____ (1965) “The behaviour of stock market prices” (1965) 38 J. Bus. 34.


_________ (1984-85) “Fifty years of securities regulation in search of a purpose” *Corp Prac Comm 545*.

_________ “A search for a meaningful disclosure policy” *31 Bus. Law* 293.


96


_______ (1990) “Company capital and securities” in The proceedings of the Faculty of Law Workshop on the Companies and Allied Matters Decree, 1990


_________ (2007) Securities information disclosure and legal PhD (Law) thesis submitted to the Department of Business Law, Faculty of Law, Obafemi Awolowo University, 234pp.


