THE INTERNATIONALISATION OF THE NIGERIAN CAPITAL MARKET AND THE DYNAMICS OF MODERN SECURITIES FRAUD AND REGULATION

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1. Introduction

The trade in securities is one of the virile features of the Nigerian Capital Market. The market is comprised of several operators. These may be classified into two categories. In the first category are the regulatory institutions, with the Securities and Exchange Commission (SEC) as the apex regulatory authority. Others are the Self-Regulatory Organisations (SROS) such as Nigerian Stock Exchange, the Central Securities Clearing System, Capital Trade Points, Over-the-Counter, Markets and the Commodities, Futures and Options Exchanges. The SROs register or license their members, prescribe code of ethics to be followed, and discipline erring members who operate in violation of their rules and regulations. They however derive their authority from the SEC. In the second category are other participants or actors in the market comprising of Issuers, Issuing Houses, Brokers/Dealers, Registrars, Trustees, Underwriters Portfolio/Fund managers, Auditors, and Investments or Market consultants. Most of these actors operate either as limited liability companies, or as registered business organizations, or professionals such as solicitors, accountants, estate valuers and company secretaries.

The main merchandise of the capital market are securities such as shares, debenture stocks, bonds and mortgages. Central to whatever form the trade in the capital market may be carried on are natural/persons who are those actually involved in the buying and selling of this merchandise. Given the intangible and intricate nature of this merchandise, it is most vulnerable to manipulation by unscrupulous and fraudulently minded operators to the detriment of unwary investors usually for personal or organizational gains.

This write-up therefore examines some of the manipulations and frauds to which the trade in securities may be susceptible. One shall also examine regulatory approach to combating this menace in order to maintain the dignity and reliability of the market to foster economic growth and development of genuine businessmen and corporations and sustain the virility of the Nigerian Capital Market.

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The discourse also examines the Nigerian Capital Market from the perspective of its integration with other world capital markets by virtue of its membership of the International Organisations of Securities Commissions (IOSCO). This calls for a cross-jurisdictional approach to dealings in the capital market and combatting securities fraud on an international scale. The write-up then underscores the imperative for international cooperation and coordination of securities regulation in order to provide a concerted approach to combating securities fraud on an international scale.

Accordingly, the discussion first proffers a contextual clarification of the terms 'fraud' and 'regulation'. The second segment deals with the imperatives for a cross-jurisdictional or transnational perspective to combating securities fraud. The third segment discusses the regulatory regime for securities transaction in Nigeria and the extent to which it is prepared to meet the emerging challenges for redressing international securities fraud. The discussion then concludes by asserting that the continued virility of the Nigerian capital market is largely dependent on the extent to which operators adhere to the necessary guidelines, provided for dealings in the securities market and the ease with which errant operators can be detected, prosecuted and appropriately penalized. This is important to protect the integrity of the market and encourage domestic and foreign investors' confidence and participation in the market.

2. Clarification of Terms

2.1 *Fraud*

Much as the word fraud is commonplace in the society, it is used differently in varying contexts. Without prevarication, the *Oxford Advanced Learners Dictionary of Current English*[29] defines fraud simply as 'criminal deception' the *Black's Law Dictionary*[30] espouses the word fraud more elaborately as follows:

> *An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives, and is intended to deceive another so that he shall act upon it to his legal injury.*

[29] Hornby, A.S.: (1980).

[30] Black, H.C., et al: West Group, 1990, 6th ed. i.e. Centennial ed. (1891-1991).

> *Anything calculated to deceive, whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth or look or gesture.*
> *A generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprises, tricks, cunning, dissembling and any unfair way by which another is cheated.*

This exposition lends credence to the fact that fraud is essentially a human phenomenon, capable of different forms and necessarily dynamic with the society.

It is noteworthy however that neither the Criminal Code (CC)[31] nor the Penal Code (PC),[32] the primary criminal legislation in Nigeria define the word 'fraud'. Rather, these have used the word 'fraudulently' to depict a form of *mens rea* or guilty state of mind for offence. It is equally reflected in phrases such as 'with intent to defraud'[33] or 'without intent to defraud', without providing a definition of the expressions in the code. The word 'fraudulently' for example is defined in the context of particular offences such as stealing, uttering false document and counterfeit seal.[34] By Section 17 of the PC, 'a person is said to do a thing "fraudulently", or "with intent to defraud" who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other person'. To satisfy the mental element of offences 'fraudulently' therefore, there must be deceit or intention to deceive, or, even concealment of facts when there is a duty to disclose, as well as actual injury or risk of possible injury by means of such deceit[35]. Like in English Law[36], it is not necessary that the intent must be to defraud a particular person. It is sufficient if the intent is to defraud generally, and someone is thereby prejudiced. It also does not matter that the accused intends to make good the injury caused by his fraud in the future.[37]

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[31] Cap.77, LFN, 1990 or Cap C.38, LFN, 2004.
[32] Cap 89 Laws of Northern Nigeria, 1963.
[33] Sections 157, 167, 384, 391, 393, 396, etc. C.C., Falsification of Books of Company being wound up; frauds by officers of companies in liquidation; fraudulent trading, under Sections 503, 504 and 506, respectively. *Companies and Allied Matters Act* (CAMA) Cap. 59, LFN, 1990 or Cap. C.20 LFN, 2004.
[34] Sections 383 and 468 respectively. C.C.
[35] Aguda, A and Okagbue, I.: *Principles of Criminal Liability in Nigerian Law*, (Ibadan: Heinemann Educational Books Nigeria Plc), 1990, p.95.
[36] *Welham V. DPP* (1960) 44 C.A.R. 124 at 155.
[37] *Op.cit.*, n.7.

In the context of this discourse, the primary legislation on securities transactions or dealings in the Nigerian Capital Market is the *Investment and Securities Act (ISA) 2004*.[38] Although, the offences are expressed as being committed by a 'person, by virtue of the *Interpretation Act*,[39] this refers to corporate bodies as well. This is further supported by the fact that the *ISA* provides different penalties for corporate offenders where a corporation is found to be culpable.[40]

Prominent amongst some of the offences recognized under ISA are insider trading, an offence defined as a situation whereby a person or individual 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.[41] Other offences include, false trading and market rigging transaction,[42] manipulation,[43] false, misleading statements,[44] and other forms of deceptive conducts such as, fraudulently inducing persons to deal in securities,[45] dissemination of illegal information,[46] offences arising from corporate takeovers and mergers[47] and prohibition of fraudulent means, that is, device, scheme or artifice to defraud.[48]

It must be stressed that the details or ramifications of these offences do not strictly fall within the precincts of this discourse. However, it suffices to mention that similar offences are recognized in other jurisdictions such as the United States, Canada and United Kingdom. In the United States, for instance, the onslaught against insider trading find expression in Section 10 of the *Securities and Exchange Act, 1934*, particularly Rule 10b-5. This is further buttressed by the *Public Company Accounting Return and Investor Protection Act, 2002, (Sarbanes Oxley Act, 2002)*, an offshoot of the collapse of United States mega corporations, Enron and WorldCom. The Act essentially aims at enhancing investor protection by increasing the

[38] Cap. 124 LFN, 2004.
[39] Cap. 123 LFN, 2004.
[40] Section 96, *ISA*.
[41] Sections 88(1) 89, 95 *ISA*. For detail discussion on this offence, See Ali, H.L.: 'Corporate Liability for Insider Trading Offences in Nigeria in *Ahmadu Bello University Law Journal*, Vols. 23-24, 2005-2006, p.150.
[42] Section 81, *ISA*.
[43] Section 82, *ibid*.
[44] Section 83, *ibid*.
[45] Section 84, *ibid*.
[46] Section 85, *ibid*.
[47] Section 99 & 100, *ibid*.
[48] Section 86, *ibid*.

accuracy and reliability of corporate governance, increase transparency and shore up investors' confidence.[49]

Similarly, in the United Kingdom, the law against insider trading is contained in part V of the *Criminal Justice Act, 1993,*[50] particularly Section 52 of the Act, while the *Insider Dealing (Securities and Regulated Markets) Order 1994,*[51] defines the markets to which the rules against insider dealings apply to include markets established under the rules of the London Stock Exchange, the London Securities and Derivatives Exchange and Trade Point and the London International Financial and Futures Exchange.[52]

Another fraud, usually a common consequence of the commission of any of the aforementioned offences in sections 81 to 86, ISA, is churning or overtrading.[53] This is a type of securities fraud[54] which occurs when a securities broker or dealer who controls the volume and frequency of trading in a customer's account abuses the customer's confidence for his own personal gain in order to increase the amount of commissions by initiating transactions that are excessive in view of the financial situation and investment objectives of the customer. The offence arises mostly in transactions in shares.[55] The ultimate questions which has to be decided in any churning case is whether the broker was acting primarily for the purpose of generating commissions for himself or in the best interests of his customer.[56]

In the United States churning is a violation of section 10(b) of the *Securities and Exchange Act, 1934,*[57] which prohibits the use of 'any manipulative or deceptive act or practice' in connection with the purchase or sale of a security,[58] and SEC rule 10b-5 which *inter alia* forbids ' any device, scheme or artifice to defraud' and 'any act, practice or course

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[49] *S.E.C Quarterly,* Vol.4 Oct-Dec., 2003, p.38; Shirinyan, I.: 'The Perspective of US Securities Disclosure and the Process of Globalisation' in *De Paul Business and Commercial Law Journal,* Spring 2004 Vol.2 No.3 pp.515 at pp.524-525.

[50] A product of several British legislative amendments of the law as contained in Part V of the *Companies Securities (Insider Dealing) Act 1985* an adoption of the European Community Directive 89/592 coordinating regulations on Insider dealing, (1989) O.J.L. 334/30 (November 18, 1989).

[51] Section 1, 1994 No.187 art.10, as amended by Section 1, 1996 No 1561.

[52] See Ali, H.L. *op.cit.,* n.13.

[53] *Armstrong V. McAlpin* (Current) Fed. Sec. L. Rep. (CCH) 99, 096 (S.D.N.Y. Jan.24, 1983).

[54] *Miley V. Oppenheimer & Co.,* 637 F. 2d 318m 324 (5th Cir. 1981); *Hecht Upham Co.,* 283 F. Supp. 417, 423 (N.D. Ca. 1968).

[55] See *Fey V. Walston & Co.,* 493 F.2d 1036 (7th Cir. 1974); *Hecht V. Harris, Upham Co.* (Supra, n.26).

[56] Poster, N.S.: 'Options account Fraud: Securities Churning in a New Context'. In *Business Lawyer;* Vol.39, February, 1984, p.571 at 572.

[57] 15 U.S. 78 j(b) (1776).

[58] For example, *Hecht v. Harris, Upham & Co., op.cit.,* n.26.

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.[59] Churching is deceptive because the broker, while causing or allowing his customer to rely upon his integrity and purportedly acting in the interest of the customer, fraudulently acts solely or primarily for the purpose of generating commissions.[60] The deception thus depends on the customer's inability to appreciate or understand the economic implications of what is taking place in his account.[61]

Recently in the United States giant corporations have been involved in one form of securities fraud or the other. For instance, Halliburton an international oil services company in 2002 faced at least 10 securities – fraud lawsuits including one from Washington based watchdog group Judicial Watch, following disclosure that the SEC is investigating the Company's accounting policies.[62] Similarly Qwest communications International a phone Company, which provides local and wireless services in 14 U.S. States, is being probed by U.S. SEC for allegedly violating accounting rules, specifically for using a technique known as 'hollow Swaps'. The probe was launched in March 2002. Qwest is also the subject of a criminal investigation by the U.S. Attorney, office in Denver. The Chief Executive Officer, Joseph Nachio, who sold 1300 million of company stock during his tenure was sacked in June 2002 by the company's board.[63]

Similarly, in 2003, prudential, an insurance company was fined $35 million and had to pay $1 billion in restitution to its cheated policy holders. Prudential had been found guilty of the practice of churning which is a racket where about 10 million customers were sweet-talked into using the cash value of older policies to pay premiums on new expensive policies. Prudential admitted guilt and fired several people.[64] Lastly, Mutual of New York paid $12.5 million back to a mob of angry customers,[65] after being found to also be involved in churning.

In Nigeria, there has been recent report on large-scale securities fraud in the market involving several stock broking companies and their chief

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[59] 117 C.F.R. 240, 10b-5 (1983).
[60] *Marshak V. Iyth, Eastman, Dillon & Co.*, 413 F. Supp. 377, 397 (N.D. Okla. 1975).
[61] *Horne V. Francies I Dupont & Co.* 428 F. Supp., 1271, 1274 (D.D.C. 1977); Hecht V. Harris, Upham & Co., *op.cit.* n.26.
[62] Nwaodu, U.: 'Corporate Fraud and Investors' Dilemma (1)' in *Financial Standard* Sept. 2, 2002.
[63] *Ibid.*
[64] Oliver, M.: 'America's Corporations are much like Russia's: the Corporate Crime wave in America' See *The Nation*, March, 20, 1997.
[65] *Ibid.*

executives. 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 Securities and Exchange Commission.[66] Other forms of securities fraud perpetrated in the Nigeria Securities market are non-purchase and lodgment of shares. A recent report of the SEC identified about 26 of such complaints against two companies operating in the market. These are De-canon Investment Ltd and Prudential Securities Ltd.[67]

The then Director-General of SEC Suleyman Ndanusa also gave an account of a particular stockbroker in Lagos who was notorious about accepting orders and moneys without fully executing such orders. The stockbroker was directed to execute all outstanding orders, notwithstanding the time lag and wide price margin between the dates the orders were made through them and the date they were directed to restore the securities. In situations where the affected investors preferred cash instead of securities, the broker was directed to pay cash equivalent to the market value of the total number of shares he failed to execute orders thereon with interests, dividends and bonuses at current rates.[68] In 1994, the registration of a Merchant Bank who acted as an Issuing House in an offer for subscription was suspended and the bank was ordered to pay over all proceeds of the issue held up by it to the issuer with interests for the entire period when the proceeds were in its custody at prevailing lending rate. All these are aimed at stemming securities fraud by making it unprofitable for those involved in it.[69]

2.2 *Regulation*

The word 'regulation' according to the *Chambers English Dictionary*[70] means the 'act of regulating: state of being regulated; a rule or order prescribed ...' This is usually with a view to exerting some form of control, to adjust or adapt continuously by laid down rules or prescriptions to guide the conduct of affairs in any field of endeavour. In the context of trading in the securities market, regulation relates to rules,

[66] See *Business Time*, Vol.27 No.08 February 3-9, 2003; Vol.27 No.09, February 10-16, 2003 & Vol.27 No.12, March 3-9, 2003, p.35. See for instance (2004)1 Nigerian Investment and Securities Law Reports (NISLR).

[67] *Securities and Exchange Commission 2001 Annual Report & Accounts*, pp.74-75.

[68] Ndanusa, S.A.: 'Capital Market Transactions and Financial Crimes: The New Role of the Securities and Exchange Commission' in *SEC Quarterly* September, 2002 pp.4-9 at p.9.

[69] *Ibid.*

[70] Landau, S. I., et al, eds. Reprints 1992.

orders or directives set down by the appropriate regulatory institutions, that is, relevant authorities, bodies or commission to guide the conduct or activities of participants in the capital market.

The central aim of any regulatory regime seeks to bring the regulated into conformity with the law. This may be through persuasion or by punishment, to bring about compliance by the regulated.[71] By the persuasive approach to regulation, regulatory agencies or enforcers respond to problems by 'negotiating future conformity to standards which are administratively determined'.[72] It is marked by 'an extended incremental approach' where any eventual prosecution is considered by the regulatory authority as 'a sign of failure'.[73] Consequently, punishment or threat of punishment as a mode of securing compliance arises due to failure of persuasion.

It is in the light of the foregoing clarifications that one shall examine the extent to which the Nigerian Securities and Exchange Commission is poised to regulating securities transaction in order to check incidents of securities fraud, at the national and international level. This however must be preceded by discussing the imperatives for a transnational perspective to combating securities fraud.

3. The Imperative for a Transnational Approach to Combating Securities Fraud

In Nigeria, prior to the 1990s, the subject of securities fraud was rarely of concern to both the academic and business circles. This was attributed largely to the underdevelopment of the capital market.[74] Very few companies traded their securities on the stock exchange. However, as at December, 31 2002, of the over 200,000 companies registered in Nigeria, 197 had their equities listed on the Nigerian Stock Exchange[75] with 621 operators comprising of brokers, dealers, solicitors, registrars and trustees, as at October, 29,2003.[76] Consequently, there has been concomitant boost in the capital market activities as many investors have

[71] Hopkins, A.: 'Compliance with What? The Fundamental Regulatory Questions, *British Journal of Criminology* 34(4) Autumn, 431-443, pp. 431-432.

[72] Hawkins, K.: Environment and Enforcement: Regulation and Social Definition of Pollution, (Oxford: Clarendon Press) 1984, pp.1-8.

[73] *Ibid.*

[74] Yagba, T.A.T.: 'The New Regime Against Insider Trading and the Internationalization of the Nigerian Capital Market' in *Ahmadu Bello University Law Journal*, Vol. 11-16 (1993-1998) pp.42.

[75] *Securities and Exchange Commission, Annual Report & Accounts 2002* pp. 62-68.

[76] *Ibid.*, pp.104-134.

resorted to it for investible funds.[77] This then calls for a close monitoring of the capital market to check prevalent acts of impropriety on the part of company officials or stock dealers and operators, capable of injuring the interest of investors or impairing public confidence in the market.

The discussion in this article stretches beyond the regulation of the securities market transaction of particular domestic regimes to the international regulatory regimes. This discussion is premised on the fact that the internationalization of securities markets means a possible extension of the scope of securities fraud and underscores the need for a transnational regulatory model acceptable to foreign issuers, without compromising domestic regulatory regimes.

The imperatives for this approach are two fold. The first is the trend toward globalization. Accentuated by communication and technology development, as well as increased transborder commercial and financial flows are, simultaneously, in part, both the causes and consequences of globalization. The Internet and other increased communication abilities have made it easier for companies to raise funds through the capital market instead of the traditional Commercial Banks.[78] This phenomenon has opened national securities market to domestic and foreign investors, and increased its susceptibility to securities fraud. Commenting on the international dimension of insider trading for instance, Gower observes:

> *It is now extremely easy, technically, for a person in one country to deal in the shares of a company which are listed or otherwise open to trading in another country; or for a person to deal in shares of a company quoted on an exchange in his or her own country via instructions placed with a foreign intermediary.*[79]

Consequently, securities markets have increased their international scope and the number of companies listing their stock on the foreign financial markets has increased tremendously. This is manifest in the growth volume of corporate equities transactions across different borders. Statistics reveal that during 2001, the volume of foreign share transactions

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[77] *Ibid.*, The report shows significant increases in the volume of traded equities from 5,890.83 million units in 2001 to 6,615.90 million units in 2002, and a corresponding value of traded equities from ₦57,612.61 million to ₦59,311.33 million within the same period. See p.19.

[78] Shirinyan, I.: *op.cit.*, n.21, p.515.

[79] Gower, L.C.B.: *Principles of Modern Company Law*, (London: Sweet and Maxwell), 6th ed. 1997, p.457.

on the New York Stock Exchange increased by fifteen percent. When compared with 1997, this amounts to an increase in volume by 2.5 times.[80]

Similar upsurge has been recorded on foreign portfolio investment in Nigeria through the Nigerian Stock Exchange (NSE). Statistics as at 2004 showed purchases by foreign investors to be in excess of ₦10 billion, excluding strategic foreign investment in the banks under the recapitalization programme. Some of the investors are resident in the U.K., U.S.A., Ireland, Canada and South Africa.[81] Another report put the recorded inflow of foreign direct investment at about $35 billion (₦4.72 trillion) between June 1999 and July 2005. This cuts across various areas of the economy such as oil and gas, telecom and the services industry.[82]

Specifically, in November, 2005, Oando Plc, one of the eight companies listing in the petroleum (marketing) subsector was granted secondary listing on the Johannesburg Stock Exchange (JSE) of South Africa. The listing which was facilitated by a Memorandum of Understanding (MOU) between the Nigerian Stock Exchange (NSE) and the JSE, comes with a bundle of benefits for the Nigerian Stock market and the economy, especially as it widens the corporate financing options for our companies and works to reduce the domestic cost of capital to our companies.[83]

Attendant to the boom in trade in non-U.S. stock are also securities fraud the dimension of which Levi notes, 'almost all serious securities frauds involve extra-territorial informational needs on the part of national agencies'. For example 80 per cent of cases investigated in London 'have some cross-border aspects'.[84] Gower aptly stated the regulatory dilemma the foregoing situation engenders thus:

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[80] *Op.cit.*, n.50; The Volume of trading in non-U.S. Stocks averaged 117.2 million shares a day in 2001, a 16.6% increase over 2000's 100.6 million. Total non-U.S. Volume was 29.1 billion shares in 2001, compared with 25.3 billion in 2000. At year-end, total worldwide market capitalization of NYSE's non-U.S. companies was $4.9 trillion. It represented 53 countries. See http://www..nyse.com/about/factbook00.html as at October 15, 2002. In 2003 China life, the biggest life insurer in China made a $3 billion Initial Public Offering on the NYSE on 17 December. The issue was rated by any standard the world's biggest and its price which ended 27 percent up on the day was a huge success. See *SEC Quarterly*, Vol. 4 October-December 2003 p.38. A quarterly report of the Nigerian Securities and Exchange Commission.

[81] Okereke-Onyiuke, N.: 'A review of the performance of the Nigerian Stock Exchange in 2005' in *NSE Review*, 2005, p.9. Okereke-Onyiuke is the Director General, Nigerian Stock Exchange.

[82] Bello, M.: At the Nigerian Business and Investment Forum held in Johannesburg, September 2005. Reported in *Financial Standard* September 12, 2005, p. 15. Bello is the Executive Secretary, Nigerian Investment Promotion Commission (NIPC).

[83] *Op.cit.*, n.53.

[84] Levi, M.: 'White-collar Crime: the British Scene', in Geis, G. and Jesilow, p.eds. *White-Collar Crime*, pp.71-82 at pp.79-80.

For the domestic legislator not to deal with the situation runs the risk that the domestic legislation will be circumvented wholesale. To apply the domestic sanctions irrespective of the foreign element, on the other hand, is to run the risk of creating criminal law with an unacceptable extra-territorial reach.[85]

The second imperative for acceptable transnational regulatory regime in the securities market stem from the internationalization of finance. This has occurred for several reasons. Among them are the increasing demand for capital by corporations, the liberalization of capital markets, the decreasing role of banks as the primary corporate financial source, the abatement of trade barriers, and the interrelations between financial markets.[86] Legislation must, therefore respond to the new demands of global trading and financial traffic. For instance, Corporate America and Europe have enjoyed some relative peace until the recent scandals in Enron and Parmalat, respectively.[87] Corporations have operated in a new and more demanding investment climate. Investors and regulators have become more careful in scrutinizing financial reports. New rules are being adopted to improve and strengthen corporate governance, increase transparency and step-up investors' confidence.[88] Shirinyan puts the dilemma of international regulation of the securities market which this phenomena produces as follows:

a discussion regarding the standard of mandatory disclosure requirements applies not only to companies entering the foreign capital market, but to domestic companies as well. Should these companies be required to reconcile their financial statements to the standards of an exchange where their securities are listed or should they be allowed to prepare their financial statements according to the state or nation of the issuer's domicile, or another regulatory body,

[85] *Op.cit.*, n.51.

[86] Kosnik, R.M.: *Reconciliation of Differing Disclosure Standards: Formal and Approaches by Regulators and Market Participants*, 1306/Corp.157, 161 (2002) in Shirinyan, I., *Op.cit.*, n.21.

[87] These Companies inter alia, understand their losses, falsified accounting records and created sham foreign accounts to give the impression that all was buoyant, while they were in the state of bankruptcy. These led to huge losses to investors and employees when these manipulations were unraveled. See Sloan, A. et al: 'Envron's Failed Power Play', *Newsweek* January 21, 2002; Rachman, T.: 'Parmalat Scandal Widens in Italy', The Associated Press, posted on-line, January 01, 2004; Babinton, D.: 'Parmalat casts familiar shadow over audit firms', Renters, 01.02.04.

[88] *SEC NEWS*, Vol.1, No.7 March 2004, p.22 Journal of the Nigerian Securities and Exchange Commission. See also, IOSCO responds to Enron-Related Issues, at http://www.iosco.org/iosco.html.

such as the International Accounting Standards Committee?[89]

While securities laws may vary from country to country, they tend to share a common extra-territorial philosophical underpinning and goals. That is the protection of the integrity of the market as a 'social institution'[90] and the maintenance of investor confidence in the securities market by minimizing the risk of fraud or unfairness in securities transactions.[91] Thus, specific nation state's securities laws are necessarily influenced by their differences in economic development, culture, legal and social environment which are also capable of effecting on the pace or speed of development of the various legal markets. This could also inhibit the development of a more universal approach to disclosure rules accounting standards and other requirements.[92] This *afortiori,* could also impact on regulatory attitude to infractions by individuals and corporations in the securities market.

For instance, it has been contended that the level of trans-border financial flows, creating strong financial market depends on the general type of financial market adopted by any given country.[93] A fairly recent study identifies two prevalent market systems: dispersed ownership and concentrated ownership.[94] While a concentrated share ownership system prevails across Europe and Asia, a dispersed system is limited to the United States and Great Britain. Depending on the broad structure adopted, a country's approach will inherently differ with respect to targeting investment clients, levels of transparency and regulatory regime development, etc.[95]

The regime that provides significant protections for minority shareholders predominates in the dispersed ownership pattern. Such

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[89] Shirinyan, I. *op.cit.*, n.21, p.516.
[90] Kitch, E.W.: *Proposals for Reform of Securities Regulation: An Overview*, 41 VA. Journal of International Law, (2001), p.629, at 642.
[91] Seligman, J.: *The Historical need for a Mandatory Corporate Disclosure System, Journal of Corporate Law,* Vol.9, (1983) p.1 at p.57.
[92] *Op.cit.*, n.21, pp.516-517.
[93] *Ibid.* p.517.
[94] La Porta, R., et al: *Corporate Ownership Around the World* (October, 1998), at http://post.economics.harvard.edu/ faculty/shleifer/papers/ownership.pdf as at October 31, 2002. (Presenting Statistics on ownership pattern of large corporations in twenty-seven wealthy economies). The authors found that except in economies with good shareholder protection, relatively, few firms are widely-held, in contrast to the image portrayed by Berle and Means of disposal of shares in Modern Corporations. (Berle and Means: *The Modern Corporation and Private Properly*, U.S.A. 1968 – passim). Rather, families or the state typically control these firms.
[95] Coffee, J.C.: 'Competition among Securities Markets: A Path Dependent Perspective' in Shirinyan: *op.cit.*, n.21, p.518.

features as a strong stock market, strict disclosure regime and high levels of transparency define the dispersed ownership pattern. The concentrated ownership pattern provides better monitoring of management and can be characterized by a weak stock market involving controlling block holders, private benefit of control, lenient disclosure regime and low transparency.[96]

In the context of combating corporate securities fraud, territorial or extra-territorial, one submits that the main propelling factor should, as stated earlier be, the attainment of the common or universal goals of securities laws across jurisdictions – that is, the protection of the integrity of the market and increase investors' confidence in the securities markets by reducing the risk of fraud or unfairness in securities transactions. Consequently, the efforts of nation states, notwithstanding their different securities markets regulatory models, should be geared at designing acceptable international standards, through harmonization of rules and laws not necessarily to substitute domestic legislation, but to provide reconciliation with them. For example, Karmel notes that although it is difficult to control insider trading and self-dealing, almost every country, more or less successfully, makes efforts to restrict such activities.[97]

It is against the foregoing background that we shall now examine the regulatory regime for the securities market in Nigeria.

4. The Legal and Structural Framework for Securities Transaction in Nigeria

Following the review of the Nigerian Capital Market in 1996 the *Investment and Securities Act, (ISA)*[98]*1999* was enacted to replace the *Securities and Exchange Commission Act, 1988. ISA* established the Securities and Exchange Commission (SEC) as the apex regulatory body for the Nigerian Capital Market[99] with the following powers and functions provided in Section 8. These include:

> *(a)* *regulate investments and securities business in Nigeria;*
> *(b)* ....
> *(c)* *register securities to be offered for subscription or sale to the public;*
> *(d)* ....

[96] Shirinyan, I.: *op.cit.*, n.21, p.518.

[97] Karmel, R.S.: 'Transnational Takeover Talk-Regulations Relation to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany, and Australia', 66, *University of Cincinnati Law ReviewI*, (1998), p.1133, 1149-1152. See also Ali, H.L.: *op.cit.*, n.13.

[98] *Op.cit.*, n.10.

[99] Sections 1 and 8 (n) *ISA*.

(e) ....

(f) register and regulate corporate and individual capital market operators as well as capital market advisers and consultants such as solicitors, accountants, engineers and surveyors;

(g) ....

(h) facilitate the establishment of a nationwide system for securities trading in the Nigerian Capital Market in order to protect and maintain fair and orderly markets;

(i) facilitate the linking of markets in securities through modern communication and data processing facilities in order to foster efficiency, enhance competition, and increase the information available to brokers, dealers and investors;

(j) act in the public interest having regard to the protection of investor and maintenance of fair and orderly markets;

(k) keep and maintain separate registers of foreign direct investments and foreign portfolio investments'

(l) ....

(m) protect the integrity of the securities market against abuse arising from the practice of insider trading;

(n) act as a regulatory apex organization of the Nigerian Capital market including the promotion and registration of self-regulatory organizations and capital market trade association;

(o) review, approve and regulate mergers, acquisition and all forms of business combinations; and

(p), (q), (r), (s), (t), ...

(u) prevent fraudulent and unfair trade practice relating to the securities industry.

The foregoing provisions, one submits, are foundational to international relationship between Nigeria and foreigners, be they individuals of corporations, in securities market transactions. Specifically, for instance, Section 8(k) *ISA* empowers the SEC to 'keep and maintain separate registers of foreign direct investments and foreign portfolio investments'. This provision has been interpreted by the SEC to mean that foreigners do not require the approval of SEC before they can invest in either private or public companies in Nigeria. They are however required to notify the SEC of such transactions by registering all relevant documents filed by the foreigner. This is to facilitate monitoring transitions of major shareholders for possible insider trading activities or if a takeover situation is in the process.[100] The SEC further opined that the purpose of Section 8(k) is the maintenance of a data bank of foreign direct investment flow into Nigeria. Hence, the notification of the SEC is for statistical purpose. The responsibility for maintaining the register of foreign direct investment lies with the Nigerian Investment Promotion Commission (NIPC)[101].

In addition, furtherance to its functions in Section 8(i) and (x) to *inter alia*, 'facilitate the linking of all markets in securities...' and 'liaise effectively with the regulators and supervisors of other financial institutions locally and overseas', the SEC has been involved in the following activities since it became a member of the International Organization of Securities Commission (IOSCO), in 1985.[102]

These include,

(a) Initiating and signing of memorandum of understanding (MOU) with other regulatory commissions, particularly the Financial Services Board of South Africa[103]. The SEC also initiated signing a MOU with India and is in the process of signing a MOU with the China Securities regulatory Commission (CSRC).[104]

(b) Adopting key IOSCO public documents, which define international standards and best practices into its rules and regulation. For instance, IOSCO's core set of non-financial disclosure standards for foreign private issuers.[105]

(c) Participated in responses to questionnaires forwarded by IOSCO on outsourcing of financial services for market intermediaries with a view to setting a benchmark on international best practice. The questionnaire was administered to 26 market intermediaries in Lagos, Kano, Kaduna and Abuja. The SEC also responded to a

[100] SEC's legal opinion upon a clarification sought by the firm of Udo-Udoma & Bello-Osazie, Barrister & Solicitor on whether the approval of SEC is required, before a foreign investor can participate in a private or public company in Nigeria. See Sec Quarterly, Vol.4 October-December, 2003, p.35.

[101] Upon a similar clarification sought by Jackson, Etti & Edu on whether a transfer by a foreign parent company of its entire minority shareholding in a Nigerian company, under a scheme of arrangement, required notification or registration with the SEC. See SEC Quarterly Vol.3, July-September, 2004, p.38. See Section 1 and 21, *Nigerian Investment Promotion Commission* Act, Cap. N. 177.LFN 2004.

[102] *Securities and Exchange Commission Annual reports and Accounts*, 2001, p.80.

[103] *Ibid.*

[104] *SEC Quarterly*, op.cit., n.70, p.49.

[105] *SEC Quarterly*, Vol. 2 April-June, 2004, p.62.

questionnaire on cross-border activities of market intermediaries in emerging markets.[106]

(d) adoption of the e-methodology, an electronic interactive version of the recently endorsed IOSCO methodology for assessing implementation of the IOSCO objective and principles of securities regulation. It is intended to facilitate IOSCO member self-assessment and third party assessment of securities regulatory regimes.[107]

(e) receive information from IOSCO on regulation and oversight of auditors in continuation of the global body's efforts in assessing the level of implementation of the core principles of the organization – investor protection, ensuring fairness, efficiency and transparency of the market, and the reduction of systemic risk.[108]

It is submitted by this writer that the bases for cooperation to enhance the international securities market can also form the core for establishing cooperation to combat fraud in international securities transactions.

Recent actions taken by the SEC as the apex regulatory body in the Nigerian Capital Markets to improve investors' confidence are worthy of mention. These are in the area of dispute resolution mechanism, corporate governance and disclosure requirements for quoted companies.

4.1 Dispute Resolution Mechanism

To enhance speedy, fair and equitable resolution of disputes the SEC established two main bodies, pursuant to its quasi-judicial function. These are the Administrative Proceedings Committee (APC) and the Investment and Securities Tribunal (IST). The APC is one of the committees of the Board of SEC reviewed and reconstituted in 1999 to adjudicate over disputes arising in the market. It is presided over by the Director General of the SEC. The members include, the two executive commissioners in the commission. Two non-executive commissioners and all the line Directors in the commission. There are also observers from the market representing variety of interests, which include, representatives of Association of Issuing Houses, Chartered Institute of Stockbrokers, trustees etc, at the committee proceedings. The proceedings are governed by prescribed rules contained in schedule VII of the SEC rules and regulations made pursuant to the *ISA*, 1999. The rules and regulations are

[106] *Op.cit.*, n.73.
[107] *Op.cit.*, n.74.
[108] *Op.cit.*, n.73.

channeled toward observing all the fundamental tenets of fair hearing enshrined in the Nigerian Constitution. It is on record that through the activities of the APC, over 555 capital market cases have been resolved in four years between 1999-2002.[109] Such disputes arise from violation of the *ISA*, or of rules or other enactments authorized to be made pursuant to the *ISA*, or of rules, or of Code of Conduct for practitioners in the market.[110]

The contention by the appellant in U.B.N. Plc (Registrars' Dept.), V. SEC[111] that compliance with the rules of practice recognized in the investments and securities industry is not obligatory was roundly rejected by the IST, as such rules codes and regulations made by the SEC and its enabling law carry out the makers command as delegated legislation.[112]

The IST was set up in 2003, pursuant to Section 224 of the *ISA* to adjudicate on capital market disputes that cannot be resolved at the APC. It can adjudicate on such disputes itemized in Section 234 (2) of the *ISA*. These are, the interpretation of any law, enactment or regulations to which the *ISA* applies; disputes between the commission and a Securities Exchange or Capital trade Point; disputes between capital market operators and their clients and disputes between quoted companies and the regulators or securities exchanges.

The IST is a specialized court dedicated to capital market disputes and is of the status of the Federal High Court. This it to ensure that disputes are decided expeditiously. This will sustain investors' confidence. The significance of this point is underscored by section 236(5) of the *ISA*, which enjoins the Tribunal to conduct its proceedings in such a manner

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[109] Al-Faki, M.: 'The Role of Securities and Exchange Commission in Developing Commerce and Industry', being a paper present by Mr. Musa Al-Faki, the Director General, Securities and Exchange Commission at the occasion of the 26th Kaduna International Trade Fair, 18th –27th February, 2005 at the Kaduna International Trade and Investment Centre, Kaduna, p.6. Several SEC Reports, and Newsletters between 2000-2004 are replete with several decisions of the APC and various stages of investigations reached in the exercise of its dispute resolution function. See for instance, Re Enpee Industries Plc. (APC/13/.2001); *Re Mrs. O. O. Abiodun V. Nigbel Securities Ltd & Ors.* (APC/20/2002); *SEC V. TMB Securities Ltd* (APC/1/2004); *Chief Tony Ezenna V. Thomas Kingsley Securities Ltd.* APC/1/2004); *SEC V. Michael Adegbusi & Ors* (APC/5/2004); *SEC V. Nigbel Securities Ltd in Re Estate of Late Pa Ajanaku* (APC/41/2001); *Ukuna Aghogho Oghogho V. UIDC Securities Ltd* (APC/41/2004); *Usoro Burns Akpan Akpan Abia V. UIDC Securities Ltd* (APC/42/2004); *Re Transglobe Investment and Finance Company Ltd* (APC/1040/2004). See particularly *SEC Quarterly*. Vol.3, July – September, 2004, pp.43-45 for various decisions and enforcement actions taken by SEC through the APC in protection of investors.

[110] U.B.N. Plc *(Registrars' Dept.) V. SEC (2004)*: ISLR, pp. 39-40, paras F-A.

[111] *Ibid.*, at p.37-38 paras F-A.

[112] *Ibid.*, at p.39 paras C-D.

as to avoid undue delay, and have matter brought before it determined within 90 days, from the date of commencement.

It is however noteworthy that the Tribunal has no criminal jurisdiction. Section 235 of the *ISA* provides that where the SEC discovers evidence of possible criminality it is obliged to pass such information to the appropriate criminal prosecuting authorities, such as the office of the Attorney General of the Federation or the State. The tribunal has extended this to include, reporting to the Economic and Financial Crime Commission (EFCC) for necessary prosecution.[113] The IST has had positive impact on the market through its activities resolving a number of cases that would have been detrimental to industrial and commercial growth in Nigeria,[114] thereby enhancing investor protection.

It is however noteworthy that the equation of the status of the IST to that of the Federal High Court has been subject of legal controversy. While writers like Udora[115] consider it as legitimate others like Akume[116] contend that it is unconstitutional. This is particularly against the backdrop of the law making powers of the National Assembly and the provisions of section 6 of the 1999 constitution of Nigeria. Specifically, Section 6(4)(a) provides;

> *Nothing in the foregoing provisions of this Section shall be construed as precluding-*
> *(a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with Subordinate jurisdiction to that of a High Court.*[117]

Given that the Federal High Court is of equal status with the State High Courts [118] and are superior courts of record in Nigeria,[119] the implication of creating the IST and vesting in it status equal to that of the Federal High Court means creating another superior court or record contrary to the provisions of section 6(4)(a) of the constitution which empowers the National Assembly only to create courts of subordinate jurisdiction to the

[113] Ibid at p.50, para A. See also *Section 7(1)(a) & (2)(f) of the EFCC Act, 2004.*

[114] *Op.cit.*, n.78 such 'Investors protected cases' include, *UBN Plc (Registrars' Dept.) V.SEC*, op.cit, n.79 *Samuel osigwe v. BPE & 15 ORS (2004) 1 ISLR, P.51; Summit Finance company Ltd. V. Iron Baba & Sons Ltd (2004) 1*, ISLR p.98.

[115] Udora, C.A: 'The Machinery for Dealing with grievances in the Nigerian Capital Market'. A paper delivered at the workshop on opportunity in the Nigeria Capital Market for the Development of Kebbi State, 3rd-4th October, 2001.

[116] Akume, A.A: 'The unconstitutionality of the investment and Securities Tribunal in Nigeria. In Benue State *University Law Journal*, Vol.3. 2004, p.51.

[117] Emphasis supplied.

[118] Section 252(1) 999 constitution of Nigeria

[119] Section 6(3) & (5) *ibid*

superior courts of record. Udora contends inter alia that the enactment of the *ISA* to confer concurrent jurisdiction on the IST coordinate to that of the Federal High Court[120] in defiance of the constitutional provision is deliberate, legitimate and intended to apply irrespective of the contrary provisions of the constitution. In this regard, he contends:

> *It is under the rules of interpretation assumed that the legislature was fully aware of the provisions of the constitution and indeed the subsequent seemingly conflicting provisions of ISA to override the constitution on the matter.*[121]

To justify his position, he stated:

> *The two documents (the ISA and the 1999 constitution) were products of the same enactment process and therefore believed to be consciously done. Assuming but not conceding, that the legislature did not intend that the ISA 1999 should confer jurisdiction on the Investment and Securities Tribunal, steps would have been taken since May 26th 1999 to amend or repeal the ISA, 1999, especially provisions relating to the jurisdictional conflict between the Federal High Court and the Investment and Securities Tribunal.*[122]

Akume on the other hand argues, and this writer agrees, that Udora's contention are a product of logical 'sense' and 'in no way represent the strict position of constitutional law on the matter.[123] Both writers however, concede to the supremacy of the constitution and the provision, which renders void any legistlation inconsistence with the provisions of the constitution.[124]

This writer submits with respect that, whether the jurisdictional conflicting provisions of the ISA were 'consciously done' or inadvertently done would not derogate from the fact that of their inconsistency with express provisions of the constitution, which renders any legislation inconsistent with it void. Nor would such conflicting provision derive their efficacy from the fact that they have neither been amended nor repealed by the National Assembly. Consequently, the statement of Chief

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[120] Section 234(2)(a)-(f) ISA, and section 251(1), Particularly paragraph (d) and (e) of the constitutions.

[121] Udora, A, op. cit., n.84, p,16, particularly in view of the fact that the *ISA* was enacted on 26th May 1999 while the constitution was enacted on 5th May 1999 meaning the constitution was 21 days earlier in existence before the ISA., The emphasis is supplied.

[122] *Ibid*

[123] Akume, A.A,: *op.cit*, n.85, P.60.

[124] Sections 1(1) and (3) 1999 Constitution.

Justice John Madison[125] over two centuries ago still hold sway. The learned Law Lord stated:

> *It is a proposition too plain to be contested that the constitution controls legislative acts repugnant to it, or to imagine that the legislature may alter the constitutions by an ordinary act. Between these alternatives, there is no middle ground. The constitution is either superior, paramount law...or it is on a level with ordinary legislative Acts....if the former part of the alternative is true, then a legislative act contrary to the constitution is not law....*

In view of the foregoing discourse, it seems that Udora's position might have been influence by business convenience, rather than law. It would hardly be tenable once subjected to judicial interpretation. In the interim, one agrees wholly with Akume when he concluded as follows:

> *The National Assembly itself is a creation of the constitution and cannot allocate powers to itself beyond what the constitution has already allocated. Any such ultra vires exercise is void intoto and outrightly illegal. The establishment of the Investment and Securities Tribunal and the jurisdiction conferred on it is therefore unconstitutional in its entirety the enabling provision in the ISA being inconsistent with the constitution.*[126]

Lastly, this discussion underscores the call for an amendment of the *ISA* to put the Tribunal in its proper place. That is a position subordinate to the Federal High Court. This is by creating the Tribunal as a division of the Federal High Court, whose decisions should be confirmed by the Federal High Court before it becomes enforceable. Upon confirmation, the judgement should be treated as a decision of the Federal High Court and enforced as such. Appeal from the decision can then lie to the Court of Appeal. By so doing, the Tribunal can then be maintained as a special but subordinate division of the Federal High Court and legitimately exercise part of the jurisdiction of the Federal High Court touching on operation of companies.[127]

[125] (1803)1 Cranch 137
[126] Akume, A.A.; *op.cit.,* n.85, p63.
[127] *Ibid.*, p. 67.

4.2 *Corporate Governance*

Since the collapse of corporate giants, particularly, ENRON and WORLDCOM in the United States, regulatory authorities have reacted sharply to the imperative of good corporate governance regime to among others, shore up investors' confidence which had fallen to its lowest ebb. The response in the United State and Nigeria may constitute classical reference points in this regard. Championed mainly by their apex securities regulatory bodies their respective Securities and Exchange Commission, it is aimed essentially at promoting investor protection by increasing the accuracy and reliability of corporate disclosure and enhancing ethical conducts in the governance of publicly quoted corporations in the economy.

In the United States this finds expression in the Sarbanes-Oxley Act, which was signed into law on July 30, 2002. The Act is broad in scope and generally makes no distinction between U.S. and non-U.S. issuers (reporting Companies) that have registered or filed reports with SEC under the Exchange Act or that have filed a registration statement for securities offering under the Securities Act, even if the registration statement is not yet effective.[128] The Act, for instance removed concessions hitherto, granted to foreign private issuers, such as accounting principles of the home country with reconciliation to the U.S. Generally Accepted Accounting Principles (GAAP); applying the international disclosure standards, like reporting aggregate executive compensation disclosure rather than individual disclosure (if an issuer's home country permits it); and exempting non-U.S. Companies from the proxy rules. Also it allowed for interim reporting on the basis of an issuer's home country and stock exchange practice... that are tailored to the needs of foreign private issuers' rather than mandated quarterly reports and acquiescence in New York Stock Exchange and National Association of Securities Dealers corporate governance standards.[129]

Since the adoption of the Act, new responsibilities have been imposed on reporting companies, their directors, their lawyers and their auditors. Its provisions affect the internal corporate governance rules and activity of non-U.S. issuers, their relationships with their outside auditors, and the information they must provide in the U.S. market. For instance, the Act requires an audit committee of independent directors for non-U.S listed companies and prohibits loans extended to or arranged by a company to

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[128] *Ibid.*, p.67.

[129] See 'petition for Rulemaking to the Sarbanes-Oxley Act of 2002' (Aug. 19, 2002) at http://www.sec.gov/ rules/proposed/s72102/tmmalan 1 htm.in Shirinya, I., Ibid.

its officers and directors. It also requires foreign public accounting firms that audit SEC-registered issuers, including reporting companies to register with the Public Company Accounting Oversight Board (the Board) and be subject to its oversight. Other requirements such as prohibitions on personal loans to executives and forfeiture of certain bonuses and profits became effective immediately, while other rules are effective upon adoption by SEC or the Board.

It has been contended that, while the intention of the U.S congress to prop-up investor protection and to improve the efficacy of the system of regulation is understandable, the transterritorial effects of the Act burden foreign issuers with unjustified requirements and inhibit the process of reciprocity and harmonization of international capital market.[130] In the words of one critic, 'the *Sarbanes-Oxley Act* has largely ignored the difference in practice and corporate governance regimes between the United States and other countries'.[131] These criticisms appear scathing, against the backdrop of the likely result in foreign companies diminished willingness to look to U.S. markets as an avenue for raising capital. The Act may be better appreciated, once viewed as a drastic response to grave malefactions, which bedeviled the American corporate scene in the months immediately preceding the enactment of the Act. This, however, should not foreclose the SEC, using its rulemaking and interpretative power, to make concessions to home country requirements and regulatory approaches of the home jurisdiction of non-U.S. issuers, to avoid conflicts, in order to reach a prompt sensible and mutually acceptable compromise.

In Nigeria corporate governance is manifest in the *Code of Best Practices on Corporate Governance in Nigeria* of October 2003, a product of the review of corporate governance practices initiated by the SEC in collaboration with the Corporate Affairs Commission (CAC), through an industry-wide committee.[132] The code prescribes best practice for public companies in the area of their operations and supervision of executive actions, to ensure transparency and accountability in the governance of these companies within the regulatory framework and market.[133] While voluntary compliance is encouraged, it does not seem that the SEC would

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[130] Shirinyan, I.: *ibid.*, p.526.

[131] Kirk, W.: 'Sarbanes-Oxley Act of 2002: Application to Foreign Private Issuers with Securities Registered under the 1934 Act' (Aug. 8, 2002), at http://www.thelenreid.com/articles/article/art_135.htm.

[132] Al-Faki, M.: *op.cit.*, n.78, P.5. Schedule 2 of the code reveal the extent of representations of membership from various sectors of the economy, from conglomerates, Shareholder Association, Capital market operators, the financial institution, business schools and professional bodies.

[133] See the Preamble to the Code.

handle lightly and blatant infraction of the provisions of the code. In the words of Ndanusa, 'while compliance is not premised on statutory regulation, that is, it is expected to be voluntary; the commission will take exception to any flagrant violation of its provisions'.[134]

Salient provisions of the Code include, the requirements for the separation of the office of the chairmen and Chief Executive Officers of companies, to avoid undue concentration of power in one person and clearly defined responsibilities of top management;[135] the requirement of full and clear disclosure of directors' total emoluments and those of the chairmen and highest paid directors, total emoluments and those of the chairmen and highest paid directors[136] determination of directors and executive director's emoluments and remuneration by remuneration committee composed of non-executive and independent directors;[137] the requirement of promoting transparency in financial and non financial reporting;[138] the requirement of shareholder protection and guaranteed participation in corporate governance, through regular meetings and detailed briefing on the true state and performance of the company;[139] the requirement of the establishment of Audit Committee in such a way as to ensure its independence from the board or any dominant personality on the board, but not to obstruct executive management.[140]

In addition to the foregoing, public companies are now required to disclose their respective levels of compliance with international best practices. The extent of companies compliance will be determined by, among others, willingness of companies to set up independent audit committees made up of people with the right experience and qualification to assess the company's compliance with laid down accounting rules and regulations and report to the board of directors and shareholders, appropriately; willingness to encourage shareholder participation in corporate governance by providing them with clear and prompt information on corporate performance; willingness to rotate external auditors to avoid 'auditors for life'. External auditors should be rotated say, every five years, in order not to compromise their integrity by becoming too 'friendly' with the companies they are meant to serve as

[134] Ndanusa Suleyman, former Director-General SEC and one of the masterminds behind the code Reported by Osei-Brown, A.: 'Ndanusa Offers Carrots on Corporate Governance' in *Business Day*, Vol. 3, No. 283, August 06, 2004, P.32.

[135] Section 2, of the Code.

[136] Section 6, *ibid.*

[137] Section 7, *ibid.*

[138] Section 8, *ibid.*

[139] Section 9, *ibid.*

[140] Sections 11, 12 and 13, *ibid.*

watch dogs and the willingness for companies to involve in more 'narrative reporting' in annual reports. This requirement is underscored by the fact that 'in today's sophisticated financial markets, it is no longer sufficient just to audit and publish statements; the figures need to be explained'. This way, investors not versed in the magic world of accountants can at least read the story behind the figures and not fall victim to the simple, but complex debit and credit function, in which much evil can be perpetrated by those skilled in its usage.[141]

While some critics may consider the provisions of the code as premature given a fragile and growing capital market as Nigeria's, one, however agrees with Ndanusa that 'the codes are proactive measures to ensure Nigeria does not have its own Worldcom and Enron soon in a growing capital market'[142] they are thus, intended to guide against opportunities for corporate fraud, which the lack of the necessary checks and balances and requirements for disclosure may engender. This is reminiscent of the hallow expression 'lead us not into temptation, but deliver us from evil'.[143]

4.3 Disclosure Requirements For Public Companies

As stated earlier,[144] consequent to Nigeria's membership of the International Organization of Securities Commission (IOSCO), the country has adopted important IOSCO public documents which defines international standards and best practices. In line with world developments and increasing internationalization of the securities market the SEC has reviewed disclosure requirements of quoted companies, and in September 2004 published same.[145] The rules aim primarily at providing potential investors with detail information concerning the state of the company they intend to invest in. Salient provisions of the rules include:

(a) Information concerning certain risk factors peculiar to the issuer, which should be considered by prospective investors, such as, risk associated with the business activities of the entity; sectoral risk, for example energy sector risk; political risk, currency risk and environmental risk.

(b) Definition of key concepts, abbreviations and technical terms to guide investors, particularly for companies engaged in technical

141 Ndanusa, S.: *op.cit.*, n 103.
142 *Ibid.*
143 Our Lord's Prayer, Mathew Chapter 6:13. *Holy Bible.*
144 *Op. cit.*, n. 74.
145 *SEC Quarterly*, Vol. 3 July-September, 2004, pp. 45-48. the United State SEC, in 1998 also adopted the IOSCO core set of non-financial disclosure standards for foreign private issuers. See Shirinyan, I,: *op.cit.*, n. 21, p. 522.

activities; corporate directory, showing the addresses and telephone numbers of the issuer's branch regional office; head/management office, e-mail, website and registrar's office (if different), and names of stock exchange where the companies shares are listed or to be listed in view of globalization of the market.

Expected time frame for completion of project for which funds are to be raised and the expected gestation period for such project.

Information about the company and group, for instance relating to sources of raw materials and quality control procedure and quality management programme in place.

Information as to whether any shareholder/director or key management personnel is involved in any bankruptcy petition or insolvency law, or prosecution and conviction for any criminal conduct or pending criminal case(s) or subject of any order, judgment or ruling of any court or regulatory body precluding him from acting as an investment adviser, dealer in securities, director engaging in any type of business activity.

Information on any existing and potential related party transactions and conflict of interest situation.

A detail disclosure of the extent of directors' interest, direct or indirect in any payments, benefits or material assets of the issuer within 2 years preceding the date of prospectus or any appropriate negative statement.

Information on any merger or takeover offer by the company or for the company by another company, price and outcomes of the offer.

Photographs or illustration of properties and assets which do not belong to the company and an accompanied statement that the properties and assets depicted do not belong to the company.

Financial information and segmental analysis, in the case of an issuer which is a group of companies. The prospectus shall contain a detailed analysis of the company/group over the past 5 years (as applicable), preceding the date of the prospectus including segmental reporting of revenue and operating projects by (where applicable) subsidiary/ associated company, product/services and market/geographical location.

Accountant's report in the case of purchase of any business. If the proceeds or any part of the proceeds of the issue is to be utilized directly or indirectly for the purchase of any business the report shall contain, the financial statement of the business to be purchased for the preceding 5 years; the balance sheet of the business for each of the preceding 5 years, immediately after the last date to which the accounts of the business were made up and such date shall not in any case, be more than 9 months prior to the issue of the prospectus.

(l) In the case of utilizing the proceeds of the issues for the acquisition of securities of another company, such that the company whose securities is so acquired shall become a subsidiary of the issuer, information shall contain income statement and balance sheet of that other company referred to in the prospectus in accordance with the Nigerian generally accepted accounting principles and SEC rules.

(m) Details of the fixed assets of the issuer i.e. land and building owned or leased by the issuer spelling out the following information in a property schedule. That is, Title, details and Address; Status, owned/leased, Description, age and tenure; purpose/use, whether as offices, factories and where a factory its capacity utilization and other information relating thereto; net book value; and market value where the assets has been revalued, with the necessary valuer's report.

(n) Statement printed in bold on the cover page of the prospectus advising a prospective, investor to read and understand the contents of the prospectus, and if in doubt to consult a stockholder, lawyer, banker or an independent investment adviser and a declaration that the prospectus has been seen and approved by the directors of the management company and for promoters of the unit trust and they collectively and individually accept full responsibility for the accuracy of all information given and confirm that having made all enquiries which are reasonable in the circumstances, and to the best of their knowledge and belief, there are no other facts the omission of which would make any statement herein misleading.

The foregoing disclosure requirement call for increased vigilance and the need for executive directors and management of public quoted companies to be knowledgeable in assessing these disclosure in prospectuses before calling on the public to buy their shares. Ignorance of any misstatement or misinformation in the prospectus may not constitute a defence in the event of an action by any injured investor. This underscores the recent call on the need for directors of corporate bodies to undergo induction programme to abreast themselves with the roles and responsibilities of being a company director.[146]

[146] Ndanusa, S.: *op.cit.*, n.103.

5. Concluding Remark

The internalization of the Nigerian Securities market is one of the consequences of the ongoing process of economic globalization. This is further promoted by increased global commercial and financial traffic, which has in turn opened national securities market to domestic and foreign investors and widens the potential for securities fraud. The need to protect genuine and honest dealings in securities transaction underscores the imperative for a well established regulatory regime to guide against the activities of unscrupulous and fraudulent operators in the market.

In this regard, one submits that the *ISA* and SEC appear to put Nigeria on the right path by providing the requisite statutory and structural foundation for effective regulation of the capital market. This affords domestic and foreign operators some confidence in participating in the market, as some of the decisions of the SEC[116] and the IST[117] have shown. 147

It must however be sounded that the SEC's membership of IOSCO should be mainly to provide an international oversight body to function in close cooperation with domestic regulators. Thus, while the IOSCO in exercise of its oversight function may make decision, monitor or be involved in dispute resolutions, concerning foreign issuers or other operators, this must not be to the submergence of the peculiarities of the Nigeria capital market environment which is predominantly dispersed in ownership pattern.

Consequently, for purpose of enforcement and bringing errant market operators to face the law, cooperation between domestic and international regulatory regimes must be toward attaining the following goal: The SEC, as government regulatory oversight body, would bring enforcement action against foreign issuers that infringe the Nigeria domestic security regulatory regime. The IOSCO, the international regulatory oversight body would bring enforcement action against issuers that violate the international regulatory régime. This intercourse may eventually engender a uniform approach to developing strong markets through uniform disclosure requirements and financial standards for adoption and enforcement across nations.

[116] Op.cit., ns. 38-41 & 69 & &
[117] Op.cit, ns. 78,79, 80 & 81