

THE INTERNATIONAL  
CAPITAL MARKETS  
REVIEW

TWELFTH EDITION

Editor  
Jeffrey Golden KC (Hon)

THE LAWREVIEWS

THE  
INTERNATIONAL  
CAPITAL MARKETS  
REVIEW

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# PREFACE

A year ago, we asked, ‘Is that light at the end of the pandemic tunnel?’

Yes, we had been caught unawares by the pandemic, lockdowns and working from home (WFH).

We also did not see and anticipate other challenges brought about by covid-19, basic as some of these may have been – hidden as they may have been also in notice provisions and other boilerplate buried in the back recesses of our transaction documents. How do you give effective notice to offices closed (often with the force of law) and with the decentralisation of WFH? If none of the methods contemplated by the parties’ agreement can be used, may a different method be used instead?

And whether the pandemic itself was an excuse for non-performance of financial market obligations? Does it trigger *force majeure* clauses in our contracts? Does it frustrate a relevant commercial purpose?

Yes, we may not have foreseen all that. However, even as the international capital markets (ICM) train emerged from pandemic tunnel darkness, there was more trouble on the tracks lurking round the bend. And we did not see all that coming either. Sanctions brought by Russia’s invasion of Ukraine, turmoil in the stocks and bonds markets, elevated inflation, increasing interest rates. Liquidity drying up, prices becoming increasingly volatile. At the time of writing, the S&P 500 has just suffered its worst one-day drop in months, global equity market issuance is down 68 per cent and there are reports that, at the current pace of things, 2022 could be the most difficult year for raising capital through IPOs since 1995.<sup>1</sup>

ICM practice can be full of surprises. Challenges though there may be, however, the capital markets have a long track-record of resilience. International capital markets lawyers are still in business, still relevant. Global law firms are reporting record profits and are actively hiring more ICM lawyers.

But our *modus operandi* may have changed a bit. While financial institutions and law firms are cautiously encouraging a return to the office, technology and our recent experience by necessity of remote working has encouraged more self-sufficiency. In a world of WFH, we keep company with the books on our shelves more than the other lawyers in the building. In such circumstances, there are ever more compelling reasons to keep this particular book on that shelf or otherwise remotely accessible through the digital platform maintained by The Law Reviews. We can expect to turn more often to published answers when we cannot as easily consult the practitioner in the office next door.

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1 SIFMA Smartbrief, 23 August 2022.

As I have written before, this book serves two purposes – one obvious, but the other possibly less so.

Quite obviously, and one reason for its continuing popularity, *The International Capital Markets Review* addresses the comparative law aspect of our readers' international capital markets (ICM) workload and equips them with a reference source. Globalisation and technological change mean that the transactional practice of a capital markets lawyer, wherever based (even WFH), no longer enjoys the luxury – if ever it did – of focusing solely on a home market within the confines of a single jurisdiction. Globalisation means that fewer and fewer opportunities or challenges are truly local, and technology more and more permits a practitioner to tackle international issues.

Moreover, clients certainly may have multi-jurisdictional ambitions or, even if unintended, their activities often may risk multi-jurisdictional impact. In such cases, it would be a brave but possibly foolish counsel who assumed: 'The only law, regulation and jurisdiction that matter are my own!'

Ironically, the second purpose this book aims to serve is to equip its readers to do a better job as practitioners at home. In other words, reading the summaries of foreign lawyers, who can describe relevant foreign laws and practices, is perfectly consistent with and helpful when interpreting and giving advice about one's own law and practice.

As well as giving guidance for navigating a particular local but, from the standpoint of the reader, foreign scene, the comparative perspectives presented by our authors present an agenda for thought, analysis and response about home jurisdiction laws and regulatory frameworks, thereby also giving lawyers, in-house compliance officers, regulators, law students and law teachers an opportunity to create a checklist of relevant considerations both in light of what is or may currently be required in their own jurisdiction but also as to where things there could, or should, best be headed (based on best practices of another jurisdiction) for the future.

Thus, an unfamiliar and still-changing legal jurisdiction abroad may raise awareness and stimulate discussion, which in turn may assist practitioners to revise concepts, practices and advice in both our domestic and international work. Why is this so important? The simple answer is that it cannot be avoided in today's ICM practice. Just as importantly, an ICM practitioner's clients would not wish us to have a more blinkered perspective.

A few years back, I had the honour of sharing the platform with a United Kingdom Supreme Court Justice, a distinguished Queen's Counsel and three American academics. Our topic was 'Comparative Law as an Appropriate Topic for Courts'. The others concentrated their remarks, as might have been expected, on the context of matters of constitutional law, and that gave rise to a spirited debate. I attempted to take some of the more theoretical aspects of our discussion and ground them in the specific example of the capital markets, and particularly the over-the-counter derivatives market.

Activity in that market, I said, could be characterised as truly global. More to the point, I posited, that, whereas you might get varied answers if you asked a country's citizens whether they considered it appropriate for a court to take account of the experiences of other jurisdictions when considering issues of constitutional law, in my view derivatives market participants would uniformly wish courts to at least be aware of and consider relevant financial market practice beyond their jurisdictional borders and comparative jurisprudence (especially from English and New York courts, which are most often called upon to adjudicate disputes about derivatives), even when traditional approaches to contract construction as between courts in different jurisdictions may have differed.



In such cases, with so much at stake given the volumes of financial market trading on standard terms, and given the complexity and technicality of many of the products and the way in which they are traded and valued, there appears to me to be a growing interest in comparative law analysis and an almost insatiable appetite among judges to know at least how experienced courts have answered similar questions.

There is no reason to think that ICM practitioners are any differently situated in this regard, or less in need of or less benefited by a comparative view when facing up to the often technical and complex problems confronting them, than are judges. After all, it is only human nature to wish not to be embarrassed or disadvantaged by what you do not know.

Of course, it must be recognised that there is no substitute for actual and direct exchanges of information between lawyers from different jurisdictions. Ours should be an interdependent professional world. A world of shared issues and challenges, such as those posed by market regulation. A world of instant communication. A world of legal practices less constrained by jurisdictional borders. In that sense and to that end, the directory of experts and their law firms in the appendices to this book may help to identify local counterparts in potentially relevant jurisdictions. And, in that case, I hope that reading the content of this book may facilitate discussions with a relevant author.

In conclusion, let me add that our authors are indeed the heroes of the stories told in the pages that follow. My admiration for our contributing experts, as I wrote in the preface to the last edition, continues. It remains, too, a distinct privilege to serve as their editor, and once again I shall be glad if their collective effort proves helpful to our readers when facing the challenges of their ICM practices amid the growing interdependence of our professional world – and now the post-coronavirus pandemic challenges that have arisen and their impact on the global economy.

Is there a clearer track for the ICM train ahead and the ICM practitioners aboard it? Let's hope so.

In the meantime, best wishes for this, perhaps another difficult, period. Stay safe, stay well and stay alert.

**Jeffrey Golden KC (Hon)**

3 Hare Court

London

October 2022

# NIGERIA

*Fred Onuobia, Ayodele Ashiata Kadiri and Lolia Biobele-Georgewill<sup>1</sup>*

## I INTRODUCTION

### i The Investments and Securities Act 2007

The Nigerian capital market is regulated by a panoply of laws, chief among them being the Investments and Securities Act 2007, as amended (ISA). Divided into 18 parts, the ISA establishes the Securities and Exchange Commission (SEC). The SEC is the primary regulator of the Nigerian capital market and has the power, *inter alia*:

- a* to make rules and regulations for the market;<sup>2</sup>
- b* to register and regulate securities exchanges and other self-regulatory organisations;
- c* to register and regulate the issuance of securities;<sup>3</sup>
- d* to intervene in the management and control of failing capital market operators;<sup>4</sup> and
- e* in appropriate circumstances, to impose penalties and levies on defaulting capital market operators.

Consequently, the Securities and Exchange Commission Rules and Regulation 2013 (the SEC Rules), drawn up by the SEC pursuant to its powers, is considered the market's bible. The SEC periodically releases new rules to complement the SEC Rules.

Two other key bodies established by the ISA are the Administrative Proceedings Committee (APC) and the Investments and Securities Tribunal (IST). The APC is a committee of the SEC established as a quasi-judicial fact-finding body. Essentially, it provides the avenue for market operators against whom complaints have been made (by investors and

---

1 Fred Onuobia is the managing partner, and Ayodele Ashiata Kadiri and Lolia Biobele-Georgewill are senior associates at G Elias. The authors also thank Favour Ogini for her contributions and research.

2 The Securities and Exchange Commission has issued the SEC Rules 2013 (as amended), available at [sec.gov.ng/regulation/rules-codes](http://sec.gov.ng/regulation/rules-codes).

3 The Investments and Securities Act 2007, Section 315, defines securities as: debentures, stocks or bonds issued or proposed to be issued by a government; debentures, stocks, shares, bonds 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, notes; or commodities futures, contracts, options and other derivatives, and the term 'securities' in this Act includes those securities in the category of the securities listed above, which may be transferred by means of any electronic mode approved by the SEC and which may be deposited, kept or stored with any licensed depository or custodian company as provided under this Act.

4 ISA, Section 315 defines capital market operators as 'any persons (individual or corporate) duly registered by the Commission to perform specific functions in the capital market', which covers brokers, underwriters, solicitors, and their respective firms.

the SEC alike) to be heard prior to the determination of the complaint by the SEC.<sup>5</sup> It goes without saying that a decision of the APC will be regarded as a decision of the SEC, and an appeal can therefore be made to the IST.

The IST is established under the ISA to adjudicate on any question of law or dispute involving:

- a* a decision or determination of the SEC in the operation and application of the ISA, and, in particular, relating to any dispute between:
  - capital market operators;
  - capital market operators and their clients;
  - an investor and a securities exchange or capital trade point or clearing and settlement agency; or
  - capital market operators and self-regulatory organisations;
- b* the SEC and a self-regulatory organisation;
- c* a capital market operator and the SEC;
- d* an investor and the SEC;
- e* an issuer of securities and the SEC; and
- f* disputes arising from the administration, management and operation of collective investment schemes.<sup>6</sup>

Decisions of the IST are to be enforced in the same manner as a decision of the Federal High Court (FHC). Appeals arising from decisions of the IST lie at the first instance to the Court of Appeal.<sup>7</sup>

## ii The Companies and Allied Matters Act

The Companies and Allied Matters Act (CAMA)<sup>8</sup> is secondary in its applicability to the capital market. CAMA governs the incorporation of companies with the Corporate Affairs Commission (CAC)<sup>9</sup> and, in some instances, the operations of these companies. To the extent that these companies are participants in Nigeria's capital market, CAMA also applies to them. For instance, Chapter 8 and Chapter 9 of Part B of the CAMA make provisions on the nature and types of shares and bonds to be issued by companies generally. Some of these securities

---

5 In an SEC circular dated 16 February 2015 on complaints management, most complaints are now to be initially lodged and resolved at trade group level or by self-regulatory organisations, such as the Nigerian Stock Exchange (now the Nigerian Exchange Group Plc). Complaints not resolved at this level are to be referred to the SEC. Consequently, market operators must register as members of their respective SEC-recognised trade groups. The objective of this arrangement is to secure speedy resolution of complaints.

6 ISA, Section 284.

7 ISA, Section 295.

8 The Companies and Allied Matters Act 2020 (as amended). CAMA's provision on the treatment of unclaimed dividends has been further amended by the Finance Act, 2020 (Section 60). Dividends in respect of shares held in a company quoted on the Nigerian Stock Exchange (now NGX), which are unclaimed for a period of six years or more from the date of declaration, are now required to be transferred to the Unclaimed Funds Trust Account. Such unclaimed dividends are a special debt owed by the Federal Government of Nigeria to the relevant shareholder and remain available at any time for payment to the relevant shareholder.

9 The Corporate Affairs Commission is established by the CAMA, Section 1. It is Nigeria's equivalent of the UK Companies House.

end up being offered and traded in the Nigerian capital market. The extensive modifications by CAMA to the now repealed Companies and Allied Matters Act 1990 that may impact the Nigerian capital market include:

- a* the enforceability of netting arrangements (even in insolvency);
- b* the absolute prohibition of both the issuance of shares at a discount and the issuance of irredeemable preference shares by companies;
- c* the publication of the list of unclaimed dividends in the national press; and
- d* the recognition of the SEC as a financial regulatory authority capable of designating a contract as a 'qualified financial contract' for the purposes of the netting provisions under CAMA.

### **iii Other relevant statutes**

Undoubtedly, there are other sector-specific legislation with a certain degree of relevance to the capital market. The most important of these are those relating to banks<sup>10</sup> (the Banks and Other Financial Institutions Act 2020), pension fund administrators<sup>11</sup> (the Pension Reform Act 2014) and the Central Bank of Nigeria (CBN)<sup>12</sup> (the Central Bank of Nigeria (Establishment) Act 2007).

### **iv Regulation of foreign investment**

There is no difference in the regulatory treatment of foreign investment in the capital market when compared to the regulation of local investment in the market. Dealings in foreign exchange are regulated by both statute and the CBN, through regulations, circulars and directives. A key legislation is the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act<sup>13</sup> (the FEMM Act).<sup>14</sup> Foreign exchange (FX) transactions are also regulated by the Foreign Exchange Manual (the FX Manual), which was revised in 2018 to conform with the foreign exchange practices implemented by the CBN prior to 2018.

There are no regulatory restrictions on foreign investment in the capital market. Pursuant to Section 26 of the FEMM Act:

*A person, whether (a) resident in or outside Nigeria, or (b) a citizen of Nigeria or not, may deal in, invest in, acquire or dispose of, create or transfer any interest in securities and other money market instruments whether denominated in foreign currencies in Nigeria or not. A person may invest in securities traded on the Nigerian capital market or by private placement in Nigeria.*

---

10 Banks are significant issuers of securities traded in the Nigerian capital market.

11 Pension fund administrators are influential investors in the market. Regulations made pursuant to the Pension Reform Act on assets that qualify for investments by pension fund administrators invariably dictate products that make their way to the capital market.

12 The CBN regulates banks and dealings in foreign exchange in the Nigerian economy.

13 The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Cap F34, LFN 2004.

14 The Foreign Exchange Manual issued by the CBN is in furtherance of the regulatory duty imposed by the FEMM Act. The CBN also regularly issues circulars on the regulation of the use of foreign exchange in the economy. For example, the CBN Circular on the Inclusion of some Imported Goods and Services on the List of Items not valid for Foreign Exchange in the Nigerian Foreign Exchange Markets, dated 23 June 2015, barred access to the foreign exchange market for the purchase of foreign exchange for investment in Eurobonds, foreign currency bonds and shares. More items have been added to this list over time by circulars and press releases.

Nevertheless, a foreign investor seeking to invest in the market must ensure that any foreign currency to be invested in the market is imported into Nigeria through an authorised dealer.<sup>15</sup> The FX Manual now permits authorised dealers to issue an electronic certificate of capital importation (eCCI) to the investor. The CBN initiated the development of the eCCI platform in 2016 to address the problems posed by the issuance of paper certificates of capital importation such as the transfer of paper certificates from one foreign investor to another or replacements of lost CCIs. The eCCI platform for the deployment of eCCIs was finalised in 2017. With the revisions to the FX Manual in 2018, eCCIs will now be issued to foreign investors purchasing Nigerian treasury bills and Nigerian government bonds,<sup>16</sup> and the CBN has introduced a master eCCI for global depositary receipts. Authorised dealers are expected to issue master eCCIs in the amount of the foreign exchange inflow to depositary banks. The eCCI guarantees ‘unconditional transferability of funds, through an authorised dealer in freely convertible currency, relating to dividends or profits (net of taxes) attributable to the investment’.<sup>17</sup> Similarly, foreign exchange purchased from the Nigerian Autonomous Foreign Exchange Market<sup>18</sup> can be freely repatriated from Nigeria without any further approval. The freedom to repatriate must be exercised in accordance with the provisions of the FEMM Act and the FX Manual to avoid running foul of the forex repatriation regime.<sup>19</sup>

The SEC Rules also require foreign portfolio investors to appoint a custodian and to file a copy of the letter of appointment of the custodian with the SEC within 10 working days of making the appointment.<sup>20</sup>

Nigerian law requires a foreign company seeking to operate in the Nigerian capital market to first incorporate and register a Nigerian company with the CAC.<sup>21</sup> Subsequently, the company must register with and obtain the relevant licences or authorisations from the SEC before it can commence operations as a capital market operator in the market.<sup>22</sup>

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15 An authorised dealer is a bank licensed under the Banks and Other Financial Institutions Act 2020 and such other specialised banks as are issued with a licence to deal in foreign exchange. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, Section 41.

16 Memorandums 19 and 20 of the FX Manual.

17 FEMM Act, Section 15(4).

18 Defined in the FEMM Act as ‘a market which the authorised dealers, authorised buyers, foreign exchange end-users and the Central Bank are participants and may include other participants that the Government of the Federation may, from time to time, recognise’.

19 The Nigerian Subsidiary of the South African telecommunications company, MTN, was directed by the CBN to refund the sum of US\$8.13 billion, which the CBN said was illegally repatriated from Nigeria. Fines were also imposed on several authorised dealers for forex repatriation infractions the CBN found them to have committed. See <https://guardian.ng/news/nigeria-orders-south-africa-s-mtn-to-refund-8-13-bltn/> (last accessed on 29 August 2019). Issues around the fines have now been resolved among the CBN, MTN and the authorised dealers.

20 SEC Rules, Rule 411(e).

21 CAMA, Section 78 makes it a general requirement for all foreign companies that are intent on carrying on business in any sector of the Nigerian economy to obtain incorporation as a separate Nigerian entity before commencing business. The CAC certificate of incorporation issued to a foreign company pursuant to this provision is one of the documents required for registration with the SEC as a capital market operator.

22 SEC Rules, Rule 407. Other registration requirements include a certified true copy of the certificate of incorporation in the company’s country of domicile; proof of registration with the securities regulator or any other regulatory authority in the foreign entity’s country of domicile; and the shareholding structure of the foreign company.

Similarly, a foreign company can only apply and be registered as a dealing member of the NGX (formerly the Nigerian Stock Exchange) (and other securities exchanges) upon registering and incorporating a separate Nigerian entity with the CAC.

#### v Cross-border securities transactions

Much like foreign investments, foreign issuers can issue, sell or offer for sale or subscription securities to the public through the Nigerian capital market. Securities may be denominated in naira or any convertible foreign currency.<sup>23</sup> The SEC Rules require foreign issuers to file an application for the registration of their securities with the SEC, and the application must be accompanied by a draft prospectus.<sup>24</sup> Importantly, under the Nigerian Exchange Group Plc (NGX) Rules, foreign issuers may apply for the listing of their *sukuk* and debt securities on the NGX.

Foreign issuers may, at the discretion of the SEC, be exempted from certain securities registration obligations under the SEC Rules if it is 'in the public interest and where reciprocal agreement exists between Nigeria and the country of the issuer, or the issuer's country is a member of the International Organization of Securities Commissions'.<sup>25</sup>

Nigeria has continued to witness the prevalence of several fintech platforms that enable retail investors to have access to both local and foreign stocks. Until 2021, their activities have been unregulated. In 2021, the SEC issued a 'licence as Digital Sub-Broker/Sub-Broker Serving Multiple Brokers through a Digital Platform to one of the fintech platforms.<sup>26</sup> This was after the SEC had issued a circular warning the public that 'only foreign securities listed on any Exchange registered in Nigeria may be issued, sold or offered for sale or subscription to the Nigerian public'.<sup>27</sup>

These fintechs have now also come under the scrutiny of the CBN, due to the FX element in their operations. The CBN had obtained freezing orders against the bank accounts of some of them on the basis that they procured FX in the Nigerian FX market to make purchases of shares, which under extant CBN circulars<sup>28</sup> are currently listed as items not valid for FX in the Nigerian FX market.

#### vi The court system

Nigeria operates a common law system but with a federal written Constitution<sup>29</sup> as the basic law. The Supreme Court of Nigeria sits atop the hierarchy of courts, with the Court of Appeal on the next rung. The high courts and National Industrial Court are on the next rung; these courts are referred to as superior courts of record. Of importance to the Nigerian capital market is the Federal High Court or FHC, which has 36 divisions across the country.

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23 SEC Rules, Rule 414.

24 Extensive provisions are made for the content of the draft prospectus in Rule 419 of the SEC Rules. The registration obligations placed on foreign issuers are the same as those placed on Nigerian public companies, trust companies, collective investment schemes, governments and government agencies, and supranational bodies.

25 SEC Rules, Rule 416.

26 See <https://nairametrics.com/2021/06/23/chaka-receives-secs-first-fintech-license-to-power-digital-stock-trading-in-nigeria/> (last accessed on 18 August 2021).

27 See <https://sec.gov.ng/proliferation-of-unregistered-online-investment-and-trading-platforms-facilitating-access-to-trading-in-securities-listed-in-foreign-markets/> (last accessed on 18 August 2021).

28 See <https://techpoint.africa/2021/08/17/court-freezes-chaka-account/> (last accessed on 18 August 2021).

29 The Constitution of the Federal Republic of Nigeria 1999 (as amended).

The FHC has exclusive jurisdiction over matters:

- a 'arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act';
- b 'the administration or the management and control of the federal government or any of its agencies'; and
- c 'any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the federal government or any of its agencies'.<sup>30</sup>

Most operators in the capital market are limited liability companies incorporated under and regulated by the CAMA. It is arguable that the FHC has jurisdiction over matters that touch on the operation of these 'CAMA companies', even if those matters occur in the capital market. Points (b) and (c) above are also relevant to capital market disputes because the SEC, which is the main regulatory body of the capital market, is an agency of the federal government.<sup>31</sup>

#### vii The FMDQ Securities Exchange Limited

The FMDQ Securities Exchange Limited (the FMDQ Exchange) is the largest securities exchange<sup>32</sup> in Nigeria by trading volume and focuses on debt and derivative products. The FMDQ Exchange's listing requirements are similar to those of the NGX, but it is dissimilar in its admission of commercial papers for listing. Furthermore, unlike the NGX, the FMDQ Exchange currently operates only one quotation list. Like the NGX and in furtherance of Part XIV of the ISA, the FMDQ Exchange established its investor protection fund in 2017.

The FMDQ Exchange also has a thriving derivatives platform and plays a vibrant role in the trading of over-the-counter (OTC) FX futures.<sup>33</sup> In 2016, the FMDQ, in collaboration with the CBN, launched the naira-settled OTC FX futures. The FMDQ, following a CBN circular dated 21 April 2017, also developed the Nigerian Autonomous Foreign Exchange Rate Fixing (NAFEX), which is a fixing methodology for the settlement of certain FX

<sup>30</sup> Section 251 of the Constitution.

<sup>31</sup> There is often an overlap of jurisdiction between the FHC and the IST in capital market disputes, and there have been no definitive pronouncements or general guiding principles laid down by the Supreme Court on this issue. Cases have therefore been determined individually, creating inconsistency, uncertainty and the opportunity to forum shop. For example, in *Ajayi v. SEC* [2009] 13 NWLR Pt 1157, the FHC decision declining jurisdiction was upheld by the Court of Appeal. The case was for judicial review of an SEC decision through its Administrative Proceedings Committee. The FHC in declining jurisdiction stated that the ISA 'rested the adjudication arising from the operation of the ISA within the purview of the IST'. That jurisdiction of the IST is not of a concurrent application with the FHC (per Peter-Odili, JCA at p. 26). However, another panel of the Court of Appeal in *Christopher Okeke v. SEC* (2013) LPELR-20355 (CA) refused to follow *Ajayi v. SEC*, and decided that the FHC had jurisdiction instead. The Court in its ruling stated that the jurisdiction of the FHC granted by the Constitution 'cannot be whittled down or taken away by an ordinary Act of the National Assembly in the absence of any amendment to the provision [of the Constitution] in question' (per Saulawa, JCA at p. 28).

<sup>32</sup> See <https://www.fmdqgroup.com/fmdq-exchange/> (last accessed on 21 August 2020).

<sup>33</sup> See the Guidelines for the Operation of the Nigerian Inter-Bank Foreign Exchange Market 2016; the OTC FX Futures Market Operational Standards 2018 (and the appendix – OTC FX Futures Market Close-Out Methodology) and the OTC Foreign Exchange Futures Market Framework 2019. See generally <https://www.fmdqgroup.com/markets/products/derivatives/> (last accessed on 21 August 2020) for the FMDQ's publications on its derivative products (last accessed on 29 August 2019).

derivatives in the Nigerian market.<sup>34</sup> Generally, and with the supervision of the CBN, the FMDQ is responsible for the registration and operational regulation of FX options and will spearhead the development of other risk management products and guidelines.

In 2019, the FMDQ Group (FMDQ) underwent a series of restructurings that resulted in the first vertically integrated financial market infrastructure group in Africa, FMDQ Holdings PLC, made up of several of its wholly owned subsidiaries: FMDQ Securities Exchange Limited, FMDQ Depository Limited, FMDQ Clear Limited, FMDQ Private Markets Limited and iQx Consult Limited. With the restructuring, FMDQ obtained the requisite approval of the SEC to reflect the new status upgrade of the FMDQ Securities Exchange Limited from an OTC market to a securities exchange. FMDQ Clear Limited was also registered as the first central and only clearing house in Nigeria. FMDQ Depository Limited will provide clearing, custodian and settlement services. FMDQ Private Markets Limited will operate a restricted access portal, the Private Companies' Securities Information and Distribution Portal, an information repository for the recording of activities of private companies in the Nigerian debt and equity capital markets. Through iQx Consult Limited, FMDQ seeks to be a 'leading provider of financial markets digitalisation in Nigeria by 2025'. Equity securities were not admitted for listing before the restructuring; that is, when FMDQ Securities Exchange Limited operated as a hybrid, both as a traditional securities exchange and as an OTC platform.<sup>35</sup> However, with its new status, it appears the FMDQ Exchange will provide a platform for trading not only equities, but also commodities.

### viii The NGX

A very significant participant in the Nigerian capital market is the NGX.<sup>36</sup> Established in the wake of Nigeria's independence from British colonial rule, the NGX (formerly the Nigerian Stock Exchange (NSE)) operates an automated trading system and is, in conjunction with the Central Securities Clearing System Plc (CSCS), capable of offering electronic clearing, settlements, delivery and custodial services. Headquartered in Nigeria's commercial capital, Lagos, the NGX has 13 other branches in the country, where trading occurs simultaneously.

The NGX currently operates the Main Board, the Premium Board (which was introduced in August 2015) and the Growth Board (which was introduced in the first quarter of 2020).<sup>37</sup> The Premium Board is for gold standard companies that successfully

34 In this circular, the CBN also established an investors' and exporters' window for eligible invisible transactions detailed under the miscellaneous payments of Memorandum 15 of the 2006 version of the FX Manual (Memorandum 14 of the 2017 revision). It is expected that the circular may be updated to reflect how the revisions to the FX Manual will affect derivatives in the investors' and exporters' window. The circular can be accessed at <https://www.cbn.gov.ng/out/2017/fmd/establishment%20of%20investors%27%20&%20exporters%27%20fx%20window.pdf> (last accessed on 22 August 2020).

35 The FMDQ Securities Exchange Limited (then FMDQ OTC Plc) initially operated as an OTC platform, then became FMDQ OTC Securities Exchange Plc in 2018 before restructuring in 2019.

36 The demutualisation of the NSE resulted in a shareholder-owned, profit-making entity called the NGX.

37 The Premium Board was officially launched by the NSE on 25 August 2015 with the three pioneer companies that successfully met the stringent listing requirements: Zenith Bank Plc, FBN Holdings Plc and Dangote Cement Plc. On 16 April 2018, the NSE migrated Access Bank Plc, Lafarge Africa Plc, Seplat Petroleum Development Company Plc and United Bank for Africa Plc to the Premium Board. MTN Nigeria Communications Plc was migrated to the Premium Board on 16 May 2019, bringing the total number of companies on the Premium Board to eight. See <http://www.nse.com.ng/issuers/listed-securities/listed-companies?filter=premium+board> (last accessed 22 August 2020).



meet the most stringent standards of the NGX. Conversely, the Growth Board is designed to encourage growth-oriented small and medium-sized enterprises and start-ups with good corporate governance standards to list. Importantly, all trading and listing on the NGX occurs through dealing members, which are stockbroking firms so licensed by the NGX. Investors are required to open securities accounts with the CSCS.

In March 2021, the NSE was demutualised, which resulted in the creation of a leading integrated market infrastructure in Africa – NGX. The group provides a wide range of services through its wholly owned subsidiaries: Nigerian Exchange (NGX) Limited, the operating exchange; NGX Regulation (NGX REGCO) Limited, the independent regulatory arm of the Exchange; and NGX Real Estate (NGX RELCO) Limited, the real estate company.

As mandated by the ISA,<sup>38</sup> the NGX has maintained an investor protection fund (IPF) since 2013. The IPF is administered by a board of trustees subject to the regulatory supervision of the SEC. The purpose of the IPF is for compensation of investors' losses arising from:

*the insolvency, bankruptcy or negligence of a dealing member firm of a securities exchange or capital point; and defalcation committed by a dealing member firm or any of its directors, officers, employees or representatives in relation to securities, money or any property entrusted to, or received or deemed received by the dealing member firm in the course of its business as a capital market operator.<sup>39</sup>*

Claims can be made against a dealing member, and the current maximum amount an investor can receive as compensation in a claim against a dealing member is 400,000 naira.<sup>40</sup> The SEC launched the National Investor Protection Fund (NIPF) in 2015. The rules of the NIPF were finalised and became operational in June 2017. The launch of all of these funds (i.e., the IPF, the NIPF and the FMDQ investment protection fund) is in furtherance of the investor protection mandate of the 10-year Nigerian Capital Market Master Plan launched in 2015.

## **ix Other securities exchanges**

The NASD provides a formal OTC trading platform for unlisted securities of public companies. Unlike the FMDQ Exchange, equity securities can be traded on the NASD platform.<sup>41</sup> Securities traded on the NASD are categorised as 'NASD Blue' (shares with a history of sound financial performance), 'NASD Pink' (shares of companies that do not comply with the minimum disclosure and reporting requirements of the SEC and NASD) or 'NASD Red' (shares of companies that fail to provide NASD with information).<sup>42</sup>

There are a number of proposals to establish exchanges for commodities in addition to the Nigerian Commodity Exchange (NCX) and the AFEX Commodities Exchange (AFEX). The NCX was set up as a stock exchange in 1998 and converted into a commodity exchange in 2001. Major commodities currently being traded are agricultural produce such as cocoa,

38 The SEC's national investor protection fund is 5 billion naira. See ISA, Section 197.

39 ISA, Section 198.

40 This amount might be inadequate to compensate a high net worth investor. In relative terms, however, it is a decent sum to the average small-time investor who is more susceptible to volatility in the market and misconduct on the part of capital market operators.

41 With the restructuring of the FMDQ Exchange, the trading of equity securities on its platform is a possibility.

42 The NASD provides the rules for admission of securities on its website at <https://nasdng.com/prices-markets/otc-securities-categorization/> (last accessed on 22 August 2020).

sesame seeds, palm produce and cowpeas. The NCX announced in 2018 that it would extend the use of its platform to solid mineral-related products. The NCX was the only commodity exchange in Nigeria until 2014 when the SEC registered the first private sector commodities exchange, AFEX.<sup>43</sup> The SEC granted a full operating licence to the Lagos Commodity and Futures Exchange (LCFE), a platform promoted by the Association of Securities Dealing Houses of Nigeria, on 14 June 2019.<sup>44</sup> The LCFE currently provides a platform for trading in four asset classes – agricultural commodities, solid mineral commodities, oil and gas commodities (including by-products), and local and foreign currencies.

## II THE YEAR IN REVIEW

### i Developments affecting debt and equity offerings

From the second half of 2017, the federal government has been pioneering the issuance of new products in the market. The first was the seven-year 100 billion naira sovereign *sukuk* bond issued in September 2017. On 18 December 2017, Nigeria issued a five-year 10.69-billion-naira sovereign green bond, which is the world's first Climate Bonds Initiative certified sovereign bond. The SEC also approved and issued the rules on green bonds in the last quarter of 2018. In 2019, the FMDQ, the Climate Bonds Initiative and the Financial Sector Deepening Africa began promoting a scheme, the Nigerian Green Bond Market Development Programme, targeted at driving education about and raising awareness of the implementation of green financing in Nigeria and, as a consequence, the development of the green bond market and the non-sovereign debt capital market. It was in furtherance of that scheme that Access Bank Plc (one of Nigeria's leading banks) announced the issuance of the first certified corporate green bond in Africa, raising 15 billion naira in April 2019.<sup>45</sup>

The UK Department for International Development, the Financial Conduct Authority and the SEC have agreed to collaborate in developing the fintech space in Nigeria.<sup>46</sup> The fintech industry in Nigeria is growing and regulators in the Nigerian financial services industry have been actively engaging stakeholders on how innovation and technology can be used to encourage development across the industry.

In the last quarter of 2021, the market witnessed the first-ever Additional Tier 1 Eurobond Issuance by a Nigerian bank.<sup>47</sup> In the first quarter of 2022, the largest equity offering by a Nigerian Issuer in several years was completed. It was an offer for sale by a shareholder in a leading telecommunications company. It is also the first public offer in the Nigeria capital market to be widely subscribed by retail investors and to be issued through a digital platform.

43 See SEC publication 'A Report on Commodities Trading Ecosystem in Nigeria', available at <http://sec.gov.ng/wp-content/uploads/2018/04/Report-of-TC-on-Commodity-Ecosystem-2.pdf> (last accessed on 1 October 2018).

44 See <https://www.lcfe.ng/about.html> (last accessed on 22 August 2020).

45 The five-year, 15.5 per cent fixed rate and fully subscribed bond has been awarded an AA- rating by Agusto & Co, and certified by the Climate Bonds Initiative. According to stakeholders, the issuance of the corporate green bond reveals the prospects of the Nigerian green finance market.

46 <https://www.thisdaylive.com/index.php/2020/02/09/dfid-fca-to-collaborate-with-sec-on-fintech/> (last accessed on 22 August 2020).

47 <https://www.whitecase.com/news/press-release/white-case-advises-first-ever-additional-tier-1-bond-issuance-nigerian-bank>.

In May 2022, the SEC issued new rules on 'Issuance, Offering Platforms and Custody of Digital Assets' to regulate all issuers seeking to raise capital through digital assets offerings (the 'Digital Assets Rules').<sup>48</sup> The Digital Assets Rules define a digital asset as a digital token that represents assets, such as a debt or equity claim on the issuer.

## ii Developments affecting derivatives, securitisations and other structured products

The derivatives regulatory space has been very active in recent years. Derivatives are largely traded on a bilateral basis between international banks and major Nigerian banks. Perhaps because a majority of the participants in the space are banks and the underlying instruments for most derivatives transactions that currently occur in the market are foreign exchange instruments, the main regulator has been the CBN. Previously, both the SEC and the NGX had proposed different rules to guide the trading of derivatives. However, the SEC approved the Rulebook of the Nigerian Stock Exchange Derivative Market on 19 August 2019 (the NGX Rulebook).<sup>49</sup> While the NGX Rulebook governs trading of derivatives on the Nigerian Exchange, the SEC Rules on Regulation of Derivatives Trading (issued by the SEC on 23 December 2019) governs both OTC-traded derivatives and exchange-traded derivatives. On 14 February 2020, the CBN in collaboration with the FMDQ launched the first long-term naira-settled OTC FX Futures contracts for a tenor of up to a maximum of five years.<sup>50</sup> Prior to this time, OTC FX Futures Contract had a tenor of one year. On 14 April 2022, the NGX Rulebook on the trading of derivatives became effective.<sup>51</sup>

CAMA includes provisions on the validity of netting arrangements in certain contracts, including derivatives contracts. Pursuant to the provisions of the CAMA, and in accordance with their terms, netting arrangements are also enforceable against insolvent companies.<sup>52</sup> In respect of banks, specialised banks or other financial institutions as defined under the BOFIA, the statutory insolvency provisions and netting provisions set out in CAMA will apply subject, however, to any conflicting or overriding provision in the BOFIA, as the BOFIA has specific provisions on netting that are expressly stated to supersede the provisions of CAMA in relation to banks.

Following SEC's registration of NGX Clearing, the NGX's clearing system, the NGX launched West Africa's first Exchange Traded Derivatives in April 2022.<sup>53</sup>

Prior to 2016, certain hedging products had been approved by the CBN for offer by authorised dealers to their customers. In particular, Memorandum 5 of the FX Manual permits authorised dealers to deal in FX spot, forward, futures and swap contracts. In addition to this, in 2011, the CBN released Guidelines for FX Derivatives in the Nigerian Financial Markets, which lists the approved hedging products that authorised dealers can offer to

48 See [https://sec.gov.ng/rules-on-issuance-offering-and-custody-of-digital-assets\\_sec-nigeria-11-may-2022/](https://sec.gov.ng/rules-on-issuance-offering-and-custody-of-digital-assets_sec-nigeria-11-may-2022/) (last accessed on 15 August 2022).

49 See <https://punchng.com/sec-approves-nse-rulebook-on-derivatives-market/> (last accessed on 29 August 2019).

50 See <https://www.fmdqgroup.com/cbn-fmdq-introduce-long-dated-otc-fx-futures-contracts-5-years/> (last accessed on 18 August 2020).

51 <https://doclib.ngxgroup.com/Listings-site/corporate-disclosure-site/Documents/NGX%20Notification%20of%20Effective%20Date%20-%20NGX's%20Derivatives%20Market%20Rules.pdf> (last accessed 15 August 2022).

52 See footnote 8 above on CAMA.

53 See <https://punchng.com/ngx-launches-west-africas-first-exchange-traded-derivatives-market/> (last accessed on 20 August 2022).

their customers as 'FX Options, Forwards (Outright and Non-Deliverable), FX Swaps and Cross-Currency Interest Rate Swaps'. The 2011 Guidelines further state that 'Authorised Dealers are to ensure that their customers are hedging trade- (visible and invisible) related foreign exchange exposures in their obligations and not speculating on the Naira'.

In 2016, as part of its response to the prevalent FX liquidity shortage in the Nigerian financial markets, the CBN issued its Revised Guidelines for the Operation of the Nigerian Inter-Bank Foreign Exchange Market (Revised Guidelines). Under the Revised Guidelines, naira-settled non-deliverable OTC FX futures (NDFs) were included in the approved hedging products that authorised dealers can offer to their customers. As with other hedging products, NDFs must be backed by trade transactions (visible and invisible) or evidenced investment. In a bid to further manage the FX liquidity shortage (1) the CBN banned the sale of foreign exchange to Bureaux de Change and suspended the issuance of licences to operate as a BDC in the third quarter of 2021;<sup>54</sup> and (2) introduced a naira for dollar scheme to incentivise diaspora dollar remittances in the second quarter of 2021. Thus, for each remittance, the CBN, through commercial banks, gives the recipients the incentive of 5 naira for every US\$1. This incentive, which was initially scheduled to end in 8 May 2021, has now been extended indefinitely.<sup>55</sup>

The CBN further directed that the NDF trades were to be facilitated on the FMDQ Exchange (this was prior to the FMDQ restructuring). Generally, with the restructuring of the FMDQ, as well as the new outlook of the FMDQ Exchange, stakeholders anticipate further CBN circulars and FMDQ publications in due course to explain how the new status of the FMDQ Exchange will affect the continued implementation of these guidelines (if at all). The CBN also released the Guidelines for the Issuance and Treatment of Bankers Acceptance and Commercial Papers in September 2019 (the CP Guidelines). The CP Guidelines replaced the former Guidelines from 2009. New introductions under the CP Guidelines include:

- a* recognition of other licensed securities depositories in addition to the CSCS; and
- b* the requirement for all security exchanges and licensed securities depositories to file reports on Bankers Acceptance and Commercial Paper trades to the CBN.

### iii Cases and dispute settlement

In a 2019 decision of the Nigerian Court of Appeal,<sup>56</sup> the Court decided that the SEC could exercise its statutory supervisory powers over an issuer of securities in the Nigerian capital market, as it would over a capital market operator.

### iv Relevant tax and insolvency law

In 2014, the federal government issued an executive order exempting income from certain securities exchange transactions from VAT (the VAT Order). The VAT Order, which was officially gazetted and dated 30 July 2014, became effective from 25 July 2014 and was to last for a period of five years from that date. Consequently, the VAT Order ceased to be effective on 24 July 2019.

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54 See <https://nairametrics.com/2021/07/27/cbn-blows-hot-discontinues-sales-of-forex-to-bdcs/> (last accessed 18 August 2021).

55 The incentive was extended indefinitely by a circular referenced TED/FEM/PUB/FPC/01/004 and dated 5 May 2021. See <https://www.cbn.gov.ng/Out/2021/TED/Dollar%20scheme.pdf> (last accessed 18 August 2021).

56 *SEC v. Big Treat Plc et al.* (2019) LPELR-46520(CA).

The Finance Act, 2021 amended the provisions of the Capital Gains Tax Act to impose capital gains tax on gains accruing from the disposal of shares valued over one hundred million naira.<sup>57</sup> The applicable rate is 10 per cent. The imposition of capital gains tax does not, however, apply to the disposal of Nigerian government securities, which includes Nigerian treasury bonds, saving certificates, premium bonds and any other long-term security issued by the Nigerian government. Investors should seek tax advice on the impact of these statutory amendments on their investments in the Nigerian capital market.

#### v Other strategic considerations

The Nigerian Insurance Commission revised upwards the minimum capital base for insurance companies.<sup>58</sup> While the new capital requirements will immediately apply to companies seeking to carry on insurance business in Nigeria, existing insurance and reinsurance companies were required to be compliant with the share capital requirements no later than 30 September 2021.<sup>59</sup> There are likely to have been a lot of capital-raising exercises (both debt and equity) in the insurance industry as insurers have been seeking to comply with the new requirements.

The SEC continues to dedicate its efforts to implementing the Capital Market Master Plan and has announced its intention to review the Capital Market Master Plan in line with current Nigerian economic realities, and engage stakeholders on e-Dividend registration and multiple accounts regularisation to deal with the problems associated with unclaimed dividends in the Nigerian capital market.

The SEC in June 2021 announced its Regulatory Incubation Program, which was set to commence in the third quarter of 2021 for fintech companies offering services and products in the Nigerian capital markets space that, although uncertain about their regulatory obligations, require some form of regulatory authorisation from SEC before commencement of their business. Prior to this, SEC released rules on crowdfunding that, among other things, requires every platform that facilitates interaction between fundraisers and the investing public for the purpose of investment-based crowdfunding to be registered with the SEC.

### III OUTLOOK AND CONCLUSIONS

The Nigerian capital market can best be described as emerging, robust and dynamic. Current global economic challenges have no doubt had an effect on the Nigerian capital market. However, tailor-made regulations and products introduced by the SEC make the market attractive to both local and foreign investors.

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57 Section 2 of the Finance Act, 2021 which amends section 30 of the Capital Gains Tax Act Cap C1 Laws of the Federation of Nigeria 2004.

58 See Nigerian Insurance Commission (NAICOM) Circular on Minimum Paid-Up Share Capital dated 20 May 2019 and the follow-up circulars dated 23 July 2019 (<https://www.proshareng.com/news/INSURANCE/Nigeria--New-Minimum-Paid-Up-Share-Capital-Policy-For-Insurance-And-Reinsurance-Firms/45396>), (<https://www.proshareng.com/news/INSURANCE/Clarification-on-NAICOM%E2%80%99s-May-2019-Recapitalization-Policy-%E2%80%93-Mergers-and-Acquisition-Guidelines-and-/46247>) and (<https://www.proshareng.com/news/Insurance/NAICOM-%E2%80%93-Insurers-to-Submit-Recapitali/46248>) (all accessed on 5 September 2019).

59 The initial deadlines were revised following the covid-19 pandemic. <https://nairametrics.com/2020/06/05/insurance-naicom-revises-recapitalisation-guidelines/> (last accessed 22 August 2020).

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