

LEGAL ALERT MARCH 2006 ? INVESTORS RIGHTS & FINANCIAL REGULATORS' STATUTORY DUTIES & LIABILITY.

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Legal Alert for March 2006 ? Investors Legal Rights & Regulators Legal Duties & Responsibilities.

Introduction.

Financial Institutions, especially Commercial Banks, have witnessed failures in Nigeria in the last two decades with the most recent being the financial "failures" at the end of December, 2005. In all cases of financial institutions failing, the money and asset depositors in such Institutions, the employees and small Shareholders have incurred massive losses while the controllers and administrators of the financial Institutions have mostly left the bad financial situation, richer.

Sadly, the Regulators and Supervisors of these Financial Institutions including the Central Bank of Nigeria (CBN), The Securities & Exchange Commission, The Nigerian Stock Exchange (NSE), the Federal Government of Nigeria through the Minister for Finance, External Auditors of failed and existing but distressed Financial Institutions, etc have not taken any kind of responsibility for these failures. No fines, debarment from holding further office in other Financial Institutions or imprisonment in cases of misappropriation of depositors' funds or gross criminal negligence or abuse of office has ever been reported, investigated and offenders prosecuted.

Innocent Shareholders have been convinced to purchase the Shares of failing Banks, through glorying public offers representing huge past, present and anticipated future profits, exhibiting approvals by Regulatory Authorities to these public offers, including in the Offers, External and Independent Auditors and Solicitors confidence in these "failing" Institutions, etc. Very sadly, these failed Financial Institutions have had their Licences withdrawn a month or two after the

"jamboree" public offers and also after paying huge fees, for these public offers, to the Regulators. Shareholders Associations have not assisted their members who they proffer to represent and or claim to protect. Employees of these financial Institutions, some of whom were members of Labour Unions and paid Union dues to these Unions, have not received any reported form of assistance, compensation or apology for losses suffered from these reported financial failures. The CBN has again published some alleged new Corporate Governance Rules in the hope that these "new" Rules would protect innocent Investors and the Institutions against "in-sider dealings" which contribute largely to a Bank's failure. The question however is whether these Corporate Governance Rules are "new" with none previously in existence in our Statute Books? Where any Corporate Governance Rules were previously in existence, what level of operation and enforcement were undertaken by our Financial Institutions and their Regulators?

Also, what are the duties and responsibilities of our Financial Regulators under Nigerian Law? Does the Nigerian Investor have any relief or reliefs whatsoever against losses and damages incurred as a result of these failures both against the failed Financial Institution - if it can be found - or against the Regulators, i.e. CBN, NDIC, SEC, NSE, etc.

Special mention must be made that some of the Laws that we may refer to in this publication are currently before the National Assembly for slight amendments especially the one on the maximum amount that would be paid to depositors of failed Banks.

Duties & Responsibilities of Primary Financial Regulator ? CBN.

The Central Bank of Nigeria is the primary Regulator when it comes to regulating Financial Institutions in Nigeria. The Banks & Other Financial Institutions Act (BOIF Law) and the Central Bank of Nigeria Act (CBN Law) among others makes adequate provisions for the CBN to properly supervise all Financial Institutions in Nigeria. In addition to issuing the legal tender of this country, the CBN also have as its primary objective the promotion of monetary stability and also ensuring a sound financial system in Nigeria.

By the BOIF Act, no person, corporate or individual, is allowed to collect deposits or carry on banking business or to provide other financial services unless such a person submits an application to the CBN, with supporting documents, for a Licence to provide the named financial services, in Nigeria. Thus, from the very beginning of the granting of a Licence to the end when the Financial Institution fails, all Financial Institutions are under the control and supervision of the CBN.

By the BOIF Law, all Chairmen, Chief Executive Officers, Directors, key employees or management of Financial Institutions in Nigeria must be screened for suitability to perform their designated function(s) and written approvals obtained from the CBN before they can assume any

position in a Financial Institution.

As the survival of a financial institution is expected to be based on receiving public deposits, all advertisements for deposits by Financial Institutions must be submitted to the CBN for prior screening and approval. Breaches of these requirements for prior approvals by the CBN to appointments, opening of branches, advertisement for deposits, etc meets with fines and as shown later on, with, in addition, periods of imprisonment to individuals in control of the Financial Institution.

To ensure that a Financial Institution particularly a Commercial Bank does not fail to meet its obligations to its depositors and innocent Shareholders, Nigerian Law requires that a Bank must observe and maintain minimum capital ratios, have with the CBN cash reserves, have special deposits, have stabilisation securities, have specific liquid assets, etc. A Financial Institution failure to comply with any of these requirements also attracts penalties including the revocation of a Bank's Licence especially where the Bank does not have the required minimum specified capital ratios. See BOIF Law.

The Law further requires Financial Institutions to mandatorily maintain with the CBN a Reserve Fund. Where the Reserve Fund of a Bank is less than its paid up share capital, the Law provides that at least 30% of its net profits must be transferred to its Reserve Fund with the CBN before any dividend is paid to the Shareholders of the Commercial Bank. Where the reverse occurs and the Commercial Bank's Reserve Fund is equal to or in excess of its paid up share capital, the Commercial Bank must transfer from its net profits, to its Reserve Fund with the CBN, an amount of not less than 15% of its net profits. Any breach of these Rules is required by Law to attract a fine by the CBN. See BOIF Law.

The BOIF Law embraced Corporate Governance Rules a long time before the "new" CBN Corporate Governance Rules, 2006. The old Corporate Governance Rules, from which no evidence abounds of its enforcement by the CBN or by other Regulators, required Majority Shareholders, Directors, Managers and or Officers of Commercial Banks to disclose their private interest in activities of their Commercial Bank. These Gentlemen and Ladies are also forbidden by Nigerian Law (BOIF) from receiving all manner of gratification by whatever description from parties that they deal with, on behalf of their Financial Institution.

Non disclosure of a Director or Banking Officer's private interest in a Bank's business attracts criminal liability which on conviction attracts a fine of N100,000 or imprisonment for a term of three years or to both the fine and the imprisonment. All assets, benefits or gains illegally obtained from such improper conduct are also forfeited to the Federal Government of Nigeria. While the CBN continues to allege breaches of this rule and other Rules, not one Officer of any Bank has

being arraigned and convicted for any statutory breach in the last failures which ended in December 2005.

Supervisory Duties of Financial Regulators.

Appointment of External Auditors.

In furtherance of the attempt of our Laws to exhaustively address the problem of Financial Institution failures, the CBN is mandatorily required to approve the appointment of all External Auditors for all Financial Institutions in Nigeria. Auditors are, in addition to their professional Oath, obligated by the BOIF Act to "blow the whistle" on all contraventions by management of any Financial Institution in Nigeria. Not one report is known to have ever been made by any Internal or External Auditor of a public company about abuses or contraventions of the provisions of the BOIF Law.

Disclosure of compliance on the part of the Auditors is encouraged by the threat of liability, where no disclosure is made, by a conviction which attracts a fine of N500,000 with terms of imprisonment for the Partners of the Audit Firm for periods of not less than 5 years.

CBN Director of Banking Supervision.

Very importantly, the CBN is required by Law to appoint a Director of Banking Supervision who in turn works with other Examiners, appointed by the CBN, in ensuring that the Books of Financial Institutions are properly kept. For emphasis, the BOIF Law requires that the numerous duties of CBN's Director of Banking Supervision include examination periodically, of the Books and State of Affairs of each and every Bank in Nigeria.

This Director of Banking Supervision has the power and right to access at all times, with or without notice, the Books, Accounts and Vouchers of all Banks in Nigeria. Lastly, he has the Power to inquire from Directors, Managers & Officers of Banks such information and explanation as are necessary to the performance of his duties.

Statutory Duties of Directors & Managers of Financial Institutions.

Nigerian Law requires each and every Director or Manager or Secretary of a Bank in Nigeria to take all reasonable steps to secure maximum compliance with the requirements of the BOIF Law and also to guarantee the correctness of all information or statements submitted to the CBN. The penalty for any failure to comply is the liability of a fine on conviction of N500,000 or imprisonment for a term of imprisonment of three years or to both the fine and imprisonment. Again, no Director or Manager of any failed Bank has ever been held accountable for breaching these rules which has resulted and would continue to result in more failures.

Protection of CBN from Adverse Claims.

Nigerian Law (i.e. BOIF Law & CBN Law) provides that adverse claims cannot be made by

injured parties against either the Federal Government of Nigeria or the CBN or any of its Officers for anything done or left undone, in good faith, in the exercise of their duties or in the execution of the duties and powers of these Regulators.

It is with respect that we submit that this must not debar a worthy claim from being made where sufficient evidence is shown that the CBN did not act in good faith or that it was negligent in the discharge of its statutory duties and responsibilities.

Part 2. ? Legal Responsibilities of The Securities & Exchange Commission, Nigerian Stock Exchange, etc.

Because of space, we have excluded this part of this Alert. In the event that you are interested in it with fuller commentaries, please visit our web site www.oseroghoassociates.com for the Legal Alert for March 2006.

Conclusion.

There would be and continue to be systemic failures where the rules and regulations of the system are not adhered to, enforced where there are breaches and strict punishments meted to defaulters. The continuing publications of new Rules when the old ones have not been adequately or at all enforced would make a mockery of our systems and encourage greater breaches both in our financial and political sphere.

Global best practices must be imbibed by the Financial Regulators, the Operators of the Financial Institutions and Investing members of the public. It is grossly insufficient for massive publicity to be undertaken claiming the enthronement of global best practices when same is not reflected in our day-to-day transactions or business culture.

Investors must also protect and claim their rights where overwhelming evidence of negligence is established against our Financial Regulators and or Institutions. It is acknowledged that the chances of success would depend on the quality of the evidence available of gross negligence, judicial adventurism on the part of our Judiciary, etc. However, such formal or informal pressures would also serve as a check and balance mechanism on the entire financial system.

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