THE NEW REGIME AGAINST INSIDER TRADING AND THE INTERNATIONALISATION OF THE NIGERIAN CAPITAL MARKET

BY

T. A. T. YAGBA, LL.B (Hons), LL.M(ABU), B.L.

1. INTRODUCTION:

Until recently, the subject of insider trading scarcely aroused any interest in Nigeria, both in academic and business circles. One reason for this may have been the relative under-development of the capital market. Very few companies traded their securities on the Stock Exchange. By March, 1994, less than 200 of the over 200,000 companies registered in Nigeria were quoted on the stock market.[1] In fact most Nigerian companies to date are private companies whose shares are not freely transferable for or marketable.

This however does not imply that the opportunities for insider trading have been non-existent in Nigeria. Surely, directors and other insiders in any type of company could take advantage of confidential corporation information not available to external or non-managerial investors to trade in their companies' securities to the detriment of the latter. By reason of their position, insiders within a company may acquire information that when made public, will affect the value of the company's securities. Because of the delay between the time that such information is available to such an insider and the time that it becomes public, an insider familiar with the ultimate market impact of the information may trade advantageously to realise profits, usually by buying from existing investors and selling to potential investors.

On the Nigerian Stock Exchange itself, suspicions have been riped that certain prevalent acts of impropriety on the part of company officials or stock dealers do positively injure the rights of investors or at the very least impair full public confidence on the stock market. Some of these allegations of unfair practices by dealers in the allotment of quoted securities have sometimes come into the open.[2]

Today with more companies turning to the capital market to seek investment capital, applications for quotation on the stock exchange seem to be rising by the day.[3] This does imply that to encourage others to do so, the question of control over insider trading is likely to become of greater concern in the immediate future. Most importantly, the spate of mergers, acquisitions and other business combinations precipitated by the Structural Adjustment Programme (S.A.P.) and the implementation of government's privatisation policy have added such steam to activities on the capital market, that the problem has assumed greater urgency.

The point to stress at the outset is the fact that securities represent "intricate merchandise in a system of private capital". They are different from most of the 'merchandise' familiar to the average person. A consumer who wants to pick a loaf of bread in the supermarket can touch and smell it. He can evaluate its worth by comparing it with other brands on the shelf. This is not the case with securities.

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. One alternative is for the consumer (here the investor) to rely on the credibility of the issuer and believe his claims about the enterprise. Experience has however shown that this means of ascertaining value often tempts those issuing securities to make exaggerated claims about the financial state and prospects of their enterprises and thus entice unsuspecting investors with fanciful promises in speculative schemes.

In most jurisdictions, this danger of inviting the public to engage in speculation has always been met by laws designed to afford investors adequate information upon which to assess the worth of the securities offered.[4]

What this establishes is that the availability of some information, favourable or unfavourable, relating to the company or the industry in which it operates is crucial to securities trading. But this is exactly what leads to the danger of insider trading. Since the directors or officers or other persons connected with the company 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 the confidential information. This paper examines how Nigerian Law has addressed this important problems.

2. THE REGIME OF INSIDER TRADING BEFORE THE COMPANIES AND ALLIED MATTERS DECREE 1990.

The Companies Act, 1968 did not make any direct provisions regarding insider trading. Therefore the main source of Nigerian Law in this area was the English Common Law and doctrines of equity. On its part, the common law had always permitted officers of a company to freely hold and deal in the shares of their company. The only sanction which it imposed in this regard was that if they use certain confidential information belonging to the company, they would be liable to it. 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.[5]

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.[6]

The reason for the slow development of English law in this sphere of company law was largely due to the decision of Astbury, J. in *Percival V. Wright.*[7] In that case, the directors had purchased the shares of a member in the knowledge that there was a ready buyer for all the shares of the company at a higher price than they paid to him without disclosing that fact. It was held that the transaction could not be set aside on account of the directors' failure to disclose the information at the time of the transaction. The court took the view that the directors were under no duty of disclosure because there was no fiduciary relationship between the directors and individual shareholders.

This decision, ex-facie, vented the foul air of laissez-faire liberalism predicated on a non-interventionist philosophy. But even by those standards, it was criticised as being repugnant to notions of commercial morality and market egalitarianism.[8]

In principle however the decision appeared justifiable on the basis of a strict application of the corporate personality doctrine. But even so the objection was that this allowed the fiction of corporate personality to obstruct, rather than enhance the interests of justice.[9]

Subsequently in the case of *Allen V. Hyatt*[10] the courts did recognise special, but very limited, circumstances in which a duty might be owed by directors to individual shareholders. In that particular case, the directors had profited through share purchases from members and were held accountable to them because they had purported to act as agents for the members by inducing the latter to give them purchase options over each member's shares supposedly to facilitate a proposed amalgamation.

While this exception was no doubt salutary, the propositions laid down in both cases offered little by way of protection to members of a company as well as those dealing with corporate insiders in regard to transactions involving their company's securities. First, both decisions taken together were of limited value because unless some special relationship of the type in ALLEN. v. HYATT could be shown so as to establish a legal duty to disclose relevant information, an officer could retain his profit without adverse legal consequences.

Secondly, the transactions covered were limited only to those involving directors. But experience in all jurisdications shows that the unfair use of inside information at the expense of shareholders has never been the exclusive 'sin' of directors. For example, it cannot be doubted that the influence of shareholders with large holdings could make it possible for them to obtain information which they would otherwise have been denied.

Thirdly, the decisions did not appear to protect non-shareholders. And fourthly, the decisions seemed to require face to face transactions. Thus dealings on the stock market were outside their ambit.[11]

Finally, it was a major drawback that the legal sanction in equity primarily lay in favour of the company itself alone as a distinct legal person. In most cases, this would be illusory since the insider directors being the offenders were not likely to bring action against themselves on behalf of the company. In many cases, action on behalf of the company was only practicable when there was a new board as in *REGAL (HASTINGS) LTD. V. GULLIVER.*[12]

In the final analysis therefore, before the promulgation of the Companies and Allied Matters Act, 1990 an insider could for example, buy shares in his company without disclosing an intended take-over offer to the seller. Similarly he could sell off his own shares when his company was crumbling without disclosing that fact.

Such opportunities for abuse of position posed a potential threat to investor and public confidence in corporate securities as a whole. It was feared that ultimately this could further undermine Nigeria's under-developed capital market as a channel of investment funds. This would have been quite unhealthy for a developing economy like ours.

In order to generate and sustain investor confidence which is *sine qua non* for the evolution of a dynamic capital market, many writers like Dr. Ayua[13] argued 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 dealng with directors on the basis of equality and market judgement rather than being at the mercy of directors equipped with price sensitive information undisclosed to them.[14]"*

The old *Companies Act of 1968*[15] made little effort at restricting insider trading except to require that a register of directors' share holdings and dealings be maintained and made available for inspection by any interested shareholder.[16]

The major drawback on the efficacy of that provision was the fact that it afforded no remedy. Also, since by virtue of section 111 of the 1968 Act nominee share-holdings were not to be entered on the register, a director who chooses to screen his holdings through trustees could traffic in the shares of his company without this being known. It was probably in realisation of these limitations and the resultant threat to the capital market that the Companies Act of 1990 focused a especial attention on the problem of insider trading.[17]

The objective of this paper is to discuss the provisions of the *Securities and Exchange Commission Act.*[18] and the *Companies and Allied Matters Act*[19] which together create a new legal regime dealing with insider trading in Nigeria. The end purpose is to examine whether or not these provisions taken together can instil the discipline and induce the kind of fair dealing necessary to build up and sustain the desired investor and public confidence in the stock market.

3. DEFINITION

Until recently the term insider trading had remained virtually undefined in our statutes. The only express mentioning of it was in the *Securities and Exchange Commission Act 1979.*[20] That Act vested the commission with the duty of "protecting the integrity of the securities market against any abuses arising from the practice of insider trading." But the Act did not itself say what would constitute insider trading.

Furthermore, even though the commission was empowered to make regulations dealing with the matter, it only tersely provided in its rules that:

> *"It shall be unlawful for any person involved in securities trading to directly or indirectly deal in the securities of a company of which he is an insider.[21]"*

In the new Securities and Exchange Commission Act, however, an attempt was made to define the practice itself. By Section 29 of the Act, insider trading occurs:

> *Where a person or group of persons who are in possession of some confidential and price sensitive information not generally available to the pulic, utilise such information to buy or sell securities for the benefit of himself, itself or any other person.*

Under the Companies and Allied Matters Act 1990 the constituent elements of the practice of insider trading as spelt out in section 614-619 wholly encapsulate this definition. The definition makes it clear that insider trading consists in the use of valuable confidential information by a person who is in possession of such information by virtue of his position on connection with the company when buying or selling the company's securities to his own advantage and to the disadvantage of the other party who does not have such knowledge. A few examples will readily illustrate the ambit of the definition. First, there is insider trading where a company director who knows that the company is in a bad financial state sells his shares in it knowing that in a few days time this news will be made public together with an announcement of a cut in dividend payment.

Likewise, the director would be carrying out insider trading if, on being informed before it was generally known by the public that the company has made a major technological break through, he bought more shares in the company in the not unrealistic expectation of an increase in their market value as a result of the subsequent public announcement.

From the above definition and illustrations, three main ingredients of the practice of insider trading may be identified. The first, is the use of valuable confidential and price sensitive information. The second, is the fact that such information is not yet generally available to the public. The third ingredient, is that the person using it must be connected to the company.

An analysis of these ingredients could reveal that three categories of people may be affected disadvantageously by insider dealing. The most proximate is the company itself. Next to it are the holders of the company's securities who may wish to increase or sell off their holdings for any reason. The third are the potential investors outside the company who wish to aquire the company's securities.

Conversely, four main categories of person are likely to benefit from the practice of insider trading. The first and immediate of these include the directors, officers, and or employees of the company. Secondly, there are associates, friends or members of the families of those officers to whom information about the company may be relayed who may also use or benefit from it.

The third group consists of persons connected with the company professionally such as accountants, auditors, bankers and legal practitioners who may equally gain access to restricted information about the company. The last group consists of members of the company who are sufficiently connected with it to be in a position to have valuable insider information about the company.

Despite this apparently easy identification of the basic constituents of the practice of insider trading, the question of its occurrence is any thing but clear cut. Even in the United States where the rules were first comprehensively developed,[22] stock market regulators still find it 'notoriously difficult' to detect and prosecute those who trade with privilege information.[23] According to the *TIME* magazine, insider trading has only been:

> *".......... roughly defined in court cases as the illicit profiting from information about corporate behaviour before that information has reached the public domain. It has been compared to playing poker with marked cards. But deciding when the cards have been improperly marked, and above all, proving it.... is no mere feat, since rumour, innuendo and split-second inference are the stuff of ordinary stock trading. The difference between insider information and a very fine research report is not clear for as an SEC (U.S. Seecurities and Exchange Commission) official said, on the stock market, 'knowledge is power, Is money. Its worth a fortune.' Deciding whether that fortune is ill-gotten one of the regulators' most forbidden tasks."*[24]

In the United States, grave difficulties in defining the nature of office of an 'officer' who may be held liable for shortswing profits from insider trading and in dealing with the position of some 'tippees' have persisted.[25] To date, the American courts have continued to grapple with the problem of what would constitute 'material information' for the purpose of liability.[26]

But before considering how the new legal regime in Nigeria has handled these problems, it would be desirable first of all, to briefly ponder on why insider trading is considered so objectionable even in a rapidly self-seeking, individualistic and even avaricious capitalist system of enterprise.

4. THE MORAL AND LEGAL OBJECTIONS AGAINST INSIDER TRADING

The ethical imperatives for prohibiting insider trading should be self-evident on the grounds that it is manifestly unfair to those who deal with the insider . As emphasized earlier, 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.[27]

Secondly, 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 advantages. It ought to be noted in this connection that the whole essence of the insider trading prohibition 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 with insider, therefore, is the timing of the 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 take-over bid so as to enable them to make personal gains for themselves through insider trading.

Also the prospect of gain by insiders may affect their judgement and recommendations with regard to matters like the declaration of dividends and investments in other companies so as to enable them to indulge in short-swing speculation in the securities of their companies. Dividends could, for example be raised by directors in order to create a false rise in the value of shares and vice-versa.[28]

From the company law perspective, the most significant reason for prohibiting insider trading is that the insider with access to confidential information is thereby in a potential conflict-of-interest situation. If he is in such a position within the company as to be able to dictate or at least influence when the public disclosure of price-sensitive information is to be made, his decision and his own desire to trade advantageously in the company's securities may conflict. Thus the best interests of the company may wrongly take second place to his own self-interests, because:

> *"human nature being what it is, there is danger - of the person....- being swayed by interest rather than duty......*[29]"

The legal prohibition aims at preventing such a conflict from arising. This seems to correspond with the equitable rule as Justice Johnson put it classically in *WORMLEY V. WORMLEY*[30] that:

> *"There are canons of the court of equity which have their foundation, not in the actual commission of fraud, but that hallowed orison, lead us not into temptation".*[31]

Beyond these also, there are many other reasons, both of economic and legal theory, why unrestricted freedom of insider trading cannot be acceptable. For one thing it would make it possible or likely for insiders to manipulate not only the stock market but also corporate affairs in general. It would also constitute an unfair additional renumeration to such directors and officers.

Furthermore, it would affect the integrity of the stock market and consequently undermine investor and public confidence in the securities of companies. It is this threat that makes insider trading a matter of public concern. By under-mining investors' confidence, the practice tends to discourage legitimate investment in corporate securities.[33]

5. SOME INSIDER TRADING INCIDENCES: A RANDOM INTERNATIONAL SURVEY

A number of notorious instances of manipulation of and malpractices on the stock markets in other jurisdictions may be cited to show the disturbing rise and magnitude of the phenomenon of insider trading as well as the transmissibility of its effects from one country to another.

In the U.S., between 1978 and 1981 alone, the Securities Exchange Commission pressed insider trading 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 precedings four decades of the agency's existence.[34]

In more recent years, the incidences seem to be rising and taking on greater ferocity. For example, in 1984 Fort woth's Sid Bass and his brothers bought and sold 9.9% of TEXACO's shares for a swift profit of $300m. And in 1986, another electrifying incidense of insider trading was announced against Iva Boesky, one of the richest and saviest New York Stock market operators at that time. The accused himself, without disclosing his profits, agreed to pay 100m dollars in penalties, return profits and accept eventual banishment from professional stock trading for life for his wrong doings.[35]

In the same year on the London Stock Exchange, two big cases of illicit dealings were reported. 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. Callier had sought to cover his tracks by 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 Commonwealth Shipping; a transport and financial services company.[36]

In fact a FORTUNE magazine study in 1991 came to the finding that insider trading on stock markets is the rule rather than the exception.

In Nigeria, despite the low number of quoted securities and low volume of trading one cannot rule out its frequent occurrences with the low level of business morality in the country. The paucity of reported incidences here most probably could be traceable to the ineffectiveness of the survelliance apparatus. In the run up to the internationalisation of the Nigerian Stock Market, it is inevitable to restructure the legal regime and the instrumentalities for effectively policing the market. This is what the new legislations on the subject in Nigeria are designed to do.

6. THE NEW LEGAL REGIME

The new legislative action concerning insider trading in Nigeria finds expression in the *Securities and Exchange Commission Act, Cap. 406*[37] and the *Companies and Allied Matters Act, Cap. 59*[38]. The first mainly reiterates the responsibility of the Commission to keep watch over the securities market so as to ensure orderly, fair and equitable dealings in securities and to protect the integrity of the market against any abuses arising from the practice of insider trading. The Act also re-emphasizes the two principal aims of our securities regulation laws, namely, the proper protection of investors and the public interest, and the assurance of fair dealings or 'the just and the equitable principles of the trade'[39] The most important feature of the new securities Act is the fact that, as earlier noted, it offers for the first time a statutory definition of the term insider trading in Nigeria.[40]

However, it is in the *Companies and Allied Matters Act 1990* that detailed provisions for the regulation of insider trading by the Securities and Exchange Commission have been made. These are partly based on the U.K.'s *Company Securities (Insider Dealing) Act 1985.*[41] Thus the first point to note is that insider trading is made a criminal offence. An individual who contravenes the ban on insider trading is liable to a penalty of two years imprisonment or a fine of ₦5,000 or both.[42]

The aim of the criminal sanctions is that those who possess material corporate information will feel compelled, to refrain from dealing until that information has been properly made available to the public.[43]

But our Companies Act of 1990 goes further than the English provisions. It provides in addition a civil remedy. The insider is liable to compensate any person for any direct loss suffered by that person as a result of the transaction. He is also accountable to the company for any direct benefit or advantage receive or receiveable by him in consequences of the transaction.[44]

(a) What is Insider Trading?

The Companies and Allied Matters Act, 1990 painstakingly defines the main ingredients of the practice of insider trading. The most important of these is the nature of the information which is the subject of the legal sanctions.

The only kind of information whose use is banned by the provisions is what is termed "unpublished and price sensitive." This consists of information which:

(i) relates to specific matters relating or of concern (directly or indirectly) to that company, that is to say, is not of a general nature..... and

(ii) is not generally known to those persons who are accustomed or would be likely to deal in those securities but which would, if it where generally known to them be likely materially affect the prices of those securities. "45

The Act also carefully defines the kind of corporate connection neccessary to incur liability under the provisions. To be liable, a person must be an 'insider' which means that "he is, or at any time in the preceding six months has been *knowingly connected with the company.*"[46]

(b) The corporate Connection

A person may be connected with the company in any one of two ways for the purposes of insider dealing. The first is where a person is a director of that company or a related company such as its subsidiary or holding company or a subsidiary of the company's holding company.

The second kind of connection arises where a person:

> 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 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.[48]

The ambit of this provision is such as to include a company's auditors, bankers, brokers and other financial or legal advisers. In this way, 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 the technical, commercial or financial state of the company are all covered. These two categories of persons immediately connected with the company are the first subjects of the insider trading ban. But the prohibitions extend beyond the two groups of persons who constitute the actual 'insiders'.

In order to close an otherwise convenient loophole, outsiders who receive unpublished price-sensitive information are also prohibited from dealing in the securities of the company to which it relates. Thus, a 'tippee' who obtains 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 would be caught by the same insider dealing prohibition.[49] For liability against a tippee to arise, it has to be shown that he either knew or had reasoable cause to believe that the imparter of the information held it by virtue of that connection and that it would be reasonable to expect him not to disclose it.[50]

Another category of prohibited persons are those who are contemplating or have contemplated making a take-over 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 comtemplated or no longer contemplated is unpublished price-sensitive information in relation to those securities. Similarly any other person who knowingly obtains such information regarding the offer from them is prohibited.[51]

Finally, 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.[52]

At this juncture, it is also pertinent to briefly mention the anti-dealing provisions against public servants 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 would be equally illegal for them to communicate the information to any other person if it would be used to deal or counsel or procure any other person to deal in the securities.[53]

A public servant for this purpose, it is submitted, has the same meaning as under Section 277 of the 1979 Constitution or 329 of the 1989 Constitution. Clearly, it covers all staff of the Securities and Exchange Commission and other regulatory agencies. In addition, in the case of members, officers, or employees of a body which exercises public functions but is not otherwise covered by the definition in the Constitution, the Minister of Trade is empowered on certain conditions, to declare by order in a statutory instrument, that such persons are to be officers for these purposes.[54]

By virtue of Section 616(1)(a) and (2), any person who knowingly obtains information from a public officer is also prohibited 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.

One immediate question is likely to arise in relation to third parties or 'tippees' who *knowingly obtain* confidential information from public officers under the preceding section or from insiders under Section 615(7). The probable problem is whether the word 'obtained' would cover situations where an accused person or the defendant is given unsought and unpublished price-sensitive information.

The question was quiet to arise in England with a similar provision. In *RE ATTORNEY-GENERAL'S REFERENCE (NO. 1 OF 1988)*,[55] 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 materia with our Sections 615(7) and 616(1) (a) and (2). The trial judge had ruled that the appellent who had been given unsought and unpublished price sensitive information had not "obtained" that information within the meaning of the sections. On a reference on the point by the Attorney-General, the Court of Appeal held, inter alia, that "obtained' meant no more than 'received' and accodingly had a wider meaning than "acquired by purpose and effort".

The House of Lords affirmed the opinion and 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. The import of this is that an individual who gets from another information within the scope of the Act which he had made no effort to obtain might be a person who has 'obtained' that information for the purpose of the law.

It is submitted that to have adopted any other interpretation would have taken the teeth of the entire prohibitions against tippees. The Nigerian Courts would therefore, when the occasion arises, be invited to follow this purposeful construction so as not to defeat the aims of the legislation as a whole.

(c) Exemptions from Liability

Wide as the dragnet cast by the anti-insider trading regime may appear, the law admits of a number of exceptions. The first of these is that a person who is prohibited under the above provisions may lawfully deal in the securities concerned if he does so otherwise than with a view to profit or avoidance of a loss for himself or another.[56] This would seem to cover circumstances which may compel the realisation of securities despite the knowledge of unpublished price-sensitive information. Other exceptions cover liquidators, receivers or trustees in bankruptcy and stockbrokers acting in good faith in the course of their functions or business.[57] Furthermore, third parties or bidders are to be exculpated of liability if they deal on the stock exchange.[58]

Also, public officers are exempted if they set with a view to facilitate the completion or carrying out of a transaction.[59] Finally an individual acting on behalf of a corporate trustee or personal representative may be relieved of liability if he acts on proper advice.[60]

The last point that needs to be emphasized is that although the Companies Act renders insider trading illegal and even indictable, it does not invalidate transactions resulting therefrom. Such transactions are neither void nor voidable by reason of the contravention of the anti-dealing provisions.[61] Curious as this might seem, it appears to be informed by a recognition of the difficulties which would be involved in any attempt by law to put the parties fairly back into their original positions or the position they would have been in but for mischief of the insider.

CONCLUSION

The preceding discussion indicates that the principal aim of the new legislations dealing with insider trading is to protect `outside' stock holders against short-swing speculations by insiders. The extent of liability is even wide enough to encompass anyone, insider or not, who has access to and trades on material non-public information without disclosing it. Though not clearly mentioned, these may also cover substantial stock holders.

The intent of these expansive provisions, it is submitted, is the need to ensure that all parties to a securities transaction have equal access to material information necessary for informed decision-making. Equal access presumably means opportunity for equal profits. From the investors' point of view, it achieves a broad egalitarianism since all investors have equal access to the same information and can react accordingly.[62]

The first problem with the provisions as a whole is that it is idealistic. In reality, profits would seem to depend on how an investor acts upon the information available to him. Investor with special expertise likely to convert information into greater profits than an ordinary investor if the two are given the same information about a company. A clear example of this situation is where the other is a professional securities analyst.

Because of his special skills, it is difficult to device a bright line test to distinguish between the legimate and illegitimate activity of an analyst. Some American cases, notably *ELKIND V. LIGETT & MYERS*[63] and *RE DIRKS*[64] show that certain aspects of insider trading regulation such as the extent of legitimate securities activity for an analyst would not be readily susceptible to legislation.[65] Our Companies Act of 1990 has avoided dealing with the matter directly. The only exception which may be invoked to cover such a situation is obviously recondite.[66]

The question of policy involved here is whether securities laws should embody a concept of egalitarianism that would prohibit a skilled financial analyst from trading without disclosing the results of his analytic skills as applied to public information? Many people, have argued that it is but just that such skilled investors should be allowed to reap the rewards of their special skills. But if this is so, then there would be no justification also in denying an `outsider' his profits if he is cunning enough to obtain inside information.

However these rationale seem to reflect the overriding concern for fairness in the market place. As earlier argued, investors will be less inclined to participat in securities trading if they feel that others may have a strategic advantage over them. This would erode their confidence in and undermine the stock market. If the aims of internationalizing the Nigerian Capital Market are to be achieved, such negative influences must be stamped out. The second problem which may be indentified in the light of the enforcement experiences in other jurisdictions is that the legal sanctions stipulated by the Act are far from adequate. First, the fines are too low. The highest fine against an individual is only ₦5,000. For a company, the fine is ₦5,000. Yet the option of a fine is likely to be the commonest penalty. Secondly the civil liability is limited to only direct loss arising from the transaction.

Bluntly put, it appears that the serious societal objections against insider trading have not been translated into meaningful deterrence by our law. It would be a powerful increased deterrence to insider trading to enable private plaintiffs to obtain double the profits and also share in any damages which may be obtained on behalf of the company. This treble profit would be an incentive for them to pursue wrongdoers. Such inducement for private prosecution is desirable because the Securities and Exchange Commission does not seem to have, either now or in the near future, the resources - human and material - needed to detect and prosecute abuses.

Finally, the possibility of executing insider trading through secret foreign accounts or through foreign intermediaries who are immune from inquiry leaves the enforcement picture, from a pragmatic point of view, rather bleak. And it would be even bleaker when the Nigerian Capital Market fully integrates into the international financial cesspool.

Actual figures are 177 with 152 quoted on the first tier exchange market and 23 on the second tier securities market (SSM). See Daily Official List of the Nigerian Stock Exchange of as March, 1994 in the Guardian Financial Weekly, Vol. 7. No. 27, Monday, March 14, 1994 at pp. 16 and 17.

See H. I. Alile & A. R. Amao: The Nigerian Stock Market in Operation (Nigerian Stock Exchange, 1986), pp. 143 - 144. See also proceedings of recent seminar organised by SEC on the theme: "Curbing Unethical Practices in the Capital Market" (July, 1990).

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."

J. D. Blackburn, Elklaymann & M. H. Malin: Legal Environment of Business - Public Law and Regulation (Illinios, Ontario: Richard D. Irwin, Inc., 1982), pp. 369.

See BRITISH INDUSTRIAL PLASTICS v FERGUSON (1938) 4 All E. R. 504; CRANLEIGH PRECISION ENGINEERING LTD, v BYRANT (1965) 1 W. L. 1293: MEASURE BROS. v MEASURES (1910) 1 Ch. 336, 2. Ch. 248: PRINTERS & FINISHERS LTD. v HOLLOWAY (1965) 1 W.L.R. 1.

See INDUSTRIAL DEVELOPMENT CONSULTANTS LTD. v COOLEY (1972) 2 All E. R. 162; PHIPPS v BOARDMAN (1965) Ch. 992.

1902 2 Ch. 421

Dr. I. A. Ayua: Nigerian Company Law (London: Graham Burn, 1948), pp. 175.

WILGUS: "Purchase of Shares of a Corporation by a Director from Shareholder" (1910) 8 Michigan Law Review, 267 at 297.

(1914) 30 T.L.R. 444: Also See BREISS v WOOLEY (1954) A.C. 333, H.L.

Cf: Section 279 (2), Companies and Allied Matters Act, 1990 Cap. 59, LFN, 1990.

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Companies and Allied Matters Act, 1990; part XVII, (Chapter 5) is entirely devoted to "Dealings in Company Securities."

Cap. 406, Laws of the Federation, 1990 which was enacted in 1988 as Decree No. 29.

Cap. 59, Laws Federation, 1990 which was enacted in1990 as Decree No. 1.

Act No. 71 of 1979. See section 6(e). The Act is replaced by Cap. 406.

See section 6(1) (e) of the Regulations of the Securities and Exshange Commission, 1980. Only the term `insider' was define in section 6(2) (a) of the Regulations.

The direct federal legislation on the subject has been in operation since 1934 i.e. the Exchange Control Act.

See the TIME Magazine, Issue No. 48, December 1, pp. 24-36.

Ibid., p. 29 (Underline Mine).

See MERIL LYNCH, PIERCE, FINNER & v. LIVINGSTON 566, F.2d 119 (9th Cir. 1978)

G. A. Glawoyin: Op. cit., note 11, pp. 155 - 159.

WILGUS: Op. cit., note 9: Also BERLE: "Publicity of Acccounts and Directors' Purchases of Stock" (1927) 25 Michigan Law Review 827 at 828; Cf: WALKER: "The Duty of Disclosure by a Director Purchasing Stock from his Stockholders (1923) 32 Yale Law Journal 627 at 639.

G. A. Olawoyin, op. cit., pp. 148.

Per Lord Herschell in BRAY v. FORD (1896) A. C. 44 at 51.
(1823) 2 U. S. 421.
Ibid. at pp. 463: Also See SNELL's Principles of Equity (London: Sweet & Maxell, 1966) 26th Ed., pp. 255 - 263.
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Ibid., Section 617 (1) (b) and (c).
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Ibid., Section 619 Cf: Section 15 (2) (b) Securities and Exchange Commission Act, Cap. 406.
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