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REGULATORY FAILURES AND THE COLLAPSE OF THE CAPITAL MARKET IN NIGERIA: ALIGNING RESPONSIBILITIES WITH ACCOUNTABILTY

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Abstract

Despite the damaging impacts of the crash in the Nigerian capital markets between 2007 and 2011 on the economy and the established cases of regulatory failures in the industry, the question of *regulatory accountability* has not received much attention in Nigeria. Looking back at these regulatory failures vis-à-vis the statutory responsibilities of the regulators of the capital markets in Nigeria and comparing same with the securities regulatory authority of the UK under the FSMA, 2000 this article argued that responsibilities should go with accountability for an effective capital market regulation in Nigeria. The article found that the apex regulator in Nigeria lacks the necessary operational independence. It questioned the increasing trend of regulatory laxity and 'highhandedness' in the capital market. The article recommended a proper *regulatory accountability* through a review of administrative decisions, actions in torts on the grounds of regulatory negligence, breach of statutory duty and misfeasance in public office. It also recommended a total restructuring of the apex regulator to make it more operationally independent in line with global best practices.

1. Introduction

One remarkable invention of our time is the *capital market*.[1] The capital market has become an increasingly dominant wealth creation platform upon which most modern economies rely. The significance of this market is reinforced by the forces of economic globalization manifested partly through increased integration and 'denationalization' of securities markets around the world.[2] A slight dysfunction in one capital market could send enormous shock waves to many other markets elsewhere.[3] In the same vein, a critical regulatory failure in one market could destabilize economies around the world and can trigger serious financial crisis. This is how

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[1]See Garner, ed. *Black's Law Dictionary*, 7th edn, at p. 982. It is a market in which securities are traded. Securities here mean shares or stocks, bonds and debentures. Section 315 of the ISA, 2007 defines "securities" to mean:(*a*) debentures, stocks or bonds issued or proposed to be issued by a government; (*b*) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate; (*c*) any right or option in respect of any such debentures, stocks, shares, bonds or notes; or (*d*) commodities futures, contracts, options and other derivatives, and the term securities in this Act includes those securities in the category of the securities listed in (*a*) - (*d*) above which may be transferred by means of any electronic mode approved by the Commission and which may be deposited, kept or stored with any licensed.

[2] See Stultz, R.M., 'Securities Laws, Disclosure, and National Capital Markets in the Age of Financial Globalization', *Journal of Accounting Research*, Vol. 47, No. 2, *Regulation of Securities Markets: Perspectives from Accounting, Law, and Financial Economies* (May, 2009), pp. 349-390, DOI:10.1111/j.l475679X.200900327.x ; Deléchat, C, et al, 'How Global Financial Markets Affect Sub-Saharan Africa', *IMF Staff Papers*, Vol. 57, No. 1 (2010), pp. 172-208; Stuber, W., International Securities and Capital Markets, *The International Lawyer*, Vol. 43, No. 2, *International Legal Developments in Review*: 2008 (Summer 2009), pp. 613-639; Simmons, B.A., The International Politics of Harmonization: The Case of Capital Market Regulation', *International Organization*, Vol. 55, No. 3 (Summer, 2001), pp. 589-620; Sen, S., Swings and Paradoxes in International Capital Markets: a Theoretical Note, *Cambridge Journal of Economics*, Vol. 15, No. 2 (June 1991), pp. 179-198; Ikhide, S.I., 'Financial Liberalisation and the Growth of the Capital Market in Nigeria', *African Review of Money Finance and Banking*, No. 1/2 (1997), pp. 5-37;

[3] See Bekaert, et al., 'Global Crises and Equity Market Contagion', *NBER Working Paper Series*, Working Paper 17121 http://www.nber.org/papers/w17121; Schwert, G.W., 'Stock Volatility During the Recent Financial Crisis', *NBER Working Paper Series*, Working Paper 16976, (April, 2011) http://www.nber.org/papers/w16976;

critical and indispensable the capital market has become in our predominantly market economies. In his century old article on the Stock Exchange, Huebner described this platform as '*the* pulse of our economic life'[1] while Duguid described it as '*the* nerve center of the politics and finances of nations' as well as '*the* barometer of their prosperity and adversity.'[2] However, the centrality of the capital market to modern economies presents enormous challenges. It is a vulnerable platform in which the instinctive greed of human beings could easily unleash itself and this may extend the stretch of regulatory jurisdictions; hence the 'speculative fervor', 'irrational exuberance' and bubbles[3] have become the recurring phenomena in many of these markets around the world.[4] This prompted the need for a strict regulatory surveillance or oversight in order to protect investors and market operators from the general human mischief.[5] In other words, the law and its enforcement are necessary for the maintenance of an effective and efficient capital market. But the law is not simply a question of assigning regulatory responsibilities *simplicita*; it is about both responsibility and accountability.

Holding regulators to account for gross regulatory failures has not received much attention in Nigeria. History has shown that the 'speculative fervor' conditioned by regulatory laxity and 'highhandedness' became one of the principal causes of the near collapse of the Nigerian capital market in 2010.[6] For instance, the House of Representatives' Ad hoc Committee (the Ad hoc Committee) which investigated the near collapse of the Nigerian capital market following the 2007-2011 crisis revealed that regulatory failure was one of the key factors responsible for the crisis in the capital market noting that 'the capital market and its institutions have been (sic) a den and haven for corrupt practices which have resulted in very low investors' confidence'.[7] In the same vein, it was observed that 'ineffective market regulation and supervision, weak institution and lack of corporate governance, lack of regulatory pro-activity and cohesion, inefficiency and cumbersome processes' have become the bane of the Nigerian capital market.[8] Since the 2004-2005 consolidation exercise in the banking sector, the Securities and Exchange Commission (SEC), the Central Bank of Nigeria (CBN), the Corporate Affairs Commission (CAC) and the Nigerian Stock Exchange (NSE) have become terribly uncoordinated and entangled

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[1] Huebner, S.S., 'Scope and Functions of the Stock Market', *Annals of the American Academy of Political and Social Science*, Vol. 35, No. 3, *Stocks and the Stock Market* (May, 1910), pp. 1-23

[2] Quoted in Huebner ibid. Fernando Henrique Cardoso, a former Brazilian President, reportedly remarked "you can neither have economic growth nor economic development, without having solid capital market".

[3] See Kaplan, P.D., et al., 'The History and Economics of Stock Market Crashes', *Insights into the Global Financial Crisis*, p.132.

[4] See Beatie, A., 'Market Crashes: The South Sea Bubble', http://www.investopedia.com/features/crashes/crashes3.asp (accessed 13/7/15)

[5] See for instance, the UK's South Sea Bubble Act, 1720. Some scholars are critical of stringent regulatory regime for the capital market. See for instance Ghosh, D.N., 'Quirks of the Market Regulator', *Economic and Political Weekly*, Vol. 39, No. 16 (Apr. 17-23, 2004), pp. 1550-1551, arguing that 'No biometric database, howsoever comprehensive or intrusive, can deter those who are innovative, daring and determined to find ways of escaping out of the regulatory net… Markets can develop on the basis of mutual respect between the regulator and market participants; this can build up only in an ambience of trust and confidence. Trust is the solvent of the market process, but when we trust, we know that we could be disappointed. Plants do not flourish when one pulls them up too often to see whether their roots are growing or not. Institutional and professional roots for market development cannot flourish if we constantly uproot it to satisfy ourselves that everything is indeed transparent and trustworthy.'

[6] The initial response to the global financial crisis by the Nigerian Regulators was to insist that Nigeria was 'insulated' from the crisis. See Soludo, C.C., Global Financial and Economic Crisis: How Vulnerable is Nigeria? CBN, Abuja, (January 2009), at p. 24.

[7] See the House of Representative Ad hoc Committee Investigating the Near Collapse of the Nigerian Capital Market, Report of the Ad-Hoc Committee on the Investigation into the Near Collapse of the Nigerian Capital Market, National Assembly, Abuja; Resolution No (HR70/2012) (hereafter 'House of Representative Ad hoc Committee, 'Report.'). In the United States, the Financial Crisis Inquiry Commission also concluded that 'the crisis was avoidable: the captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public.' See Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report, xvii (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[8] See Dialoke, O., Capital Market Crisis: Why a Slump Became a Crash, *Vanguard*, 16th Januarys, 2011;

in a free-for-all regulatory atmosphere while market infractions and insider dealings were increasingly ignored and condoned. Some of the regulators were found to be direct accomplices to market infractions, insider abuses and other illegal dealings.[1] There is a general consensus among stakeholders and scholars that the Nigerian capital market and the economy suffered tremendously from these avoidable regulatory failures and confusions.[2] In particular, the crash in the value of stocks in the capital market between 2007and 2011 and the total chaos in the market have negatively affected the country's financial stability and economic growth.[3] However, in spite of these devastating impacts little has been done to identify the 'regulatory cracks,' clarify the responsibilities and accountability of all stakeholders under the law in order to forestall or minimize the impacts of future occurrences.[4] The accountability of the regulators seems largely ignored in spite of the inexcusable actions and inactions that grossly violated legal prescriptions and undermined both the capital market and the entire financial system. The reality is that crisis in the capital market is a recurring phenomenon the world over and it is not here suggested that it can be averted completely but it certainly makes sense to recognize this reality while addressing observed lapses in its operation and regulation.

In the light of the above, this article examines the legally prescribed responsibilities of the key regulators in the capital market and advocates for effective accountability measures to address any irresponsible behavior by any regulator. Guided by the history of capital market crises and the available evidence on the recent 2007-2011 crisis in the capital market in Nigeria, the article identifies and critically examines the relevant statutory responsibilities of the regulators of the capital market in Nigeria in order to clarify the increasing lack of regulatory coordination among them. The article argues that 'regulatory passivity' and 'regulatory highhandedness' ought to be penalized rather than praised. It also argues that holding regulators to account is important to the stability of the market and is likely to deepen investors' confidence in the market. The article seeks to accomplish these tasks by first discussing the functions of a capital market. Section three examines the statutory responsibilities of these regulators and mirrors the functions of each against the backdrop of the 2007-2011 capital market crash. Section four examines issues of accountability which are often ignored in the financial services sector in Nigeria. It also looks inward to identify the needed accountability principles from both public and private law perspectives and then proposed a restructuring of the apex regulator to ensure regulatory accountability. Section five concludes the article with some recommendations.

2. Nature, Functions and Significance of the Capital Market

The capital market is a 'securities market in which stocks and bonds with long term maturities are traded'.[5] Country's capital markets are the markets in which companies, governments and their institutions raise capital publicly and 'where securities representing claims to capital are traded'.[6] The market consists of the securities and non-securities segments.[7] While the latter consists of banks and other financial institutions with their instruments such as loans, mortgages and leases, the former which is the focus of this article consists of both the fixed interest securities (debentures and bonds) and the shares markets.[8] In Nigeria, the bonds market is

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[1] ISA defines "insider dealing" to include insider trading which occurs 'when a person or group of persons who being in possession of some confidential and price sensitive information not generally available to the public, utilizes such information to buy or sell securities for the benefit of himself, itself or any person'. See section 315.

[2] See Jenrola O.A., & Daisola, O.R., Ujunwa, A., et al., The Global Financial Crisis: Realities and Implications for the Nigerian Capital Market, *Am. J. Soc. Mgmt. Sci*., 2011, 2(3): 341-347, doi:10.5251/ajsms.2011.2.3.341.347; Yakubu A. & Akerele A.O., An Analysis of the Impact of Global Financial Crisis on the Nigerian Stock Exchange, Current Research Journal of Social Sciences 4(6): 396-399, 2012 ; The Implications of Global Financial Crisis on the Nigerian Capital Market Performance: An Empirical Investigation (2000-2008), *European Journal of Humanities and Social Sciences Vol. 16, No.1, 2012.*

[3] Nwude, C.E., the Crash of the Nigerian Stock Market: What Went Wrong, the Consequences and the Panacea, *Developing Country Studies*, Vol 2, No.9, 105 (2012).

[4] Some company executives were already prosecuted and sentenced for insider dealings, abuse of powers and a host of other violations of the securities and criminal laws in the country. See

[5] Garner, ed. *Black's Law Dictionary*, 6th edn.

[6] Stultz, R.M., 'Securities Laws', op cit, at p. 350.

[7] See Ikhide, S.I., 'Financial Liberalization', op cit, at pp. 5-6.

[8] Ibid, at p. 6.

dominated by governments[1] while the shares market is dominated by private enterprises. In terms of institutional arrangement, the capital market consists of a primary market which is dominated by the brokers, dealers and ventures capitalists and a secondary market dominated by the Stock Exchange. The former's main concern is with the primary issues, while the secondary market handles already existing issues of the Exchange.[2] The ISA, 2007 defines the latter as 'any exchange registered by the Commission…which constitutes, maintains or provides a market place for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by an exchange.'[3]

The Nigerian banking sector consolidation exercise of 2004-2005 had demonstrated the immense potentials and significance of the capital market as an efficient, reliable and effective vehicle for capital mobilization and allocation in modern emerging economies. The function of the primary market in mobilizing and channeling savings into long term investments and infrastructural development constitutes the most crucial advantage of the market as it offers diverse options to investors and financiers.[4] It directs the flow of capital from channels least needed at a given time to channels in need at the same time. The liquidity and flexibility offered by the secondary market further strengthen the capital market as a convenient platform where investments could be disposed off without much difficulty. Through this role of mobilizing and channeling funds, the capital market enables wider investor participation in economic activities, encourages financial discipline, transparency and accountability, promotes solvency and corporate competitiveness, and reduces over-reliance on debt financing[5] with its characteristic challenges of enforcement in the country.[6] Secondly, the market informs and guides investment decisions as it is the barometer of determining the profitability of certain class of businesses thereby preventing the misdirection of investments into unnecessary, unprofitable ventures.[7] In particular, the stock exchange has been rightly described as 'the clearing house for all news of business significance' thereby relieving investors of the trouble and expenses of seeking to know 'the many isolated facts underlying the operation, management and future prospects of corporations'.[8]

Thirdly, the capital market also 'discounts the future'[9] by giving a barometer to gauge the prospective value of other properties not listed on the exchange. This aids significantly in determining the economic direction of a country. For instance, previous financial crises around the world were mostly preceded by falling stock prices giving sufficient clues as to the position of the real economy.[10] Fourthly, capital markets exert significant influence on the money market often preventing financial panic in the sense that stocks and bonds used as collaterals for bank loans could readily be liquidated by the bank without affecting other real businesses. Fifthly, capital market allows retail investors to have a long term retirement plans. And finally, governments and supranational bodies could easily resort to the market in financing infrastructural development projects.

Not surprisingly therefore, these functions and advantages combined to make the capital market an efficient avenue for smooth investment activities in market economies. It is central to the growth, development and

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[1] This was originally supported by the Income Tax Management Act 1961, Trustee Investment Act, 1962, and the Insurance (Miscellaneous Provisions) Act 1964. See also the Pension Reform Act, 2004 and the ISA, 2007.

[2] Ikhide, S.I., op cit., at p. 7.

[3] See ISA, 2007, s. 315.

[4] Azfar o., and Matheson, T., Market-Mobilized Capital, *Public Choice*, Vol. 117, No. 3/4, *Essays in Memory of Mancur Olson* (Dec., 2003), pp. 357 AT 358-9; Akamiokhor, G. A., 'Building Capital Market Regulatory Institutions in Developing Countries — The Nigerian Experience', *Social and Economic Studies*, Vol. 45, No. 2/3, *Special Monetary Studies Issue (Capital Markets in Regional Development)* (June/September 1996), pp. 249-278, at p. 251.

[5] Akamiokhor, G. A., 'Building Capital Market', op cit.

[6] See Bello, M., 'Clearing the Minefield for Secured Lenders in Nigeria: Pledge of Land as Alternative to Mortgage Security in Nigeria', BUJPL (2011) Vol.4, p.

[7] Huebner, S.S., Scope and Functions of Stock Market, op cit, at p. 12.

[8] Ibid.

[9] Ibid.

[10] Ibid, noting that 'a marked rise or decline in the general level of prices is the surest indication, in fact an almost unfailing index, of coming prosperity or depression.'

strength of these economies and plays key roles in sustaining the financial system.[1] It became popular after the collapse of the Soviet Union which saw the 'triumph' of capitalism.[2] In functional terms, the capital market brings so many players together for mutually beneficial purposes.

By its nature however, the capital market provides some room for financially distasteful and unenviable activities making some to describe it as 'the bottomless pit, worse than all the hells.'[3] This necessitated the need for regulation so that all players will behave in accordance with acceptable standards of transparency, full disclosure and fairness. The objective is to maintain financial stability, sustain confidence in the market and protect investors.[4] This can be achieved through registration of participants, disclosure and checking market infractions. But these regulatory imperatives have encountered serious challenges in a technologically driven world with enormous sophistications and constant innovations. In addition, the effects of globalization and financial markets integration pose additional challenges to domestic regulators due to cross-border and cross-asset interactions.[5] Foreign stocks are increasingly becoming lucrative targets for investments and the absence of foreign investments in a country is seen as a sign of economic stagnation. It is on record that the withdrawal of foreign investments from the Nigerian capital markets in 2007 instigated serious market runs and was instrumental to the 2007-2011 market crash. This in turn was largely influenced by the global financial crisis emanating from the USA.[6]

In essence, stringent regulations are necessary in order to ensure fair trading in securities. And since the latter has become internationalized, the legal standards are gradually becoming universalized. The International Organization of Securities Commissions (IOSCO), for example, has set out three core objectives of modern securities regulations to include: protection of investors, ensuring that markets are fair, efficient and transparent; and the reduction of systemic risks.[7] In line with these objectives, the ISA, 2007 established the SEC as the *apex* capital market regulator in order 'to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of systemic risk'.[8] Thus, proper disclosure and transparency are necessary for sustained trading on any capital market. In this regard, it has become an almost universal practice to provide in the constitution of stock exchanges that the exchange shall provide 'rooms and other facilities for the convenient transaction of business by its members and to maintain high standards of commercial honor and integrity among its members, and to promote and inculcate just and equitable principles of trade and business'.[9]

Although the Nigerian legal framework on securities trading sought to follow the three key objectives recommended by IOSCO, it has not adequately reflected the details of the principles provided therein as we will examine later. This contributed to the crisis while shielding some regulators from accountability.

3 The Regulators and the Collapse of the Capital Market in Nigeria

Beside the international dimension, the crisis in the Nigerian capital market was largely a product of a colossal failure of most (if not all) the stakeholders in the market particularly the regulators. The legislatures found that 'there were monumental lapses in regulation.'[10] Therefore, it is important to identify these regulators and examine their responsibilities in the light of the crisis that rocked the capital market.

3.1 The Regulators of the Capital Market

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[1] See International Organization of Securities Commissions (IOSCO), *Objectives and Principles of Securities Regulations*, IOSCO, September, 1998, at p.1.

[2] See Akamiokhor, G. A., 'Building', op cit, at p. 250.

[3] Heubner, S.S., Scope and Functions, op cit, at p. 7.

[4] See Ihkide, S.I., 'Financial Liberalization', op cit, at p. 18.

[5] IOSCO, *Objectives and Principles*, op cit, at p.2.

[6] House of Representatives' Ad hoc Committee, Report, op cit.

[7] IOSCO, *Objectives and Principles,* op cit, at para. 4.

[8] See ISA, 2007, the Preamble.

[9] See Heubner, S.S., Scope & Functions, op cit., at p. 9.

[10] House of Reps Ad hoc Committee, *Report*, op cit, at para 4.4

Although there is one principal or *apex* regulator of the capital markets in Nigeria (the SEC), the events of 2004-2012 (banking consolidation, astronomical increase in market capitalization of the NSE, corporate collapse and eventual crash in the market) have revealed that the SEC is not alone in performing this all important task. Therefore, it seems better to present a broader regulatory picture in order to appreciate the statutory roles of these regulators. Other 'regulators' in this regard include the Federal Ministry of Finance, the Corporate Affairs Commission (CAC), the Nigerian Stock Exchange (NSE), the Central Bank of Nigeria (CBN) and the Nigerian Deposit Insurance Corporation (NDIC). Over the years, these bodies have been regulating the activities of other non-statutory stakeholders of the market who are the 'regulated' or 'regulatees'. The latter include the Stockbrokers, Registrars, Shareholder associations, retail and institutional investors, listed companies and their directors. They can be held liable for infractions of market rules or be subjected to the existing legal machineries in the country. Thus, the accountability of these private stakeholders is fairly and relatively clear and therefore warrants no further discussion in this article.

It should be pointed out that the NSE started as a statutory body but it is now a private 'regulator' as it offers the platform for market operators and 'regulates' their activities on the NSE. Trading on the NSE requires *listing* or *quotation* of the securities.[1] This is the official admission of securities to the official list of a stock exchange.[2] Only public companies duly registered in Nigeria are qualified for listing on the NSE and the securities must have been duly registered by the SEC.[3] We now turn to the statutory responsibilities of the key regulators.

3.1.1 Responsibilities of SEC in Capital Market Regulation

This body was established first in 1973 as the Capital Issues Commission. It was re-named the Securities and Exchange Commission (SEC) in 1979 pursuant to the Securities and Exchange Commission Act (SECA) of the same year. The Investment and Securities Act, 1999 (ISA) repealed the SECA but retained the SEC with a wider, enlarged role.[4] The ISA was further amended in 2007 by the Investment and Securities Act. Under this Act, SEC is the apex regulatory authority of the capital market and securities transactions in the country.[5] It has enacted detailed capital market regulations. Unlike the CAC, SEC only deals with public companies and other entities entitled by law to transact or trade in securities. Its regulatory functions are therefore, more pervading given the increasing relevance and influence of public companies in the country. Section 13 of the ISA, 2007 outlines these statutory responsibilities as follows:

a. regulation of investments and securities business in Nigeria;
b. registration of securities of public companies and regulation of all offers of securities by public companies;
c. registration and regulation of corporate and individual capital market operators;
d. protection of investors and maintenance of fair and orderly markets;
e. protecting the integrity of the securities market against all forms of abuses including insider dealing;
f. promoting investors' education and the training of all categories of intermediaries in the securities industry;
g. intervening in the management and control of capital market operators which it considers has failed, is failing or in crisis including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors;

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[1] see s.315 of the ISA which defines "quotation" in relation to securities and in relation to a stock market of a securities exchange or capital trade point to include the displaying or providing, on a stock market of a securities exchange or capital trade point, information concerning :- (*a*) prices or considerations; in a case where offers to sell, purchase or exchange the securities at particular prices, or for particular consideration, are made or accepted on that stock market; (*b*) offers or invitations; in a case where offers or invitations are made on that stock market, being offers or invitations which are intended, or may reasonably be expected, to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange the securities at particular prices or for particular consideration, those prices or that consideration; or (*c*) in any case, the price at which, or the consideration for which, particular persons or particular classes of persons, propose or may reasonably be expected to sell, purchase or exchange the securities

[2] See NSE, The Green Book, p.3. see also s. 31 of the ISA.

[3] See Rule 311 SEC Rules, 2011.

[4] ISA, 2007, Explanatory Note.

[5] Ibid, s. 13.

h. preventing fraudulent and unfair trade practices relating to the securities industry; and
i. Seeking judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the Act, or any securities law or regulation in Nigeria or other jurisdictions.

The above are some of the regulatory functions of the body. Thus, it monitors operations of capital market players and ensure compliance with the ISA and other related regulations governing the securities of public companies in Nigeria. As noted above, its roles are more sensitive given the immense influence of public companies, the riskiness of their ventures and the increasing stretch of their spheres of operations. It is in this light that the ISA, 2007 is seen as a 'comprehensive' legislation that gives more teeth to the Commission.[1] It has a Monitoring and Investigation Department meant to avert manipulative practices, enforce compliance with rules and markets ethics and ensure transparency in the operations of the capital market in the country.[2] As pointed out above, SEC also has a rule-making function.[3] In this regard, it has enacted a set of rules and regulations ('the Rules') directly concerned with investor protection, fair market practices and corporate governance. In 2011, these Rules were reviewed and updated.[4] Under the Rules, every public company is required to file an annual report which must 'state the level of compliance of the public company with the Code of Corporate Governance for Public Companies'.[5] In line with IOSCO's regulatory objective of reducing systemic risk in the capital market, the Rules also require all public companies to include risk management as part of their accounting policies, disclose any material effect of unmitigated risk on corporate profitability and to disclose strategies for preventing risks they are exposed to.[6]

In addition, the ISA and the Rules require the registration of all capital market operators and other regulated entities.[7] For instance, all appointments of directors of capital market operators and establishment of branches must be approved by SEC.[8] After registration of any operator by SEC, such operator shall also comply with the post-registration requirements of membership, inspection, etc.[9] Capital market operators are subject to routine examination and inspection by the SEC; any *failing* operator may be taken over by the SEC.[10] Interestingly, SEC may even revoke the registration of any failing operator, appoint a provisional liquidator and apply to the Federal High Court for winding up.[11] What is striking however is that this power of SEC either directly conflicts with or complements that of the CAC under the CAMA.[12] The ISA even adds another ground for winding up outside those stipulated under section 408 of the CAMA: revocation of registration of a capital market operator.[13] Even though the CAMA is a general company law legislation that should give way to a special one (ISA), the fact remains that there is an apparent regulatory 'intersection' here.

SEC & the Collapse of the Capital Market

Clearly, the SEC has enormous responsibilities of ensuring a fair and efficient securities trading in the country. However, the enormity of its task plus the bureaucracy, regulatory laxity and 'highhandedness', corruption and the increasing technological challenges facing the capital market in the country appear to have constrained SEC in effectively discharging its functions. This is evident in the financial crisis manifested by the collapse or distress of publicly traded companies directly under its regulatory jurisdiction in the country. One of the findings of the House of Representatives Ad hoc Committee was that 'there is a complete failure of regulation by the

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[1] Paul Usoro & Co, Investments and Securities Act, 2007, *PUC Journal*, May, 2008 edn., at p.1
[2] ISA, 2007, s.
[3] Ibid, s. 313.
[4] SEC, *General Rules and Regulations Pursuant to the Investment and Securities Act, 2007,* (SEC Rules,2011).
[5] Ibid, Rule 39.
[6] Ibid., Rule 43
[7] Ibid, Rule 45.
[8] Ibid, Rules 21 & 28.
[9] Ibid, Rules 30-31.
[10] ISA, 2007, ss. 49 & 50.
[11] Ibid, ss. 51 & 53.
[12] CAMA, 1990, ss.
[13] Ibid, s. 53 (4)

apex securities' market regulator'.[1] In fact, available records have shown that SEC was directly complicit in the collapse of the capital market between 2007 and 2011.[2] For instance, the SEC was directly implicated in the missing 8 Billion Naira arising from a public offer by one bank in 2005;[3] SEC allowed unlisted private placements in public offers and it was involved in a conflict of interest situation when its DG was coopted into the board of AMCON contrary to legal prescription;[4] SEC employed staff of one bank when the bank was acquiring another bank that had more net worth than the acquirer; apparent market infractions by its 'regulatees' like the stock brokers (who became the conduits for insider dealings), issuing houses and registrars as revealed by the sheer magnitude of share buy-back schemes, with some banks funding their own public offering of securities thereby creating bubbles in the market;[5] SEC preferred levying fines to compliance with rules by market operators; SEC allowed issuance of bonds to refinance old debts by state governments; and it directly meddled in the affairs of market operators who were not *failing* in any way and even effected change in the management of the NSE, a company limited by guaranteed, thereby encroaching into the powers of the management of the company.[6] These are proofs of both regulatory laxity and regulatory highhandedness.

In spite of all the above problems, the Commission seems to be accountable to no one except perhaps the President or his Minister of Finance.[7] The Director General and the three Commissioners of SEC are appointed by the President upon confirmation by the Senate and removable by him subject to Senate's approval.[8] The Act is silent regarding the appointment and removal of the remaining five members of the board, but it can be implied that the President has such power of appointment. Beside the requirement of 15 years' experience in the operation of the capital market for the DG and a Bachelor's degree, no further qualification is required for such appointment. Indeed, history has shown that political considerations rather than experience and competence were the principal basis for such appointments.[9] The inputs of the core market stakeholders such as the self-regulated organizations (SROs), stock brokers, under writers, issuing houses and registrars or even the associations of these professionals and shareholders or lawyers are not required before the appointment of the board members or the DG. In essence, 'industry checks' are not available. Therefore, the reality is that one can hardly dissociate SEC from the politics of the country in spite of its sensitive regulatory roles in the economy. It is clear that the necessary independence of the regulator required by IOSCO's Principles seems to be lacking here.

In fact, the ISA, 2007 further compounds the situation by making a provision conferring 'immunity' to the officers and members of the commission for acts done in 'good faith'. It provides thus:

> No suit, prosecution or other legal proceedings shall lie against any officer, member or other employee of the Commission for anything which is done in good faith or intended to be done under this Act or the rules and regulations made thereunder.[10]

This seems to impose a liability on the officers or members of the commission for any unlawful or inappropriate action where *bad faith* or *lack* of good faith can be established. It certainly has its purposes but it is hardly designed to entrench accountability. In fact, it can be argued that it may undermine regulatory accountability. The SEC as a corporate body can of course be sued[11] but the above provision would seem to have indirectly diluted the efficacy of this accountability route because in functional terms, the commission acts through its staff, officers and members who are covered from legal proceedings.

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[1] House of Reps Ad hoc Committee, *Report*, op cit, at para. 4. 15.

[2] Ibid.

[3] Ibid, at para.4.1.

[4] AMCON Act, 2010, s. 10

[5] Contrary to Section 106(4) and Section 110 of the ISA 2007 as well as Rule 109B of SEC Rules, 2011.

[6] House of Reps Ad hoc Committee, *Report*, op cit.

[7] ISA, 2007, s 298.

[8] Ibid, ss. 5 & 8.

[9] One former DG had only a degree in computer science but no 15 years' or any years of experience in the capital market and the House of Reps Ad hoc Committee's Report at Para. 4.19 'observed that the DG of SEC…is incompetent and lack the cognate qualifications stipulated by Section 3 (3) of the Investments and Securities Act, 2007. Her appointment fall (sic) short of the provisions of the ISA 2007.'

[10] See ISA, 2007, s. 302.

[11] Ibid, s.1(2)

Apart from the above 'immunity' provision, the *independence* of SEC from political interference is limited by (1) the overwhelming powers of the Minister under ISA and (2) its financial dependence on the Federal Government which has the implication of creating a moral hazard.[1] The Act strangely provides that 'the Minister may give to the Commission such directives as appear to him to be just and proper for the effective discharge of the functions of the Commission under this Act and it *shall be the duty* of the Commission to comply'.[2] As will be discussed hereunder, this clearly subjects SEC to an unhealthy political control thereby undermining its independence as the apex regulator of the capital market in the country.

3.1.2 The Responsibilities of the CAC in Capital Market Regulation

The CAC is central to the activities of corporate capital market participants in Nigeria. One of the major innovations of the CAMA, 1990 is the establishment of the CAC for the registration and statutory administration of companies in the country. Prior to 1990, these functions were vested on the Companies Registry under two different government Ministries, i.e., the Federal Ministries of Trade and Justice.[3] The CAMA is explicit on the key regulatory functions of the CAC which include:

a. to administer the Act including the regulation and supervision of the formation, incorporation, registration, management and winding up of companies;
b. to arrange or conduct an investigation into the affairs of any company where the interest of the shareholders and the public so demand;
c. to perform such other functions as may be specified by any other Act and carry such activities that are necessary for giving effect to the provisions of the CAMA.[4]

It is pursuant to this and other provisions of the CAMA that the CAC registers and regulates companies and supervises dissolution of all companies in Nigeria. In the same vein, the commission constantly monitors the financial health or status of all companies by requesting for and receiving and examining their annual returns, financial statements and other statutory reports.[5] It approves and monitors any change in the management of any company; it may also make enquiries on any person or company regarding compliance with the CAMA.[6]

Thus, the CAC registers and regulates corporate capital market operators or participants and provides the basis for any subsequent industry-based regulation of corporate entities in the country. In other words, it is the first point of contact or regulatory authority for persons desirous of forming a public company or converting a private company into public and vice versa. Before any public company issues its securities for trading purposes or even assume its legal status as such, it must be duly registered by the CAC as a corporate entity first. Thereafter, the company must file returns and comply with all the provisions of the CAMA.

The CAC & the Collapse of the Capital Market

The CAC is obviously indispensable to the capital market operations in the country. But like the SEC, the CAC has become under serious scrutiny lately following the capital market crash in 2007-2011 as so much regulatory failures emerged. Apart from bureaucratic bottlenecks, the CAC seems technologically ill-equipped to deal with many challenges brought by the sophistication of modern businesses as a consequence of globalization. In addition, the Report of the Ad hoc Committee also made damning findings on the registration by CAC of bogus companies that were used to facilitate the 'nationalization' of some companies whose stocks were listed on the NSE but simply disappeared thereafter.[7] For instance, between Friday 5th August 2011 and Monday, 8th August, 2011, the names, shareholding structures, membership and board structures of three banks were completely changed and 'there were evidence to suggest fraud, misrepresentations, and forgeries'.[8] From public companies the banks suddenly became private companies with two private shareholders each.[9] Companies were dissolved

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[1] Ibid, s. 19.

[2] ISA, 2007, s. 298. Italics for emphasize.

[3] See Orojo, O.J., *Company Law and Practice in Nigeria* (Durban: Lexis Nexis, 2008) at p.23; Nigerian Law Reform Commission, *Report on Company Law Reform in Nigeria* (Lagos: Federal Government Printer, 1992); & Dominic, A., & Olong M., The Corporate Investigative Powers of the Corporate Affairs Commission in the Promotion of Corporate Governance', available at http://www.dspace.unijos.edu.ng.

[4] CAMA, 1990, s.7.

[5] Ibid, ss. 370-372.

[6] Ibid., s.563.

[7] House of Reps Ad hoc Committee, *Report*, op cit, at para. 4. 2, pp. 41-47.

[8] Ibid, at para.4.2, p. 42

[9] Ibid, at pp.42-47.

by other regulators (e.g. CBN and the NDIC) without regard to the provisions of the CAMA or coordinating with the CAC and the latter failed in its functions by its passivity or simply looking the other way or being complicit to this regulatory fiasco.

Like the SEC, the question of accountability of the CAC and its officers has not received much attention even after the crisis in the capital market. But it is worth noting that apart from being a corporate body suable for any action or inaction, there is no provision for any 'immunity' to its officers or members like the one under section 302 of the ISA, 2007 with respect to SEC officers and members. In addition, unlike the provisions of the ISA in respect of the composition and appointment of board members of SEC, the CAMA entrenches an 'industry check' on the composition of the CAC by requiring the appointment of a chairman who shall be a person with 'ability, experience or specialized knowledge of corporate, industrial, commercial, financial or economic matters or of business or professional attainments'[1] as well as members representing the business community from the Nigerian Association of Chambers of Commerce, Industries, Mines and Agriculture; the accountancy profession; and the legal profession.[2] The Registrar General who is the Chief Executive shall be appointed and may be sacked by the commission with the approval of the President and must be a legal practitioner with at least 10 years' experience in company law and practice.[3] The Act is silent on the appointing authority of other members but it can be implied that the Commission (with the approval of the President) is the appointer.

3.1.3 The Responsibilities of Central Bank of Nigeria in Capital Market Regulation

The banking sub-sector dominates the capital market and accounts for over 70% of activities on the NSE.[4] Therefore, as the apex regulatory body of this sub-sector, the Central Bank of Nigeria (CBN) is an important body that is at the fore-front of financial sector regulation in Nigeria. Unlike the above two regulators, the CBN is industry-specific with regard to the capital market. Historically, its establishment in 1958 ended the 'free-banking' period in the country which was characterized by supervisory vacuum.[5] Obviously, the sensitivity of the banking business makes prudential regulation and supervision imperative. Both the CBN Act and the BOFIA provide the general regulatory and supervisory roles of the CBN. These include requirements as to the establishment of banks (granting and revocation of license),[6] keeping and filing of returns by banks,[7] and ensuring that banks maintain minimum capital ratio and a reserve fund to ensure constant liquidity.[8] An important aspect of the supervisory role of the CBN is the routine examination of banks and its controlling powers over 'failing' and undercapitalized banks.[9] It further collaborates with the NDIC for implementing specific distress resolution measures for such banks.[10] Furthermore, the CBN may issue guidelines to institutions under its supervision.[11] In 2003, the Bankers' Committee produced a *Code of Corporate Governance for Banks* [12] which was reviewed following the 2004-2005 recapitalization and consolidation exercise in the sector. This

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[1] CAMA, 1990, s. 2.

[2] Ibid.

[3] Ibid, s. 8.

[4] See the Central Bank of Nigeria, *Annual Report, 2014* (Abuja: Central Bank of Nigeria, 2014)

[5] See Adegbite, J., 'Corporate Governance of Banks and the Banking Reforms in Nigeria', at p.8, found at http://197.210.252.106/videoplayer/166.pdf?ich_u_r_i=70940969d09bb3fc9d71a7493b8410d2&ich_s_t_a_r_t=0&ich_e_n_d=0&ich_k_e_y=1345088914752063202413&ich_t_y_p_e=1&ich_d_i_s_k_i_d=12&ich_u_n_i_t=1 (11/03/13); & Wilson, I., 'Regulatory and Institutional Challenges of Corporate Governance in Nigeria Post Banking Consolidation',*The Nigerian Economic Summit Group Economic Indicators*, Vol.12., No.2 (April-June, 2006), found at http://www.templars-law.com/media/regulatory%20and%20intitutional%20challenges.pdf, (accessed 11/12 2012).

[6] BOFIA, 1991, ss.3, 5 & 12.

[7] Ibid, ss.24-27.

[8] Ibid, ss.9, 13 – 16.

[9] Ibid, ss.30-38

[10] Ebhodaghe, J.U., 'Financial Distress and Failure Resolution', NDIC Quarterly, Vo.7, Numbers 3&4 (Sept/Dec., 1997) 17

[11] CBN Act, 2007, s. 33 (1)(b).

[12] Inyang, B.J., 'Nurturing Corporate Governance System: The Emerging Trends in Nigeria', *Journal of Business Systems, Governance and Ethics*, Vol.4, No.2, (July, 2009) 1 at pp.4-5, noting that one of the key objectives of

became necessary in order to address post-consolidation challenges such as the passivity of shareholders, board room squabbles, technical incompetence, poor risk management systems, insider abuses, fraudulent and self-serving practices, etc.[1]

The CBN was instrumental in setting up the AMCON to acquire the non-performing loans and toxic assets of the banks in the country.[2] The CBN and the FMF constitute the two shareholders of both AMCON[3] and NDIC.[4] The latter was established to provide insurance to depositors of deposit money banks in the country[5] while the former is directly controlled by the CBN on behalf of the Federal Government.[6]

The CBN & the Collapse of the Capital Market

The CBN has been at the center of all major economic reforms in the past two decades in the country. It initiated and propelled series of banking reforms notable of which were the 2004-2005 consolidation in the banking sector and the 2010-2014 corporate governance reforms both of which significantly impacted on the national economy. It was revealed that over 400 Billion Naira was raised as a result of the forced recapitalization of the banks.[7] Today the banking sector has been strengthened because of these reforms. However, notwithstanding the positive effects of these reforms to the economy, many legal questions have been raised about their propriety.[8] The CBN has over the years become a 'meta-state' that is increasingly becoming unaccountable and pursuing its reform measures by forcing itself upon other regulatory agencies while disregarding the legal boundaries constructed by statutes. This was evident first in the recapitalization of commercial banks which set in the *forced* consolidation exercise in 2004.[9] The CBN issued a Guideline on mergers and acquisition[10] which are hugely risky business combination mechanisms ordinarily falling within the regulatory province of SEC.[11] Critics of consolidation view it as the CBN prioritizing banking supervision over monetary stability while forcing odd entities to merge because of regulatory pressure.[12] Ogowewo and Uche argue that:

> Mergers and acquisitions are in the best of circumstances - when they are entered into because of the identification of a strategic business objective - fraught with many difficulties. Where the strategic objective is regulatory pressure, the odds against successful consolidations increase. By "forcing" banks to approach mergers with an eye to achieving a balance sheet consolidation, rather than on the synergies to be created, the Central Bank has increased the risk that ill-fitting entities may have consolidated their balance sheets. Consolidated entities that end up destroying shareholder value can hardly be regarded as successful merger.[13]

In hindsight, the critics were vindicated because the CBN itself admitted that the consolidation exercise was a hoax and the CBN had woefully failed in its regulatory functions in this regard: governance and internal processes were unstructured and the CBN did not provide input to the SEC in planning its examinations of

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the FITC is 'to protect, promote and advance knowledge of good corporate governance in all sectors of the Nigerian economy.'

[1] CBN, *Code of Corporate Governance for Banks in Nigeria Post-Consolidation,* (2006) at pp.4-5.

[2] AMCON Act, 2010, ss. 4-6.

[3] Ibid, s. 2 (1).

[4] NDIC Act, CAP N102, LFN, 2004, s. 9 (2).

[5] Ibid, s. 5.

[6] AMCON Act, 2010, ss. 8, 22 & 58.

[7] CBN, Annual Report, 2005 (Abuja: CBN, 2005)

[8] See Olanipekun, W., When Financial Transactions Become Crimes: The Powers of Regulatory Bodies and Judicial Institutions', being a paper Presented at the 3rd Annual Conference of the Nigerian Bar Association's Section on Legal Practice (SLP), held at Hamdala Hotel, Kaduna, Nigeria, on 4th November, 2009.

[9] Tunde I. Ogowewo and Chibuike Uche, 'Mis-using Bank Share Capital as a Regulatory Tool to Force Bank Consolidations in Nigeria, *Journal of African Law*, Vol. 50, No. 2 (2006), pp. 161-186

[10] See CBN, Revised Procedures Manual for Processing Applications for Bank Mergers/Takeovers", 30 March, 2005, available at: <http://www.cenbank.org/out/publications/pressrelease/gov/2006/pdP/o203-l-06%20pr.pdf>.

[11] ISA, 2007, ss. 119-151.

[12] Ogowewo & Uche, (Mis-using Bank Share Capital as a Regulatory Tool, op cit, at p. 173.

[13] Ibid.

banks.[1] The former Governor of the CBN pointed out that the CBN's 'Board agendas were set by the Governor and consequently reflected his priorities, and there were inadequate committee structures and processes to ensure the CBN Board's independence in assessing whether the CBN was fulfilling its mission'.[2] In addition, the former Governor observed that 'no one was held accountable for addressing the key industry issues such as risk management, corporate governance, fraud, money laundering, cross-regulatory co-ordination, enforcement, legal prosecution or for ensuring examination policies and procedures were well adapted to the prevailing environment'.[3]

In the same vein, the investigation of the Legislatures found that the N25 billion capital requirement for banks in Nigeria laid the very foundation for capital bubbles that were to haunt the financial sector for a very long time[4] and concluded that the 'successes' of the consolidation exercise were 'cooked' as it was 'largely ego-driven, and merely an attempt to control, rather than to supervise or regulate the banking system.'[5] The exercise led to indiscriminate margin loans, 'crystallized underwriting of new public issues; direct speculative activities by banks through their subsidiaries; direct/indirect purchase of own shares (treasury stocks) by banks; boom in primary market and a sucking dry of secondary market as investors dumped their shares in the secondary market in favor of the primary market.'[6]

In 2010, the CBN tried to rescue the banking subsector by injecting over 600 Billion Naira into some illiquid banks following the crash in the capital market and the 'nationalization' of failing banks but refused to disclose results of special examination to anybody thereby raising concerns about the transparency of the entire process.[7] This bail-out measure proved to be effective but there was no any budgetary process or parliamentary approval for that contrary to the global practice.[8] In addition, it is evident that the CBN has an over-bearing influence over other regulators. For instance, the 'nationalized' banks were simply converted into private limited liability companies while their stocks were not delisted from the NSE thereby implying complicity on the part of both the SEC and CAC as indicated above.[9] The NDIC is also directly controlled by the CBN as evidenced by the adoption of the bridged bank failure resolution option in the case of the failed banks.[10] The AMCON, described as a 'time-bomb'[11] and directly regulated and controlled by the CBN for all purposes, had also co-opted the DG of SEC into its Board.[12] It has been observed that the direct control of AMCON by the CBN made both regulators unaccountable as 'it is a case of one regulating oneself'.[13] The members of the Board of CBN and the Governor are to be appointed by the President subject to confirmation by the senate. Beside the political accountability mechanism which is often abused, the CBN cannot be held to account for its regulatory failures and this is really troubling for efficient and capital market operation in the country.

3.1.4 The Nigerian Stock Exchange (NSE)

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[1] Sanusi, L.S.,'The Nigerian Banking Industry: What Went Wrong and the Way Forward', a Convocation Lecture delivered at the Convocation Square, Bayero University, Kano, on Friday 26 February, 2010, at p.10.

[2] Ibid, at p.

[3] Ibid, at p.

[4] House of Reps Ad hoc Committee, *Report*, op cit.

[5] Ibid, p.48. The former Governor said 'it was almost as if, having made "consolidation" the hallmark of success, there was a desperate need to remain in a state of denial rather than recognize that mistakes had been made and take corrective action.' See Sanusi, L.S., The Nigerian Banking Industry, op cit.

[6] Ibid, p. 50.

[7] Ibid.

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[9] House of Reps Adhoc Committee, Repport, op cit, at p.44. noting that there were facts suggesting that up to 2013, there is no evidence that the public shares of nationalized banks were delisted prior to the acquisition by private companies owned by two persons each.

[10] Ibid.

[11] Ibid, at p.51.

[12] Ibid, at p.55.

[13] Ibid, at p. 56.

The NSE is a securities exchange recognized by the ISA as one of the platforms for trading in securities issued by companies and governments.[1] As noted above, Stock Exchanges have traditionally exercised oversight function regarding listing, enforcing disclosure standards, maintenance of fair, transparent market and monitoring compliance with market standards.[2] Since 1960, the Nigerian Stock Exchange has developed into the 'pinot of the Nigerian capital market'[3] providing a crucial avenue for raising capital and channeling accumulated wealth for investment purposes. In reality, the consolidation exercise in Nigeria's banking sector was made possible through this Exchange. The official recapitalization of the banks forced them to offer their stocks to the public thereby increasing the number of their shareholders and significantly diluting or dispersing the equity ownership structures of these banks. The NSE is a self-regulatory organization (SRO) under the jurisdictional control of the SEC. In terms of regulation of the capital market, it 'complements' the role of SEC because it is not a statutory body but a company *sui generis*. It is a body that is empowered to 'call for information from, inspect and conduct inquiries and audit of its members'.[4] As noted above, the NSE also enacted Listing Rules that require listed companies to submit 'quarterly, half-yearly and annual accounts'.[5] The Listing requirements primarily aimed at ensuring fair and transparent market, promoting general market efficiency, creating and maintaining trust and protecting the investing public from the inherent risks and fluidity of the market.[6] Importantly, the regulatory functions of the NSE, like other securities exchanges, are essentially meant to provide a conducive atmosphere for trading in securities. Transparency and fair market operations are therefore central. Accordingly, the SEC Rules require the disclosure of material and price sensitive information that are likely to affect financial conditions to the securities exchange.[7] For instance, the Rules provide that:

> All information likely to affect the financial condition of a company shall be made available to the Securities Exchange by the company and the Securities Exchange shall disclose it on the trading floor immediately the information is made available.[8]

The NSE & the Collapse of the Capital Market

The NSE is the prominent capital market in Nigeria and has played an unparalleled role in the development of Nigeria's securities trading system over the years. It was the crash of stocks in this Exchange that affected the entire economy for over three years.[9] Thus, it was the 'field' in which the regulatory failures of the above bodies manifested themselves into a catastrophic market crash. The fact that market infractions went undetected or ignored by the NSE management is enough to impeach its credibility as an effective SRO. Like these regulators, the NSE failed to exercise its regulatory powers over its members. Available evidence shows that most Council members and the head of the NSE were stockbrokers and the stockbrokers were found to be the actual perpetrators of insider dealings in the market.[10] It failed to live up to its responsibility of registering brokers and renewing their licenses and its management was indicted for corrupt practices.[11] Of course the SEC removed the management of NSE in a questionable manner but the reality is that the NSE did not provide the requisite platform that will guarantee transparent and fair market dealings.

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[1] See ISA, 2007, s..315 SEC Rules and Regulations, 2011, Part E.

[2] Christiansen, H. and Koldertsova, A., The Role of the Stock Exchanges in Corporate Governance', *Financial Markets Trends*, (OECD, 2009)

[3] Yahaya, K.A., et al, Financial Meltdown on the Capital Market: A Study of the Nigerian Stock Market Exchange', *Academy of Taiwan Business Review,* Vol.7, No. 3, December, (2011) at p.79

[4] ISA, 2007, S.32

[5] The Nigerian Stock Exchange, Listing Requirements (The Green Book).

[6] Onyema, O.N., 'Corporate Governance as a Competitive Tool for Growing Nigerian Stock Market', a paper presented at the Transcorp Board of Governance Retreat, held at the Heirs Palace, Ikoyi, Lagos, on 2 December, 2011.

[7] SEC Rule & Regulations, 2011, Rule 216.

[8] Ibid.

[9] Nwude, C.E., the Crash of the Nigerian Stock Market (2012), OP CIT.

[10] House of Reps Adhoc Committee, *Report*, op cit,

[11]

4. Regulatory Accountability in Nigeria's Capital Market

From the above, it may be safely concluded that the regulators directly and indirectly caused the 2007-2011 crises in the capital market due largely to a combination of both regulatory laxity and regulatory highhandedness thereby causing regulatory breaches and lack of coordination which eventually undermined investors' confidence in the market. As noted earlier, the normal investigations and criminal trials were launched but should these be the ultimate end and will they even satisfy the quest for *regulatory accountability*? It will be noticed that one recurring problem in this market crisis has been the lack of accountability of nearly all the regulatory players involved even in the face of enormous statutory responsibilities and powers conferred on them. The questions here are: what manner of *accountability* can address regulatory laxity and regulatory highhandedness for an effective capital market operation in the country? Is removing heads of organizations for failure and making them to stand trial not enough for the purpose of *accountability*? Can there be *regulatory accountability* or can regulators *qua* regulators be held accountable for regulatory failures to prevent future market crash? Can, for instance, the CBN and SEC be held liable for the systemic crash in the capital market and by whom? It may seem implausible to talk of regulating regulators but it is submitted that it is elementary jurisprudence that the law will fail in its functions if it does not regulate regulators. Thus, there is *regulatory accountability* for failures beyond the mere traditional measures of criminal trials, investigations and sacking of heads of organizations. Perhaps, that is why constitutional constraints are necessarily imposed on regulatory institutions.[1]

4.1 Accountability in Context

It is important to understand *accountability* as a concept. It is sometimes treated as a synonym of *liability* or *culpability*. In this context, *accountability* simply entails a legal entity answering for its actions or inactions with a view to maintaining integrity as well as creating and sustaining confidence in the capital market. According to the IOSCO *accountability* implies that a regulator operates independent of sectoral interests with a sufficiently defined system of public accountability that permits judicial review of decisions of the regulator.[2] This is a plausible approach but it seems to have centered on the judicial process. While advocating for a robust *performance evaluation* accountability mechanism for regulators, Scott conceived *accountability* as 'a relationship in which the organization being held to account has an obligation to explain its activities to another organization that may pose questions, make judgments, and (possibly) deliver consequences for failings.'[3] The key determinant is the regulator's compliance with rules and procedures.[4] Accountability can occur at three levels which may be employed simultaneously: *upwards* (to the courts, legislature, and ministers), *horizontally* (to other agencies such as ombudsman, audit institutions, and information regulators), and *downwards* (to 'regulatees' or intended beneficiaries of the regime like all the market participants in the context of capital market).[5] Within these three levels both the criminal and civil liability measures could be discerned. In the UK,

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[1] CFRN, 1999, ss. 4 (8), 6 & 315 (3). See also Jacobszon, S., 'Independent Regulatory Authorities in OECD Countries: an Overview', in OECD, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005, at 73, p.74.

[2] IOSCO, op cit, at p. 11. See also Tsou S.H., and Wang, W.H. 'Public Satisfaction and the Capability, Integrity, and Accountability of Financial Regulators', *Emerging Markets Finance & Trade*, Vol. 44, No. 4 (Jul. - Aug., 2008), pp. 99-108, at 101-2; Jacobszon, S., Independent Regulatory Authorities, op cit; Gilardi, F., 'Evaluating Independent Regulators', in OECD, *Designing*, op cit, at p.101; Majone, G., Strategy and Structure the Political Economy of Agency Independence and Accountability, in OECD, *Designing*, op cit, at; Nicolaedes, P., Regulation of Liberalised Markets: A New Role for the State? (or How to Induce Competition Among Regulators?), in OECD, Designing, op cit, at p. 156; Moore, M.C., 'Maintaining Efficient and Effective Relations Between Regulatory Authorities', in OECD, *Designing*, op cit, at p. 172; Frison-Roche, M., 'The Role and "Office" of the Regulator in the Settlement of Disputes between Operators', in OECD, *Designing*, op cit,p. 188; Thatcher M., 'Independent Regulatory Agencies and Elected Politicians in Europe', in OECD, *Designing*, op cit, at p. 202.

[3] See Scott, C., 'Evaluating the Performance and Accountability of Regulators', *Seattle University Law Review,* Vol. 37, *353at p.361 (2014).* Jacobzon S., op cit, also use performance evaluation to assess accountability using judicial review, auditing and overall economic assessment.

[4] Ibid.

[5] Ibid, at p. 360.

the FSMA, 2000[1] instituted parliamentary accountability, stakeholder accountability, corporate governance accountability mechanisms, and holding the regulator accountable through the courts and independent complaint scheme.[2]

In Nigeria, some executives of the companies and other market participants involved in the market infractions were already subjected to criminal trials and were sentenced accordingly[3] while others are still standing trials. However, *individual criminal liability* is unsuitable to securities regulation. This is partly because the constitutional constrains regarding fair trial, burden and standards of proof makes criminal liability practically inefficient, ineffective and disadvantageous to the sustainability of the capital markets.[4] Second, the territorial reach of criminal jurisdictions constrains the efficacy of penal sanctions particularly in the light of the increasing internationalization and integration of capital markets around the world. Thirdly, market infractions and breach of securities regulations are relatively less morally reprehensible vis-à-vis other crimes and 'since criminal offences compete for scarce police resources with other, seemingly more serious, crimes', breaches of securities laws are unlikely be given any priority.[5] Thus, civil and what some called 'regulatory'[6] liability seem better for the creation and sustenance of confidence in the capital market.

4.2 Holding Regulators Accountable for Regulatory Failures in the Capital Market: Some Proposals

All the above regulators are corporate bodies with capacity to sue and be sued.[7] In spite of this capacity, very few cases were instituted in order to hold them accountable for some of the regulatory failures highlighted. And none of the heads of these bodies who misdirected them with poor judgement was charged with any offence despite overwhelming evidence of crimes being committed. Perhaps identifying the proper claimants plus the immunity from prosecution might pose some challenges. Regardless however, the regulators may be held accountable either under public law actions for judicial review or private claims in tort.[8] In the light of the challenges in our judicial system, we further propose the development of another relatively efficient regulatory accountability mechanism in the form of either a new restructured SEC or a *supreme* regulator of the capital market. We now expound these three accountability channels separately.

1. Actions for Judicial Review

Any decision of the regulator that is *ultra vires* or otherwise questionable on account of legal propriety could ground action for judicial review.[9] Some cases were instituted against some of the regulators notably by shareholder activists but most of the cases were terminated on technical grounds.[10] Given the sensitivity of the capital markets to the economy, a cautious approach needs to be adopted by the courts and care should be taken not to 'second guess' the professional decisions of the regulators so as not to ground or disrupt the markets. Thus, only meritorious cases should be entertained by the courts.[11] In an action against an SRO in the UK, Lord Bingham held thus:

> It seems to me quite plain that [SROs] are bodies over whom the court can, in appropriate circumstances, and will, exercise supervisory jurisdiction, but recognition of that jurisdiction must in my judgement be combined with a recognition that the clear intention of the Act is that ... these bodies ... are, in anything other than very clear circumstances, to be left to get on with it.[12]

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[1] See FSMA, 2000, ss. 2-11, sched 1 paras. 3-4, 8-12.

[2] See E. Lomnicka, 'Making the Financial Services Authority accountable', [2000] J.B.L. 65.

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[4] Lomnicka, E., 'Capital Markets Regulation in Nigeria and the UK: The Role of the Courts *Journal of African Law*, Vol. 46, No. 2 (2002), pp. 155-166, at p. 159.

[5] Ibid.

[6] Ibid, at p.

[7] See ISA, 2007, s.; CAMA, 1990, s.; CBN Act, 2007, s. .

[8] Lomnicka, E., 'Capital Markets Regulation in Nigeria and the UK, op cit, at p.163

[9] Nwabueze, B., Constitutional Democracy in Africa (Ibadan: Spectrum Books,)

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[11] See *R v. Panel on Take-overas and Mergers ex p Datafin* [1987] 2 W.L.R. 699; [1987] 1 All E.R. 564 (CA); *R v. SIB exp Sun Life Assurance plc* [1996] 2 B.C.L.C. 150; *R v. SIB exp IFAA* [1995] 2 B.C.L.C. 76 (CA).

[12] *R v. The Securities and Futures Association e x p Paton* (CA) (20 June 1994), [1995] J.B.L. 595

However, it should be pointed out that judicial scrutiny of capital market regulators and participants in Nigeria should be stricter than in the UK in the light of the former's level of development in securities law and practice. This, it is submitted, would enhance the integrity of the system and consolidate the development of the market.

2. Actions in Tort

This may be employed against the regulators in three main situations as follows:

a. Regulatory Negligence

The regulated or 'regulatees' and even members of the public affected by capital market meltdown may institute actions against any regulator *qua* regulator that is found to be guilty of negligence in the performance of its duty.[1] Thus, in the light of the facts presented above the SEC, CBN, CAC and NSE all could be held liable on the ground of *regulatory negligence* that caused the capital market to crash regard being had to the statutory period of limitation of course, immunity on grounds of good faith and other statutory constraints. However, as in most cases of negligence, the major challenge here is how to establish a duty of care in favor of the regulated or the members of the public who alleged regulatory negligence.[2] Another likely challenge in this context is that of locus standi.[3]

b. Breach of Statutory Duty

The regulated or 'regulatees' may hold any regulator accountable for a breach of statutory duty under the law of tort. This cause of action arises where a statutory body committed or caused to be committed a wrong in apparent disregard of its statutory duties thereby harming the claimant.[4] This can be employed to hold capital market regulators accountable for both regulatory laxity and regulatory highhandedness that contravened their statutory powers and caused harm to capital market participants. There is no decided case on this head of claim against regulators in Nigeria. In the English case of *Melton Medes Ltd v. SIB*[5] the Securities and Investment Board disclosed information received as a regulator of the claimant to help investors sue the claimant and the latter instituted action claiming that the action of the regulator amounted to both a breach of statutory duty and a breach of confidence. And it was held a regulator can be held liable on account of its violation of its statutory duty to the regulated.

c. Misfeasance in Public Office

'Misfeasance' means transgression or performing a lawful action in a wrongful manner.[6] It is a tort of excessive, malicious or negligent exercise of statutory powers by a public officer.[7] Thus, it perfectly fits into our notion of 'regulatory highhandedness'. Misfeasance is a novel but 'promising'[8] cause of action that has also not yet been tested against the regulators in Nigeria. In fact, even in other common law jurisdictions it is still evolving in the area of *regulatory accountability*. In the English case of *Three Rivers D.C. V. Bank of England (No. 3)*[9] following the collapse of BCCI, depositors brought an action against the Bank of England (the equivalent of our CBN) as the regulator of the collapsed bank and it was held that regulators can be sued for *misfeasance* in public office. Thus, capital market stakeholders aggrieved by any excessive use of powers by the CBN or SEC as established immediately after the crisis can initiate action under this head. This will certainly entrench *regulatory accountability* in the sector.

3. A New SEC or a Supreme Regulator

With politics and massive corruption in the country generally and in the financial services sector in particular, relying on the above legal 'channels' to hold capital market regulators accountable may seem hugely daunting

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[1] See Winfred and Jolowitz on Tort

[2] Same challenge was faced in the following English cases: *Yeun Ken Yeu V . AG of Hong Kong* [1988] A .C. 175;[1987]3 W.L.R.7 76; [1987]2 All E.R. 704; *Minories Finance Ltd v. Arthur Young* [1989] 2 All E.R. 105; [1988] F.L.R. 345; *Davies v. Radcliffe* [1990] 2 All E.R. 536 (PC)

[3] See V. President of Nigeria

[4] Winfred and Jolowitz on Tort, op cit, at p.

[5] [1995]3 All E.R. 880.

[6] See Garner ed., *Black's Law Dictionary*, 7th edn. at p. 1015

[7] Ibid.

[8] See Lomnicka, E., 'Capital Markets Regulation in Nigeria and the UK, op cit, at p.164.

[9] [2000] 2 W.L.R. 1220 (HL)

and problematic for obvious reasons. Most criminal trials are individualistic in nature and are ill-suited to the securities market as argued above. And corporate criminal responsibility is similarly problematic particularly in the context of the Nigerian criminal justice system.[1] In addition, the independence of these regulators is seriously doubtful in the light of the events that unfolded in the financial services sector in the past decade. The frequent sacking and reconstitution of the Boards of the regulators which are mostly populated by political cronies are unhealthy for a smooth development of the capital market in the country. Needless to stress the elementary point that regulators may be sued by private persons or capital market participants or stakeholders who felt aggrieved by their actions or inactions. Indeed, following the financial crisis several actions were filed by some activist stakeholders challenging regulatory highhandedness in the capital market.[2] However, these are normal legal actions that must follow the normal judicial processes in the country. And it is unarguable that even with the Investments and Securities Tribunal (IST) as a special tribunal established to ease and facilitate speedy adjudication of disputes in the capital market,[3] the judicial system in Nigeria is protractedly unreliable as it is far from being sound, effective and efficient. One should not expect investors and participants in securities transactions in the capital markets to put up with a sluggish, inefficient judicial machinery. In addition, coordinating the regulatory players is difficult. The Financial Services Regulatory Coordinating Committee is biased towards the banking and other financial institutions and its legal status is unclear. Besides, the FSRCC is dominated and controlled by the CBN which has succeeded in making itself *the* 'unaccountable oligarch' in the sector and is therefore, unreliable in our quest for an effective and proper *regulatory accountability* in the sector. Finally, the past decade has shown that the SEC is not truly and in functional terms the actual *apex regulator* of the capital market even as the ISA proclaimed it to be so. In functional terms, the CBN, AMCON and CAC seem to treat it as a *peer* (perhaps *subservient* in the case of the CBN) regulator.

Therefore, it seems plausible for the purpose of *regulatory accountability* to consider two options: to either restructure, recreate the SEC and conferred it with more *operational independence* or establish another institutional layer on the regulatory ladder so that all the existing players will be subject to its jurisdiction in terms of securities transactions on any regulated exchange in the country. It may be argued that the latter option will amount to an unnecessary duplication of function. But if we truly want *regulatory accountability* then it may not be a duplication at all. In either case *true* independence is critically important. This is because *independence* of the regulator is necessary in order to shield it from political interference as happened before, during and after the recent crisis in the capital market in Nigeria. In fact, the first regulatory principle recommended by IOSCO is that 'the regulator should be operationally independent and accountable in the exercise of its functions and powers' and it should 'adopt clear and consistent regulatory processes'.[4] Interestingly, governments' bonds are commonly traded on the capital market. Therefore, the regulator ought to be insulated from any form of political or commercial interference. It is recognized that government involvement in securities regulation is necessary at some point but the circumstances 'should be clear and the process sufficiently transparent or subject to review to safeguard its integrity'.[5] Appointing politicians will promote short-termism while undermining regulatory independence.[6]

In the UK for instance, the Financial Service Authority (FSA) is uniquely positioned with operational independence to enable it regulate the capital market without political interference.[7] The FSA is a company limited by guarantee but has been conferred with statutory powers.[8] Unlike the Nigerian SEC, it is a self-financing body independent from the Government except in the following limited circumstances: appointment of board, directive to alter Rules following report of the Competition Commission, directive to FSA to comply with UK's international obligations and initiating inquiries in cases of serious regulatory failure.[9] In addition, the FSA is subject to judicial control and has overall regulatory jurisdiction on other 'secondary' capital market

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[1] ISA, s. 305.

[2] See for instance, *Okezie V. Central Bank of Nigeria & 6 Ors* (2012) 9 NWLR (Pt.1304) 89,

[3] ISA, 2007, ss. 274-297.

[4] IOSCO, Objectives and Principles of Securities Regulation, op cit, para. 6, at p.11.

[5] Ibid.

[6] Thatcher M., 'Independent Regulatory Agencies and Elected Politicians in Europe', in OECD, *Designing*, op cit, at p. 202

[7] Lomnicka, E., 'Capital Markets Regulation in Nigeria and the UK', op cit, at pp.156-7.

[8] See the UK's FSMA 2000, s. 1(1).

[9] Ibid, ss. 14-18 ,410(4)(a), 163, and Sched. 1, para. 2(3).

regulators. Therefore, unlike the Nigerian SEC, the FSA has *true* operational independence required by the IOSCO's standards for regulator's independence and accountability as examined above.

5 Conclusion

Capital markets are too important to allow regulatory laxity or regulatory highhandedness to overrun them. From the above analysis, there is no doubt that the apex regulator in Nigeria needs to be overhauled and restructured to make it more genuinely independent in performing its functions. More importantly, history may repeat itself in the absence of genuine *regulatory accountability* in the capital market. It is recommended that both the primary and secondary regulators of the capital markets need to be held accountable for regulatory laxity, highhandedness, apparently illegal and misdirected decisions and negligence. This must go beyond mere parliamentary inquiries and selective, individual criminal prosecutions. Responsibilities must go with accountability. While all the regulators have defined responsibilities, it is submitted that responsibilities without matched accountability will end up being sure recipes for systemic financial crisis and collapse of the capital market in the country. Both public accountability principles of judicial review of administrative actions and private actions in torts of regulatory negligence, breach of statutory duty and regulatory misfeasance could be invoked to hold regulators accountable. In essence, their actions must be within the bounds of the law. Shareholders and all the other key stakeholders must rise to the occasion. This is because lack of *regulatory accountability* could lead to frequent reoccurrence of avoidable capital market crisis. The cross border effects of market collapse in Nigeria must be recognized. And with the position of the country as the largest economy in Africa, the domino effects of this to the global economy can only be imagined.