A CASE FOR CORPORATE LIABILITY FOR INSIDER TRADING OFFENCES IN NIGERIA

1. INTRODUCTION

The phenomenon of 'insider trading'[1] otherwise referred to, as 'insider dealing'[2] by some learned authors is inextricably associated with unlawful transactions in company securities. The insider trader may be defined as a person or individual who uses price sensitive information or knowledge acquired by virtue of his privileged position in a corporation, either arising from holding an office or by connection to those in office, to trade in such information for personal gain to the detriment of the investing public, prior to such information being made public. Trading in company securities constitute the very essence of private capital investment and the ultimate survival of capitalism. The imperatives for the requirement of perfect securities market are hinged on two conditions that is, freedom from manipulation and freedom from trading on inside information. This calls for a form of regulation and it is the function of government and the law in one way or another to cleanse the markets of these ills as nearly as possible. The aims of the consideration of this offence as it relates to corporations are to examine the rationale for making insider trading an offence, the legal regime on insider trading and the extent to which the offence can be committed by a corporation.

2. Rationale for making Insider Trading an Offence

One must state from the outset that securities represent 'intricate merchandise'[3] in the sustenance of the private capital enterprise. Unlike tangible 'merchandise' that can easily be touched, smelt and evaluated in comparison with other brands by physical examination by the consumer, it is not the case with securities. As rightly stated by Yagba, the worth of securities depends on the worth of the issuing entity. Knowledge of that entity's operations is therefore necessary to evaluate its worth. This is ordinarily beyond the consumer's reach. The consumer, (in this case the investor) is invariably constrained to depend on the credibility of the issuer and believe his claim about the enterprise. The temptation therefore, is for those issuing securities to make outlandish claims about the financial state and prospect of their enterprises and thus preying on unsuspecting, unsophisticated or gullible investors with fantastic promises in speculative schemes.[4]

In most jurisdictions,[5] the law has come to protect such unwary investors against unscrupulous issuing entities by affording investors adequate information upon which to assess the worth of the securities offered in order to arrive at wise business decisions. Such information, by and large, would have to originate from the issuing entities to the public by or through its directors, or officers or other person connected with the issuing entities or companies or industry. Herein lies the danger of insider trading since such directors or officers are likely to be either the authors of such information or its first recipients, where they know such information to be material or price sensitive, they may unfairly trade in the company's securities to the disadvantage of those who trade without access to or knowledge of the confidential information. Thus, apart from the conflict in interest that immediately arises from such a situation, the securities market may suffer from the artificial manipulations of such insiders to the detriment of other dealers who ordinarily may have based their speculations on prevailing market forces.[6] The need for regulation, therefore, is to provide a level playing ground and foist some corporate discipline to as much as possible benefit all participants in the market.

For ethical reasons, prohibiting insider dealing should be self-evident on the ground that it is manifestly unfair to those who deal with the insider. In the words of Yagba, 'it is a practice akin to, and as reprehensible as cheating at cards because the insider possesses a secret advantage which is certain to benefit him at the other party's expense.'[7]

Furthermore, to allow insiders to trade in the securities of their company as freely as any other person may induce them to improperly delay the disclosure of relevant information relating thereto in order to secure personal advantage. In this context, prohibiting insider trading is to ensure that insiders disclose material information at their disposal before trading in the securities and that they should refrain from trading if they cannot make the disclosure without betraying corporate confidence. The basic problem therefore is the timing of disclosure. Thus where undue delay would enable insiders to profit themselves, they might easily be tempted to procrastinate. For instance, directors may delay the recommendation or rejection of a takeover bid so as to make personal gains for themselves through insider trading.[8]

Also, insider trading, where it pervades unchecked is capable of distorting the entire corporate set up. The prospect of gain may prejudice the judgment of insiders and recommendations on matters like the declaration of dividends and investment in other companies, so as to enable them indulge in short-swing speculation in the securities of companies. Dividends could, for example be raised by directors in order to create a false rise in the value of shares and vice-versa.[9] This could affect the integrity of the stock market, thereby undermining investor and public confidence in the securities of companies, and consequently discourage legitimate investment in corporate securities.[10]

The justification for making insider trading an offence is that it is akin to the offence of cheating or obtaining by false pretence whereby a person fully aware of the true state of events in a corporation, in the context of price sensitive information ought to disclose to all interested in that corporation but fails to do so. If he proceeds to take advantage of it to the detriment of other interested persons, such other persons stand cheated since if they also knew of the information, they might take advantage of it. Criminalising corporate insider dealing may also curb or deter the raging and brazen abuse of corporate price sensitive information through their manipulation by some chief executives and managing directors of giant corporations, which have caused horrendous losses to employees and investors in these corporations.

3. The Legal Regime on Insider Trading

The classical regime against insider trading was hinged on common law fiduciary duties of company directors or officers with its entire ramifications. Although strictly outside the scope of this discourse the laws are essentially founded either on the need to protect professional integrity or on the disclosure philosophy of honesty rather than fairness, which is the focal consideration in the regulation of insider trading.[11] These eventually evolved into standard statutory legal provisions in various commonwealth jurisdictions with minor or no difference in the substance of protection it seeks to afford investors.

Accordingly, the general principles on insider trading as stated in the preamble to the European Community Directive is that investor confidence in security markets depends inter alia on 'the assurance afforded to investors that they are placed on an equal footing and that they will be protected against the improper use of insider information.'[12] It is against this backdrop that one shall examine the basic features of statutory provisions on insider trading in the United States, Canada, England and Nigeria, with a view to ascertaining the extent to which they apply to corporations.

A consideration of the phenomenon of insider trading in these jurisdictions will proffer insight into the attitude of the law in these various countries and serve as persuasive guide not only to the legislature but also to the judiciary in Nigeria. It also assists in bringing to focus the varying degrees and types of corporate insider dealings, which sometimes may influence legislative and judicial approach to combating the vice.

A cross-jurisdictional approach to this discussion is further compelled by the increasing globalisation of the world economy. This phenomenon is facilitated by the developments in information and communication technology, which has engendered the interconnectivity of world capital markets, securities transactions and regulatory institutions thereby breaking the barriers to primordial ideological differences among the nations. There is therefore a convergence of economic interests. These underscores the need for agreements among various nations' regulatory institutions to allow them obtain information and evidence located abroad while avoiding conflicts of law issues arising from divergence in legal systems.[13]

The United States

In the United States, the main statutory onslaught on insider trading appears to find expression in Rule 10b-5 which operates by virtue of section 10 of the United States *Securities and Exchange Act, 1934:* Rule 10b-5 provides:

> It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, to employ any device, scheme or artifice to defraud. To make any untrue statement of a material fact or to 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, or to 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 any security.

This is complemented by the signing into law on July 30th 2002 of the *Sarbanes Oxley Act* – an offshoot of the collapse of US mega corporations, Enron and WorldCom. The Act essentially aims at enhancing investor protection by increasing the accuracy and reliability of corporate disclosure. It created new rules to strengthen corporate governance, increase transparency and shore up investors' confidence.[14]

It is noteworthy that although the word 'insider' is not used in this Act, it applies by necessary implication to the extent of the opening phrase relating to 'any person directly or indirectly.' Such person may be connected to the company either directly, as in the case of the corporate officers or directors or indirectly as in 'tippees'[15], that is, the receiver of inside information from an insider. Commenting on this category of insiders Loss Luis stated that 'the duty to disclose does not necessarily stop with what might be called the first generation of tippees, for some tips conveyed by the first tippee-become-tipper may be more specific and significant than other tips emanating directly from an insider.'[16] He however added that the proposed *Federal Securities Code* would solve the problem of treating all tippees alike, but only *prima-facie*, with authority in the Securities and Exchange Commission or a court to find that it would be 'inequitable, on consideration of the circumstances and the purposes of this code (including the deterrent effect of liability)' to treat the particular tippee like an insider.[17]

Commenting further on Rule 10b-5 Loss observed that:

> Rule 10b-5 ... in general terms prohibits fraud or misstatement or half-truths by *any* person in connection with the purchase or sale of any security. This was not conceived of as a weapon against insider trading at all. It was simply a way for the commission to proceed against fraudulent buyers generally... But the court watered the acorn in two ways. First, they emancipated themselves from the common law by simply construing the rule, as a matter of federal law, so as to impose an affirmative obligation on insiders to disclose all material facts. Secondly, they construed a private right of action as a matter of federal law, so that any buyer or seller who can show a violation of the rule is entitled to damages or other appropriate relief.[18]

So far as the extent of information required to be disclosed is concerned, it is the *Federal Securities Code*, which defines a fact as 'material' if 'there is a substantial likelihood that a reasonable person would consider it important under the circumstances in determining his course of action.'[19] For instance, this would include failure to disclose truly extra ordinary events, such as a contemplated merger or a tremendous mineral discovery on the company's property. This seems to correlate with the 'special circumstances' doctrine laid down by the U.S. Supreme Court, in 1908, in the case of **Strong V. Repide.**[20] In explaining the concept of materiality further, the Federal Securities Code talks of affirmative disclosure only of 'facts of special significance,' which it defined as a fact that in addition to being material 'would be likely on being made generally available to affect the market price of a security to a significant extent' or alternatively, a fact that 'a reasonable person would consider... especially important under the circumstances in determining his course of action in the light of such factors as the degree of its specificity, the extent of its difference from information generally available previously, and its nature and reliability'.[21] The Securities and Exchange Commission in approving the code, insisted on abandoning this concept in its own actions, and putting the burden on the defendant in an action to establish that the omitted fact was not one of 'special significance' once the plaintiff pleaded and proved that it was material. Thus, in **SEC v. Texas Gulf Sulphur Co.**[22] the court held that the test for determining what constitutes a material disclosure is objective in that the relevant question always is whether there has been non-disclosure of any fact, which in reasonable and objective contemplation might affect the value of the securities.

One last point is worthy of mention on rule 10b-5. An 'insider' under the rule does not seem to be restricted only to natural person. The phrase 'any person' in the opening paragraph is suggestive of the fact that an insider could also be a corporate body. One submits that in the absence of any express restriction in the rule excluding its application to corporate bodies, the word 'insider' is perforce applicable to corporations. The justification for this assertion shall be discussed in the next segment of this section on the extent of the application of the insider trading prohibition on companies. In the interim we must first conclude the discussion in the other jurisdictions mentioned earlier.

3.1 Canada

Provincial laws in Canada dealing with insider trading have similar provision creating a fiduciary duty owed to shareholders by directors and officers of a company. Operating as a double-edged sword, the legislation in the first place requires an insider to report his beneficial holdings in the corporation and any changes in those holdings to the relevant securities commission, failure of which would result in criminal liability.[23] Secondly, it provides that every insider of a corporation and every associate or affiliate of an insider who in connection with a transaction relating to the capital securities of the corporation, makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities,

> is liable to compensate any person or company for any direct loss suffered by such person or company as a result of such transaction unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction and
>
> (b) is also accountable to the corporation of any direct benefit or advantage received or receivable by such insider, associate or affiliate as a result of such transactions.[24]

Since directors also fall within the meaning of insiders for the purposes of Canadian insider legislation they have duties to disclose material information, not only to shareholders, but also to other people with whom they are likely to deal in securities, such duties are enforceable by a civil action either by these people or the companies with which the directors are connected. It also seems the legislation creates duties of disclosure on the part of directors in regard to dealings in securities towards their holding or subsidiary companies as the case may be, or to persons standing in a fiduciary relationship to the company of which they are directors.

Similar provisions against insider dealings, creating a right on the part of third parties dealing with a corporate officer, in respect of any loss suffered as a result of the officer using material information, unknown to the third party who could be a shareholder, to gain from such transactions are provided in the Australian and Singaporean legislation on insider dealing.[25]

3.2 England

In England, the law against Insider trading is contained in Part V of the *Criminal Justice Act, 1993.*[26] The Act, in section 52 (1) defines the Central offence which it creates thus: 'An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3) he deals in securities that are price-affected securities in relation to the information.' This definition, one submits, merely makes insider dealing an offence, leaving the essential constituents of the offence adumbrated and qualified in the remaining sections of the part, which are considered below.

First, the Act does not aim to control all dealings in shares where one of the parties has unpublished price sensitive information in his possession. The dealing must have taken place 'on a regulated market' and in certain similar situations for the Act to apply. It does not therefore control face-to-face transaction between private persons. Statutory instruments identify such regulated markets. The *Insider Dealing (Securities and Regulated Markets) order, 1994*[27] stipulates that in the United Kingdom these are markets established under the rules of the London Stock Exchange, the London, International Financial and Futures Exchange, the London Securities and Derivatives Exchange and Trade point. The law equally applies to analogous situations described as 'off-market' deals defined as those where the person dealing 'relies on professional intermediary or is himself as a professional intermediary.'[28] Such a profession must be that of acquiring or disposing of securities (for example, as a market maker[29]) or acting as an intermediary between a person who wish to deal (for example, as a stock broker), and the corporation, and such activities must not be incidental or occasional to some other activity. This, sort of removes the unduly restrictive requirement of dealing 'on a regulated market', as it is broader.

Secondly, the *Criminal Justice Act* regulates insider dealing on regulated markets or through professional intermediaries only by *individuals*[30]. This is rather curious, as it is indicative that only natural persons are susceptible to trading in inside information. The lack of use of the usual term, 'persons', as in the United States Rule 10b-5, express the scope of the provisions of the Act, such that corporate bodies are not liable to prosecution under it. The authors of *Gower's Principles of Modern Company Law*[31] seem to justify the restriction of the application of the Act only to individuals on account of alleged 'difficulties' its application to corporate bodies might cause particularly to merchant banks when one department of the bank had unpublished price-sensitive information about the securities of a client company and other departments had successfully been kept in ignorance of that information by a 'Chinese Wall,[32]' or otherwise. One of those other departments might deal in the shares, in which event the bank as a single corporate body would arguably have committed an offence had the Act applied to corporate bodies. Suffice to state here, with due respect to the learned authors that, this rationalization smacks of an unholy attempt at watering down the corporate liability principle, by artificially separating the constituent departments within a corporation in order to avoid liability by the corporate entity. This is more particularly so as each and every department within a corporation complements one another toward the attainment of the corporate goal-profit maximization. It is hereby submitted that the knowledge by a department within a corporation, of a price-sensitive information should be imputed to the management of the corporation enough to dissuade such company from trading in unpublished price-sensitive information.[33]

Thirdly, the individual must have traded on inside information. This is aimed at ensuring that all investors are placed on a level playing ground so that none is unduly prejudiced by information obtained by the other from inside the corporation. This is, however, not suggestive that all operators in the securities market must have parity of information. This is because there may be a superiority of one information over the other as a result of extra effort or skill expended by an investor in researching or investigating into a company's securities situation in order to arrive at a wiser investment decision. Thus it is contended,

> The aim of the legislation therefore should not be to eliminate all informational advantages, but to proscribe those advantages whose use would be improper, often because their acquisition was not the result of skill or effort but of the mere fact of holding a particular position.[34]

Thus, section 56 of the Act defines 'inside information' as information which:

Relates to particular securities or to a particular issuer of securities and not to securities generally or to issuers of securities generally. This is further expatiated by section 60(4) that information shall be treated as relating to an issuer of securities 'not only where it is about the company but also where it may affect the company's business prospects.' This definition therefore covers information from outside and/or within the company. For instance, that the government intends to liberalise the industry in which the company previously had a monopoly (as in outside information) or, that the company is about to declare a substantially increased or decreased dividend or has won or lost a huge contract; (as information from within).

The information must be specific or precise. It is specific where the information concerns a particular event but precise where it concerns not only the event but includes some minute details of the event. The knowledge of a take over bid is considered as specific, while knowledge of the price to be offered or the exact date on which the announcement is to be made would be precise. Thus while a specific information may not be precise, a precise information is invariably always specific.[35]

The information has not been made public. The question as to when information is 'made public' appears to be further elucidated by section 58 of the Act. From the point of view of analysts such information must possess either or both of the following characteristics. The first is that 'information is public if .... it is derived from information which has been made public.'[36] This requirement, it has been contended,[37] was intended to protect analysts who derive insights into a company's prospects which are not shared by the market generally (so that the analyst is able to out-guess his or her competitors) where those insights are derived from the intensive and intelligent study of information which has been made pubic. An analyst in this position can deal on the basis of insights so derived without first disclosing to the market the process of reasoning which has led to the conclusions even where the disclosure of the reasoning would have a significant impact on the price of the securities dealt in.

The second requirement is that information can be said to have been 'made public' if the information 'can readily be acquired' by those likely to deal in the relevant securities. The public in this case must be the dealing public that is the public that ordinarily deals in relation to the securities concerned. It may also not matter that the information is not known to that public, provided it is readily available to them. Thus, it appears that trading is permitted as soon as the information can be readily acquired by investors even though it has not in fact been acquired. This provision appears to be further reinforced by section 58 (2) (a) and (b) to the effect that publication in accordance with the rules of a regulated market or publication in records which by statute are available for public inspection mean that the information has been made public.[38] Section 58 (3) of the Act further throws light on the question of whether information is readily available to the extent of stating that certain features of the information do not necessarily prevent it from being brought within the category of information which 'can be readily acquired'. Thus, an information may not be excluded solely because it is published outside the United Kingdom, or is communicated upon payment of a fee, or can be acquired only by observation or the exercise of diligence or expertise, or is communicated only to a section of the public. However, an information may be excluded from being 'public information', where it can be shown that given the entire circumstances of a particular case, it is available only to a restricted few, for instance information to be obtained only on payment of a fee. In some circumstances, therefore, the question of whether a piece of information is 'made public' may be substantially determined by the court based on the circumstances of each case.

Lastly, inside information is expressed to be that which would be likely to have 'significant effect' on the price of the securities, if it were made public.[39] Although this may be difficult to assess by the time an insider is sought to be prosecuted, as he might have dealt in the securities already, and the information already public, the question may however be answered by looking at what impact the information did in fact have on the market when it was published.

The fourth but no least requirement for liability for insider trading is that the individual must have come in possession of the unpublished price sensitive information as an 'insider.' One has briefly commented on the requirement that the insider must be an individual.[40] The Criminal Justice Act defines three categories of insiders. Section 57 (2) (a) provides two categories while section 57 (2) (b) provides the third. The first are those who obtained inside information 'through being' a director, employee or shareholder of an issuer of securities. This has been construed simply as a 'but for' test- that is, there must be a causal link between the employment and the acquisition of the information, but not strictly in the sense that the information must be acquired in the course of the employee's employment.[41] For instance, if a junior employee happens to see inside information in the non-public part of the employer's premises, he would be within the category of insider, even if the duties of the employment do not involve acquisition of that information. Where, however, he comes across such information in a social context, this would not make the employee an insider, even though the information related to the worker's employer. It is noteworthy that this legislation recognises that shareholders fall into this category of insider, a most likely situation in the context of large institutional shareholders, which may, either as a general practice or in specific circumstances, keep in close touch with at least the largest companies in their portfolios.[42]

The second category of insider defined by section 57 (2) (a) is the individual with inside information 'through having access to the information by virtue of his employment, office or profession,' whether or not the employment, etc relationship is with an issuer. The phrases, 'by virtue of' seems liable to either of two interpretations. Either a simple 'but for' test or to mean 'in the course of' (a slightly stronger suggestion is this second category insider). If the latter is to be adopted, an insider may be, or be employed by, a professional adviser to the company, an investment analyst, who has no business link with an issuer, a civil servant, or an employee of an overseeing regulatory body; or a journalist or other employee of a newspaper or printing company. This may also include partners and employees of a merchant bank or solicitors' firm retained to advise an issuer on a particular matter, employees of regulatory bodies who are concerned with the issuer's affairs, journalist researching an issuer for story and even employees of a printing firm involved in the production of documents for a planned but unannounced takeover bid. Where however, the 'but for' test is adopted, then employees of these organizations, not employed on the tasks mentioned, but who perchance stumble into the information in the workplace, would be covered too.

The third category of insiders recognized in English law appears to obviate the need to define the actual scope of the second category. This is provided for by section 57 (2) (b) of the Act. Otherwise referred to as 'tippee[43]' in the United States, this consist of those who have inside information 'the direct or indirect source of' which is a person falling within either of the first two categories. This, for example will cover an employee of a merchant bank who overhears a colleague talking about a takeover bid on which the latter is engaged, liability of such an employee in this context is regardless of whether the primary insider has consciously communicated the information to the secondary insider. Indeed, the 'tipper' may be entirely unaware that inside information has been communicated to anyone else. All that matters is that the 'tippee' came across the information from a source falling within the first or second categories. Thus, inadvertent acquisition of inside information is covered.[44]

Apart from defining an insider for the purpose of liability, section 57 of the Act further imposes a requirement of *mens rea* for liability. This requirement is two-pronge: the accused must be proved to have known that the information in question was inside information and that the information came from 'an inside source,' that is, that he fell within one or the other of the three categories of insiders discussed. It may not be easy to establish this secondary arm of the *mens rea* with respect to the third category of insider, where particularly it is contended that the information came indirectly from the primary insider through a chain of communications.[45]

It is pertinent to highlight what the insider is prohibited from doing in English law. It however does not matter that as at the time the prohibited act was done, he had ceased to be an insider, either due to resignation as director or from employment through which the inside information was obtained. The first prohibited act is that there must be no dealing in the relevant securities. These are the securities which are 'price-affected' i.e. those upon the price of which the inside information would be likely to have a significant effect, if made public. Dealing is defined as acquiring or disposing of securities.[46] It does not matter that the dealing was carried out by an agent or a principal. So far as there is dealing, there is liability. Dealing in this respect indicates a positive act of acquiring or disposing of securities, as this will not affect a refrain from carrying out any of these acts.

Secondly, the insider is prohibited from procuring, directly or indirectly, the acquisition or disposal of securities by any other person. This seeks to cover an insider's agent or nominee or a person acting at his direction. Such a person procured may well not be in possession of any inside information before dealing.

Thirdly, is the prohibition on the individual encouraging another person to deal in price-affected securities knowing or having reasonable cause to believe that dealing would take place on a regulated market or through a professional intermediary.[47] It, therefore, does not matter that the person encouraged did not deal in the securities eventually or was not imparted with any inside information by the accused. This according to one author aims at discouraging over-zealous presentations by company representatives to meetings of large shareholders or analysts.[48]

Finally, the individual must not disclose the information 'otherwise than in the proper performance of the functions of his employment, office or profession to another person.'[49] Here, the communication of the inside information is a necessary element of the offence, but no response on the part of the person to whom the information is communicated need occur nor be expected by the accused. Thus, disclosure, which is not expected to lead to dealing, will not result in liability, but the burden of proving the absence of the expectation falls on the accused.

Thus far, one may safely contend that the restriction of liability for the offence of insider dealing to individuals in English law, to the exclusion of companies is rather artificial, than being based on any concrete objection to the realities and requirements for the commission of the offence. For instance English law recognises the fact that, there are large institutional investors, holding shares in other companies by virtue of which they would wish to maintain a closer watch on the market of the securities of such companies.[50] Similarly, the *Criminal Justice Act 1993* recognises that a 'shareholder' of an issuer of securities could be an insider.[51] The intriguing question is why should shareholders, be they institutional or natural person, be discriminated against in the application of established principle of the corporate liability of an entity. This appears to create two rules, i.e. one for the institutional investors and another for the natural persons who deal in corporate securities. The obsequent character of such disposition to established principles of corporate criminal liability are further articulated in the next segment of this section. But before that let us now consider the Nigerian position on insider dealing.

3.3 Nigeria

In Nigeria, prior to the 1990s, the subject of insider trading was rarely of concern to both the academic and business circles. This has been attributed largely to the underdevelopment of the capital market.[52] Very few companies traded their securities on the stock exchange. As at 31st December, 2001, of the over 200,000 companies registered in Nigeria, 194 were quoted on the stock exchange[53] with 347 operators as Brokers, dealers, solicitors, Registrars and even trustees.[54] Consequently there has been concomitant boost in capital market activities as many investors have resorted to it for investible funds.[55] This then calls for a close watch on the activities in the capital market to check prevalent acts of impropriety on the part of company officials or stock dealers and operators capable of positively injuring the rights of investors or impairing full public confidence on the stock market.

The current regime against insider trading in Nigeria is the *Investment and Securities Act (ISA), 1999.*[56] This draws essentially from the hitherto provisions of the *Securities and Exchanges Commission Act*[57] and *part XVII of the CAMA*[58] which have been repealed by ISA.[59] These laws were an improvement on the hitherto common-law position and the doctrines of Equity, which restricted itself mainly to the protection of certain confidential information belonging to the company from abuse by officers of the company. Such information was restricted to the use of industrial or trade secrets and details concerning customers. The misuse of such information was actionable whether it occurred during the course of or after the termination of corporate office.[60] In equity, a director who used the company's confidential information could be compelled by the company to divulge and disgorge any secret profits he had made on the ground that he had breached his fiduciary duty to it. This principle also allowed the company to rescind the transaction where possible.[61]

With the development in the Nigerian Capital market it became necessary to extend the duty not to abuse corporate confidential information by the officers of companies, to include abuse by other individuals connected to the company who may come across unpublished price-sensitive information relating to company's securities. This seeks to prohibit such individuals from dealing in the company's securities to the detriment of the investing public, thereby eroding investors' confidence in the market. It is against this background, that writers like Professor Ayua [62] contend that there was real need to assure investors that:

> The market quotations given for their share represent objective valuation of the investments they hold and ... that they are dealing with directors on the basis of equality and market judgment rather than being at the mercy of directors equipped with price sensitive information undisclosed to them.

It is in this context that one will now consider the safeguards against insider trading in Nigeria as provided by *ISA* and subsequently examine the extent of their application to companies. Part X generally regulates trading in securities and section 88 (1) prohibits dealing in securities by insiders in the following terms:

> ...an individual who is an insider of a company shall not buy or sell, or otherwise deal in the securities of the company, which are offered to the public for sale or subscription if he has information, which he knows is unpublished price sensitive information in relation to those securities.
>
> As to who is an insider, section 95 (2) provides:
>
> an individual is an insider of a company if he is or at any time in the preceding six months has been knowingly connected with the company;
>
> an individual is connected with a company if...
>
> he is a director of that company or a related company, or he occupies a position as an officer (other than a director) or employee of that company or a position involving a professional or business relationship between himself (or his employer or a company of which he is a director) and the first company or a related company which in either case may reasonably be expected to give him access to information which, in relation to securities of either company, is unpublished price sensitive information, and which it would be reasonable to expect a person in his position not to disclose except for the proper performance of his functions.

This provision applies to persons with direct connection with the company either in their capacity as director, officer, employee or a professional or business relationship with the company such as auditors, bankers, brokers and other financial or legal advisers. In this regard, all other persons, including complete outsiders whose functions or link involve access to privileged information or persons who, incidental to the exercise of their professional functions, make use of information relating to technical, commercial or financial state of the company are all covered. These two categories of persons directly connected with the company are the first subjects of the insider trading ban.

The second category of persons prohibited from inside trading are those who receive unpublished price sensitive information from those person identified in the first category. Otherwise referred to as 'tippee',[63] such individual must have obtained information, whether directly or indirectly, from a person who is or was connected with the company within the period of six months prior to the receipt of the information.[64] For liability to arise, it must be established that the tippee either knew or had reasonable cause to believe that the informant held the information by virtue of his connection with the company and that it would be reasonable to expect him not to disclose it.[65]

A third category of insider recognised by the *ISA* are those who are contemplating or have contemplated making a takeover offer for a company in a particular capacity. Such persons cannot deal in securities of that company in another capacity if the information that such offer is contemplated or no longer contemplated is unpublished price-sensitive information in relation to those securities. In the same light, any other person who knowingly obtains such information regarding the offer from them is prohibited.[66]

Lastly, any person prohibited from dealing in securities under any of the above provisions cannot counsel or procure any other person to deal in these securities and shall not communicate that information to any other person if it would be used for dealing or counselling or procuring any other person to deal in those securities.[67]

One must mention at this stage that the prohibition against insider dealing equally extends to public officers who may receive some privileged information in their official capacity. They are themselves prohibited from dealing in the relevant securities as well as from counselling or procuring any other person to deal in such securities. It will be equally illegal for them to communicate or tip any person if it would be used to deal or counsel or procure any other person to deal in the securities.[68]

By virtue of section 95 (1) *ISA* a public officer 'has the meaning assigned to it under section 277 of the Constitution of the Federal Republic of Nigeria 1979, as amended'. It is submitted that with the promulgation of the 1999 constitution, the relevant provision is section 318. This provision clearly covers all staff of the Securities and Exchange Commission and other relevant regulatory agencies. Furthermore, in the case of members, officers or employees of a body, which exercise public functions but is not otherwise covered by the definition in the constitution, the minister of finance is empowered on certain conditions, to declare by order in a statutory instrument, that such persons are to be officers for these purposes.[69]

Within the context of the current privatisation programme of the Obasanjo administration in Nigeria, one may hazard to state that certain public officers might have been enmeshed in insider dealing activities. This is particularly notable in the controversy surrounding the privatisation of NITEL given the allegations, inter alia, that it was sold to a sham company (Pentascope) with a dubious registered office in the Netherlands. These culminated in the appearance before the House of Representatives of the erstwhile Director-General of the Bureau for Public Enterprises (BPE) Mr. Nasir El-Rufai on allegation of improprieties and corruption surrounding the deal and his eventual ban from contesting for any public office in Nigeria for a period of fifteen years.[70]

At the political economy level, the implication of such controversy is the loss of confidence in the entire privatisation process by foreign and local investors. This may result in stunted followership and the consequential political backlash, which may manifest in lack of support at the polls in the event of elections.

In addition section 89(1) (a) & (2) prohibit any person who knowingly obtains information from a public officer from dealing in the relevant securities or counselling or procuring any other person to deal therein. He also cannot otherwise communicate the information to any other person for the same purpose.

It does appear that there is a basis for one to contend that despite the restriction of liability for insider trading offences to 'individual' by the *ISA*, the *CAMA* furnishes sufficient legal basis for corporate liability for insider trading offences in Nigeria. The basis for this position is found in the provisions of sections 65, 66 and 70 of the *CAMA*, a better appreciation of which requires that they be partly quoted:

> 65 Any act of the members in general meeting, the board of directors or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person: Provided that:-
>
> a. The company shall not incur civil liability to any person if that person had actual knowledge at the time of the transaction in question that the general meeting, board of directors or managing director, as the case may be, had no power to act in the matter or had acted in an irregular manner or if, having regard to his position with or relationship to the company, he ought to have known of the absence of such power or of the irregularity.
>
> b. If in fact a business is being carried on by the company, the company shall not escape liability for acts undertaken in connection with that business merely because the business in question was not among the business authorised by the company's memorandum.
>
> By virtue of section 66 of the *CAMA*,
> The acts of any officer or agent of a company shall not be deemed to be acts of the company unless, inter alia the company, acting through its members in general meeting, board of directors, or managing director, shall have expressly or impliedly authorised such officer or agent to act in the matter...

Lastly, section 70 of the *CAMA* provides that where in accordance with the foregoing sections, a company would be liable to a third party for the acts of any officer or agent, the company shall, except where there is collusion between the officer or agent and the third party, be liable notwithstanding that the officer or agent has acted fraudulently or forged a document purporting to be sealed by or signed on behalf of the company.

It is hereby submitted that the reference to 'Any act' in section 65, is suggestive of any transaction and may not only be restricted to legitimate acts. This may include illegal acts bordering on insider trading. The implication is that once it is either expressly or impliedly authorised by any of the recognised organs of the company i.e. (members in general meeting, Board of Directors or Managing Director), the company will be liable, civilly or criminally.

Similarly, drawing from section 65(b), where any of the organs of the company involves in any business which is illegal, provided it is connected with the business of the company, the company will be liable, regardless of whether or not such business is authorised by its memorandum. For instance, a beverage company may have in its memorandum the power to invest in securities of other companies. If in carrying out such investment, the Managing Director of such company makes use of undisclosed price sensitive information, the company will be liable. It does not matter that the company might not have authorised its use.

The import of section 66(1) is that where such illegal transaction bordering on insider trading is carried out by any officer or agent of the company, it must have been authorised by any of the organs of the company in order to ground corporate liability. In any of the foregoing instances, the managing director or the officer or agent of the company may be liable jointly and severally with the company. The liability of the company will not be affected by the fraud of any officer or agent or the managing director, by virtue of the provision of section 70 of the *CAMA*.

To this extent one can safely posit that although, *ISA* appears to have restricted liability for insider trading to 'individual' or natural persons, the provisions of *CAMA* discussed above by necessary implication extend liability for insider trading offence, to corporations. Consequently where a managing director of a beverage company which holds shares in another company uses price sensitive information to trade in the securities of that company, the beverage company should be liable for such transaction. It may not matter that it has not enjoyed the benefit of such trade. Where however it is an agent or officer of the beverage company that indulges in insider trading, there must be show of authority, implied or express in order to ground corporate liability. The fact that the benefit of such trading inures to the beverage company may be *prima facie evidence* of such authority, it may not be conclusive, in the absence of show of authority, to ground corporate liability. Further more, such agent or officer must be shown to have acted within the scope of his employment, by virtue of section 66(3) of the *CAMA*.

Apart from being an insider as defined in the preceding discussion, the insider must have dealt in information considered by the *ISA* as 'unpublished and price sensitive.'[71] This consists of information which:

> (i) relates to specific matters relating or of concern (directly or indirectly) to that company, that is, is not of a general nature relating or of concern to that company, and
>
> (ii) is not generally known to those person who are accustomed to or would be likely to deal in those securities but which would, if it were generally known to them be likely materially to affect the price of those securities.

Thus, unpublished price sensitive information may subsequently be desensitised by its expiration or publication. For instance, a specific information relating to a proposed take over bid may become irrelevant after the take over has been completed, or such information may become declassified once it becomes generally known to the public, that is those persons who are accustomed to trade in the affected securities. One submits that the question of the materiality of the information must be determined by the court as a question of fact depending on the circumstances of the case. It is hereby recommended that Nigeria should adopt the definition of materiality as proffered by the American *Federal Securities Code* that is that 'there is a substantial likelihood that a reasonable person would consider it important under the circumstances in determining his course of action.'[72]

One last issue worthy of mention is in relation to third parties or 'tippees' who *knowingly obtain* confidential information from public officers under sections 88 (2) and 89 (2) of *ISA*. The knotty issue is, should the word 'obtain' cover the situation where an accused person or the defendant is given unsought or unsolicited and unpublished price-sensitive information? A clue to the attitude of Nigeria courts may be gleaned from the decision of the English House of Lords in *Attorney General's Reference*[73], where the court held that inadvertent acquisition of inside information is covered. In that case the appellant had been acquitted on two counts of dealing in the securities of a company as a prohibited person contrary to sections 3 and 4 (a) of the *Companies Securities (insider Dealing), Act, 1985*. These sections are *in pari material* with the Nigerian sections 88 (2) and 89 (2) *ISA*. The trial judge had ruled that the appellant who had been given unsought and unpublished price sensitive information had not 'obtained' that information within the meaning of the sections. When this was referred to the Court of Appeal by the Attorney General, the court held inter alia that 'obtained' meant no more than 'received' and accordingly had a wider meaning than 'acquired by purpose and effort.'

The House of Lords affirming this opinion held that parliament must have intended 'obtained' to have a wide enough meaning to include its secondary or general meaning of coming into possession of a thing without effort on one's own part. It is hereby advocated that Nigerian courts should adopt this interpretation, as to do otherwise would amount to depriving the entire provisions, as appertains to tippees of their efficacy.

4. Insider Trading and Corporate Criminal Liability

The discussion thus far reveals that legislation directly dealing with securities transaction are cast especially in the context of prohibiting 'individual' from insider trading. In England there seem to be a deliberate restriction of liability for the offence of insider trading to individuals, to the exclusion of companies.[74] In Nigeria, corporate liability for insider trading offences seem to arise only by implication.[75] Even in the United States where the main provision against insider trading (Rule 10b-5)[76] used the term 'person,' which, for general construction of statute also applies to companies, the discussion on the subject by learned authors[77] made no allusion to the fact that it can or ought to apply to corporations. The fundamental question is, does the lack of direct or express legislation against insider dealings by companies suggest that companies cannot commit the offence of insider trading?

The position of this writer in this article is that there exist very concrete bases to ground corporate liability for insider trading offences as there are for liability by natural persons. Apart from the rationale for the regime against insider trading, which one submits ought to have a universal application to natural and artificial persons alike, the dynamics of modern corporate structure and their *modus operandi* lend further justification to the liability of corporations for insider trading. But first, what are the perceived inhibitions to corporate liability for insider trading?

One main factor which appears to lend weight to the restriction of insider trading offence to natural persons is that the offence is one commonly committed by natural persons who exploit their position in corporations to take advantage of inside information for personal benefit. Trends in modern corporate operations and management tilt excessively towards individualising the corporation. Liability rules therefore appear to have better efficacy once directed at individuals who run these corporations. This one still contends, is no sufficient ground to restrict liability for insider trading offences to individuals. The incidents cut across national jurisdictions,[78] the mention of a few of which will suffice.[79]

In the United States, between 1975 and 1981 alone, the Securities and Exchange Commission pressed insider charges in 39 cases involving more than 80 individuals and institutions. This was, nearly the same volume of cases and defendants as in all the preceding four decades of the agency's existence.[80] In 1984, Fort Woth's Sid Bass and his brothers bought and sold 9.9% of TEXACO's shares for a swift profit of $300 million. In 1986 one of the most brazen incidence of insider trading was announced against Ivan Boesky, one of the richest and savviest New York stock market operator at that time. The accused himself, without disclosing his profits, agreed to pay $ 100 million in penalties, return profits and accept a permanent ban from professional stock trading for his wrong doing.[81]

The recent collapse of Enron and Worldcom was characterised by massive gains by their top executives arising from insider trading, to the detriment of their employees and other investors. For instance, in Enron while the chief executives were drawing on millions of dollars from sale of their stock, they restricted their employees from selling their stock until it plummeted from $90 in 2000 to 26 cents at the time of its collapse in 2002. Within the same period, Jeff Skilling the former chief executive officer was worth about $14.5 million, Ken Lay the chairman $37.7 million and Lou Pai Unit chief executive officer $63 million from sales on insider dealing between May 2000 and August 2001.[82]

For Worldcom, revelations in 2002 that it had over stated a key measure of earnings by more than $3.8 million over five quarters dating back to 2001 caused ripples and its stock which peaked at $64.50 in 2000 dropped to 83 cent in 2002. While its chief executive officer and chief Accounting officer, Bufford Yates drew million of dollars in insider dealing. This caused investors above $175 billion dollars nearly three times the loss in Enron.[83]

In a similar incident, in August 2004 Martha Stewart Omnimedia founder, and her stock broker, Peter Bacanovic were convicted and sentenced to five months in prison for her trade in biotechnology firm, Imclone System. In addition Bacanovic was barred by the United States SEC from working for a broker or investment adviser.[84]

Also in 1986, two major cases of illicit dealings were reported on the London Stock Exchange. The first involved Geoffrey Collier, a merchant banker who had used the knowledge of a pending take-over bid by a Morgan Grenfell client of which he was the chief equity trader to buy stock in the target company. Collier had sought to cover his tracks of buying the shares through the California, U.S. branch of Scrimgeour Vickers, a rival London Brokerage house. A few days after that Scrimgeour Vickers again uncovered a second case involving an employee of British and common wealth shipping a transport and financial services company.[85]

In Nigeria there is a paucity of reported cases of insider trading. This has been attributed more to the ineffectiveness of the surveillance apparatus, rather than the want of frequency of insider trading, given the low level of business morality in the country.[86] However Professor Gower is reported to have cited the buying of shares by Chief, Okotie Eboh, then Minister of Finance, in a shoe company on the strength of proposed tax concession to be granted by his ministry as an instance of insider trading.[87]

However with improved surveillance techniques, the Nigeria SEC in 2003 clamped down on several stock broking companies and their executives for insider dealing. The companies and their executives were discovered to have masterminded illegal transactions in fraudulent sale of shares of some investors in Nestle Nigeria Plc and Unilever Nigeria Plc worth over N300 million, to their original owners. This led to the dismissal of 17 stockbrokers and the suspension indefinitely of five stock broking companies by the SEC.[88]

Also recently the Bureau for Public Enterprises (BPE) in a bid to privatise the Federal Government stake in African Petroleum (AP) arrested top officials of the company after it was found that N600 million worth of shares were wrongly and fraudulently manipulated in its books to conceal the true state of its indebtedness, and investors were being lured to purchase AP shares through stock exchange. The indebtedness in the information memorandum obtained by core investors after the due diligence carried out by the BPE did not reflect the ₦26 billion-debt overhang then owed to banks and the Nigerian National Petroleum Corporation (NNPC). The indebtedness in the information memorandum carried out in December 1999 was put at N6.85 billion. A staggering debt of almost ₦20 billion was concealed by the Management of the company.[89]

Another justification for the lack of provision for corporate liability for insider trading is the alleged difficulty it will cause a merchant bank that have successfully maintained a 'Chinese wall' in one of its department, but one of whose other departments has gone ahead to deal in the securities, in which event the bank as a single corporate entity would be considered to have committed the offence were the Act to apply to corporate bodies. The artificiality of this separation in a corporate entity in order to avoid liability has already been pointed out[90] and it is needless restating same.

Consequently parliament in England have refused to pay heed to the 'Chinese wall' argument in drafting the regulatory regime for those authorised to carry on investment business under the *Financial Services Act, 1986*. The policy was to bring insider dealing, even by corporate bodies, within the scope of the regulatory prohibitions but then to deal with the problem of attributed knowledge. Thus, Core Rule 28 of the Securities and Investment Board Provides that 'a firm must not effect (either in the United Kingdom or elsewhere) and own account transaction when it knows of circumstances which mean that it, its associate, or an employee of either, is prohibited from effecting that transaction by the regulatory restriction on insider dealing.'

Thus, by virtue of the Core Rule the statutory prohibition on insider dealing, which applies to the company's employees, is extended to the company itself. The point about knowledge was dealt with by Core Rule 36, which provides that 'the firm is not... to be taken to act if none of the relevant individuals involved on behalf of the firm acts with knowledge'. Therefore, the company will be liable only if those who deal on its behalf have the relevant knowledge and not if the knowledge is simply available in some other part of the firm but has not been communicated in fact to those who deal. This writer, however, still submits that all that the *Financial Services Act, 1986* appears to have done is to have legislated on the 'Chinese wall' concept, thereby legitimising the artificiality of the separation of the investment departments of corporations from other departments within the corporate entity in order to avoid liability. The department, one further submits, operates, not only for the benefit of its section of the corporation, but for the overall benefit of the entire corporate entity. Therefore the knowledge of that department should be imputed to the entire corporation in order to ground liability for insider trading offences.

It is, however, worth noting that despite the provisions of sections 65, 66 and 70 of the CAMA, and our earlier analysis that it provides for corporate liability for insider trading, section 257 (1)(d) of the CAMA appears to provide the contrary. Specifically, section 257 (1)(d) disqualifies 'a corporation other than its representatives appointed to the board for a given term... from being directors'. Thus, while the representatives of such corporation may be liable for insider trading, the corporation will not. This is, notwithstanding the fact that the corporation might have gained the benefit of trading in an insider information, whereby it is procured by such representative to deal in it.

It is however submitted that the foregoing provision is *non sequitur* section 395 (e) of the *CAMA*, which permits the appointment of a body corporate as secretary. It is trite that such a body corporate can only act though the instrumentality of human agency. Where the secretary deals in inside information liability would necessarily be that of the corporation. One may in this regard contend that corporate liability for insider dealing in Nigeria seems dependent on the capacity, in which the corporation acts. If it is as secretary, the corporation will be liable qua corporation. But where it merely appoints a representative to the board, only the representative of the corporation shall be liable. It is however doubtful whether, even in the second context, the principles of vicarious liability may not be successfully invoked in order to ground corporate liability.

This writer however submits that practical modern corporate and commercial realities favour a regime of corporate liability for insider trading. Consequently, the analysis of sections 65, 66 and 70 of the CAMA in favour of corporate liability for insider trading should be preferred. The justification for this position is manifold. First, it is submitted that the immensity of modern corporate business and the widening gap between ownership and control coupled with the imperatives of their operations make the restriction of liability for insider dealing to individuals not only unrealistic, but unacceptable. Corporations are economic entities. Central to this is that insider dealing is predicated on making some financial gains, using inside information to the detriment of other participants in the securities market, an advantage of which can be exploited by any person, including corporations.

Secondly, given the extent and diversity of institutions/investors, which may either as a general practice or in specific circumstances, keep in close touch with at least the largest corporations in their portfolios,[91] the tendencies for such institutional shareholders to indulge in insider dealing cannot be completely obliterated. A study in the United States, for instance, reveals that the universe of indirect as well as direct holders of American enterprise includes about 100 million equity investors through institutions such as insurance companies and pension plans.[92] Indeed, recent years have seen a steady institutionalisation of the securities markets, to the extent where institutional trading amounts to perhaps 70 percent of total dollar volume.[93]

The above trend has been on the increase as a survey quoted by Demb and Richey[94] reveal that:

> U.S. pension funds now control assets of 2.5 trillion dollars, and demographic trend suggests that they will make new investments of 100 to 200 billion dollars annually over the next ten years. Institutional investors control 40% of the equity capital of public traded companies in the United States a quarter of which is in the 20 largest pension funds- and account for over 70% of the stock traded on the New York stock Exchange. They also hold approximately 25% of outstanding corporate credit in the United States.

Coming late to the market the American institutions had to buy small stakes in medium sized and big firms. So they adopted a hands-off strategy. This was bolstered by the invention of 'efficient market theory,' an economic notion that, because share prices reflect all available information, there is no point in investors trying to 'beat the market' by searching for firms whose shares would out perform in the future. Instead, an investor should reduce firm - specific risk by diversifying across a wide range of shares.[95]

The above trend cuts across several jurisdictions. A study conducted by Farrar and Russel is indicative of the fact that institutional investors increased their market shares of U.K. listed equities from 17.9% in 1957 to 54.1% in 1981, and are acquiring about 2% of the U.K. equity market each year. It was estimated that they would hold 69%-84% by the year 2000, although it is uncertain whether this trend will be sustained. Institutions held 63.8% listed loan capital in 1981.[96]

In Germany, companies, own over 40% of German equities. Banks have been at the centre, at least, since Bismarck who used them to promote economic growth. Starting as lenders, they became big shareholders when firms they had financed either went to the stock market or defaulted in their loans. There is no legal limit on how much of a firm's equity a bank can hold, except that it may not exceed 15% of a bank's capital, though typical stake are under 10%. For instance, the five biggest investors in Damler-Benz own 68% of its stake.[97]

Similarly, in Nigeria with the growth of the Nigerian stock market, there has been an increased confidence in securities transactions, so that over 1.5 million individual and hundreds of institutional investors, including foreigners who own 40%-60% of quoted companies as well as pension funds participated in the securities market in 1992.[98] In addition, with the ongoing divesting of Government interests in some companies as a result of the privatisation exercise, institutional and individual participation in the share of companies has witnessed a steady increase.[99] The major market reform engendered by the programme has resulted in the privatisation of 37 government owned companies valued at about N65.5 billion between the year 2000 and December 2001. This has increased activities in the Nigerian capital market such that new issues have grown from N12 billion in 1999 to N43.4 billion as at September 30, 2002. Listed equities maintained its level at 194, while market capitalisation rose from N300 billion to N738.6 billion within the same period.[100]

The effect of all these, in the words of Farar, is that this enormous participation by institutions in corporate holding 'revolutionise the concept of control. Ownership is regrouped... with the potential of control'.[101] One other major or legal implication of institutional power identified by Farrar[102] is that as controlling shareholders, they may have advantages over small shareholders in respect of easy access to insider information, particularly 'unpublished price-sensitive information', about the share market. The potential for this could arise when they appoint nominees to the board of companies in which they have shares. The rule however, is that, such a nominee, like other directors must not have regard primarily to the interests of those who appointed him when he carries out his directorial functions.[103] He must place the interest of the company first. He must not provide to his appointors information not equally available to other shareholders. Neither must he relate his corporate opportunities to his appointors.[104]

On the foregoing note one submits that it begrudges the status of the corporation to discriminate against 'individual' shareholders with respect to insider trading abuses. This amounts to an abject beguilement of existential economic realities.

A third justification for corporate liability for insider dealing stem from their economic strength. Corporations are to a greater extent financially stronger than individuals who invest in them. If individuals who may be financially weaker are held liable for perpetrating insider dealing, there is no seeming justification to exclude corporations.

Corporate liability for insider dealing is further justified on the ground that corporations, have been held liable for serious offences such as manslaughter[105] which have no direct bearing with their profit motive or business purpose, by an accretion to their profits. Dealing in insider information is capable of a direct connection with the profit of a corporation and should perforce constitute a basis for corporate liability. Where a corporation is not prosecuted, it may be unjustly enriched to the detriment of the other participants in the securities market.

Finally, given the internationalisation of securities market, to restrict the offence of insider dealing to individuals may be exploited by individuals (foreigners) who can merely incorporate companies to take advantage of such information either by acquisition or takeover, to the detriment of indigenous investors.

5. Conclusion

This discussion shows that the continued restriction of liability for insider dealing to individuals is no longer defensible given the realities of the dynamics of modern corporate business and operations. In Nigeria, legislative disposition to insider trading offence may only be deduced by implication. One hereby advocates that the legislature in Nigeria should take a proactive step in legislating directly and expressly against corporate insider dealing offenders aimed at not only disgorging corporations of gains accruing from insider dealing, but where necessary prosecute and punish offending corporations.

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13.For instance, it is reported that China Life, the biggest life insurer in China made a $3 billion initial public offer on the New York stock exchange on December 17, 2003. By any standard, the issue became the world's biggest and its price which ended 27% up on the day was a huge success. China prepared 2.2 million application forms for retail investors and 400,000 for local stockbrokers - 1 for every 3 people in Hong Kong where the shares were made a start on December 18, as well as printed 250,000 copies of its 1,078 -age prospectus. See SEC *Quarterly* Vol. 4 Oct-Dec 2003, Pg. 38. Similarly, China has signed memorandum of understanding (MOU) with 16 countries among which are, the Special Ministerial Region of Hong Kong, United States, Germany, Great Britain, France, Spain, South Africa and Nigeria. China, like these countries also has a strong commitment to the International Organization of Securities Commissions (IOSCO).

Ghana, in 2003 was also at the verge of concluding memorandum sharing and enforcement cooperation with the Quebec Securities Commission, Canada, and as a member of IOSCO like Nigeria operates on reciprocal basis with other members of the world body to ensure effective enforcement of securities laws. See *SEC NEWS* Vol. 1 No. 2 January 2003, Journal of the Nigerian Securities and Exchange Commission, Pp 13 - 15 and Pp 18 - 20.

14.*SEC Quarterly,* vol. 4 *Op. cit.;* Shirinyan. I.: 'The Perspective of US Securities Disclosure and the Process of Globalization' in *De Paul Business and Commercial Law Journal,* Spring 2004 Vol. 2 No. 3 Pp 515 at Pp 524-525

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22.401 F2D 833 (1968) at p. 848-9.
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25.*Australia Uniform Companies Act,* 1961, Section 124 (a) (1); *Singaporean Companies Acts* 1967-71, Section 132A.
26.A product of several British Legislative Amendments of the Law as contained in *Part V of the Companies Act, 1980,* later consolidated in the *Company Securities (Insider Dealing) Act, 197/85* and an adoption of the European Community Directive 89/592 coordinating regulations on insider dealing, (1989) O.J.L 334/30 (November 18, 1989).
27.Section 1, 1994 No. 187 art 10, as amended by section 1 1996 No. 1561.
28.Section 52 (3).
29.A firm which has undertaken to make a continuous two-way market in certain securities, so that, in relation to those securities, it will always be possible to buy from or sell to the market maker, though, of course, at a price established by the market maker. See Gower L.C.B. *Op. cit.*, n. 2, p. 455
30.See section 52 (1). The underlining is mine.
31.*Op. cit.*. n. 2, p. 458.
32.An arrangement designed to prevent information in one part of a firm being available to individuals working elsewhere in the firm.
33.This Writer's submission is further justified on several grounds in the next segment of this work. Gower L.C.B.: *Op.cit.*, n. 2, p. 460
34.Gower L.C.B.: *Ibid.*
35.*Ibid.* p. 461
36.Section 58 (2) (d), *Criminal Justice Act, 1993.*
37.Gower L.C.B.: *Op. cit.*. n. 32, p. 462-463.
38.This would cover publication on the Exchange's Regulatory News Service and Latter document filed at Companies House or the Patents Registry.
39.Section 56 (1) (d), *Criminal Justice Act, 1993.*
40.*Op. cit.*. ns. 28-312. ante.
41.Gower, L.C.B.: *Op. cit.*. n. 32, p. 465.
42.The extent to which such institutional shareholders will be liable for insider trading in view of the clear restriction of insider to individuals is an issue of subsequent discussion in the next section.
43.A coinage credited to Securities Regulations Guru, Professor Louis Loss of Harvard Law School and acknowledged in the Oxford English Dictionary.
44.See *Attorney General's Reference* (No. 1 of 1988) (1989) A.C. 971. Cited in Gower L.C.B.: *Op. cit.*, n. 125, p.467.
45.The practical problem to proving this is subject to further discussion in the Limitations to Corporate Criminal Liability. Infra.
46.Section 55, *Criminal Justice Act, 1993*
47.Section 52 (2) (a).
48.Gower L.C.B.: *Op. cit.:* n. 32, p. 469.

49.Section 52 (2) (b) *Op. cit.*, n. 44.
50.By appointing Directors to the Boards of such companies.
51.Section 57 (2) (a) *ibid.*
52.Yagba, T.A.T. *Op. cit.*, n. 94, p. 42.
53.*Securities and Exchange Commission, 2001 Annual Report and Accounts*, pp. 102-109.
54.As at 30[th] September 2002. See SEC Quarterly, September 2002 table 11.
55.See the President Magazine, November 20, 1989, vol. 1, No. 27 pp. 25-33 which did an extensive research under the caption "Capital Market Bubbles."
56.Promulgated as Decree No. 45, 1999.Cf. Section 315, 1999 Constitution of the Federal Republic of Nigeria.
57.Cap 406, Laws of the Federation, 1990 which was enacted as Decree No. 29, 1988.
58.Cap 59, Laws of the Federation, 1990 enacted as Decree No. 1, 1990.
59.Section 263 (1) (c) and (d), *ISA*
60.See *British Industrial Plastics v. Ferguson* (1938) 4 All E.R. 504; *Cranleigh Precision Engineering Ltd v. Byrant* (1965) 1 W.L.R. 1293; *Measure Bros. V. Measures* (1910) 1 Ch. 336, 2 Ch. 248; *Printers and Finsihers Ltd. V. Holloway* (1965) 1 W.L.R., p. 1
61.See *Industrial Development Consultants Ltd. V. Cooley* (1972) 2 ALL E.R. 162; *Phipps v. Boardman* (1965) Ch. 992. See generally, Yagba, T.A.T. *Op. cit.*, n. 1, pp. 43-46.
62.Ayua, I. A. *Nigerian Company Law*, (London: Graham Burn U.K.) 1984, p. 176.
63.One who receives a tip of the information from an insider. The word is etymologically credited to Loss op.cit., n. 41
64.Section 88 (2) (a) (i), ISA
65.Section 88 (2) (a) (ii), and (b), *Ibid.*
66.Section 88 (4) and (5), *Ibid.*
67.Section 88 (6) and (7), *Ibid.*
68.Section 89 (1), (2) and (3), *Ibid.*
69.Section 89 (4), and Section 264, *Ibid*
70.*Tell Magazine, 13-20 June 2005*
71.Sections 88 (1) and 95 (2) (c), *Ibid.*
72.*Op. cit.*, n. 17.
73.*Op. cit.*, n. 42.
74.*Criminal Justice Act, 1993*
75.*Investment and Securities Act, 1999. Cf. Sections 65, 66, and 70 CAMA discussed above.*
76.Section 10, *Securities and Exchange Act, 1934.*
77.Loss, L. *Op. cit.*, n. 1.; Yagba, T.A.t.: *Op. cit.*, n. 1
78.See English case of *Re Messrs Litheridge* under Part V of the 1980 *Companies Act* (1982) 3 Co. Law, 122. Where a husband and wife pleaded guilty to charges of procuring the husband to trade on insider information provided by the wife; the Canadian case of *Multiple Access Ltd. V. McCutcheon* (Unreported) Supreme Court, 9, August, 1982. where the accused persons were the president and the director of the issuer, Multiple Access Ltd. See generally Rider, B.A.K.: *The Company Lawyer*, vol. 4 and 3, *op. cit.*, n. 2.
79.A recount of a few incident by Yagba, T.A.T.: *op. cit.*, n. 1 is worthwhile.
80.Louis: 'The Unwinnable War on Insider Trading' *Fortune Magazine*, July 13, 1981, p. 72.
81.*Time Magazine*, Issue No. 48, December 1, pp. 24-36
82.Sloan, A. *et al*: '*Enron's Failed Powerplay*', *Newsweek* January 21, 2002
83.*Time Magazine*, July 3, 2002, p. 25
84.http:/www.forbes.com/2004/08/30/0830
85.*Op. cit.*, n. 8
86.Yagba, T.A.T. *op.cit.*, n. 1, p. 50
87.Olawoyin, G. A. *Status and Duties of Company Directors* (Ife: University of Ife Press, 1977), Cap. 5, p. 57
88.*Business Times* vol. 27, No. 08, February 3-9, 2003; vol. 27 No. 09 February 10-16, 2003 and vol. 27 No. 12, March 3-9, 2003, p.35.
89.Osho, O.: 'Taming Corruption in the Boardroom' in SEC NEWS vol. 1 No. 2, January 2003, pp. 26-28.
90.*Op. cit.*, ns 28-31.
91.Gower L.C.B.: *Op. cit.*, n. 2 p. 465

92. New York Stock Exchange, *Institutional Share-Ownership (1964) 3.*

93. The figure was 70.3 per cent in value and 57.3 per cent in number of shares during 1976. N.Y. Stock Exchange, *Public Transaction Study (1976) 9.* Institutional Ownership grew from 8.5 per cent of the value of all outstanding securities listed on the New York Stock Exchange in 1933 {Securities Industries Study Report, S. Doc. No. 13, 93d Cong., 1st sess. (1973) 113} to 25 per cent by the end of 1979 {39 SEC Statistical Bulletin 28 (July 1980)}. See generally Loss, L.: 'The Role of Government in the Protection of Investors' in *op. cit.*, n.1 pp. 33-34.

94. Bishop, M.: 'Corporate Governance Survey', *The Economist, January 29, 1994, p.3 at p. 6.*

95. *Ibid.*

96. *Farrar, et al: Company Law* (Butterworths: London Edinburgh) 1988, p. 425, referring to Farrar, J.H. and Russel, M., (1984) *Company Law, 107.*

97. Bishop, M.: *op. cit.*, n. 91, pp 4 and 8.

98 *The Nigerian Stock Exchange Fact Book, 1992, p. 35*

99. *The Financial Post, vol. 5, No. 13, January-February 13, 1993, p.6*

100. *SEC NEWS: Op. cit.*, n. 86, p. 11.

101. *Farrar, et al: Op. cit., n. 93*

102. *Ibid., pp. 431-435*

103 *Scottish Cooperatives Wholesale Society v. Meyers (1959) AC 324, H.L.*

104 *Cook v. Deeks (1916) 1 A.C., 554 P.C.*

105. *R. v. I.C.R. Haulage Ltd. (1944) KB 551,* Lyme Regis Case (1994) Jackson Transport (Ossett) Ltd; Herald of Free Enterprise (1990) discussed in Slapper, G. & Tombs, S. *Corporate Crime* (United Kingdom: Longman) 1999, pp. 31-33; in United States, the state of New Jersey specially provided for corporate liability for homicide and other crimes of violence. See Leight, L.H. *The Criminal Liability of Corporations in English Law,* (London: Weiden Feid & Nicolson) 1960, p. 60.