

## THE ROLE OF SECURITIES AND EXCHANGE COMMISSION (S.E.C.) IN PUBLIC ISSUE OF SECURITIES AND THE STRUCTURE OF THE NIGERIAN CAPITAL MARKET<sup>1</sup>

### Abstract

*Securities are intangible goods, which are incapable of physical evaluation. Therefore, in order to assist investors in deciding whether to invest or not to invest in any security, the Securities and Exchange Commission requires that important information concerning the issuer and the securities must be provided to the investing public. This requirement is important because investors need to be protected against issuers who may easily take advantage of investors, where correct and timely information are not disclosed. The function of the Securities and Exchange Commission is to regulate investment and securities business in Nigeria. Investment and securities business in Nigeria is carried out in the capital market. The capital market plays very important role in the development of any economy. As a place where the wealth of a nation can be bought and sold, its role in accelerating the socio-economic well-being of citizens of any country and also the economic growth of a nation leaves no doubt as to its importance in nation building. To appreciate this, it will be appropriate to understand the role of Securities and Exchange Commission (S.E.C.) in public issues of securities and the structure of the Nigerian capital market.*

**Key words:** *Securities, Capital Market, Public Issues, Companies, Investment, Stock*

### 1. Introduction

The capital market exists largely to deal with the securities of companies and, therefore, is an important and, in modern economies, a crucial tool for national economic development. It has the advantage of providing a platform for the greater percentage of the people to participate in the growth of the economy. It has the obvious advantage of making funds available for the development of infrastructure, for example, roads, water, housing, and for developing industrial, agricultural and other necessary facilities for economic development. The fact of listing on the stock exchange gives credibility to a company by ensuring improved accountability and professional management.

The institutions expected to undertake capital market activities are the Securities and Exchange Commission (SEC) and the Capital Trade Point. This work therefore seeks to make an exposition of the meaning, structure and function of the capital market in Nigeria. It also considers statutory regulations of the capital market in Nigeria, public offer and sales of securities and invitations to the public which constitute investment business in Nigeria, and the role of the Securities and Exchange Commission in regulating investments and securities business in Nigeria which is carried out in the capital market.

### 2. Meaning of Capital Market

The capital market is not defined in the Investment and Securities Act (I.S.A) 2007<sup>2</sup> but it has been described as a financial market for long-term maturity financial assets such as government bonds, corporate bonds and equity, unlike the money market which function is to provide short-term funds; rather, it is a network of financial institutions that in various ways bring together

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<sup>2</sup> In this paper reference to "I.S.A" is to the Investment and Securities Act No. 29 2007 the Act among other things, provides for the establishment of Securities and Exchange Commission; the repeal of the Investment and Securities Act 1999, the enlarged powers and function of the commission over the capital market and a set of new market infrastructure and wide-ranging system of regulation of investment and securities business in Nigeria, especially in the area of merger, acquisition and take over, and collective investment schemes, where new provisions were made.

suppliers and users of capital, facilitating the issuance of secondary and long term financial investments.<sup>3</sup> The growing importance of the market to the economy has made some knowledge of it a must for every business operator including the lawyer.<sup>4</sup>

The capital market otherwise called the securities market is a market for medium and long term funds. This segment is responsible for channeling long term funds from economic units desirous of parting with their monies (savers) into productive investment by economic units requiring funds for relative long period (borrowers). Akoh<sup>5</sup> defines capital market as “that area of financial market that provides facilities for mobilizing and dealing in medium and long term funds”. In a similar breath, Agbadu-Fishim<sup>6</sup> also defines the capital market as “an area of the financial market which brings together economic units willing to forgo their surplus funds for relatively long periods for use by economic units with deficit funds.” One thread runs through these definitions and that is that they place emphasis on transfer of long term funds between lenders and borrowers. These definitions, though a reflection of the general idea of what the capital market represents, have failed to touch on the aspects that facilitate the transfer of funds.

A more exhaustive definition is that advanced by Dougali<sup>7</sup> as follows:

The capital market is defined as the complex of institutions and mechanisms through which intermediate term funds and long term funds are pooled and made available to business, government and individuals and instruments already outstanding are transferred.

The above definition is a reflection of the entire structure of the capital market. It recognizes the existence of institutions in the market which the principal regulatory institutions and self-regulating organization (S.R.O) are subsumed. It also alludes to the complex mechanism of transfer of funds, which are normally managed by trained operators in the market. It further recognizes that the funds in the market are available for business concerns, government and individuals who are the principal users of funds. It recognizes the secondary market for securities, which forms the greater ambit of the market. Adesiyani<sup>8</sup> also attempts to describe the capital market from the perspective of the nature and type of instrument traded in the market thus:

The capital market is a system involving an inter-play of various part and participant carrying out different roles in what may be described as a continuous process in the course of which financial instruments (securities) are issued and traded and funds mobilized and allocated. Such securities include those evidencing debt or ownership relationship, between the issuer and the subscriber/investor.

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<sup>3</sup> N. Okereke Onyiuoke, ‘An introduction to the capital market’ a paper delivered at a seminar in Abuja on (12<sup>th</sup> October 2000).

<sup>4</sup> See J.O. Orojo, *Company law and practice in Nigeria* (5<sup>th</sup> ed., Lagos: Lexis and Nexis Butterworth 2008) p 361.

<sup>5</sup> I. I. Akoh, ‘Legal framework and requirements for foreign investment in the Nigerian capital market’ *M.P.J.F.I.L* (1999) vol. 3 No.2 p 289.

<sup>6</sup> J.T. Agbadu Fishim, regulatory powers of securities and exchange commission a commentary’ (2002) *M.P.J.F.I.L* vol. 6 No.2 p 470.

<sup>7</sup> H.E. Dougali, *Capital Market and Institutions* (New Jersey: Prentice Hall Inc. 1975) p 3.

<sup>8</sup> S.O. Adesiyani, ‘the structure of the Nigerian capital market’ being a paper presented at the workshop on introduction to capital market for students and others at the SEC training Abuja (October 18<sup>th</sup> 2004).

The above definition underscores the basic distinction often made between the bond and equity segment of the capital market. While the bond market provides facilities for raising long term debt funds, the equity segment on the other hand provides facility for raising long term funds through the issuance of securities which confer ownership right on the holders.

It is important to note that in the process of transfer of funds from investor to users, various financial instruments otherwise called “securities” are created. They are called securities because they secure interest in the transferred funds. The different securities thereby created carry with them different risks and yields depending on the type of instrument held by investors.<sup>9</sup>

### **3. Statutory Regulations and Functions of Capital Market in Nigeria**

The capital market is a specialized market dealing in an intangible subject matter which “are not visible to the human eyes and so not given to physical assessment but based on information for investment decisions requiring some knowledge to do so.”<sup>10</sup> The subject matter of trade in the market consist of such things as stocks, shares, bonds, treasury bills, commercial papers and bankers’ acceptance and insurance instruments. To assist investors to invest and sellers to sell profitably, they require information which must be correct, complete, up-to-date and not misleading. It is therefore necessary to regulate the market to ensure that the relevant institutions in the industry are properly established and monitored and that the operators in markets are “fit and proper” persons to operate the market. There is also a need to provide rules and regulations that will help to ensure fairness, efficiency, orderliness, transparency, stability and confidence in the capital market.

The regulatory apparatus consists of both statute and the statutory regulatory body. The first direct formal effort of regulating the capital market in Nigeria was the Capital Issue Committee set up by the Central Bank of Nigeria (CBN) to assist it in the regulation of dealings in company securities. In 1973, statutory support was given to this arrangement through the Capital Issue Commission Act, 1973. This was followed by the Securities and Exchange Commission Act 1979, the Securities and Exchange Commission Act 1988, the Companies and Allied Matters Act (Part VII) the Investment and Securities Act, 1999 and now the Investment and Securities Act 2007 (No. 29) which is the current regulating statute in Nigeria.

The Capital Issue Commission Act, 1973 gave statutory regulatory duties to the Capital Issues Commission which was before then an ad hoc committee established by the Central Bank. Under the Act, the Capital Issue Commission was established with the function of determining the price of which shares or debentures of a company were to be sold to the public either through offer for sale or by direct issue; determining the timing and amount of any subsequent public issue of shares or debentures by the company; and undertaking such other incidental or supplementary functions as the Commission may determine.

In 1979, following the report of a government panel, the Securities and Exchange Commission Act 1979 was promulgated to remove some of the defects of the previous Act such as the absence of any power to value securities to be offered to the public or in which aliens had an interest. The Act established the Securities and Exchange Commission (SEC) to replace the Capital Issue Commission (CIC). Under the Act, the SEC was charged with wider function

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<sup>9</sup> J. Isaac Essien, ‘A critical appraisal of the structure of the Nigerian capital market and the role of securities and exchange commission in public issues of securities’ (2008) *B.S.U.J.P.P.L* Vol. 1 No.1 pp 2-4.

<sup>10</sup> N. Sulaiman ‘The new Investment and Securities Act’ being a paper delivered at the Nigerian law school in (October 2001) pp. 1 – 3.

than the CIC. Section 7 of the Act provided that a company or enterprise in which aliens participate shall not issue, transfer or sell its securities unless with the prior approval of the SEC. In interpreting this provision, the Court of Appeal held, inter alia, in the case of *Societe Generale Bank Nigeria Ltd v SEC*<sup>11</sup> that the provision was not limited to public companies only; but that a transfer of securities in a private company in which aliens participated also required the prior approval of the SEC. This case was also followed in *Faloughi v Faloughi*.<sup>12</sup>

In 1988, the SEC Act 1979 was amended and enacted as the Securities and Exchange Commission Act, 1988. In particular, the functions of the SEC were extended to cover the regulation of mergers and acquisitions and all forms of business combinations. In 1993, the SEC gave up its function of determining the price at which securities of a company are to be sold to the public. The function was transferred to the issuing houses by administrative arrangement although the function was not deleted from the Act.

Following the report of a government panel which undertook a comprehensive review of the Nigerian capital market and its regulation and supervision, the Investment and Securities Act (ISA)<sup>13</sup> was enacted on 26<sup>th</sup> May, 1999. It has been described as "... a very extensive and comprehensive law on the securities market, covering every conceivable aspect of securities offering and trading." The Act repealed and replaced the Securities and Exchange Commission Act 1988. It also repealed Lagos Stock Act, 1960.

Commenting on the objective and impact of the Investment and Securities Act 1999, the Director General of the SEC, S.A Ndanusa, once said inter alia:

The provisions of the ISA are meant not just to regulate the capital market but to serve as a springboard for its rapid development. It strengthened the path to both domestic and foreign investment through the Nigerian capital market by providing for the establishment of new securities exchange market facilities and instrument. It is also aimed at enhancing the efficiency, competitiveness and transparency of the market in order to improve participation, liquidity and its international standing.<sup>14</sup>

He also further observed:

The enforcement machinery which is usually a major consideration by foreign and indeed, local investors and intermediaries in deciding on an investment or business location has also been strengthened through, inter alia, the creation of an Investment and Securities Tribunal (IST)

It is also noted that the Act sought to bring together under one statute all laws dealing with securities matters. In pursuant of this objective, Part xviii of the Companies and Allied Matters Act<sup>15</sup> which dealt with the subject matter of dealings in securities and was to be administered by the SEC, has been deleted and included in the Investment and Securities Act 1999 as Part

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<sup>11</sup> (1992) 1 SEC LR 1.

<sup>12</sup> (1995) 2 NWLR (pt 380) 729.

<sup>13</sup> Cap 124 LFN 2004.

<sup>14</sup> Ndanusa Sulaiman D.G SEC, 'The new Investment and Securities Act' *Op.cit.* Pp. 1 – 5.

<sup>15</sup> Cap C 20 LFN 2004.

VII. The Investment and Securities Act 2007 (No 29) is a new enactment and was brought about to better regulate investment and securities. It repealed and replaced the Investment and Securities ACT 1999. The ISA 2007 is the current statute dealing with the subject. It includes most of the provisions of the ISA 1999 and some new ones.

The Securities and Exchange Commission was first established as the Capital Issues Commission under the Capital Issues Commission Act, 1973. It was established as the Securities and Exchange Commission in 1979, under the SEC Act 1979 with considerably widened functions.

Under the SEC Act 1988 which replaced the SEC Act 1979, the Commission's functions were further widened. This Act was repealed by the Investment and Securities Act, 1999, which in turn, was repealed and is now replaced by the Investment and Securities Act 2007, which has further widened the scope of the function of the Commission. Section 13 of the Investment and Securities Act provides for the function and powers of the Commission as follows:

The Commission shall be the apex regulatory organization for the Nigerian capital market and shall carry out the function and exercise all the powers prescribed in this Act and in particular shall

- (a) Regulate investment and securities business in Nigeria as defined in this Act;
- (b) Register and regulate securities exchange, capital trade points, futures, options and derivatives exchanges, commodity exchange and any other recognized investment exchange;
- (c) Regulate all offers of securities by public companies and entities.
- (d) Register securities of public companies;
- (e) Render assistance as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points.
- (f) Prepare adequate guidelines and organize training programmes and disseminate information necessary for the establishment of securities exchange and capital trade point.
- (g) Register and regulate corporate and individual capital market operator as defined in this Act:
- (h) Register and regulate the workings of venture capital funds and collective investment scheme, in whatever form.
- (i) Facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly market;
- (j) Facilitate the linking of all markets in securities with information and communication technology.
- (k) Act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administered by securities exchange and capital trade point.
- (l) Keep and maintain a register of foreign portfolio investment;

- (m) Register and regulate securities depository companies, clearing and settlement companies, custodian of assets and securities, credit rating agencies and such other agencies and intermediaries.
- (n) Protect the integrity of the securities market against all forms of abuses including insider trading;
- (o) Promote and register self-regulatory organizations including securities exchange capital trade point and capital market trade association to which it may delegate its powers.
- (p) Review, approve and regulate mergers, acquisitions, takeovers and all forms of business combination and affected transactions of all companies as defined in this Act.
- (q) Authorize and regulate cross border securities transaction.
- (r) Call for information from and inspect, conduct inquiries and audits securities exchanges, capital market operators, collective investment schemes and all other regulated entities.
- (s) promote investors' education and the training of all categories of intermediaries in the securities industry;
- (t) call for, or furnish to, any person such information as may be considered necessary by it for the efficient discharge of its functions;
- (u) levy fees, penalties and administrative costs of proceedings or other charges on any person in relation to investments and securities business in Nigeria in accordance with the provisions of the Act;
- (v) intervene 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 whatever the commission deems necessary for the protection of investors;
- (w) Enter and seal up the premises of persons illegally carrying on capital market operations;
- (x) In furtherance of its role of protecting the integrity of the securities market, seek judicial order to freeze the assets (including bank account) of any person whose assets were derived from the violation of this Act, or any securities law or regulation in Nigeria or other jurisdictions;
- (y) relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into-co-operative agreements on matters of common interest;
- (z) conduct research into all or any aspect of the securities industry;
- (aa) prevent fraudulent and unfair trade practices relating to the securities industry;
- (bb) disqualify person considered unfit from being employed in any area of the securities industry;
- (cc) advise the minister on all matters relating to the securities industry; and
- (dd) perform such other functions and exercise such other powers, not inconsistent with this Act, as are necessary or expedient to give full effect to the provisions of the Act.

From the above functions, it will be noted that there is a deliberate effort to ensure that the capital market in this country is looking forward as the Act provides for the regulation of not only the existing institutions and facilities but also those that are not yet in place but which it is hoped will be in place in the future with the growth of the economy and the capital markets. Such facilities include the capital trade point, option, futures and commodities exchanges. Indeed the Commission is mandated by its functions to act as a regulatory apex organization for the Nigerian capital market.<sup>16</sup> Finally, the Securities and Exchange Commission has made rules pursuant to the Investment and Securities Act, 1999 and these continue in operation by virtue of Sections 313 and 314 of the current Act. These Rules and Regulations cover various aspects of the market and its operation.<sup>17</sup>

The capital market plays very important role in the development of any economy. As a place where the wealth of a nation can be bought and sold, its role in accelerating the socio-economic well-being of citizens of any country and also the economic growth of a nation leaves no doubt as to its importance in nation building. Practically, the importance of the capital market can be seen in the following functions it performs in the economy.

- (i) Capital formation/mobilization and allocation: this is done through the process of issuance of securities by companies and Government to mop up the surplus funds from the hands of the investing public. This way the Government can meet its social responsibility and the companies can meet their operational requirement. The more securities issued, the more the increase in market capitalization or capital formation in the economy. By matching the demand and supply of funds in the economy, the capital market facilitates an effective and efficient allocation of capital in the economy.
- (ii) Creation of employment: the unique nature of the capital market and the complex nature of business of securities give rise to equally unique and complex services which can only be performed by trained and qualified personnel. It must not be forgotten that two of the most important components of the capital market are the institutions and operators in the market. The need for their services therefore creates gainful employment for the operators and institutions in the market.
- (iii) Creation of wealth: one of the most important considerations in investment in securities in the capital market as a form of business is the reasonable returns that would accrue thereon. The surplus economic units in an economy do not relinquish their funds free of charge. They expect returns for the use of their funds by the deficit economy units. Alile<sup>18</sup> alludes to this fact when he states inter alia:

In the process of transferring funds from savers to users, securities of various types come into existence. These become the main instruments (financial assets) that are traded in the capital market. The securities evidence the transfer of funds and the entitlement to the eventual repayment of the capital and to the resulting periodic income in the interim. From this assertion, the capital market can be seen as a medium of investment for wealth creation in an economy.

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<sup>16</sup> Investment and Securities Act Cap 124 LFN 2004 Section 8(n).

<sup>17</sup> J.O. Orojo, *Company Law and Practice in Nigeria*. Op.cit. pp. 362-369.

<sup>18</sup> H.I. Alile, *The Nigerian Stock Market in Operation*. (Lagos: Nigerian Stock Exchange Publication, 1986) p 31.

- (iv) Economic performance indicator: the performance of the capital market is one of the most popular methods of measuring the performance of an economy. Normally, the performance of an economy is measured by the level of its ability to absorb the capital needs in the economy. In this regards, when the level of capitalization in the market by reasons of resort thereto for the capital needs of institutions in the economy increase, this would be indicative of an increase in economic activities and as such the resultant increase in earnings and gross domestic product. An efficient fair and robust capital market is a reflection of a growing economy. As noted by Ekiran,<sup>19</sup> the macro or over-all performance of the capital market could signal improvement, stagnation or retrogression in the economy. Any of these signals poses some challenges not to only a country's financial authorities but also to the government of the day.
- (v) Encouragement of savings: By the provisions of facilities for the transfer for fund between the surplus economic unit (savers) and the deficit economic unit (borrowers) the capital market encourages investment, trade and therefore production. It offers access to a variety of financial instrument that enables economic agents to pull, price and exchange risk. Through the use of assets with attractive yields, liquidity and risk characteristic, the capital market encourages savings in financial form. This is very important for government and other institutions, in need of long term funds and for suppliers of long-term funds, who because of the nature of their liabilities undertake to maintain part of their assets in a relatively liquid form.
- (vi) The capital market also provides an index of the current cost of capital (via its pricing mechanism) which enables the determination of the level and rate of new investment.
- (vii) By promoting long-term borrowing or equity financing, dependency on borrowing from the money market is reduced. This therefore increases solvency and stability of the financial system.<sup>20</sup>

Therefore, the capital market exists largely to deal with the securities of companies and, it is an important and, in modern economies, a crucial tool for national economic development. It has the advantage of providing a platform for the greater percentage of the people to participate in the growth of the economy. It has the obvious advantage of making funds available for the development of infrastructure e.g. roads, water, housing and for developing industrial, agricultural and other necessary facilities for economic development.

The fact of listing on the stock exchange gives credibility to a company by ensuring improved accountability and professional management.<sup>21</sup>

#### **4. Structure of the Capital Market**

The proper understanding of the structure of the capital market in Nigeria involves the following

- (a) The consideration of the segments;
- (b) The type of financial instruments.
- (c) The facilitator in the market (market operator)

The capital market is segmented into two, i.e.

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<sup>19</sup> O. Ekiran, *Basic Understanding of Capital Market Operation*. (Lagos: CIBN Press Ltd., 1999) p 16.

<sup>20</sup> J. I. Essien, 'A Critical Appraisal of the Structure of the Nigerian Capital Market and the Role of Securities and Exchange Commission in Public Issues of Securities'. *Op.cit*, p 4-6.

<sup>21</sup> J.O. Orojo, *Company Law and Practice in Nigeria*. *Op.cit*, p 361.



- (i) The primary market and
- (ii) Secondary market

The primary market is the new issue market which is concerned with the offering of new issues or securities on the stock exchange. The secondary market is concerned with the process of selling and buying securities already owned and quoted on the exchange. The secondary market provides liquidity in the financial system by providing facility for the easy conversion of investor's holdings into cash. Unlike the primary market, the proceeds from resale of securities do not go to the issuer of securities but to the last preceding investors. The primary and secondary markets are interdependent. The existence of the secondary market is dependent on the primary market. This is so because no securities can be on the secondary market that has not been issued on the primary market.

Trading in the capital market is facilitated by the creation and use of financial instruments which are negotiable. In other words, such instruments traditionally known as "securities" are transferable from one person to another. These securities form the contract between the investor and the issuer and acts as the evidence of and security for investment. Securities traded in the capital market are categorized into three broad types depending on the type of capital required. These are.

- (a) Equity instrument otherwise called common stock (ordinary share). It is the most popular means of raising long-term funds by public and private companies in the capital market. These instruments can be held in perpetuity except in cases of winding up.
- (b) The debt instrument which connotes that the holder of such instrument is a creditor to the issuer and the issuer is liable to pay the holder at an agreed future date. Long term debt instruments in the capital market are in the nature of debenture stock and bonds. Debt instruments have maturity ranging between five or thirty years.
- (c) Hybrid instruments which have the feature of equity and debt instrument. This instrument attracts fixed dividend and sometimes the right to share in additional profit of the company in the future, depending on the type of stock. Preference shares or stock fall under this category.

The term "capital market operators" was not defined by the Investment and Securities Act 1999 but the ISA 2007 defined it in Section 315 as '... any persons (individuals or corporation) duly registered by the Commission to perform specific function in the capital market.'

For practical purposes, some persons and organizations are generally admitted to be capital market operators. These include the securities, exchange issuing houses, stock brokers and dealers, investment advisers, jobbers, registrars, trustees, auditors, receiving agents and receiving banks. However, questions and, indeed objections have been raised against classifying some professionals that have interaction with the capital market as capital market operators who should be registered by the Commission before they can carry on their professional services to some operators in the market. In *Professor A.B Kasunmu v SEC*<sup>22</sup> one of the main issues for determination was whether the SEC has the right or power under the ISA, 1999, or any other law, to direct or insist that the plaintiff, a legal practitioner or any other legal practitioner be accredited or registered with the Commission before participating as a solicitor in a public issue. The Federal High Court held that the law, as at that time, did not give the Commission such power or right. The point should be made that in the light of the

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<sup>22</sup> Unreported Suit No. FHC/L/C5/70 2002 ruling delivered on 15/1/2003.

provisions of the law and the powers of the Commission for example under Section 38(1) of ISA 2007, the approach to the problem may now be different.<sup>23</sup>

### **5. Public Offer and Sale of Securities and Invitation to the Public**

The major characteristic of a public company is the fact that it can offer its securities to the public for sale or subscription. In order to protect the investing public from the danger of losing their money in fake and fraudulent investment various, restrictions are placed on the invitation by a public company to the public to buy or subscribe to its securities.

Before 1999, the public offer and sale of securities and the invitation to the public were regulated by Section 541-673 in Part xvii of the Companies and Allied Matters Act, 1999 (CAMA). This part was administered by the SEC.<sup>24</sup> However, Part xvii of the CAMA was repealed by Section 263 of the ISA, 1999, which made detailed provision to replace the repealed ones. This Act was in turn repealed and replaced by the ISA, 2007, the provisions of which now regulate this subject.

Section 315 of the Investment and Securities Act<sup>25</sup> which forms the interpretation section defines securities to mean-

- (a) Debentures, stock, or bond 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 opinion in respect of any such debentures, stocks, shares, bonds or notes, or
- (d) Commodities future, contracts, options and other derivatives, and the term securities in this Act include those securities in the category of the security 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 depository or custodian company as provided under this Act.

Public issue of securities is one of the most effective means of raising large amounts as long term capital by companies. However, this method of raising long term finance is only available to a public company. This preserve of public companies has the statutory backing. Section 67 of the Investment and Securities Act provides as follows.

No person shall make any invitation to the public to acquire or dispose of any securities of a body corporate or to deposit money with anybody corporate for a fixed period or payable at call, whether bearing or not bearing interest unless the body corporate concerned is –

- (a) A public company, whether quoted or unquoted and the provision of sections 73-87 of this Act are duly complied with:  
or

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<sup>23</sup> J. I. Essien, 'A Critical Appraisal of the Structure of the Nigerian Capital Market and the Role of Securities and Exchange Commission in Public Issues of Securities.' *Op. Cit.*, pp 6-9; J.O. Orojo, *Company Law and Practice in Nigeria. Op.cit.*, p 377.

<sup>24</sup> See CAMA Cap C 20 LFN 2004 Section 541.

<sup>25</sup> No. 29 2007.

- (b) A statutory body or bank established by or pursuant to an Act of the National Assembly and is empowered to accept deposits and savings from the public or issue its own securities (as defined under this Act), promissory notes, bills of exchange and other instrument. Provided that nothing in this subsection shall render unlawful the sale of any shares by or under the supervision of any court or tribunal as may be authorized by law, if an invitation to the public is made in breach of subsection q of this section, all person making the invitation and every officer who is in default or anybody corporate making the invitation shall each be separately liable to a penalty of N500, 000 in the case of a body corporate and N100,000 in the case of an individual.

If any person acquires or disposes of any securities or deposits money with any company, as a result of any invitation to the public made in breach of subsection 1 of this section, he shall be entitled to

- (a) Rescind such transactions; and  
 (b) Either in addition to or in place of rescinding the transaction, recover compensation for any loss sustained by him from any person who is liable whether convicted or not, in respect of the breach.

Where, in accordance with subsection 3 of this section, any person claims to rescind any transactions, he shall do so within a reasonable time and shall not be entitled to rescind any transaction with the body corporate or to recover compensation from it unless he takes steps to rescind the transaction before the commencement of the winding up of the body corporate.

Provided that the application of the subsection to bar the right of a claimant to rescind a transaction shall not prejudice his right to recover compensation from any person other than the body corporate.

The breach of this provision attracts a fine. However, any person who was misled into subscribing for securities in breach of the section has a remedy to rescind the contract. Such a person may claim compensation as an alternative to rescission for any loss sustained by him from any person who is liable whether convicted or not in respect of the breach.

Sections 68 and 69 of the Investment and Securities Act provide for invitation to the public to deposit money by public companies and meaning of invitation to the public. Section 70 of the Investment and Securities Act provides for when offer for sale is deemed to be made by the company it is worthy to note that an invitation to the public may be made by the issue of the form of application or by notice, circular or advertisement. But Section 71 provides that except where an exemption certificate is granted under Section 74, a form of application for securities in a public company shall not be issued unless it is issued with a prospectus which complies with the requirements of Section 79. This, however, need not be done if it is shown that the form of application was issued:

- (a) In connection with a bona fide invitation to a person to enter into an under writing agreement with respect to the shares; or

(b) In relation to shares which were not offered to the public.<sup>26</sup>

If any person issues an invitation to the public as above without a prospectus as required by law, he commits an offence punishable with a fine. On the other hand, certain notices, circulars and advertisements are prohibited. For example, Section 75(1) provides that no person shall issue, circulate, publicly disseminate or distribute any notice, circular or advertisement which offers for subscription or purchase of securities of a company, or invites subscribers for a purchase of securities or calls attention to such an offer or invitation as to a prospectus unless the notice, circular or advertisement is not made or issued to the public, or is registered as a prospectus or is of the nature specified in Section 75(2) (c) and (d). This prohibition applies to notice, circulars and advertisement published whether by newspaper, radio television broadcasting, cinematograph or any other means.<sup>27</sup>

If any person contravenes the provisions of Section 75 as set out above or authorizes or permits its contravention, he commits an offence and is liable on conviction to imprisonment or to a fine.<sup>28</sup> Similarly, where the contravention is with the permission or is by or with the authority or permission of an officer of the company, the company commits an offence and is liable on conviction to a fine.<sup>29</sup>

## **6. Prospectus and Disclosure Requirements of SEC**

As earlier noted, securities are debentures, stocks or bonds issued or proposed to be issued by a government; debenture stocks, share, bond or notes issued or proposed to be issued by a body corporate; any right or option in respect of any such debentures, stocks, shares, bonds, or note, or commodities futures, contracts, options, and other derivatives and the term securities in this Act includes those securities in the categories 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 depository or custodian company as provided under this Act. Therefore, in order to assist investors in deciding whether to invest, or not to invest in any securities, the Securities and Exchange Commission requires that important information concerning the issuer and the securities must be provided to the investing public. This requirement is important because investors need to be protected against issuers who may easily take advantage of investors, where correct and timely information are not disclosed. It must not be forgotten that the stock market crash of 1929 to 1933 in the United States of America, which led to the enactment of the Securities Act of 1933 and 1934, was as a result of the fraudulent and dishonest practices and misrepresentation in the issuance of securities that occasioned large losses to investors.

To guard against the repeat of the above event, the Securities and Exchange Commission requires that issuers of securities must make frank and full disclosure of material fact concerning the securities sought to be offered to the public in what is referred to as a “prospectus”<sup>30</sup>

Section 315 of the investment and securities Act defines prospectus as:

...any written or electronic information, notice, advertisement or other forms of invitation offering to the public for subscription

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<sup>26</sup> (Ibid) Section 71(3).

<sup>27</sup> (Ibid) Section 75(3).

<sup>28</sup> (Ibid) Section 75(4).

<sup>29</sup> (Ibid) Section 75(5)

<sup>30</sup> J.O. Orojo, *Company Law and Practice in Nigeria* (3<sup>rd</sup> ed., Lagos: Mbeyi and Associates 1992) pp 239-240.

or purchase, any shares, debentures or other approved and recognized securities of a company and other issues or schemes.<sup>31</sup>

Section 78 of the Investment and Securities Act provides that notwithstanding section 67 which controls the invitation to the public to acquire or dispose of securities it shall be lawful to make an invitation to the public to dispose of or acquire any securities of a company if within six months before the invitation, there has been delivered to the Commission and registered by it a prospectus as required by the Act. A copy of the prospectus must have been supplied to every person to whom the invitation is made (unless exempted under section 78(2)), and every copy of the prospectus must state on its face that it had been at the time when the invitation was first made, registered and the date of registration must be reflected on it.<sup>32</sup>

Section 82 of the Investment and Securities Act provides that where a company allots or agreed to allot any securities in the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made, is for all purposes, deemed to be a prospectus issued by the company. Such a document is, unless the contrary is proved, evidence that an allotment if, or an agreement to allot securities was made with a view to the shares being offered was made within six months or that at the date of the offer, the whole consideration to be received by the company had not been received.

The purpose of the prospectus is to ensure that all potential subscribers and purchaser of securities are fully informed of all facts material to their decisions to subscribe or purchase the securities of the company. Therefore, the fullest information on the company's capital business and financial state (past, present, and foreseeable future) must be given together with particulars of material contracts, that is, those likely to affect the company's prospects and hence, the safety to the shareholder's investment in the company. Accordingly, Section 76 of the Investment and Securities Act provides that apart from cases where a certificate of exemption is granted by a securities exchange or capital trade point under Section 76 where the company makes a general invitation,<sup>33</sup> in other words, invites the public to acquire any securities of a public company, the prospectus by which the offer is made shall-

- (a) State the matters specified in Part 1 of the 3<sup>rd</sup> schedule of the Act; and
- (b) Set out the report specified in Part II of the 3<sup>rd</sup> schedule.

This requirement does not apply to an invitation by a company in respect of the share of that company to its associated company made only to the existing shareholders of that company, or which in all respect are uniform with the shares of the company previously issued and for the time being dealt on an approved securities exchange or capital trade point.

On the other hand, where there is a restricted invitation, in other words, an invitation to the public to acquire or dispose of any securities of a public company, not being a general invitation either because it does not invite the public to acquire any securities or because it is otherwise exempted, a prospectus relating to such an invitation may not state all the matters or set out all the report specified in the 3<sup>rd</sup> schedule, but it must not contain any untrue statement. If the securities to which it relates are dealt on in any securities exchange or capital trade point or if application has been or is being made to a securities exchange or capital trade point for permission to deal in the securities, the prospectus shall state or contain the matters specified

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<sup>31</sup> *Andrews v Mockford* (1896) 1Q B 377.

<sup>32</sup> See SEC Regulation 55.

<sup>33</sup> (Ibid) Section 79(1).

in Section 79(3) (a)-(c). In any other case, the prospectus shall state that the securities are not dealt in any securities exchange or capital trade point.<sup>34</sup>

Section 80 of the Investment and Securities Act provides for registration of prospectus thus.

No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the commission a copy of the prospectus for registration, signed by every person who is named in it as a director of the company, or by his agent authorized in writing and having endorsed on it or attached to it

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- (a) Any consent to the issue of the prospectus required by section 68 from any person as an expert; and
- (b) In the case of a prospectus issued generally, a copy in English<sup>35</sup> of any contract required by paragraph II of the 3<sup>rd</sup> schedule to this Act to be stated in the prospectus; or
- (c) In the case of a prospectus deemed by virtue of a certificate granted under section 67 of this Act to comply with the requirement of the 3<sup>rd</sup> schedule, a contract or a copy of such contract or a memorandum of a contract which was made available for inspection in connection with the application made under the section to the securities exchange or capital trade point; and
- (d) Where the persons making any report required by part II of the 3<sup>rd</sup> schedule to this Act have made in it or without giving the reason have indicated in it any such adjustment as are mentioned in paragraph 21 of the 3<sup>rd</sup> schedule, a written statement signed by those persons wetting out the adjustment and giving the reasons for them.

Every prospectus must, on the face of it, state that a copy has been delivered for registration as required by the section and specify or refer to the statement included in the prospectus which specified any document required by this section to be entered on or attached to the copy so delivered.<sup>36</sup>

The Commission cannot register a prospectus unless it is satisfied that

- (a) It is dated and signed as required by section 80(1).
- (b) It has endorsed on it, or attached to it the documents (if any) specified; and
- (c) The prospectus otherwise complies with the requirements of the Act<sup>37</sup> and the rules and regulations 54-56.

If a prospectus is issued without a copy of it being delivered or without the copy so delivered having endorsed on it or attached to it the required documents, the company and every person who is knowingly a party to the issue of the prospectus, commit an offence punishable by fine.<sup>38</sup>

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<sup>34</sup> (Ibid) Section 79(2).

<sup>35</sup> (Ibid) Section 80(2).

<sup>36</sup> (Ibid) Section 80(3); see also SEC Regulations.55.

<sup>37</sup> ISA 2007, Section 80(4) and the Rules and Regulation 54-56.

<sup>38</sup> (Ibid) Section 80.

Section 77 of the Investment and Securities Act provides for experts' statement on prospectus. Section 81 of the Investment and Securities Act provides that a company limited by shares shall not, before the statutory meeting vary the terms of a contract referred to in the prospectus or a statement in lieu of prospectus, except with the approval of the statutory meeting. Section 76 of the Investment and Securities Act provides for exemption certificate and effects.

### **7. Liabilities for Misstatement in Prospectus**

Where a person issues or permits the issue of a prospectus containing statement which turn out to be untrue, any person who acts upon such untrue statement and suffers loss or damage can hold the issuer, or the person who permitted the issue, liable for such loss or damage. The person who suffers the loss or damages has these remedies both at common law and under the Act.

In *New Brunswick and Canada Railway Co. v Maggeridge*<sup>39</sup> Kingdersley V.C emphasized the duty of those who issued a prospectus as follows:

Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no one fact within their knowledge, the existence of which might, in any degree, affect the nature, or extent, of quality of the privilege and advantages which the prospectus holds out as inducement to take shares.<sup>40</sup>

A false statement may consist of a half-truth represented as whole truth<sup>41</sup> and Section 83 of the Investment and Securities Act now provides that a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included, thus giving statutory effect to the decision in *R v Kysant*.<sup>42</sup>

The common law remedies available to a person who has suffered loss as a result of misrepresentation in a prospectus are damages for misrepresentation/misstatement and rescission of the contract. The persons against whom the remedies are available in appropriate cases are the company, the director or the experts.<sup>43</sup> Section 85 of the investment and Securities Act provides for civil liabilities for misstatement in prospectus thus:

where a prospectus invites persons to subscribe for shares in a company, the persons referred to in subsection (2) of this section shall be liable to pay compensation to all persons who subscribed for shares or debentures relying on the prospectus for the loss or damages they may have sustained by reasons of any untrue statement or misstatement included in it.

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<sup>39</sup> (1860) 1 Dr and Sun 365.

<sup>40</sup> See also *Henderson v Lacon* (1867) LR 5 E.Q 249 at 252.

<sup>41</sup> *Aaron's Reefs Ltd v Twiss* (1896) AC 273. HL per Lord Halsbury

<sup>42</sup> (1932) 1 KB 442.

<sup>43</sup> But see *Derry v Peek* (1889) 14 APP Cas 377.

A person liable to pay compensation under subsection (1) of this section includes

- (a) Any director of the company at the time of the issue of the prospectus.
- (b) Any person who consented to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time.
- (c) Any employee of the company who participated in or facilitated the production of the prospectus; and
- (d) The issuing house and its principal officers”

Section 85 (4) of the Investment and Securities Act provides for general exception as follows:

No person shall be liable under subsection (1) of this section if he proved

- a) That having consented to become a director of the company, he withdrew his consent in writing before the issue of the prospectus, and that it was issued without his authority or consent.
- b) That the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he immediately gave reasonable public notice that it was issued without his knowledge or consent.
- c) That after the issue of the prospectus and before allotment, he on becoming aware of any untrue statement or misstatement in it, withdrew his consent in writing and gave reasonable public notice of the withdrawal and the reason for his withdrawal; or
- d) That as regard every untrue statement or misstatement-
  - (i) Not purporting to be made on the authority of an expert, or of an official public document or statement, he had reasonable ground to believe and did up to the time of the allotment of the shares, as the case may be believe that the statement was true.
  - (ii) Purporting to be a statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it and that persons had given the consent required by Section 77 of this Act to the issue of the prospectus and has not withdrawn that consent before delivery of copy of the prospectus, for registration, and
  - (iii) Purporting to be a statement made by an official person or contained in what purports to be a copy of or an extract from an official public document, it was a correct and fair representation of the statement or copy of or extract from the document.”

The provisions or subsection (4) of this section shall not apply in the case of a person liable by reason of his having given a consent required of him by Section 77 of this Act as a person who has authorized the issue of a prospectus in respect of an untrue statement purporting to be made by him as an expert.



Section 77 of the Investment and Securities Act provides for expert statement on prospectus. An expert who has given his consent will not be liable in respect of an untrue statement, if he proves that he withdrew his consent in writing before delivery of a copy of the prospectus for registration, or that after delivery of the prospectus for registration and before allotment, he withdrew his consent and gave public notice of it, and he was competent to make the statement and had reasonable grounds to believe up to the time of the allotment, that the statement was true.<sup>44</sup> Furthermore, a person is not deemed to have authorized the issue of a prospectus by reason only that he gave the consent required under Section 77 to the inclusion of a statement purporting to be made by an expert.<sup>45</sup>

Section 85(7) of the Investment and Securities Act provides that where a prospectus contains the name of a person as a director and he has either not consented or as such or has withdrawn his consent before the issue, or has not authorized or consented to the issue where his consent is required, such a person is entitled to be indemnified by the director of the company (except those who did not know of a consent to the issue) against all liabilities resulting from the issue, by the inclusion of his name in the prospectus as such director, and also in defending himself against any proceeding brought against him in respect of such prospectus. Section 94 of the Investment and Securities Act provides for action for rescission, while Sections 86 and 87 of the Investment and Securities Act provide for criminal liability for misstatement in prospectus and criminal liability in respect of statement in lieu of prospectus.

## **8. Conclusion and Remarks**

The primary function of the Securities and Exchange Commission is provided in Section 13 of the Investment and Securities Act to regulate investment and securities business in Nigeria which is carried out in the capital market. The SEC regulatory role would therefore be greatly felt in what constitute the structure of the capital market and activities like public issue of securities which constitute investment business.

We have been able to examine the meaning, functions and components of the capital market. We have shown that what makes up the capital market in Nigeria involves the consideration of the segments, the financial instruments as well as the facilitators in the market or market operator. The two broad segments i.e. the primary and secondary market are so designed to accommodate the nature of instrument traded therein. We have also shown the various instrument ranging from equity debt as well as hybrid instrument traded in the capital market.

In our discussion on public offer and sale of securities and invitation to the public we have been able to bring out that the major characteristics of a public company is the fact that it can offer its securities to the public for sale or subscription. In order to protect the investing public from the danger of losing their money in fake and fraudulent investment, various restrictions are placed on the invitation by a public company to the public to buy or subscribe to its securities. The invitation is normally done through the issuance of a prospectus. We have also discussed in details the disclosure requirement of the SEC in respect of prospectus inviting the public to subscribe for shares. In our discussion, it is revealed that the duty imposed on issuers and all parties to the issuance of prospectus is very strict and this is aimed at protecting the investing public against fraudulent misrepresentation or misstatement contained in the prospectus.

Finally, it has been shown that either civil or criminal liabilities are imposed on issuers of prospectus. As shown further, various remedies both statutory and common law are available to the public where members are misled into subscribing for securities by reason of untrue statement contained in the prospectus.

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<sup>44</sup> (Ibid) Section 85(6).

<sup>45</sup> (Ibid) Section 85(8); see also Section 86(2) in respect of criminal liability.