AN EXAMINATION OF THE LEGAL FRAMEWORK FOR COMBATING FRAUDULENT INVESTMENT SCHEMES IN THE NIGERIAN CAPITAL MARKET.

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NOVEMBER, 2016.

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A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA, NIGERIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWSDEGREE - LL.M.

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NOVEMBER, 2016.

DECLARATION

I declare that the work in this Dissertation entitled "An Examination of the Legal Framework for Combating Fraudulent Investment Schemes in the Nigerian Capital Market" has been carried out by me in the Department of Commercial Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other Institution.

Clementina Chika OKEKE Date

CERTIFICATION

This dissertation entitled AN EXAMINATION OF THE LEGAL FRAMEWORK FOR COMBATING FRAUDULENT INVESTMENT SCHEMES IN THE NIGERIAN CAPITAL MARKET by Clementina Chika OKEKE meets the regulations governing the award of the degree of Master of Laws -LL.M of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

_____ _____

Chairman, Supervisory Committee Date
Prof. A.R. Agom

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Member, Supervisory Committee Date
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Head, Department of Commercial Law Date
Prof. A.R. Agom

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Dean, School of Postgraduate Studies. Date
Prof. K. Bala

DEDICATION.

This work is dedicated to my parents, Mr. and Mrs. Victor J. N. Okeke for empowering me with knowledge. I remain eternally grateful to God for giving you to me. I pray you live very long enough to enjoy your labour over my life.

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Glory be to God the Father and to the Son and to the Holy Spirit for the successful completion of this study- Amen.

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Alfred Mamman, Rev. Fr. Joshua Shichet, Power and Dominion Partners, Victory in Jesus Catholic Charismatic Renewal especially members of the Evangelical Ministry. I love you all.

ABSTRACT

Finance is the key to investment and growth hence the need for efficient financial systems to help development. Nigeria's financial system comprises the money and capital markets that serve it. These two sub-sectors create financial assets and liabilities by intermediating between surplus and deficit units in the economy. While the money market is where short term loans are sourced, the capital market is one for medium and long term funds. The Nigerian capital market like other capital markets in the world is sustained by the level of investment that drives it. Investment is fundamental to the growth and development of any economic entity. The returns on investments benefit the individual and have multiplier effects on the society at large. This dissertation examines the legal framework for combating fraudulent investment schemes in the Nigerian Capital Market by employing the doctrinal method of research. The upsurge in fraudulent investment schemes in the Nigerian capital market has virtually impacted all aspects of the country, ranging from money loss; leakage in the financial system; undermining confidence in the market and psychological effects on the investor among others. Despite the numerous laws and institutions in place to help in the fight, fraudulent investment schemes continue to plague the Nigerian capital market. This research finds that this can be attributed to the ignorance displayed by investors at identifying genuine investment schemes. There is therefore, the need for the Securities and Exchange Commission to embark on massive investors' enlightenment campaign to educate investors and potential investors about investment schemes.

TABLE OF CONTENTS.

CONTENTS **PAGES**

COVER PAGE …… i

FLY LEAF …….. ii

TITLE PAGE …….. iii

DECLARATION ……... iv

CERTIFICATION……. v

DEDICATION …….. vi

ACKNOWLEDGEMENTS…… vii

ABSTRACT……... ix

TABLE OF CONTENTS…….. x

TABLE OF CASES…… xiii

TABLE OF STATUTES……. xvi

LIST OF ABBREVIATIONS…… xix

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study…… 1

1.2 Statement of the Research Problem. …….. 4

1.3 Aim and Objectives of the Research. …… …5

1.4 Literature Review…… .6

1.5 Scope of the Research …… …9

1.6 Justification of the Research. …… 9

1.7 Research Methodology…… 9

1.8 Organisational layout. …… 10

CHAPTER TWO

CONCEPTUAL CLARIFICATION(S)

2.1 Introduction…… 11

2.2 Legal Framework. …….. 11

2.3 Combating. …….. 13

2.4 Fraudulent. …… 14

2.5 Investment Schemes …….. . …17

2.6 The Nigerian Capital Market……22

CHAPTER THREE

FRAUDULENT INVESTMENT SCHEMES.

3.1 Introduction …….. 29

3.2 Ponzi Schemes …… 29

3.3 Pyramid Scheme …… 34

3.4 Affinity Scheme …… 36

3.5 Pump- and- Dump …… 39

3.6 Boiler Room Fraud …… 40

3.7 Foreign Exchange Scam …….. 41

3.8 Real Estate Investment Fraud. . …… 44

CHAPTER FOUR

THE LEGAL FRAMEWORK FOR COMBATING FRAUDULENT INVESTMENT SCHEMES IN THE NIGERIAN CAPITAL MARKET.

4.1 Introduction. …… 48

4.2 The Legislative Framework…….. 49

4.2.1. Investments and Securities Act, 2007. …… 50

4.2.2 .The Criminal Code and Penal Code Acts, 2004. …….. 58

4.2.3. Economic and Financial Crimes Commission Act, 2004…… 60

4.2.4. The Advance Fee Fraud and Other Related Offences Act, 2004…… 64

4.3 The Institutional Framework …….. 66

4.3.1 The Securities and Exchange Commission…… 67

4.3.2 The Investment and Securities Tribunal. …….. 76

4.3.3 The Administrative Proceedings Committee. …… 83

4.3.4 The Economic and Financial Crimes Commission. …… 86

4.3.5 The Police ……92

4.3.6 The Judiciary …… 94

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary …… 97

5.2 Conclusion. …… 97

5.3 Recommendations……. 99

Bibliography……. 103

Appendix

TABLE OF CASES.

CASES **PAGE**

Alh.AbdullahiAminuTafida vs. FRN suit no SC 2/7/2011 Retrieved from legalpedia.com…… 66

Assets Co. Ltd vs. Mere Roihi (1905) AC 176…… 15

Blue Chip Acquisition vs. Zenith Bank Plc. &3 ors. (2005)3 ISLR,72…… 79

Boat Nigeria Limited vs. Nigerian Stock Exchange &Anor. IST/OA/2007 (2012) NISLR,155…… 79

Borland Trustee vs. Steel Bros & Co. Ltd (1901)1 Ch.279…….. 21

Charles Hughes & Co. vs. SEC (1943) 139 F 2d 434…….. 15

Chief LivinusEzemgbe vs.Nigerian Stock Exchange IST/OA/06/20/06 (2012)3 NISLR,112…… 79

Derry vs. Peek (1889) 12 AC 337, HL…….. 15

Federal Republic of Nigeria vs. Amadi (2005) 2 QILR 129……... 88

FolarinGbadebo-Smith &33 Ors.vs. First Bank of Nigeria plc. & 4 ors.(2013)7 NISLR…… 73

Interest Property Ltd vs. Fed. Commissioner of Taxation (1943) 67 CLR 508…… 23

IRC vs. Parker (1965) Ch. 1032…… 20

Jacobellis vs. Ohio (1964) 378 US.184, 197…… 25

Magit vs. University of Agriculture Markurdi (2006) ALLFWLR Pt.298,1313…….. 96

Moore vs. Economic and Financial Crimes Commission. (2010) ECLR 312,314…….. 91

Molten Trust Ltd. & 1 or. vs. SEC IST/APP/03/2004…… 80

MuftauAjayi vs. SEC (2009) 13 NWLR,PT.1157,1…… 81

Nospecto Oil & Gas Ltd. vs. Olorunnimbe& 15 ors. (2012) 10 NWLR, pt. 1307,115……..… 82, 95

Otukpo vs. John (2012) LPELR-206, 19 (SC)…….. 16

Olusemo vs. C.O.P (2006) ALLFWLR PT3,12…….. 93

Owena Bank Nig.) Plc. vs. Nigeria Stock Exchange (1999) 5 SLR,1…… 71

Re Smithers, Watts vs. Smithers (1935) 1 Ch. 1015…… 20

R.O. Yusuf vs. Messrs. J. Adewuyi (1993) 2 SEC Law Reports…… 21

Salomon vs. Salomon (1894) AC 22…… 4

SEC vs. African Petroleum Plc. &. APC/22/2002 SEC Record of Proceedings of the APC…….. 84

SEC vs. All Green Investments Nig. Ltd. & 53 ors. (2012) 4 NISLR…… …73

SEC vs. CM Joiner Leasing Corporation (1934) 320, US 344……... .. 19

SEC vs. Dominion Trust & 11 ors. (1992) 1SLR53……71

SEC vs. Kasunmu& 1 or. (2009) 10 NWLR PT.1150,509……... 57, 81.

SEC vs. NAL Merchant Bank Plc. &anor. APC/19/2000 SEC Record of Proceedings of APC (2000-2002) vol.4, 2004…… 83

SEC vs. Nutoyos Ltd (1992) 1SLR 89……..…. 54

SEC vs. Osindero&ors. CA/A/222/05…… 85

SEC vs. Prudential Securities & 9 ors.(1992) 1SLR 34……..…….... …71

Sir Okeke Owoh v. Apex Securities & 2 ors. (2013)7 NISLR,144…….…… ..70

Solomon &Ors.vs. Monday &Ors. (2014) LPELR-22811 CA…… 16, 99

Stuart vs. Kingston (1932) 32 CLR309 at 329…… 15

Tate Industries Plc. vs. Devcom M.B. Ltd (2004) 12 NWLR, Pt.901, 182…….. 17

United Housing Foundation vs. Forman (1979) US 873……. 20

Waimiha Sawmilling Co. Ltd vs. Waione Timber Co. Ltd (1926) AC101, PC…… 15

TABLE OF STATUTES.

STATUTES **PAG ES**

Advance Fee Fraud and Other Related Matters Act, 2005…… 64
S.1……..... 64,65
S. 2…… 64
S.4 …… 65
S.5 …… 65
S.11……..... 65

Companies and Allied Matters Act, Cap C20 L.F.N.2004 …….. 50
s.22(2) …….. 51
s.24 …… 50
s.25(5) …… 50
s.211 …….. 51
s.567 ……... 52

Constitution of the Federal Republic of Nigerian 1999 Amended 2011……. 63
s.36(8)……..... 63
s. 36(12)……..... 63
s.6(5)…… 80,95
s.6(4)(a)…… 80
s. 211…… 89
s. 214(2)…… 92
s.230 ……..... 95
s.237……..... 95
s.249 ……..... 95
s.251(l)(r)……..... 82
s. 257……..... 95

Criminal Code Act Cap C. 28 Laws of the Federation of Nigeria, 2004……. 58
s.421 …… ….... 59
s.422…… ……. 59

Economic and Financial Crimes Commission (Establishment, Etc.) Act, 2004
…….. 60
s.2……...87
s.5 ……...92
s.6 ……...87,88
s.7(b)……... 90
s.12 …….. 90
s.18 ……62
s.38 ……90

s.39 ……90,91
s.41 ……91
s.42……80
s.43 ……... 91
s.46 ……... 62

Investments and Securities Act, 2007…… 50
s.13 …… 57, 67
s.38 …… . 57
S,54 …… 51, 55, 56
s.60 …… 51
s.62 …… 51
s.65 ……..... . 51, 70
s.66 …… . 70
s.67 …… 50,54,56
s.73 …… ….. 50, 52, 53.
s.69 …… .. 51
s.74 ……... ... 53
s.80 …… .. 70
s.86 ……. …. 54
s.87 …… ….. 50,
s.241(3) …… …… 80
s.242 …… …… 80
s.243(1) …… …… 80
s.275 …….. ….. 77
s.280 ……. ……77
s.284(1) …… … 77
s.284(2) …… …….77, 78
s.285(1) ……. ……77
s.289 ……. …….78
s.290(3) ……. ……78
s.304 ……. …….72
s.315 …… ……..52
s.313 ……. 72

Investments and Securities Act, Rules and Regulations, 2000. ……... …55
Rule 40 …… ….55

Penal Code Act Cap. P3 Laws of the Federation of Nigeria, 2004, …… 58
s.320 …… 59
s.322 …… 60

Police Act Cap. P19 Law of the Federation of Nigeria, 2004 …… 92
s.4 ……. 93
s.5 ……..93

Securities and Exchange Commission Rules made pursuant to the Investments and Securities Act, 1999. ……. 83
Rule 2 …… 84
Rule 3 …… 83
Rule 12 ……... 84
Rule 13 ……. 84

LIST OF ABBREVIATIONS

AFF- Advance Fee Fraud

AGF- Attorney General of Federation

APC-Administrative Proceedings Committee

CAC- Corporate Affairs Commission

CBN- Central Bank of Nigeria

CC- Criminal Code

EFCC- Economic and Financial Crimes Commission

FATF- Financial Action Task Force

FIU- Financial Intelligence Unit

FIS- Fraudulent Investment Scheme

Forex- Foreign Exchange

FSC – Financial Services Commission

GDP- Gross Domestic Product

ISA- Investments and Securities Act.

IG- Inspector General.

IST- Investments and Securities Tribunal

MLM- Multi Level Marketing

NDLEA- National Drug Law Enforcement Agency

NCCT- Non Cooperative Countries and Territories

NPF- Nigerian Police Force

PC- Penal Code

SA – Securities Act

SEC-Securities and Exchange Commission.

CHAPTER ONE.

GENERAL INTRODUCTION.

1.1 Background to the Study.

The financial system of every country regulates the mercantile environment. This is important because finance is key to investment and growth hence the need for efficient financial systems to help development. A nation's financial system comprises the money and capital markets that serve it. These two sub-sectors create financial assets and liabilities by intermediating between surplus and deficit units in the economy. While the money market is where short term loans are sourced, the capital market is one for medium and long term funds[1].

All efficient financial systems are sustained by the level of investment that drives the system. Investment is a *sine qua non* of growth and development of any economic entity. Usually, investment involves postponing current consumption to put resources in capital formation activity or production of future income. The basic objective of any investment decision is the creation of wealth via returns on investments.[2] The returns on investments are derived from visible manufacturing or commercial activities. These returns on investment benefit the individual and have multiplier effect on the society at large[3].

Investment without doubt plays a crucial role in the economic well being of individuals and business enterprises. It is one of the vital ways of creating wealth. It is also an act that prepares one for a better future. An individual or a body with better investment potentials lays good foundation for eventual opportunities and good living in future; that is why it is essential and advisable for individuals, corporate bodies and even government authorities to invest for a better tomorrow. The objective of investment ranges from dividends, capital

[1]Osaze, B.E. (2007) *Capital Markets, African and Global*, Bookhouse Company, Nig. p.7
[2] Agom, A.R (2010) "Global Investment Alert; The Ghost of Charles Ponzi and Investment Regulations", *African journal of Business and Comparative Law*, Vol. 1 No. 1, p.38
[3] *Ibid*

appreciation or growth, capital gains or adventure[4]. Investing in the capital or money markets provide the long or short term funds needed to develop a country.

According to the World Bank[5], Gross Domestic Product (GDP) growth is higher for those countries, which have relatively higher investment ratio. Lately, the Nigerian economy has enjoyed global prominence. Following the 2014 April statistical rebasing, Nigeria emerged as Africa's largest economy and ranking twenty-sixth in the world with a Gross Domestic Product put at five hundred and two billion United States Dollar[6]. Generally speaking, investment refers to all economic activity which involves the use of resources to produce goods and services. Investments can broadly be classified into two:[7] real and financial investments. Real investments refer to investments in tangible assets, such as machinery, land, factories and offices. These assets are used to produce goods and services for future consumption. This is regarded as capital investment[4.] In the case of financial investment (*choses* in action) the investor's sole interest is in the amount invested and the future streams of income it will generate[8].

Financial investment must be distinguished from gambling/wagering transactions which in their nature are speculative and essentially games of chance[9]. Usually, when investors invest in any scheme, their basic objective is that they receive returns. Their intention of coming to the market is not to gamble their hard earned money but to invest into real and visible manufacturing or commercial activities not phony investment schemes. Risk

[4] Apinega, S.A.(2006) "Legal And Economic Issues In Stock Selection", *Ahmadu Bello University LawJournal,* vol.24-25, p.102

[5]Anwer, M.S.andSampat,R.K.(1999) "Investment and Economic Growth", Being a Paper Presented at Western Economics Association Annual Meeting, Department of Agricultural and Resource Economics, Colorado State University. p.3

[6] Agom, A.R.,(2015)"Investments And Securities Act: A Veritable Tool For The Development And Growth In The Nigerian Capital Market"; A Paper Presented at the Investments And Securities Tribunal Workshop Held at the Oriental Hotel Lekki, Lagos on the 8th day of December, p.2

[7]Maimako, S.S (2014) "Risk and Return: Investment Choices And Irrational Exuberance", being a paper presented at the University of Jos Inaugural Lecture Series 66, p. 1

[8] Agom *op cit.* p. 38

[9] Agom, A.R (2011) "The Ghost of Charles Ponzi; An Albatross for Investment Regulation in Nigeria",*Benue State university Journal of Private and Public Law,* vol. 1, No.1 p.49

and return are natural consequence of investment. The complex nature of an investment defines the peculiar exposure of investors to risk. Generally, all investors (individuals or institutions) have investment objectives and on the basis of risk tolerance can safely be classified into three categories[10].The risk averters are investors who do not like taking risks. Investors who are risk lovers are more willing to take chances with given expected return than accept an equal sure amount. They select attractive investments with good yield in income and capital appreciation[11]. The third category is the risk neutral investors. They are indifferent to risk.

Any of these categories of investors can be a victim of phony or fraudulent investment schemes. Although their choice of investment vehicle is usually influenced by safety factors and certainty of returns, rational investors would normally avoid investing in worthless ventures. Nevertheless, occasionally, even the most rational investors could be victims of fraudulent investment schemes.

In recent times, various fraudulent investment schemes have been advertised in Nigeria with promises of good returns. Prominent among them is the case of New Nation in 2014.[12] The Securities and Exchange Commission clamped down its activities which had branch network in all 36 states of the Federation, including the Federal Capital Territory. In Nigeria, fraudulent investment schemes known as 'wonder banks' gained prominence following the saga of Resource Managers Nigeria Ltd in Port Harcourt in 1991[13]. One Mr. Ummanah E. Umanah using this company offered investment and money management services to members of the public. The scheme offered subscribers as much as sixty percent

[10]Osaze, E.B (2007) *Capital Markets African and Global*, Bookhouse Co., Lagos p. 176
[11]Osaze, Ibid
[12]Ighomwenghian, K. (2014), SEC Draws Battle Line with Wonder Banks, Business News, February 19 2014, retrieved from dailyindependentnig.com/2014/02/sec-draws-battle-line-with-wonder-banks. Accessed 18/6/2015
[13] Agom (2011) *op cit.*, p.55

interest within thirty days. This was in addition to other benefits. This outfit attracted so many investors until the clamp down by the Securities and Exchange Commission.

From the 1920s when fraudulent investment schemes gained prominence by the actions of Mr. Charles Ponzi, variants of the scheme have reverberated across the globe and on such occasion showing new sparks and jolting securities regulators.Corporate and Securities laws have learnt and developed after high points of corporate collapse and the attendant regulatory response. The South Sea Act of 1720, the Joint Stock Company's Act of 1844 and the Judgment of the House of Lords in the case of **Salomon v. Salomon**[14] were bold attempts at containing corporate excesses of their times. In Nigeria, the Companies and Allied Matters Act, the Investment and Securities Act and the Codes of Corporate Governance were also regulatory attempts at containing corporate excesses. These have sharpened our corporate and securities law today.

The Fraud Saga has no doubt impacted seriously on our corporate laws generally and securities regulation specially. The lessons from the spate of corporate failures have thrown up so many challenges for securities regulation and resulted in streamlining and tightening of securities law in virtually all jurisdictions and Nigeria is no exception[15]. This study is premised towards that direction.

1.2 Statement of the Research Problem.

The regulation of the Nigerian Capital Market has been in place for over five decades. Although, the first major step towards formal capital market regulation was taken in 1961 when the Lagos Stock Exchange Act[16] was enacted. The regulation of the market can be

[14] (1894) AC 22
[15] Agom, A.R.(2005) "Lessons from the Burst of Enron and the Challenges for Securities Regulation", *Ahmadu Bello University Journal Of Commercial Law, Zaria*, vol.2 no.1, p.142
[16]Sanusi, I.O (1984) "Capital Market in Nigeria: Nigerian Commercial Law, Problems and Prospects", Ahmadu Bello University Law Journal, Zaria p. 133

traced from the colonial era when the colonial Stock Act of 1877[17] was in force in Nigeria. Despite the numerous laws[18] that have been enacted over time to regulate the capital market, the market is still plagued with fraudulent investment schemes.

Additionally, the Investments and Securities Act[19] created the Securities and Exchange Commission as the apex regulator of the Nigerian capital market with statutory regulatory powers. The SEC has been in existence since 1988 yet fraudulent investment schemes operate openly in defiance of SEC. The legal question that arises is whether or not SEC is adequately equipped legally to fight these fraudulent investment schemes. Therefore, the questions arising from this research are;

1. How adequate are the legislations in Nigeria for combating fraudulent investment schemes?
2. How effective are the existing legal institutions in combating fraudulent investment schemes?
3. What mechanisms are in place for investors' education on fraudulent investment schemes and how adequate are they?

1.3. Aim and Objectives of the Research

The present research is considered necessary to examine the existing legal regime of the nation's capital market to ascertain its viability as a tool for fighting fraudulent investment schemes in order to ensure the continuance of the Nigerian capital market, since the capital market is one of the major driving forces of the Nigerian economy. The research therefore considered the following objectives:

[17]Igwe, J.U.K (1999) *Investment, Nigerian Capital Market and Corporate Governance Laws, Practice andEthics*, Law Development Research Publication and Consultancy, Lagos p. 6
[18]Promulgation of the Nigerian Enterprises promotion Act, Securities and Exchange Commission Decree No. 71 of 1979; Investment and Securities Act No. 4 of 1999; Investment and Securities Act 2007; Companies and Allied Matters Act, 1990 etc.
[19] 2007

1. To appraise specific laws in Nigeria to ascertain their viability as tools for protecting the Nigerian capital market against fraudulent investment schemes in order to ensure the virility of the market.

2. To identify the weaknesses of the existing legal and institutional frameworks for combating fraudulent investment schemes in the Nigerian capital market.

3. To examine the sufficiency of mechanisms in place for investors' education in order to determine their adequacy as tools for the protection of investors against fraudulent investment schemes.

1.4. Literature Review.

Existing literature in this field has comparably remained scanty; the need for an update under the current legal regime becomes compelling. We acknowledge with due respect the works of learned authors in this area of interest.

Osaze[20] in chapter six of his book attempts an insight into the regulatory environment of the Nigeria capital market, affirming the importance of regulation. It is submitted with due respect that his contributions are restatements of laws such as the Companies and Allied Matters Act[21], the Insurance Act[22] and the Trustee Investment Act[23]. Apart from the fact that the laws he examined do not fall within the scope of this research, in discussing the regulatory institutions of the Nigerian capital market he states that the Securities and Exchange Commission is the apex regulatory body of the capital market after the Ministry of Finance and the Central Bank of Nigeria, which view is not the true position under the current Investment and Securities Act 2007 and which this work seeks to correct. This research not only examines the primary law that regulates the Nigerian capital market, it also

[20]Osaze E.B (2007) *Capital Markets African and Global*, Bookhouse Co., Lagos p. 176
[21] Cap C20 L.F.N.2004
[22] 2003
[23] 1962

examined other laws that are targeted at combating financial crimes in Nigeria, such as the Economic and Financial Crimes Commission Act, the Criminal and Penal Codes and the Advance Fee Fraud Act[24]. This research does not merely state these laws but examines them in the light of the present Nigerian society.

Ako[25] in chapter seven of her book merely lists the laws regulating the Nigerian capital market and mentions the now repealed Investment and Securities Decree NO.45 of 1999. Therefore, an update under the current legal regime becomes compelling. This research will provide the update under the ISA, 2007.

The work of Olukole[26] in chapter six attempts an examination of legislations relating to the capital market. Like Ako's[27]work, it was carried out under the old laws such as the Investment and Securities Decree 1999, Nigerian Investment Promotion Commission Decree, 1995 among others. The need for a current write-up which this research provides.

In addition, Ekiran[28]and Eleh[29] examined the Nigerian capital market. Analyzing the types of markets, types of securities, market operators among others. Despite their contributions, there was no mention of fraudulent investment schemes in their book or of the legal framework for combating them. This research provides for this.

Other foreign texts reviewed include that of Tjio[30]. In his book of eight chapters he discussed extensively the principles and practices of securities regulation in Singapore, pointing out the importance of securities regulation. Despite his contributions, the scope of his research does not fall within the precinct of this work which is not just about regulating securities but combating fraudulent investment vehicles existing in the market.

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[24] 2005
[25]Ako, R.M (1999) *Capital Market Manual,* La Rose Ltd, Abuja
[26]Olukole, R.A (2002) *The Capital Market in Nigeria*, Perfect Printers Ltd, Lagos.
[27]Ako, *op cit*.
[28]Ekiran, O.(1999) *Understanding of Capital Market Operations*, CIBN Press Ltd
[29]Eleh, Z.N (2004) *Know Your Capital Market Inside-Out*, Creation House, Lagos
[30]Tjio, H. (2011) *Principles and practice of Securities Regulation in Singapore*, Lexis Nexis, Utopia Press Ptc Ltd, 2nd ed.

It must be noted that while this research seeks to examine investment schemes which in themselves are fraudulent, and how to combat them, most of these authors reviewed did not extend that far, even when they mentioned fraud it was in relation to fraud in securities transaction and not fraudulent investment schemes.

Geoffrey[31]another foreign author examined the Malaysian Capital Market in his ten chapter book. His book centres on the Malaysian capital market with specific reference to the Malaysian Capital Market Services Act; discussing the history of the Malaysian capital market, market misconduct among others. Thus, the need for a Nigerian text which this research provides. In addition, his book does not extend to the scope of this research which centres on phony investment schemes.

Other works in journals were reviewed. In this category is the work of Akume[32] and Agom[33] these Journal articles basically centre on the Securities and Exchange Commission's powers to regulate the Nigerian capital market generally, this research specifically looks at the role of SEC in combating fraudulent investment schemes. This research is different from theirs in scope at least.

Finally, Agom[34] in his journal article appears to be the only author to touch the core of this research. But then, his focus is only on Ponzi scheme which is one of the many fraudulent investment schemes covered in this research. This research is wider in scope and covers more ground. In the circumstances, research reveals that the topic of this dissertation has not been comprehensively treated and there follows the need for work in this area of the law

[31]Geoffery, S.(2010) *Capital Market Laws of Malaysia*, Lexis Nexis, Dolphin Press Ltd,Sdn Bhd.
[32]Akume, A.A (2007) "A Critical Analysis of the Exercise of the Securities and Exchange Commission'sPowers to Regulate the Nigerian Capital Market*"*, *Ahmadu Bello University Journal of Commercial Law*, Vol. 1 No. 3, pp. 186-202
[33] Agom A.R (2009), *"*The Transmogrifying of the Securities and Exchange Commission from a Watchdogto a Bloodhound",*Ahmadu Bello University, Journal of Commercial Law,* vol. 4, pp. 26-49
[34] Agom, A.R (2011) "The Ghost of Charles Ponzi, An Albatross for Investment Regulation in Nigeria",*Benue State University Journal of Private and Public Law,* vol. 1 no. 1 pp. 49-60

1.5 Scope of Research

The scope of this work is determined by the statement of the problem and objective of the research. Accordingly, the Investments and Securities Act 2007 is the main law in focus. In addition, references are made to other laws that cover financial crimes such as the Economic and Financial Crimes Act, The Criminal and Penal Code Acts and The Advance Fee Fraud Act. The geographical scope of this research is the Nigerian capital market. References are made to other jurisdictions as learning points for Nigeria.

1.6 Justification of the Research

The necessity to expose the dangers of fraudulent investment schemes to the Nigerian society and the need to update the existing texts under the current legal regime makes this work compelling and important. The attendant ignorance displayed by the general public who are major victims of this phony scheme justifies this research as a means of enlightenment for them.

In addition, the place of importance occupied by the capital market in the economy of the nation in promoting investment makes this research important in the sense that this work has identified fraudulent investment schemes and the way investment laws and institutions could be marshaled to combat them.

1.7 Research Methodology.

The research is largely based on doctrinal method. To this end, primary sources of data such as statutes, case laws arising out of the decisions of courts have been relied upon. Secondary sources of materials such as textbooks, journals, magazines, newspapers, and the internet have extensively been used in writing this research.

1.8 Organizational Layout.

The research is organized into six chapters for adequate treatment and comprehension of the subject matter. Chapter one generally introduces the main features of this research including the problem, scope, methodology, review of related literatures and justification.

Chapter two focuses on the conceptual clarification of the terms contained in the topic of research in order to aid understanding of concepts such as; legal framework, combating, fraudulent, investment schemes and the Nigerian capital market. Chapter three extensively discusses fraudulent investment schemes, ranging from Ponzi, pyramid, affinity, pump-and-dump, boiler rooms, and real estate scam.

Chapter four appraises the legislative and institutional framework for combating such fraudulent investment schemes like the Investments and Securities Act 2007, the Economic and Financial Crimes Commission Act 2004, the Criminal and Penal codes Act L.F.N.2004; the institutional frameworks ranging from the Securities and Exchange Commission, the Investments and Securities Tribunal, the Administrative Proceedings Committee, the Economic and Financial Crimes Commission, the Police and lastly the Judiciary. Finally, chapter six draws some general conclusions based on the findings and offers some useful recommendations.

CHAPTER TWO

CONCEPTUAL CLARIFICATION(S).

2.1 Introduction

This chapter examines some key concepts in this research topic with a view to providing a general understanding and appreciation of the discussion. Furthermore, the capital market is a complex market with technical rules and peculiar dictions and names. It is highly imperative to undertake a conceptual clarification of terms and words which are constantly/recurrently used in this research.

2.2 Legal Framework

The term 'legal framework' contains two key words 'legal' and 'framework'. 'Legal' has been defined to mean "of or relating to law, falling within the province of law" or "established, required or permitted by law"[35]. Also legal is defined to mean "connected with the law" allowed or required by law"[36].These definitions connote one basic factor which is that 'legal' has to do with the law. The question then is what is Law?

From the very early times, juristic writers and legal theorists have advanced various postulates and ideas on law which reflect their divergent responses. One school known as the Austinian or positivist school maintains that law is the command of a sovereign authority intended to be obeyed by the people under that authority and supported by sanction[37]. The main weakness of the positivist theory of law is that it takes a narrow view of the idea of law[38]. If applied strictly, it will automatically eliminate other rules or norms of human

[35] Garner, B.A (2004) *Black's Law Dictionary*, West Publishing Co., USA, Eight edition, p.912
[36] Hornby, A.S (2010) *Oxford Advanced Dictionary Learner's Dictionary*, Oxford Press, Eighth edition p. 849
[37] Ladan, M.T (2008) *Introduction to Jurisprudence, Classical and Islamic*, Faith Printers Ltd, Zaria, p. 40
[38] *Ibid*

conduct which, even though not in the form of sovereign commands, do nevertheless ensure legal order and justice in an organized political society[39].

Another school of jurisprudence[40] which developed as a result of the reaction against the positivist theories denies that any law or legal rule exists until a court has made its pronouncement in a specific case. Thus a leading pioneer of this school, Justice Oliver Holmes of America puts it: "the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law".[41]The major weakness of this school of thought is that it stresses more the interpretation of the law by the courts, law practices than law as they are promulgated by the law-giver or laws as stated in legal instruments[42]. Normally, a judge does not make laws in the functional sense of legislating for the country; rather he is expected to decide issues in dispute listed in his own court.

Similarly, the sociological school maintains that law cannot be understood unless it does is studied[43]. But this school seems to pursue a more penetrating study of the judicial process than the realists who confine their inquiry to the operation of courts and the judges who man them[44].The leading exponent of the sociological school Dean Roscoe Pound considers, for instance, that the values that direct the development of law must be analyzed thoroughly in order to understand legal development whose appreciation is the key to the nature of law.

His thinking is basically that law is more than a set of abstract norms or a legal-order- it is also a process of balancing conflicting interests and securing the satisfaction of the maximum of wants within the minimum of friction.[45] Law from this out-look immediately

[39]*Ibid*
[40] The Realist school of Jurisprudence
[41] Ladan, *op cit*. p. 40
[42]*Ibid*
[43]*Ibid* p. 42
[44]*Ibid*
[45]*Ibid*

becomes a "social engineering" so as to achieve distributive justice, that is to say, a fair division of social benefits and burdens among the members of the community[46].

The rival theories on the concept of law, as shown above, illustrate the fact that there is no definite answer to the question "what is law". Law however defined; exist always to ensure order and the due administration of justice in an organized society. This is the general purpose of law[47] and it is from this perspective that law is viewed in this research.

On the other hand, a framework is a set of ideas, rules or beliefs from which something is developed or on which decisions are based[48]. It is also "a set of beliefs, ideas or rules that is used as the basis for making judgments, decisions etc.[49]. In addition, a framework is "a broad system of rules that governs and regulates decision making agreements, laws etc."[50] Legal frameworks are needed in order to understand the significant costs and procedures that must be followed in carrying out an action. In examining the legal framework for combating fraudulent investment schemes in the Nigerian capital market, this research focuses on existing legal institutions and the functions assigned to them by law.

2.3 Combating

The term 'combating' is derived from the word 'combat'. It was first used in the 16th Century to denote a fight between two people.[51] It is a combination from the French word *Combatree* meaning fighting and from Late Latin word *combattree* meaning '*Com'* together with and *'batteree'* 'to fight'.[52]

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[46] *Ibid*
[47] *Ibid* p. 44
[48] *Longman Dictionary of contemporary English*, Retrieved from www.idoceonline.com accessed 3/6/2015
[49] Hornby, op cit. p. 594
[50] *Legal English Dictionary*, Retrieved from http://www.translegal.com/.../
[51] *Oxford Advanced Learners' Dictionary,* Retrieved from www.oxforddictioanries.com/defintion/english/combat, accessed on 19/6/2015
[52] i*bid*

The term 'combat' typically refers to armed conflict between opposing military forces in warfare. The Longman Dictionary of Contemporary English[53] defines the word combat as 'to try to stop something bad from happening or getting worse". It also means "to stop something unpleasant or harmful from happening or from getting worse"[54]. The synonyms of 'combating' have been listed as battle, contend, go up against, do battle with, engage, fight, oppose, withstand etc.[55]

The scope of this research is to examine the various laws and institutions in place to contend, fight, oppose, stop or withstand the unpleasant continuation of fraudulent investment schemes in the Nigeria capital market.

2.4 Fraudulent

The term 'fraudulent' is the adjective of the word fraud[56]. In the context of this work, 'fraudulent' is used to describe 'investment schemes' that are not genuine or honest. Fraud is a generic term and embraces all multifarious antics which human ingenuity can devise, which are resorted to by one individual to get an advantage over another by false representation. No definite and invariable rule can be laid down as general proposition for defining fraud as it includes surprise, tricky, cunning and unfair ways by which another is cheated[57].

The only boundaries defining it are those which limit human knavery.[58] The use of the term fraud has been wider and less precise in the Chancery than in the common law courts. This followed necessarily from the remedies which they respectively administered[59]. Common law gave damages for a wrong and was compelled to define with care the wrong

[53] Longman, *op cit.*
[54] Hornby op cit. p.282
[55] Retrieved from www.thesaurus.com/browse/combating
[56] An adjective is a word that modifies or describes a noun.
[57] Agu, O.B (2011) "Economic Crimes and National Security: Nigerian Perspective", Nigerian Institute of Advanced Legal studies, *Journal on Law and Security in Nigeria*, Retrieved from www.nials-nigeria.org/text/journals.aspx on 7/6/2015
[58] Albretch, W. S et al (2006) *Fraud Examination*, Thompson south Western, Canada, 2nd edition, p. 7
[59] Per Anson, W.R (1919) *Principles of the Law of Contract*, cited in Black's Law Dictionary 8th edition (2004) at p. 685

which furnished a cause of action. Thus, 'Fraud' at common law is a false statement while in equity 'fraud' has often been used as meaning unconscious dealing[60].

One of the earliest cases dealing with fraud was **Derry v. Peek**[61]. In this case the House of Lords made an important distinction between misrepresentation and deceit by saying that in an action of deceit, it is not enough to establish misrepresentation alone, that something more must be proved to cast liability on the defendant. Secondly, the court said that in order to sustain an action of deceit, there must be proof of fraud, the court stated that fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false. Lastly, the court emphasized that if fraud is proved, the motive of the person guilty is immaterial. It does not matter that there was no intent to cheat or injure the person to whom the statement was made.

Some of the principles in so far as common law is concerned are that 'fraud' must be actual[62.] Actual fraud has been judicially defined as 'dishonesty'- a willful and conscious disregard of the rights of other persons[63] or in the words of Knox J[64], as 'something in the nature of personal dishonesty or moral turpitude. However, the courts in the United States have repeatedly stated that the fraud provisions in the SEC Act are not limited to circumstances that would give rise to a common law action of deceit[65]. In the case of **Charles Hughes & co. v SEC**[66], the court was emphatic in stating that 'we need not stop to decide, however, how far common law fraud was shown. For the business of selling investment securities has been considered one peculiarly in need of regulation for the protection of investors'.

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[60] *Ibid*
[61] (1889)14 AC 337,HL.
[62] *Assets Co Ltd v Mere Roihi* (1905) AC 176
[63] Per Salmond J, in Waimiha*Sawmilling Co Ltd v Waione Timber Co Ltd*(1926) AC 101,PC
[64] *Stuart v Kingston* (1923) 32 CLR309at329
[65] Geoffrey, S (2010) *Capital Market Laws of Malaysia,* Lexis Nexis,Dolphin Press SdnBhd
[66] (1943) 139F 2d 434

What is clear from the analysis of the US cases on this point is that courts have refused to define fraud with any specificity; whether under the Common law deceit or Securities law[67]. In Nigeria, the Court of Appeal recently in the case of **Solomon &ors.v Monday&ors**[68] defined fraud as:

> Fraud implies a willful act on the part of anyone, where by another is sought to be deprived by illegal or in equitable means, of what he is entitled to. Fraud for the purpose of civil law includes acts, omissions and concealments by which an undue and unconscientious advantage is taken of another.

Also in the case of **Otukpo v John**[69], the court defined fraud as:

> An intentional perversion of truth for the purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. It is something dishonestly and morally wrong…

A cursory examination of the various anti-corruption and financial crime laws in Nigeria contain no definition of the word 'fraud' or 'fraudulent' except for the penal code which attempts a definition. This is in fact a serious lacuna which must be corrected.

The Penal Code[70] defines the term 'fraudulent' as

> a person is said to do a thing fraudulently or with intention to defraud who does that thing with intent to deceive and by means of such deceit to obtain some advantage for himself or another or to cause loss to any other persons.

Commenting on this provision, Richardson[71] pointed out the following:

> a) Wherever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime at least two elements are essential.
> i. Deceit or intention to deceive or in some cases mere secrecy or concealment; and
> ii. Actual injury or a risk of possible injury by means of the deceit.

[67] Geoffrey, *op cit.* p.247
[68] (2014)LPELR-22811CA. Cited In Okojie, E (2015) "Corporate Fraud In Nigeria And The Dialectics OfManagement Of Evidential Burden In Litigation*",Journal of Policy And Globalization*,vol.38, p.105, retrieved from www.iiste.org
[69] (2012) LPELR-20619(SC) Cited in Okojie, *ibid*
[70] Section 17, *Penal Code Law,* Cap.P3, L.F.N.,2004.
[71]Richardson, S.S (1987) *Notes on the Penal Code Law;* Fourth Edition

b) A good test is found in the question; did the author of the deceit derive any advantage from it which he could not have had if the truth has been known? If so, there was in all probability an equivalent loss to someone else and, if so fraud.

It is submitted that fraud is key in most financial crimes, it is therefore, important that the lacuna in the various laws targeted at combating crime be amended by including a definition of the key concept fraud. This is to ensure that no crime goes unpunished and that criminals do not rely on the inadequacy of the laws to claim the defense that their action does not constitute an offence under the law, just because of the failure to define the crime or its scope.

2.5 Investment Schemes

To invest is "to make an outlay of money for profit" or "to buy property, shares in a company etc. in the hope of making profit[72]. Investment is the act of putting money to use either by purchase or expenditure into something which offers profitable returns in the form of interest or income[73]. In **Tate industries Plc.v. DevcomM.B.Ltd**[74] 'invest' was defined to mean: to expend money with the expectation of achieving a profit or material result by putting it into financial schemes, shares or property or by using it to develop a commercial venture. It is to lay out money or capital in an enterprise with the expectation of profit".

While an investment has been defined as:

> A contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profit solely from the effort of the promoter or a third party. It being immaterial whether the shares in the enterprise are evidenced by formal certificate or a by nominal interest in the physical assets employed in the enterprise"[75]

[72] Garner, op cit. p. 1311
[73] Webster's Encyclopedia (1994) Unabridged Dictionary of English Language p. 523
[74] (2004) 12 NWLR, (pt.901), p.182,para D-F
[75] *SEC v CM Joiner Leasing Corporation* (1934) 320, US 344

The Investment and Securities Act does not define investment in any of its sections, it only attempted a definition of collective investment scheme as;[76]

A scheme in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which-

> (a) Two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through share, units or any other form of participatory interest;
> (b) The investors share risk and the benefit of investment in proportion to their participatory interest in a portfolio of scheme or on any other basis determined in the deed, but not a collective investment scheme authorized by any other Act.

On the other hand, a scheme is "a plan or system for doing or organizing something'[77]. In effect an investment scheme could be seen as a plan vehicle, or arrangement in which investors pool their resources or money in order to generate a return. Investment schemes in the capital market are in the nature of securities or instruments.

Securities have been defined from two approaches;[78] the very broad approach and the narrow approach. The Securities Act of 1933 of the USA is axiomatic of the first approach[79]. According to section 2 of the Act, security is defined to mean;

> any note, stock, treasury stock, bond, debenture evidence of indebtedness, certificate of interest, or participation in any profit sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferable shoe, investment contract, voting trust certificate, certificate of deposit for security fractional undivided interest in oil, gas or other mineral rights, any put, call, straddle, option or privilege on any security, certificate of deposit or group or index of securities (including any interest therein or based on the value thereof or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign

[76]Section 315,*Investments and Securities Act* 2007
[77] Hornby *op cit.* p. 1319
[78]Agom, A.R (2008) "*The Legal and Institutional Framework for the Regulation of the Nigerian CapitalMarket*", (unpublished) Ph.D. Thesis, Ahmadu Bello University pp. 33-71
[79]*Ibid* p.33

> currency or in general any interest or instrument commonly known as "security" or any certificate of interest or participation in, temporary or interim certificate for receipt for, guarantee of or warrant or right to subscribe to or purchase any of the foregoing.

The wide definition can very well be offered for financial instruments generally beyond those limited to the capital market. Instruments used in the capital market are of different legal nature and consequences from those in the other segments of the financial markets. To the extent that this definition is offered for securities beyond the capital market, it is too wide[80].

The Investments and Securities Act[81] defines the subject from a narrow perspective; specifically, section 315 ISA defines securities to mean:

> a) Debentures, stocks 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 option in respect of any such debenture, 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 securities, listed in (a)-(d) above which may be transferred by means of any electronic mode, approved by the commission and which may be deposited, kept or stored with any licensed depository or custodian company as provided under this Act.

This is an improvement over the definition in the ISA 1999 which contains glaring meaningless reference to non-capital market instruments and excludes collective investment scheme and the all-embracing investment contract as stated by Agom in his work[82].

It is submitted that the definition of securities by the U.S is preferable to that in the ISA because it is all encompassing. What constitutes securities can be from down earth to high heavens and therefore the law should effectively contemplate whatever constitutes securities. This will help in knowing what to regulate and to make sure that nothing escapes

[80] Ibid
[81] ISA 2007
[82] Agom (2008) op cit. p.36

the eye of regulations. For presently it appears that the ingenuity of the market operators has exceeded that of the law makers.

Understanding securities as the main scheme of investment in the capital market in not only basic it determines the scope of application of securities laws and exposes the underlying purpose and objectives of securities legislation. A survey of judicial decisions reveals that it is not always clear cut what securities are. Analyses of decided cases in different jurisdictions make this point. In the USA, **United Housing Foundation v. Forman**[83]a cooperative housing corporation required residents of its housing units to buy shares in the corporation so as to secure housing. No matter the number of shares held, the residents had one vote each in the co-operative. The corporation treated the shares as refundable deposits so that the shares were non-negotiable. Whenever a member left the co-operative, he was obliged to sell his shares to the corporation at the original prices. The members were not entitled to dividends contingent on profits, shares were non-negotiable, and the shares could not appreciate in value. On this premise, the court held that the co-operative stocks were not securities.

In the English case of **Re Smithers, Watts v. Smithers**[84] faced with the construction of a will, the court held that stock and shares in a company could not pass under the gift of "my securities" but government bonds and stocks being secured on the revenue of the Government concerned could. Also, in **IRC v. Parker,**[85] by a majority of two to one, the chancery court held that the payment off of a debenture was not a transaction in securities.

Lately, the notion of investment contract or profit sharing agreement appears to underlie every serious effort at discerning security. The emphasis now in the USA is on defining investment contract rather than security. The courts are drawn to the catch-all phrase of "investment contract" to enable them approach a transaction in line with the remedial

[83] (1979) US 837
[84] (1935) 1 Ch. 1015
[85] (1965) Ch. 1032

principles of the US Act. The courts look out for those characteristics which relate to the purpose of securities regulation.

As internationalization of the Nigerian capital market compels further liberalization of the capital market, section 315 ISA 2007 will be tasked from time to time. This provision does not contemplate investment contract or even profit sharing agreements. In the meantime the Nigerian courts must flexibly expound the law to cater for new securities that may be devised beyond the contemplation of this section[86].

Securities can be in the form of debt or ownership securities[87]. Ownership security constitutes its holders a member of the enterprise. A classic example of ownership security is a 'share'. A share[88] "is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second. But also consisting of series of mutual covenants entered into by all the shareholders inter se".

Debt securities create a legal relationship of debtor and creditor. A debt security holder is in law not a member of the issuer having rights in it but a creditor having rights against it. Debt securities may take the form of bond or debentures. While a bond is an interest bearing certificate of debt, usually issued in series by which the issuer (a government or corporation) obligates itself to pay the principal amount and interest at a specified time[89]. Bonds are long-term contracts under which government agrees to make payment or interest on them[90]. The term "debenture' does not lend itself to precise definition: However, statutes and case laws have given some pointers to what in law and in commerce would for most purposes be regarded as essential features of a debentures; namely that debentures are a type

[86] ibid
[87]Per farwell, J. *In Borland Trustee v. Steel Bros & Co. Ltd* (1901)1 Ch. 279, p. 288; see also *R.O Yusufv. Messis J. Adewuyi* (1993)2 SEC Law Report, p. 84
[88]Olukole, R.A (2002) *The Capital Market in Nigeria*, CIBN Press Ltd, Lagos, p..34
[89] ibid p.4
[90] Apinega, S.A (2006) "Legal and Economic Issues in Stock Selection", *Ahmadu Bello University LawJourna*l, vol.24-25, p.107.

of transferable security whereby a company can raise finance in the form of loan capital instead of share capital[91].

Major challenges in clarifying these concepts lie in their exact scope and meaning. Most of these terms do not have a specific meaning. This in itself is a problem for regulations made to govern such areas whose scopes are unascertainable.

2.6 Capital Market

Any enduring attempt at defining capital market must beam a light on the two constituting words "capital" and "market". Etymologically, 'capital' appears to be derived from the Latin word "'*Caput'* meaning 'head' or 'principal'[92]. In Medieval Latin, there were constant references to *captialis pars debiti*, that is, the principal sum as distinct from interest.[93]

Originally, the term seems to be confined to loans of money, later it took in other assets and acquired a wider meaning than loan. The full phrase is said to be capital stock[94].In the ancient Guild system[95] there was little need for capital stock. The principal assets of the business were the skills and connection of the tradesman. The only capital he needed was to build or rent a house, purchase tools or stock and set himself up. These funds could usually be acquired by savings as a journeyman working for another established trader. By the 16th century, with the expansion of money supply, and a growth of distinctly capitalist class, the concept became associated with sum of money[96].

The term 'capital' was used in the 16th and 17th centuries to mean either the stock of money used for the purchase of physical commodities to be sold for profit in trade and

[91] S.166 *Companies and Allied Matters Act*, Cap. C20 L.F.N.2004
[92] Farrar, J.H et al(1988) Farrar's Company law, Butterworths, London and Edinburgh, 2nd ed.
[93] Ibid.
[94] i*bid*
[95]Coke, C.A (1950) Corporation, Trust and Company p. 39
[96]*ibid*

commerce or the stock of physical commodities themselves[97]. Capital was thus given both financial and physical meanings. Adam Smith in 1776, in his work "wealth of Nations" used capital in this sense. By the latter part of the 19th Century, capital was viewed as one of the factors of production.

The concept of capital is of fundamental importance not only in law and accounting but even more in economics. In each of these fields, it is used to describe different concept at different times. According to Farrar's Company Law,

> There is probably no concept in economics which is quite so ambiguous and confusing as capital. According to the contemn the word may mean wealth, a factor of production, the value of those means of production, net worth of the business enterprise, the present value of a future sequence of receipts, money, the money value of assets and possibly other things as well…"[98]

Here capital is thought of in physical terms, in value terms and in money terms. This imprecision has been carried over into law. According to Latham, C.J in the Australian case of **Interest Property Ltd v. Federal Commissioner of Taxation**[99] "It is impossible to say that 'capital' has a single technical meaning which prima-facie should be attributed to the word in any statutory provisions".[100]

There is no statutory definition of the word in company law, except in relation to some other items. The Companies and Allied Matters Act defined[101] 'authorized Minimum share capital'; 'circulating and 'fixed capital' without sparing a thought for the pivotal word 'capital'. Notwithstanding the difficulty of precise definition in modern corporate law, the concept is used casually to describe the fund subscribed or provided by members or creditors and the assets such funds are invested in.

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[97] *The Encyclopedia Americana* (1988) International edition, Grolier incorporated USA, vol. 5 p. 599
[98] Farrar J.H. et al.*op cit.* p. 133
[99] (1943) 67 CLR 508
[100] Ibid, p.515
[101] Section 567,Companies and Allied Matters Act, op cit

Capital has become the life line and credit worthiness of a company. It fixes the minimum value of the assets which must be raised initially and as far as possible retained in the business. The capital of the company is the creditor's guarantee fund. Consequently, company law by the capital maintenance doctrine aggressively seeks to protect corporate investors by ensuring that a company's capital is only raised and employed to generate wealth for corporate stakeholders. Ensuring that this doctrine is maintained is a major task for securities regulation. Lack of precision in determining capital has not made this task any easy[102].

'Market' in the most literal sense is a place where things are bought and sold. In modern industrial system it includes the whole geographical area in which sellers compete with each other for customers. In economics, a market is a point at which the forces of supply and demand converge to establish a process for an article of trade markets often tend to occur at set time and places affording buyers broad choices and bets prices and to seller the benefit of reaching many buyers thus saving money and time.

Modern market can be historically traced to rural fairs[103]. The twin impact of international trade and the forces of globalization have transformed the traditional concept of market to an organizing principle of society. A market system in an ideal setting is one in which economic activities are left to freely respond to the opportunities and discouragement of the market place. The main instrument is the law of demand and supply.

According to the Capital market Glossary[104] capital market as "Financial Markets trades in medium to long term financial instruments (stocks and bonds) with maturity in excess of one year". This definition appears oblivious of the fact that instruments in the capital market have grown beyond the traditional instruments of stocks and bonds. The

[102] Agom(2008) 0p cit
[103]The New Encyclopedia Britannica (1988) Encyclopedia Britannica Inc.15th ed. vol. 23 p. 557
[104]Securities and Exchange Commission; Capital Market Glossary, Capital market Education Series p.10

dynamic nature of the capital market has made an enduring definition of capital market very elusive. Ultimately, regulators approach to discerning capital market is a practical one and can be likened to that of Stewart, J.[105] using the "I know it when I see it" standard.

The protection of investors, maintenance of market sanity and guarding against systematic risk pliably inform stakeholders approach to the concept of capital market. Broadly, the capital market may be a securities stock market or commodities market[106]. Functionally, the securities market may be a primary market or secondary market.

The primary market is the original point of call in the capital market. It is regarded as primary market because it involves the creation and marketing of completely new securities by the issuer; a particular security is offered at the same price and time to the public; except on rare occasions where there are more than one call, the offer is made once; the proceeds of the offer go to the issuer; this market is not identifiable with any particular location; and efforts to dispose of purchases in this market facilities activities in the secondary market.

Of the key financial institutions in the capital market, the issuing house is the hub of the primary market. Issuing Houses[107] are firms of professionals and specialists registered by the Securities and Exchange Commission as capital market operators. The business of issuing house is mostly dominated by investment banks involved in capital restructuring of companies for good financial leverage. The most crucial function[108] of the issuing house is the packaging of securities. Securities to be offered to the public must be properly structured to meet the essence of the issue. Packaging of securities involves various stages. Companies can only make offers of their securities to raise funds in the primary market and no other place.

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[105] In defining Pornography in *Jacobellis v. Ohio* (1964) 378 U.S 184, 197
[106] Ekiran, *op cit*. p.20
[107] *Ibid* p. 69
[108] *Ibid* p. 71

The prospectus is a constant feature of the primary market and is the main instrument of regulation of public issue[109]. It must accompany any invitation to the public to subscribe or purchase securities of any company[110]. A prospectus means notice, circular, advertisement or other invitation, offering to the public for subscription or purchase of any share or debentures of a company. Furthermore, any document which offers securities for consideration other than cash is a prospectus.

The general aim of a prospectus is to ensure that the company, at least gives the public the essential minimum information about its position. It also ensures that whenever a company offers its securities to the public it fairly and fully discloses the relevant facts to enable the investing public assess the risk of their investment.

According to Section 67 ISA, it shall not be lawful to issue any form of application for securities in a public company unless the form is issued with a prospectus. The prospectus shall state the matters specified in part 1 of the third schedule and set out the report specified in part II, third schedule to the Act.

The secondary market is the second or latter section of the securities market. It is a consequential market where securities as evidenced by share certificates are exchanged for funds[111]. In this market, holders of instrument from the primary market sell their securities to other holders or to completely new investors. It is regarded as a secondary market because it cannot exist without the primary market. Here, different investors sell their holdings of the same or different securities at different times and possibly at different prices; the proceeds of sale go to the holders of the instrument and not the company; the instruments traded in this market are not new; and the market is largely identifiable with a particular site popularly called trading floor of the stock exchange.

[109]Osaze,op cit. p.234
[110] S.567 CAMA
[111]Ako*op.cit* p. 16

There are two broad classifications of the secondary market,[112] the centralized auction market and the dealers market. The stock exchange is a centralized auction market with regulations and procedures for the buying and selling of securities[113]. It is called a stock exchange not because an investor can exchange one security for another, but because investors can exchange securities for cash or vice-versa.

The stock exchange regulates its own market as well as its members. For the purpose of accessing the market, the stock exchange has listing requirement which a company seeking quotation must meet. The dealers market[114] is not centralized. Unlisted securities account for the overwhelming majority of securities traded in the dealer market. These are securities that are variously traded largely at the counters/screens of issuing houses or by brokers appointed by the issuer. The secondary market developed over the period from simple telephone communication to sophisticated linkages through complex electronic communication machines linking up investors and finance houses. Prices in the market are determined through negotiation between buyer and seller.

The gateway into the secondary market is the stock broker. This is the main intermediary in the secondary market. Stockbrokers are capital market operators licensed by the stock exchange and registered by the apex regulatory agency of the capital market.[115] They buy and sell securities quoted on the exchange on behalf of their client as agents and at times on their own account as dealers. An important role of a stockbroker is the intermediation between the seller and buyer of securities and facilitating the liquidity process of the market.

On the whole, the stockbroker is expected to display a high degree of professionalism and probity in his operation so as to retain the confidence of the investors in the capital

[112]Ekiran, op cit. p.24
[113]*ibid,* p.25
[114]*Ibid*, p. 34
[115] *Ibid*, p.74

market and indeed in the financial industry as a whole. Fraudulent investment schemes may be perpetrated in the primary and secondary market. Very often the schemes hurt investors and the economy at large. This work thus seeks to examine various fraudulent investment schemes in the Nigerian capital market and the nation's legal regime for combating them.

CHAPTER THREE

FRAUDULENT INVESTMENT SCHEMES.

3.1 Introduction

Fraudulent investment schemes refer to investment vehicles which in themselves are phony. Their originators usually commence with the intention to defraud investors. They know such schemes would normally fail because there is usually no viable legal commercial venture to put the funds pooled from investors. Fraudulent investment schemes affect millions of lives and shake the socio-economic dynamics of the state[116]. The Central Bank of Nigeria in 2010 stated that a total of 560,882 claims amounting to N106.9 billion naira have been submitted by members of the public against 440 illegal companies/wonder banks[117]. Out of these, 36 illegal fund managers accounted for N104 billion or 97.3% of the total collated claims[118]. Fraudulent investment schemes have devastating effects on the economy of any nation. It not only causes illiquidity of the market but also affects the virility and continuation of the financial markets by hindering investors from investing in the markets. Very prominent fraudulent investment schemes in Nigeria are the arrangements called "wonder banks". Their activities were made prominent by the Umanah Umanah Scheme in 1991[119] championed by one Mr. Umanah E. Umanah.Today, schemes considerably more sophisticated or complex liter the various economies of the world. Some of the various notorious schemes are considered in this chapter.

3.2 Ponzi Scheme.

[116]Bhuin, P.K.(2015) "Impact Of Ponzi Schemes On Economy: A Study Of West Bengal", *Global Journal For Research Analysis*,vol.4 p.1, Retrieved from, the globaljournals.com/…/file.php?...
[117] CBN: Depositors claim #107 billion from wonder banks, accessed from thisdaylive.com/…/cbn…/843971 on 12/10/2015
[118] ibid
[119] Agom A.R (2011) *"*The Ghost of Charles Ponzi; Albatross, for Investment Regulation In Nigeria*",BenueState University journal of Private and Public Law*, vol. 1, No.1, P. 55

The first recorded case of a fraudulent investment scheme in the world that engaged regulators attention can be traced as far back as the 1900s to the acts of one Charles Ponzi, from whom the name Ponzi scheme originated[120]. Charles Ponzi was an Italian immigrant to the United States of America in the late 1920s. Working under the aegis of his company, Security Exchange Company, Ponzi issued investment notes to subscribers with a promise of one hundred percent return on investment in ninety days or fifty percent interest in forty-five days. Profits were advertised to come from exchanging international postal reply coupons. At the initial stage of the scheme, Ponzi was able to honour his obligations with ease. This he did by paying earlier investors with monies brought in by new ones. Since he did not default in his obligations, this gave some credibility to the scheme and more people were attracted to it. Within eight months, about forty thousand people including law enforcement agent and the *crème de la crème (best of the best)* of the American society invested about fifteen million dollars and were note holders in the Ponzi scheme.

The bubble burst when the tabloid, the Boston Post, began to cast doubt about the source of return for the scheme. The exposure expectedly eroded investors' confidence and participation dwindled. Charles Ponzi's liabilities rose fast as he could no longer honour his obligations to note holders. Within a short time, in the absence of any legitimate earning from money he had creamed off unsuspecting investors, his liabilities went far in excess of his assets. Arrested, he was tried and jailed for his scam and died in 1949.[121] In truth, Charles Ponzi was not the first[122] to invent this investment charade, but his operation took in so much money at the time that it acquired global notoriety.

[120] Ibid p. 51
[121] Agom Ibid
[122] In 1899, William "520 Percent", William operated a syndicate in Brooklyn, New York. William which exploited some of the main themes of Ponzi Schemes. He promised investors ten percent weekly interest and more for customers who re-invested their interest. He defrauded his customers to the tune of one million dollars before he was eventually exposed and sentenced to jail for ten years between 1970 and 1984, in Portugal a woman known as Dona Branca maintained a similar scheme among others.

A Ponzi scheme is a dishonest get-rich-quick investment devise. The definition of a Ponzi scheme given by Investopedia[123] is "a fraudulent investing scam promising high rates of return with little risk to investors. The Ponzi scheme generates returns for older investors by acquiring new investors". This scam will usually pay promised returns to early investors, as long as new investing occurs.

The motivation, behind every Ponzi scheme is the desire to exploit lapses in judgment arising from investor's naiveté and greed[124]. Leveraging in on the innate human quest to believe in something, the Ponzi scammer moves from place to place peddling his elixir for instant fortune and alchemist shortcuts to wealth. In a short while, he assembles a group. In group, the promoter finds it easier to sway his victims as the people are more emotional and less able to reason or keep enough distance to be skeptical. With a contagion effect, passion and enthusiasm for the scheme sweep through the group. The scam promoter holds the group spellbound in words and action; mould them into a new cult of believers in the scheme. In this state, the investors themselves propagate the scheme[125]. At the early stage getting new participants does not pose a problem as potential investors are encouraged to participate by those who have benefited from the scheme. Part of the fund provided by new entrant is employed to service interest and principal for existing participants. The other part is then consumed as running cost of the scheme. The scheme can then be kept going as long as new funds in sufficient quantity keep flowing in.

Ponzi schemes have certain attributes. They are never registered with the necessary regulatory authorities. In their nature they constitute serious threat to the integrity of the financial market[126] because they are bound to fail. This is because there is little or no underlying earning from the moneys received by the promoters. The collapse of the scheme

[123] Agom *op cit.*p.55
[124]*ibid* p. 52
[125] I*bid*
[126]*ibid* p. 53

may happen in several ways. At the summit of the scheme, the promoters may vanish taking all the investment with them. The scheme may collapse of its own weight, as investment slows and the promoters start having problem paying out the promised return very soon the word is out and there is a run on the scheme[127].

The regulatory authority may interrupt the scheme because the promoters are unregistered or are selling unregistered securities. The Ponzi scheme in so many variants has spread to so many countries in the world leaving devastating consequences on its trail and throwing up challenges for regulators. Since the innovation of money, different techniques have been developed and carried out to defraud people of their assets. These methods have evolved together with advances in technology, and some have proved to be more efficient than others.

One of the largest of these schemes ever carried out occurred in the United States and was uncovered in 2008[128]. The man behind it managed to keep the scheme running for over 15 years in one of the most monitored economic systems in the world. The man in charge of the operation, Bernard L. Madoff, got arrested for his scheme and pled guilty to the embezzling of billions of dollars. It struck many as unimaginable how such a fraud could occur in an environment so carefully controlled by regulations and supervised by different institutions. In 2010, Ponzi schemes shook the West African nation of Benin Republic to its roots[129]. Benin is a small country with a population size of about 8.7 million people, with it citizen's annual income hovering around seven hundred and fifty dollars. More than 130,000 people entrusted their savings to a company called Investment Consultancy and Computing services (ICC). The company was registered as a non-profit making computer services company but it illegally solicited deposits from the public like a banking institution. To suck

[127] I*bid*
[128]Known as the Madoff scam.Laughner, B. (2010) "Robbing Peter To Pay Paul: Ponzi Schemes Throughout History" Retrieved from www.moaf.org/...history/ponzi%20artic...
[129]*Benin Ponzi scheme*, Retrieved from: http://news.yahoo.com/s/ap/20/00901/benin-ponzi-scheme2-;accessed on 14/06/2015

in unwary investors, the managers promised annual interest rate of 200% investments placed with the company. ICC was forced to close down on July, 2010, when it could no longer meet its obligation to its customers.

In Nigeria, Ponzi scheme gained prominence following the saga of Resource Managers Nigeria Ltd in Port Harcourt in 1991[130]. One Mr. Umanah E. Umanah, using this company, offered investment and money management services to members of the public. The scheme offered subscribers as much as sixty percent interest within thirty days. This was in addition to other offers in the form of assistance to obtain goods such as electronics and cars at ridiculously low prices. This outfit attracted so many investors until the clampdown by the Securities and Exchange Commission. Lately, there has been a resurgence of Ponzi schemes across the length and breadth of Nigeria. Prominent in this group is the Women in Oil[131]. The Women in Oil was a bogus investment scheme run by one Charles Dukwe founded in 2012 which vaunts itself as a government endorsed women empowerment program.

The founder claimed its aim was to help the Nigerian women profit from the country's plenteous petroleum resources. According to its website[132], the initiative is an attempt to take the 35% quota policy of the President Goodluck Jonathan administration beyond political appointment. It was discovered by the SEC that all the Women in Oil was really doing was collecting money from poor Nigerian women especially those in the rural areas, to enrich its founder. Posing as an initiative operated in collaboration with the Federal Republic of Nigeria, its representatives collected between N 8,700 and N12, 000 from rural women with an assurance that from August 2014 each will receive a monthly income of N30, 000. Its terms and conditions, as listed on its website, promised a minimum income distribution of N10, 000 per month, in worst case scenarios to members.

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[130] Agom *op cit.* p. 55

[131] Ighomwenghian, K. (2014) *SEC Draws Battle line with Wonder Banks*, Retrieved from: dailyindependent.com/2014/sec-draws-ballte-line-with-wonder-banks, accessed on 19/6/2015.

[132] http://www.dukwe.com/wio

It was estimated that about 155, 000 Nigerian women were already registered. On Thursday, 25th April 2013, the Nigerian government through the presidential spokesperson, Mr. Reuben Abati, released a press statement distancing itself from Women in Oil. The SEC finally sealed off the Women in Oil premises in Port Harcourt and Sokoto offices. No follow up action by SEC has been reported.

3.3 Pyramid Scheme

Apyramid scheme is a type of investment scam that fraudsters often pitch as a legitimatebusiness opportunity in form of Multi-Level Marketing (MLM) programs[133]. Multi-level marketing programmes are promoted through internet advertising, company websites, social media, presentations, group meetings and conferences. In a multi-level marketing programme, you typically get paid for products or services that you and the distributors in your 'downline' (i.e. participants' profit you recruit and their recruits) sell to others. However, some MLM programmes are actually pyramid schemes. A type of fraud in which participants profit almost exclusively through recruiting other people to participate in the programme.

Pyramid scheme masquerading as MLM programmes often violate the Securities laws, such as laws prohibiting fraud and requiring the registration of securities offerings and broker-dealers. In a pyramid scheme money is used to pay commissions (that may take any form, including the form of securities) to earlier participants as it is done in classic Ponzi schemes, where money from new investors are used to pay fake 'profit' to earlier investors[134]. The Securities and Exchange Commission (SEC) in different parts of the world is faced with the challenge of these fraudulent schemes. In the case of **US SEC v. GCB 168**[135], the SEC field a charge to stop an alleged pyramid scheme perpetrated under the façade of an MLM

[133] US SEC (2013) Pyramid Schemes Posing As Multi-Level Marketing Programs, Accessed from http://www.sec.giov/investor/alerts on 7/7/2015, p.1
[134] Ibid
[135] Ibid

programme for online children's courses. The promoters of the scheme allegedly solicited investors worldwide, including targeting members of Asian-American communities, in New York and California. The SEC alleged that these promoters misrepresented CKB as a legitimate and profitable MLM company that sells web-based children educational courses when in fact CKB has little or no retail consumer sales and no apparent source of revenue other than money received from new investors.

Also, in the US case of **SEC v. Rex Venture Group**[136] the SEC shut down a $600 million fraud that duped approximately one million internet customers through a complex investment scam involving a Ponzi scheme promoted as a daily profit share pool and a pyramid scheme pitched as an MLM program for Zeckrewards.com, the self-described affiliate advertising division for zeekler.com a penny auction website. The SEC alleged that, for the pyramid scheme component of the scam, the defendants promised bonuses and commissions to customers for enrolling in a monthly subscription plan and recruiting others to join the plan. However, according to the SEC's complaint, new customer's funds were pooled and used to pay recruiting bonuses to existing customers because there was no substantial legitimate revenue from product sales.

Therefore, when considering multi-level marketing programmes or high level yield investment options, investors must look out for these hallmarks in order to determine if the investment venture is legitimate or not. Whether there are genuine products or service[137]. MLM programs involve selling a genuine product or service to people who are not in the program. Investors must exercise caution if there is no underlying product or service being sold to others or if what is being sold is speculative or appears in appropriately priced or suspicious. Also, investors must be leery of promises of high return in a short time period[138].

[136] Ibid
[137] Ibid, p.2
[138] Ibid

High returns and fast cash in an MLM programme may be indications that commissions are being paid out of money from new recruits rather than revenue generated by product sales.

Further, promises of easy money or passive income[139] being offered as compensation in exchange for little work such as making payments, recruiting others and placing advertisements, absence of demonstrated revenue from retail sales[140]are indicators of a pyramid scheme. In addition where a buy-in is required[141] it is an indication of fraud. The goal of an MLM program is to sell products. Investors must be careful if required to pay a buy-in to participate in the program, even if the buy-in is a nominal one-time or recurring fee. Lastly, where emphasis is on recruiting,[142] investors must be skeptical of a scheme where they would receive more compensation for recruiting others than for products sales.

3.4 Affinity Scheme

Affinity fraud refers to investment scams that prey upon members of identifiable groups, such as religious or ethnic communities, the elderly or professional groups[143]. The fraudsters who promote affinity scams usually pretend to be members of the group. They often enlist respected community or religious leaders from within the group to spread the word about the scheme, by convincing those people that the investment is legitimate and worthwhile. Many times, those leaders become unwitting victims of the fraudster's ruse[144].

These scams exploit the trust and friendship that exists in groups of people who have something in common. Because of the tight-knit structure of many groups, it can be difficult for regulators or law enforcement officials to detect affinity scam[145]. Victims often fail to notify the authorities or pursue their legal remedies; instead they try to work things out within

[139] Ibid, p.3
[140] Ibid
[141] Ibid
[142] Ibid
[143]United States Office of Investor Education and Advocacy, "*Affinity Fraud, How to Avoid InvestmentScams That Target Groups"* /www.investor.gov. accessed on 5/7/2015
[144] Ibid
[145]Ibid

the group. This is particularly true where the fraudsters have used respected community or religious leaders to convince others to join the investment[146].

Many affinity scams involve 'Ponzi' or pyramid scheme, where new investor money is used to make payments to earlier investors to give the illusion that the investment is successful. This ploy is used to trick new investors to invest in the scheme and to deceive existing investors into believing their investments are safe and secure. In reality, the fraudster almost always steals investors' money for personal use. Both types of schemes depend on an unending supply of new investors. But when the supply of investors dry up the whole scheme collapses and investors discover that most or all of their money is gone.

Affinity frauds can target any group of people who take pride in their shared characteristics, whether they are religious, ethnic or professional. Cases of affinity fraud abound. In the US[147] a Ponzi scheme targeted African-Americans and Christians. The defendants perpetrated an affinity fraud, raising at least $16.5million from mostly African-Americans and Christians by falsely representing they would receive returns through investments in, among other things, real estate, small businesses and 'markets of the world'. Also, in the US[148], the SEC charged various real estate investment companies and their principals for defrauding senior citizens and retirees of $15 million by conducting transactions in which they issued promissory notes in real estate investments, they owned and operated. To make the sales, the defendants made gross misrepresentations about the financial condition of theirs companies.

In Jos Nigeria, the case of the Fadama scheme was prominent[149]. The Covenant Fadama Multipurpose Cooperative Society was founded by Bishop Jonas Katung of

[146] Ibid
[147] Ibid
[148] Ibid
[149] In God's Name Plc.: Investors Lose Billions To Bishop In Jos, retrieved from, thestreetjournal.org/on/in-gods-name-plc-…

Maranatha Covenant Churches in 2006. According to the founder, the main objective of the society was to inculcate the culture of saving into members and as well create wealth through the various businesses the society was engaged in. Due to laudable successes, lots of people joined the scheme; it lived up to its expectation of paying monthly dividend of 10% of members' contribution. After five years the scheme stopped paying its members and nobody could explain what went wrong. Since February 2012 no dividend has been paid members and no news about the founder heard.

Most victims of fraudulent schemes often neglect or refuse to consider some sound basic fundamental rules of investment. Some of these rules are briefly restated. Investors must do their homework[150]: intending investors must check out everything, no matter how trustworthy the person seems who brings the investment opportunity to their attention. Never make an investment based solely on the recommendation of a member of an organization or religious or ethnic group to which you belong. Be aware that the person telling you about the investment may have been fooled into believing that the investment is legitimate when it is not. Investors must avoid high-return "risk free" investments[151]. If an investment seems too good to be true, then it probably is. Investors should be extremely cautious of any investment that is said to have no risks; very few investments are risk free. The greater the potential return from an investment, the greater the risk of losing money. Promises of fast and high profits with little or no risk are classic warning signs of fraud.

In addition, investors must take time in making decisions concerning any investment opportunity. Investors must not allow themselves to be pressured or rushed into buying an investment before they have the chance to think about or investigate the "opportunity". They must be especially skeptical of investments that are pitched as "once-in-a-lifetime" opportunities particularly when the promoter bases the recommendation on "inside" or

[150] Ibid
[151] Ibid

confidential information. Lastly, investors must be careful of investment opportunities online[152]. Fraudsters are increasingly using the internet to target particular groups through e-mail spasm. If you receive an unsolicited e-mail from someone you don't know, containing a "can't miss" investment, your best move is to pass up the "opportunity".

3.5 Pump- and- dump Scheme.

Pump- and – dump schemes or market manipulation are based on the manipulation of lower volume stocks purchased on over the counter market. The basic goal of market manipulation fraud is to artificially inflate (pump) the price of penny stocks so that the conspirators can sell (dump) their shares at a large profit[153]. The "pump" involves recruiting unwitting investors through false or deceptive sales practices, public information or corporate filings[154]. Many of these schemes use "boiler room" methods where brokers, who are bribed by the conspirators, use high pressure sales tactics to increase the number of investors and therefore raise the price of the stock[155]. Once the targeted shares reach a certain point, the perpetrators "dump" their shares at a huge profit and leave innocent investors to foot the bill[156].

One recent trend seen in market manipulation cases involves, "computer infusion"[157]. Computer infusion for the purpose of market manipulation often includes a criminal hacking into victim's personal online brokerage accounts and using them to purchase shares of a penny stock to inflate its price. As in normal 'pump and dump' schemes, once the price of the stock reaches a certain point, the perpetrators dump their own shares and walk away with a large profit.

Pump and dump schemes often occur in the internet where it is common to see messages posted that urge readers to buy a stock quickly or to sell before the price goes

[152] Ibid
[153] "Pump and dump: Tips for Avoiding stock Scams on the Internet",Retrieved from www.sec.gov/investor/pubs/puimp.htm pump and dump.com: Accessed 7/7/2015 p.1
[154] Ibid
[155] Ibid, p.2
[156] Ibid
[157] How does a Pump and Dump Scam Work? Retrieved fromwww.investopedia.com on 7/7/2015

down, or a telemarketer calls using the same sort pitch. Often the promoters claim to have "inside" information about an impending development or try to use an "infallible" combination of economic and stock market data to pitch stocks. In reality, they may be company insiders or paid promoters who stand to gain by selling their shares after the stock price is "pumped" up by the buying frenzy they create. Once these fraudsters "dump" their shares and stop hyping the stock, the price typically falls and investors lose their money[158]. Penny stock companies often have low liquidity. Investors may encounter difficulty selling their position after the buying pressure has abated, and the manipulators have fled.

3.6 Boiler Room Fraud

Boiler room fraud usually involves bogus stockbrokers, usually based overseas, calling people to pressure them into buying shares that promise high returns, but are, in reality either worthless or non- existent[159]. Individuals are usually contacted out of the blues by a professional- sounding broker who offers them investment opportunities that seem too good to be true. They are often promised free research reports, special discounts and secret 'stock tips'. The fraudsters may provide false share certificates and other documents to make the investments appear legitimate but they quickly disappear once they obtain investor funds. As with many fraudulent schemes the victims are encouraged to keep their investment secret to ensure they receive maximum returns. This allows the fraudsters to hide the real nature of their scheme.

Fraudsters aim to make their business seem legitimate so they often use technical jargon, impressive job titles and mock websites to appear credible. The main characteristics of this scam includes[160]: Delivery charges. Fraudsters often request a charge or offer a 'free gift' in return for the investment. "Cold"-calling. This involves an unauthorized firm contacting the investor out of the blue. Hard-sell tactics- By email, phone or in person; the

[158] Ibid
[159] *"Encyclopedia of Scams-Boiler room"*, scams. Wikispace.com/ boiler-the, Accessed on 4/8/2015
[160] *Boiler room*, Retrieved from: www.actionfraud.police.uk/fraud-az-boil…Accessed on 7/7/2015

sale will be highly pressured and the investor will be encouraged to make quick decisions. These investments may relate to unknown companies, it is likely that they do not exist and boiler rooms often operate in overseas investments. In addition, the fraudsters claim to have inside information that is not publicly available.

In addition, Boiler rooms are also scams in which a temporary office, called a boiler room is used to lend legitimacy to fraudulent operations[161]. The company operates a website and a toll- free number often along with a respectable office address to lure investors. Boiler rooms may be used to perpetrate various types of fraud (both Investment and other) and are often used in conjunction with pump and dumps.

3.7 Foreign Exchange Scam

The foreign exchange (forex) market is defined as "a place where one country's currency can be bought with or sold for another country's currency"[162]. This market is not a geographical location, as the term might suggest, instead the market is the collection of foreign exchange traders with office in their respective banks who are connected with each other around the world by the internet[163]. The foreign exchange market is a worldwide decentralized market for the trading of currencies. The forex options market began as an over-the-counter financial system for large banks, financial organisations and boastfully international corporations to hedge against foreign currency exposure[164]. Forex option trading has come forth as an alternate investment vehicle for a lot of traders and investors.

A forex option is a financial currency agreement giving the forex option purchaser the right, but not the obligation, to buy or sell a particular forex spot contract at a particular price on or before the expiration date[165]. The sum the forex option contract purchaser pays to the

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[161] Ibid
[162] Olukole, R.A (2002) *The Foreign Exchange Market in Nigeria*, CIBN Press Ltd, Lagos p. 1
[163] *Ibid*
[164] "Forex secrets and the Art of Buying and selling any commodity" http://ozsticks.files.wordpress.com/.../for. p.5
[165] Ibid

forex option seller for the forex option contract right is known as the forex option "premium"[166]. Either the buyer, or holder, of a foreign currency option has the option to sell the foreign currency contract before expiration, or he or she may decide to hold the foreign currency options contract till expiration and exercise his or her right to take possession in the underlying spot foreign currency. Exchange in the forex market occurs instantaneously.

Forex trading is a complicated process[167]. Foreign currency is bought and traded with the profit or loss account based on the exchange rate of a currency. Trading decisions are made on numerous factors, including signals, markets indicators and the global economy[168]. Traders find themselves amidst an avalanche of information that takes a lot of time. This makes forex at times, confusing and frustrating. That is where the opportunity for forex scams presents itself[169]. The combination of inexperienced traders, a worldwide audience and the most liquid market known to man, makes it a favourite for scammers to target[170]. According to the North American Securities Administration Association (NASAA)[171], forex markets are among the most active markets in the world when it comes to dollar volume. On some occasions more than three trillion dollars is traded daily.

The forex market has seen a huge increase in popularity over the past years, which is great for the global economy; however, that popularity has attracted many unscrupulous people. Forex scams take advantage of the investor on many different levels. The most obvious targets are investors with a very narrow investment knowledge base[172]. The most common type of forex fraud involves unregulated firms that offer foreign currency contracts[173]. The unregulated firm advertises through traditional methods and on the internet.

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[166] Ibid, p. 6
[167] Sawyers, B. (2011) *the World of Forex Scams,* Retrieved from-www.scamshield.com/Alertasp?id = 16 *on 9/7/2015.p.1*
[168] Ibid
[169] Ibid
[170] Ibid
[171] Ibid
[172] Ibid
[173] Ibid

The majority of forex traders utilize online forex trading as part of their investment strategy. The popularity of forex automated trading has created an entire world of forex software fraud. Various websites promise potential investors software that guarantees outrageous returns and complete accuracy, they even supply a money back guarantee, and so there is no risk at trying out the software[174]. However once the investors discovers that the system does not perform as promised, the money back is only guaranteed to be hard to get.

This is not to say that all systems are scams, there are many systems available which save investors valuable time and boost profits[175].Forex scammers leverage on certain weaknesses of their victims. These include: forex investments that are not made through firms that have a reputable business history and verifiable licensing; where investing individuals do not consider their goals and financial resources. Not knowing how much risk can be taken, and how to calculate the number; purportedly education, experience and simple common sense are keys in avoiding forex scams.

One cannot but agree with Sawyer thus:

> Whether a forex offer comes in the form of a firm wanting your business or a company trying to sell software, there is no such thing as guaranteed returns in investment. Educated investors use many tools to generate profits on the forex market but they do this over time, with lots of trial and error, and even more patience. It is a long term process, not a "get rich quick" scheme. There are always risks associated with investing in forex. If anyone tells you different, then you are looking a scam dead in the eyes[176].

Unsolicited phone calls, limited time offer or information that is available only to an elite few are all indicators of a forex scam. A legitimate investment firm will hardly talk a prospective investor into investing essential living money. They do not pressure investors to transfer cash immediately. They provide information that allows informed decisions. In trading forex, patience, researching everything, assuming nothing and never doing something

[174] Ibid
[175] Ibid
[176] Ibid

that does not feel 100% right, non-reliance on forex robots, wonder method, and other "snake oil products" are continuous consideration of rational investors.

3.8 Real Estate Investment Fraud

Real estate investment involves the purchase, ownership management, rental and/or sale of real estate for profit. Real estate markets in most countries are not as organized or efficient as markets for other more liquid investment instruments[177]. Real estate investment scheme may be constituted as a company or trust[178]. Along with a successful real estate market often come mortgage fraud and other real estate investment scams[179]. Fraud promoters typically spend a great deal of time and energy to make their schemes appear genuine. Fraudulent investments are often very similar to legitimate investments, giving the consumer a false sense of security.

Real estate investment scam properties offer promises of investment funds being secured by an interest in real property; however, the property in question is already highly leveraged and has no remaining equity. Real estate fraud is a very broad word used to describe different types of fraud and deceit faced by the real estate industry[180]. The frauds can range from obtaining a mortgage under false pretenses (such as by relying on a fraudulent appraisal, which exaggerates the value of a property) to using stolen or false documents to transfer a registered owner's title to a fraudster who then either transfers the property on to an innocent buyer or obtains a mortgage on the property and then absconds with the closing or mortgage funds[181].

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[177] Husa, A et al, "*Real Estate Fraud: Who Should Bear The Loss? A Look At The Liability Of Lending Insitution In The Context Of Real Estate Fraud Cases",* Retrieved from www. Grilp.com/…/ on 11/7/2015

[178] Rule 250, Securities And Exchange Commission Rules And Regulation, Pursuant to ISA no 45 of 1999.

[179] *Husa, op cit. p.1*

[180] *ibid*

[181] *Ibid*

Notwithstanding the form of fraud the consequences are always serious. Horrified homeowners are left to deal with a mortgage that they neither wanted nor obtained the benefit of. Lending institutions are left with little security on hundreds of thousands (sometimes millions) of dollars advanced. Lawsuits (and disciplinary proceedings) are the inevitable result. Sadly by the time an action is commenced, the fraudsters are often not a source of recovery, having since disappeared or having no assets left with which to satisfy a judgment if they can be identified at all[182].

There are two main types of fraud prevalent in the real estate industry[183] mortgage fraud (also referred to as value fraud or "Oklahoma fraud") and title fraud (also referred to as identity fraud). Mortgage fraud[184] predominately affects financial institutions and other lenders. Often the fraudster acquires a property which is then "flipped" (or sold) various times to other "purchasers". In the course of these flips, the value of the property is artificially inflated. The mortgage lender is deceived into advancing funds in a higher amount than would otherwise have been available, in respect of property whose real worth falls below the value of the funds advanced. Often, there are fraudulent appraisals submitted in support of the mortgage application which reflect an inflated property value. In other cases, the fraudsters approach an unwitting dupe and request that this person "lend" his or her name to the transaction as a purchase and mortgagor. The excuses given are varied and can include the allegation that the genuine purchaser has a bad credit history and simply needs the use of someone else's name to obtain a mortgage. The dupe or "straw purchaser" as they have come to be known, is assured that he or she will not have to make any mortgage payment or pay any legal fees associated with the transaction. He or she is assured that "soon" after the

[182] *Ibid*
[183] *Ibid*
[184] *Ibid*

transaction closes the title and mortgage documents will be rectified. The strain purchaser receives a monetary payment in return for his or her troubles[185].

By contrast, title or identity fraud, predominantly hurts individual homeowners.[186] Title fraud occurs when a fraudster using stolen identity or forged documents transfers title to a property to his or her name without the true owner's knowledge, and then acquires a mortgage (or sells) the property[187].In the United States In 2012, the Securities and Exchange Commission[188]charged David M. Connolly in real estate Investment scam. His activities involved a series of investment vehicles formed for the purported purpose of purchasing and managing rental apartment buildings in New Jersey and Pennsylvania. The SEC alleged that he induced investors to buy shares in real investment vehicles he created through his Connolly properties incorporated. He promised investors monthly dividends based on cash-flow profits from rental income at the apartment buildings as well as the growth of their principal from the appreciation of the property. However, the real estate investment did not produce payments to earlier investors using money from new investors.

Discerning a real estate scam can be quite challenging. This has been exacerbated by the fact that the internet has made it easier for online fraudsters to target both buyers and renters. Real estate scammers leverage on certain carelessness of their victim. This includes non-verification of the identity of the person or company being dealt with; making payments up front or signing a contract without first inspecting the property no matter how official the documentation looks; non-employment of the services of registered legal practitioners or professionals and giving personal information especially over the internet. The SEC rules provides requirements for companies intending to carry out investments in real estate[189]

[185] Ibid, p.2
[186] Ibid, p.3
[187] Ibid
[188] www.sec.gov/news/.../13651714891489172 Accessed on 7/7/2015
[189] See rules 250 to 281

which are similar in many respect to the general rules for making public offers. Thus, any intending investor in real estate investment must familiarize himself with these guidelines.

CHAPTER FOUR.

THE LEGAL FRAMEWORK FOR COMBATING FRAUDULENT INVESTMENT SCHEMES IN THE NIGERIAN CAPITAL MARKET.

4.1 Introduction.

Fraudulent investment schemes have grievous impacts on a country regardless of its level of development. The scope of its impact extends to virtually all aspects of the country. Fraudulent investment schemes affect millions of lives and shake the socio-economic dynamics of a state[190]. Thus, the overall impact of fraudulent investment schemes is hardly comprehensible unlike other scam. The effect could be either direct or indirect and includes: Money Loss[191]; the extent of money lost may not be easily assessed since not all victims report cases of fraudulent investment schemes. In Nigeria, the Corporate Affairs Commission in 2013 stated that it had filed for the liquidation of 30 out of the 400 'wonder banks' which Nigerians invested over ₦106 billion which may never be recovered[192]. This is the consequence of most fraudulent investment schemes at the points where their operators are arrested they usually have nothing that may be used to restitute their victims.

Additionally, fraudulent investment schemes lead to leakage in financial systems[193]. The Nigerian financial system regulates its mercantile environment. This is important because finance is the key to investment and growth, hence, the need for efficient financial systems to help development. The Financial system of a country enables borrowers and lenders to exchange funds. The surplus money in the forms of savings gets transformed into investible funds through this system. The operations of these fraudulent schemes create a loophole to the system. Money which could have been utilized for capital expenditures are

[190] Bhuin, P.K.(2015) "Impact Of Ponzi Schemes On Economy: A study of West Bengal", Global Journal for Research Analysis vol.4 p.1 retrieved from, The globaljournals.com/…/file.php?.....
[191] ibid
[192] "CAC Liquidates 30 Wonder Banks", Retrieved from www.thisdaylive.com/articles/cac-liquidates-30-wonder-banks-17 accessed on 18/6/2015
[193] Ibid, p.2

spent for personal luxury or on non-productive activities by the fraudsters. This ultimately slows down the entire process of capital formation and growth of an economy. Not only do fraudulent investment schemes undermine confidence on financial markets[194], it also has grave psychological impacts on investors who have ended up committing suicide once it becomes clear that the investment was a farce.

As a result of the grave consequences of fraudulent investment schemes on the financial system, various laws and institutions have been put in place to help in the fight against these fraudulent schemes. We shall now consider these laws and institutions.

4.2 The Legislative Framework.

The regulation of investment scheme is very often derived from the regulation of the capital market generally. Commenting on the essence of securities regulation in Nigeria, Akanle[195]stated:

> While the tradition of securities business all over the world is a tradition of honesty and ethical practice, yet history is replete with instances of dishonest, sharp practices as well as downright fraud … it is thus the need to protect the investing public that has primarily motivated the regulation of the securities business.[196]

Thus, the objective of regulation is not to insure investors against the risk of losing their investment by the operation of market forces but from the deceitful, unscrupulous and manipulative tendencies of deviants in the market.[197] The motivator behind statutory regulation is its command status. There is usually higher degree of compliance with statutory regulation than non-statutory prescription. The legislative framework for the regulation of fraudulent investment schemes in the Nigerian capital market is provided by motley of laws. It is to these laws that this discussion now turns

[194]Carvajal, A; Monroe,H; Patiillo, C. and Winter, B.(2009) "Ponzi Schemes In The Caribbean", International Monetary Fund Working Paper, p.5
[195]Akanle, O. (1991) "A Decade of Securities Regulation in Nigeria 1980-1990*",Nigeria Institute of Advanced Legal studies Journal,* Lagos.
[196] ibid
[197] Agom, A.R (2008) "The legal and institutional framework for the Regulation of the Nigerian Capital Market", (unpublished Ph.D. Dissertation) Faculty of Law Ahmadu Bello University p. 95

4.2.1 The Investments and Securities Act 2007.

The Investments and Securities Act (ISA) is the primary statute for combating fraudulent investment schemes (FIS)[198] in the Nigerian capital market. Specifically, FIS offend the provisions of section 67 of the Investment and Securities Act. Section 67, ISA provides as follows:

> 1. No person shall make any invitation to the public to acquire or dispose of any security 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 to 87 of this Act are duly complied with.
> b. A statutory body or bank established by or pursuant to an Act of the National Assembly and is empowered to accept deposits and saving from the public or issues its own securities (as defined under this Act) promissory notes, bill of exchange and other instruments…

The provisions of section 67 ISA, clearly lists out requirements which a company intending to make invitations to the public must fulfill, to acquire; dispose securities or make invitations for money deposits. They include that: the company must be public and not private; a statutory body or bank empowered by any Act of the National not State Assembly to accept deposits from the public and that the public company must comply with the provisions of sections 73 to 87 of the ISA. A public company is any company other than a private company and its memorandum shall state that it is a public company[199]. A private company cannot invite the public to subscribe for its shares or deposit money with it[200] unless authorized by law but a public company can. A private company must by its articles restrict

[198] Hereinafter referred to as 'FIS'
[199] S 24 Companies and Allied Matters Act, Laws of the Federation of Nigeria., 2004.
[200] S.25(5) ibid

the transfer of its share[201] but a public company does not. Every public company must hold a statutory meeting and file a statutory report[202] but a private company is not required to do so.

A public company whose securities are required to be registered under the ISA shall file with the SEC on a periodic or annual basis; its audited financial statements and such other returns as may be prescribed by the Commission from time to time[203]. Such public company shall establish a system of internal controls over its financial reporting and security of assets and it shall be the responsibility of the board of directors to ensure the integrity of the company's financial controls and reporting[204]. In addition, no person shall carry on the business of auditing a public company unless that person is registered by the Commission on such term and conditions as may be prescribed from time to time[205]. Any company which contravenes these provisions shall be liable to a penalty of not less than one million naira and a further penalty of twenty five thousand naira per day for the period the violation continues[206].

This penalty appears too little to serve as deterrence for failing to adhere to financial regulations; as finance is central to the effectiveness of every company. For a company that has millions of investors fund which are placed under trust of the company; The penalty should be as grave as grounding it, so that that it would take responsibility to do what it is required in law to do.

The Act in section 69(1) further provides that an invitation shall be deemed to be made to the public if an offer or an invitation to make an offer is-

a. 'Published, advertised or disseminated by newspaper, broadcasting, cinematography or any other means whatsoever;

[201] S. 22(2) ibid
[202] S. 211 ibid
[203] S. 60, ISA
[204] S.61(1) ibid
[205] S.62 ibid
[206] S.65 ibid

b. Made to or circulated among any persons whether selected as members or as debenture holders of the company concerned or as clients of the persons making or circulating the invitation in any other manner…'

This provision is important so that fraudulent persons in this age of technology would not hide under any platform and defraud innocent persons on the guise that they did not make invitation on a paper and thereby escape liability. This therefore restricts whatever medium from down earth to high heaven which fraudsters may want to adopt in advertising their fraudulent investments.

Further the requirements to make invitations to the public as captured in sections 73 to 87 of the ISA, centres on the prospectus. A prospectus is '...any written or electronic information, notice, advertisement or other forms of invitation offering to the public for subscription or purchase, any shares, debenture or other approved and recognized securities of a company and other issues or scheme'[207]. Furthermore, any document which offers securities for consideration other than cash is a prospectus[208]. A prospectus is a constant feature of the primary market and is the main instrument of regulation of public issue. It must accompany any invitation to the public to subscribe or purchase securities of any company. The general aim of the prospectus is to ensure that the company gives the public the material information about its position. It also ensures that whenever a company offers its securities to the public it fairly and fully discloses the relevant facts to enable the investing public assess the risk of their investment[209]. Even where the company does not make an immediate public offering of its securities or contemplate one; the company must nevertheless file a Statement in lieu of prospectus in the form and contain the particulars set out in part I and II of the Fourth Schedule to the ISA 2007[210] .

[207] S. 315 ibid
[208] S.567 CAMA
[209] Agom, A.R (2008) op cit. p. 71
[210] S.73

The prospectus requirement applies to all invitations to the public whether by way of direct offer by prospectus or by an offer for sale. It is immaterial that an invitation is a notice, circular, advertisement or otherwise. However, where the invitation is made by a company to existing members of the company or its associated companies; where the securities offered are in all respect uniform with those already listed and dealt in on a stock exchange and application is being made for quotation of the securities, the provisions on prospectus may not apply[211]. A prospectus is required to give the person to whom it is addressed a full, accurate and fair picture of the state and prospect of the company. Thus, it must not contain any ambiguous statement which is not true in every sense in which it might reasonably be understood. It must disclose every material fact[212].

The actual content of a statutory prospectus as prescribed in the Third Schedule to the Act can be briefly described under three main heads[213]. The first is that the full details must be given of the actual offer; the second head requires details of all contracts entered into within the previous two years and of all properties purchased or acquired or proposed to be purchased or acquired and the third set of information is the report of the company's auditor whose names and addresses are to be stated under paragraph 12 of the Third Schedule[214]. The cumulative effect of the provisions on prospectus in capital market jurisprudence is the displacement of the old mercantile rule of *caveat emptor*. In capital market law it is *caveat vendito*[215]. The duty to beware is squarely placed on the shoulders of the issuer of securities. This immutable rule is compelled by the intricate nature of the merchandise dealt with in the markets which are purely intangible (choses in action). Where any statement contained in a

[211] S.74 ISA
[212] Agom, A.R. and Alubo, A.O (2015)"Blue Chip Acquisition V. Zenith Bank And Others(2005) 3 ISLR,72: A Milestone in Investors' Protection in Nigeria", *Benson Idahosa University Law Journal*, vol.2,no.1,pp.1-19
[213]Agom, A.R (2008) op cit. p71
[214] S.73 ISA
[215] Agom (2008) op cit.p.35

prospectus is untrue, the persons who are guilty of such untrue statement must repay monies received from applicants amongst other sanctions[216].

The provisions on prospectus underlying the assumption that an investor who is given full and accurate information about an offer can take steps to protect himself may be unrealistic considering the literacy level of an average Nigerian investor. For those needing investment guidance on how to spot fraudulent investment schemes will receive little or no comfort from the balance sheets, contracts or compilation of data that either lack the intelligence to assimilate them and find useful information or are concerned with speculative profit as to consider them relevant.

Any company or enterprise which contravenes the provisions of sections 67, 73 to 87 can be deemed a FIS. Analysis of these provisions shows that FIS violate the law by making public invitations to persons to invest or deposit money without meeting these requirements. In cases of violation of section 67 which controls invitation to the public, all persons and every officer who is in default or anybody corporate making the invitation shall each be separately liable to a penalty of N 500,000 in the case of a body corporate and N 100,000 in the case of an individual[217]. Thus, in ***SEC vNutoyosLtd***[218], a private company through a firm of chartered accountants offered for subscription ten million ordinary shares of 50k each at 60k per share to teachers in Oyo state. In the prospectus the company claimed it was a public company but since its policy was for the mass participation of teachers in Oyo state, the shares of the company could not be quoted on the stock exchange. The SEC through the news media declared the offer illegal. It warned that the prospectus contained incomplete and misleading information neither registered nor approved by SEC and advised the public against investing in it.

[216] S. 86 ISA
[217] S.67(3) ISA
[218] (1992) 1 SLR 89

FIS appear in many variants each having its own distinguishing features which has not been clearly captured by this section. Section 67 of the ISA is too general to effectively capture the specifics of each type of FIS offence. Criminal offences are usually treated separately and not generalized to ensure that particulars of each offence are clearly stated. FIS are criminal and must be treated as such. In addition the punishment provided by section 67 (3) is too minimal to serve as deterrence.

Further, the ISA in order to protect the capital market from FIS regulates the securities that are offered in the market. All securities to be offered in the market must first be registered with the SEC[219]. Securities are registered with the SEC by the registrant filing an application which shall contain information on the character of the securities, the nominal value; rate of dividend and brief description of the preference shares if any[220].

The application must provide information on the organisation, financial structure and nature of the business of the company including any risk factor. Information must be provided on directors, officers and underwriters if any, and each security holders of record, holding more than five percent of any class of equity or fifty thousand naira in value whichever is higher. The bonus and profit sharing arrangements, the management and service contracts, any write up from the issuing houses on the issue, schedule of claim and litigation; binding loan agreement and schedule of other maturing contracts are material facts that the application must disclose. Evidence of property ownership or transfer, and any other document or information required by the SEC must also be furnished from time to time[221].

A person who contravenes these requirements commits an offence and is liable on conviction to a fine of one million naira or to a term of imprisonment of three years or to both such fines and imprisonment. The SEC may in lieu of prosecution impose a penalty of one

[219] S.54, ISA
[220] Rule 40, Investment And Securities Act, Rules and Regulations,2000
[221] ibid

million naira and a further fine of five thousand naira for everyday of violation[222]. If as a result of any such contravention any person acquires or disposes of any securities he shall be entitled to proceed against the defaulter. He may rescind such transaction and or recover compensation for any loss sustained by him from any person who is liable[223].

Fraudulent investment schemes (FIS) violate the provision of the ISA because they are never registered with the apex capital market regulatory institution or any appropriate authority. However, some actually incorporate at the Corporate Affairs Commission and confuse their clients who may pass such registration for authorization of the scheme by the appropriate regulatory body. The problem that arises for investors would be how to get adequate information about the provisions of the law as regard persons qualified to make invitations to the public and the criteria required in offering securities especially when FIS appear similar to legitimate ventures and some professionals are also seen to be part of the FIS. Again, much of investment regulation-and consequently investment marketing and practice-remains shrouded in verbiage incomprehensible to the average person. It is not realistic to expect investors to educate themselves when enough is not being done to de-mystify investments and their regulation through the use of language ordinary people can understand, delivered through information channels investors can access.

In addition, the operators of the market are also subject to a regime of regulation. Securities dealers, stockbrokers, share transfer agents, bankers to issue, market trustee(s) of a trust deed, registrars to an issue, merchant bankers, issuing houses, underwriters, portfolio managers, investment advisers are intermediaries in the securities industry. These are the experts in the capital market that facilitate the search, mobilization and allocation of resources between the surplus and deficit ends in the economy.

[222] S. 54(6)and(7) ISA
[223] S.67(3) ibid

According to section 38(1) ISA, 2007, no person shall operate in the Nigerian capital market as an expert or professional or in any other capacity as may be determined by the Commission; or carry on investment and securities business unless the person is registered in accordance with the Act. Specifically, the SEC shall register and regulate corporate and individual capital market operators as defined by the Act[224]. In carrying out this important function of registration, the SEC prevented Prof. Kasunmu a legal practitioner from acting as solicitor to an issue. Thus, in **SEC v. Prof. A.B. Kasunmu SAN &1 or**[225]., the question on whether a legal practitioner must register with the SEC pursuant to the ISA as a capital market operator before he could act as a solicitor to issue. The court held that by the combined provisions of sections 29(1) and 30 of the ISA a legal practitioner is not included in the intendment of the words as used in the Act.

The reason for supervising the activities of these persons is not far-fetched. In reaching investment decisions, investors usually rely on information about an issuer supplied by its management. The information provided are verified by such professionals such as auditors, reporting accountants, registrars, issuing houses, stockbrokers[226], solicitors to the issuer and to the issue. It is necessary that those saddled with verification, dutifully and responsibly ensure that the information supplied to the investing public is true and accurate, free from any material misstatement, concealment of facts or deliberate misrepresentation of facts about the issuer.

Since the enactment of ISA in 2007; fraudulent investment schemes continue to proliferate the market. In 2013, the SEC published[227] a list of fourteen fraudulent investment outfits operating in Kaduna state and warned members of the public to desist from patronizing them because they were not registered or licensed to engage in any function in

[224] S.13(g) ISA
[225] (2009) 10 NWLR,(Pt. 1150),509
[226]Ologe, K.O.,(2007) *You Don't Have To Be Rich To Invest In Shares And Make Money*, Impact Consult. Ltd, Abuja, p.39.
[227] See Daily Trust, Monday April 22, 2013……excerpt of the publication is attached as appendix 1

the capital market. It therefore means that there is more to be done beyond the present provisions of the ISA.

The Securities Act (SA) of Jamaica[228] subjects the public offering of securities and of collective investment schemes to authorization by the Financial Services Commission (FSC). The SA states that intermediaries who carry on securities services have to be licensed by the FSC[229]. The SA specifies that breach of registration and licensing requirements constitute an offense punishable upon conviction by a fine of up to J$2 million(about US$23, 000) and /or imprisonment for a period up to two or three years imprisonment[230]. The experience of some countries in particular US against fraudulent investment schemes have been to mainly use the provisions of their securities laws to combat them[231]. Other countries especially in Africa have mainly used deposit taking provisions to combat fraudulent schemes[232]. Other countries have considered that such provisions are too narrow to be able to cover the activities of fraudulent investment schemes. As a result they have enacted special provisions for prohibiting and sanctioning pyramid schemes (Sri Lanka and Afghanistan) or prohibiting the collection of money from the public without license (Colombia)[233].

4.2.2. The Criminal Code and Penal Code Acts.

Nigeria as a nation has several statues that prohibit and punish criminal activities generally and can be used in combating fraudulent investment schemes. The traditional statutes in Nigerian fighting general crimes are the Criminal Code Act[234] and the Penal Code Act[235]. Although, neither the Criminal Code (CC) nor Penal Code (PC) expressly provides for

[228]Carvajal, op cit. p.20
[229]*Ibid*
[230] *ibid*
[231] *Ibid,* p. 28
[232] *Ibid*
[233] ibid
[234]Cap C. 38 L.F.N. 2004,
[235]Cap. P3 Laws of the Federation of Nigeria, 2004

the offence of fraud or fraudulent investment schemes; fraudulent investment schemes can be inferred to have been captured in theses sections. Section 421CC provides that:

> Any person who by means of any fraudulent trick or device obtains from any other persons anything capable of being stolen, or induces any other person to pay or deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods, or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanor, and is liable to imprisonment for two years.

Although the CC titles this section cheating, fraudulent investment schemes may be punished under this section. In addition Section 422 of the Criminal Code also makes conspiracy to defraud an offence. It states that:

> Any person who conspires with another by deceit, any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of a felony, and is liable to imprisonment for seven years.

Examination of the CC does not define what fraud is. It is a major lacuna in the law. In addition, classifying cheating as a misdemeanor under section 421 thereby making the punishment two years is most unrealistic and too little a punishment to deter fraudsters.

Also, section 320 of the Penal Code (PC) provides that:

Whoever by deceiving any person –

a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property; or
b) Intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.

Whoever cheats shall be punished with imprisonment for a term which may exceed three years or with fine or with both[236]

Examining the provisions of the CC and PC on cheating clearly points out features of fraudulent investment schemes which includes among others; deceit and inducement to part with money or property. A commonly used provision to prosecute fraud in Canada is the general fraud provision found at section 380(1) of the Criminal Code[237]. This section can apply to any transaction when it is alleged that someone has defrauded the public or any person by deceit, falsehood or other fraudulent means. The maximum penalty is 14years where the amount defrauded is greater than $5,000 or two years were it is under $5,000[238].

It is in response to the grave impact fraudulent investment schemes (FIS) can cause in a nation's economy that Australia enacted its own law against Serious and Organized Fraud[239] otherwise called market manipulation. In Canada the Criminal Code, also provides for sections dealing with investment frauds.[240] Nigeria can learn from these countries by enacting specific laws to cover capital market offences.

4.2.3. The Economic and Financial Crimes Commission (Establishment etc.) Act.

Another legal instrument deployed in the fight against fraudulent investment schemes (FIS) is the Economic and Financial Crimes Commission Act, 2004. The definition of economic and financial crimes covers the scope of fraudulent investment schemes. Fraudulent investment schemes are non-violent criminal and illicit ways of earning wealth illegally in an organized manner through the issuance of non-existing securities thereby violating the existing provisions of the ISA governing activities in the capital market and

[236] Section 322 Penal Code
[237] A Final Canadian Strategy to Combat Investment Frauds,(2014), published by Canadian Foundation for Advancement of Investors Rights, retrieved from faircanada.ca/…/2014/…/FINAL-A-…
[238] ibid
[239] Australian Crime Commission (2012) "*Serious and Organized Investment Fraud in Australia"* retrieved from https:www.crimecommission.gov.au/…/…
[240] Such as S.380 covers fraud; S. 380(2) fraud affecting the public markets; S. 382C market manipulation and S.400 Circulation of a false prospectus, statement or account, Cited in *A FinalCanadian Strategy to Combat Investment Frauds*,(2014), published by Canadian Foundation for Advancement of Investors Rights, retrieved from faircanada.ca/…/2014/…/FINAL-A-…

constitutes fraud. Thus fraudulent investment schemes fall within the contemplation of the EFCC Act.

The Economic and Financial Crimes Commission (Establishment, Etc.) Act, 2004 was enacted to repeal the Economic and Financial Crimes Commission (Establishment) Act, 2002. Before the establishment of the Economic and Financial Crimes Commission Act, (EFCC Act), the previous military governments established a presidential task force on trade malpractices while the police had a unit called the special frauds unit set up with the assistance of the British government.[241] These administrative agencies worked in collaboration with the tribunals established alongside regular courts to handle cases on financial and economic crimes. With the return of Nigeria to democracy, tribunals and task forces became incompatible with constitutional governance therefore, the government set up a ministerial task force on drugs and financial crimes with cabinet members besides retaining a special adviser to the President on the subject.[242]

Administratively, the major legislations on economic and financial crimes before the EFCC Act revolved round the National Drug Law Enforcement Agency (NDLEA),[243] which was statutorily charged with dealing with drug trafficking while overseeing economic and financial crimes. The origin of the arrangement was not without basis. At the time of passing the legislation, virtually every economic crime was linked with drug trafficking, hence the NDLEA was saddled with the responsibility.[244] In spite of the efforts of the agency and other government bodies however, the spate of economic and financial crimes did not abate.[245]

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[241]Owasanoye, B (2003) *"Old Wine in New Wineskins- the Economic and Financial CrimesCommission Act 2002: What is New?"* Being a paper presented at the National workshop on Financial Crimes, Institute of Advanced Legal Studies, University of Lagos, Lagos on the 24 – 25 June, p. 13
[242]ibid
[243] Ibid p. 14
[244] Ibid
[245]Ibid

Rather, the tempo escalated forcing the international community to decertify the country and list her amongst Non-Cooperative Countries and Territories (NCCT) by the Financial Action Task Force (FATF). De-certification of Nigeria by FATF in 2001 alarmed everyone being yet another stigma in the long line of international smears.[246] This decertification meant that Nigeria was a high risk jurisdiction and thus any country transacting business with her treaded very cautiously. This decertification also entailed the loss of US aid and withdrawal of US support.

At this point the Nigerian government also realized that preventive and investigative measures to curb economic and financial crimes went beyond the work or capacity of NDLEA, therefore, a different strategy to tackle the problem was inevitable. Thus the EFCC Act 2002 was enacted and later replaced by the EFCC Act 2004. The EFCC Act[247] in its interpretation Section[248] defined economic and financial crimes to mean:

> The non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud … etc.

FIS affect the economy of the nation and it is also a non-violent criminal and illicit activity committed with the objectives of earning wealth illegally. Fraudulent investment schemes also violate the provisions of the law.[249] Thus, it may be deemed to fall under crimes covered by the EFCC Act. Also, section 18 covers offences in relation to economic and financial crimes and penalties and states thus:

1. A person who-

[246] Ibid
[247] Economic and Financial Crimes Commission (Establishment, Etc.) Act 2004
[248] S. 46 Cap. E1, EFCC Act LFN 2004.
[249] S. 67 ISA

a. Engages in the acquisition, possession, or use of property knowing at the time of its acquisition, possession or use that such property was derived from any offence under this Act;
b. Engages in the management , organisation or financing of any offence under this Act;
c. Engages in the conversion or transfer of property knowing that such property is derived from any offence under this Act; or
d. Engages in the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property knowing that such property is derived from any offence under this Act,

Commits an offence under this Act and is liable on conviction to the penalties provided in subsection (2) of this section.

2. The penalties for offences under subsection (1) shall be imprisoned for a term not less than two years and not exceeding three years.

Although, these sections refer to economic and financial crimes, they do not provide expressly against fraudulent investment schemes. In addition, section 46 makes references to fraud; it does not define what constitutes fraud. Also, the use of 'etc.' at the end of the definition of economic and financial crimes does not necessarily mean that fraudulent investment scheme operators can be punished under the Act. Concluding the definition with 'etc.' is legislatively inappropriate because criminal law must be specifically created and not assumed. This is because Section 36 of the constitution[250] provides that:

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place constitute such an offence…[251]…a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law…[252]

Therefore, half measures cannot be used in the fight against fraudulent investment schemes. It appears that stiffer measures have been taken to address other offences that have raised their heads in other sectors of the Nigerian economy but the matter of fraudulent investment schemes have been treated with laxity because the legislators seem not to

[250] Constitution of the Federal Republic of Nigeria,(1999)as amended, 2011
[251] Section 36(8) CFRN
[252] Section 36(12) CFRN

comprehend the magnitude of the effect of fraudulent investment schemes (FIS) on the nation's economy.

4.2.4. The Advance Fee Fraud and Other Fraud Related Offences Act[253].

The Advance Fee Fraud (AFF) Act is an Act to create offences pertaining to advance fee fraud and other fraud related offences; to provide for the arrest and trial of persons, who commit such offences and for matters connected thereto. Advance fee fraud popularly known as "419" has put Nigeria in the negative light of international attention more than any other vice and is comparable in notoriety only with military dictatorship.[254] As the name suggests, AFF is a vice which is successfully perpetrated when a crook makes an unsuspecting victim part with money or other valuable property in advance on the representation of a false or non-existent contract or business relationship often of a beneficial nature to parties. The crime of AFF can be traced to S. 419 of the criminal code of Nigeria from which it derives its name 419.

As a result of the proliferation of the Nigerian economic and financial scene of AFF and the inadequacy of Section 419[255] to deal with the complexities of the offence an independent Act was enacted to cover fraud in all its ramifications. The Act was enacted as a response to AFF. The Act is divided into three parts with eighteen sections. Although the Act was enacted to cover offences of advance fee fraud and other fraud related offences, it does not in any section define fraud or its constituents. This is a grave lacuna which must be corrected. Part one of the Act, covers various offences ranging from obtaining property by false pretenses,[256] other fraud related offences,[257] use of premises,[258] fraudulent invitation,[259] receipt of fraudulent letter,[260] among others. Section 1 provides thus:

[253] Advance Fee Fraud and other Fraud Related Offences Act, Cap A6, L.F.N 2004
[254] Owasanoye op. cit p. 1
[255] Criminal Code
[256] Section 1 Advance Fee Fraud and other Fraud Related Offences Act, Cap. A6 LFN 2004
[257] section 2 Ibid
[258] Section 1(3) Ibid

Notwithstanding anything contained in any other enactment or law, any person who by any false pretense, and with intent to defraud

a) Obtains from any other person, in Nigeria or in any other country, for himself or any other person;
b) Induces any other person, in Nigeria or in any other city, to deliver to any person; or
c) Obtains any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretense, is guilty of an offence under this Act.

Section 2 further provides:

> A person who by false pretense, and with the intent to defraud, induces any other person, in Nigeria or in any other country, to confer a benefit on him or on any other person by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for is guilty of an offence under this Act.

A person who is guilty of an offence under subsection (1) or (2) of this section is liable on conviction to imprisonment for a term of not less than ten years without the option of a fine.[261]In addition to any other penalty prescribed under this Act, the High Court shall order a person convicted of an offence under this Act to make restitution to the victim of the false pretense or fraud …[262]. These no doubt are wonderful provisions against fraud. In fact, the addition of restitution to the penal sanction is commendable. However, the provisions of the Act do not seem to cater for instances when individuals or corporations invite persons to invest in fraudulent investment schemes. It appears that fraudulent investment schemes or capital market offences did not fall within the contemplation of the drafters. It is therefore important that clear provisions against capital market frauds be engrafted into the Act, so that fraudsters cannot escape liability under the guise that their activities are not offences in any known law. The courts will not punish an individual for an offence that is not provided in

[259] S.4 ibid
[260] Section 5 ibid
[261] Section 1(3) ibid
[262] Section 11 ibid

any law. In the Supreme Court case of ***Alh AbdullahiAminuTafida v. Federal Republic of Nigeria***[263], the appellant was charged and convicted by the trial court for the offence of contract splitting which was not an offence in Nigeria as at the time the accused was alleged to have committed the offence but a publication in one of the government's circulars. The Court of Appeal upheld the conviction. The Supreme Court held that the conviction was contrary to section 36(8) and (12) and quashed the judgment. In the words of Fabiyi JSC[264]

> … as if the above is not enough, I need to say it in passing that all the counts for which the appellant and others were tried and convicted rest on Exhibit P3 a circular, which forbids contract splitting by officials. It only provides administrative disciplinary action. It has no potency for penal sanctions at all times material to this matter.

Nigeria cannot afford half measures in the fight against fraudulent investment schemes. Therefore, it becomes expedient that the existing legal frameworks on ground be able to cover fraudulent investment schemes specifically and capital market offences generally.

4.3. The Institutional Framework.

Consequent upon the grievous impacts of fraudulent investment schemes, not only have countries put in place laws to help forestall their effects, legal institutions have become a major site in present day economies. This is because laws do not implement themselves but institutions are established by law to ensure effective implementation and enforcement of regulatory prescriptions. It is very common in financial sector regulation to find the legal provisions ably backed up by statutory agencies vested with *vires* to implement the normative rules and vested with jurisdiction to sanction breach of the rules. The financial sector, particularly the capital market is one such example. This discussion now turns to these institutions.

[263] Suit no SC 217/2011, retrieved from legalpedia.com
[264] ibid

5.3.1 The Securities and Exchange Commission.

The Securities and Exchange Commission (SEC) is the apex regulatory body of the Nigerian Capital Market. Thus, it is the principal body charged with fighting fraudulent investment schemes in the Nigerian capital market. The functions and the powers of the SEC as captured in Section 13 of the ISA[265] include:

a) Regulate investments and securities business in Nigeria as defined in the Act;
b) Register and regulate securities exchanges, capital trade points, futures, options and derivatives exchanges, commodity exchanges 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 programs and disseminate information necessary for the establishment of securities exchanges and capital trade points;
g) Register and regulate corporate and individual capital market operators as defined in this Act;
h) Register and regulate the workings of venture capital funds and collective investment schemes 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 markets;
j) Facilitate the linking of all markets in securities with information and communication technology facilities;

[265] No. 27 of 2007

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 and exchanges capital trade points;

l) Keep and maintain a register of foreign portfolio investments;

m) Register and regulate securities depository companies, clearing and settlement companies, custodians 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 dealing;

o) Promote and register self-regulatory organisations including securities exchanges, capital trade points and capital market trade associations to which it may delegate its powers;

p) Review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions of all companies as defined in this Act;

q) Authorize and regulate cross-border securities transactions;

r) Call for information from and inspect, conduct enquiries and audit of 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 this 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 whatsoever 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 jurisdiction.

y) Relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into co-operative agreement 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 persons considered unfit from being employed in any arm 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 for giving full effect to the provisions of this Act.

These functions of the SEC can be subsumed under the brand categorization of market regulation and market development.[266] The commission's regulatory machinery is structured to prevent unfit persons and investments, detect market manipulations, untrue statements in the prospects and other vices that may undermine the integrity of the capital

[266]Agom, A. R. (2009) "The Transmogrifying of the Securities and Exchange Commission from a Securities Market Watchdog to a Bloodhound" *Ahmadu Bello University Journal of Commercial Law*, Vol. 4, No. 1, p.41

market.[267] Registration, monitoring, investigation, enforcement and rule making are SEC's tool for combating fraudulent investment schemes in the capital market.[268]

Registration is the hallmark of regulation. It is the entry point to the capital market. It is through the process of registration that the fitness of an applicant, market places as well as the worthiness of instrument to be offered in the market is examined.[269] In carrying out this important function of registration, the SEC prevented Prof. Kasunmu a legal practitioner from acting as solicitor to an issue[270].

The 2013 SEC Annual Report revealed that a total of 37 companies were listed and 7 were delisted. Additionally 36 capital market operators' applications were approved. For registration of capital market operators the SEC insists or integrity check, financial suitability, professionalism and competence of applicant.[271] For registration of securities, the SEC insists on full disclosure of all relevant information about the securities being issued to the public.[272] The SEC does not in any way guarantee the accuracy of the information disclosed in the prospectus or rights circular[273]. However, the directors and experts whose names appear on the offer documents are culpable for any untrue statement or commission in offer documents.[274] A violation of the terms of registration can attract suspension, revocation of registration be it of operators or securities.[275]. Thus in **Sir Okeke Owoh v. Apex Securities & 2 ors.**[276] - the tribunal held that it is the duty of SEC to publish the revocation of license of erring capital market operators not just on the SEC and NSE websites but also on a medium where it can be easily accessed by investors.

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[267]Ibid
[268]Ibid
[269] Section 13(b), (c), (g), (h), (m), (p), ISA
[270] (2009) 10 NWLR, Pt. 1150,509
[271]Police clearance, last employers report, Banker's report and other relevant qualification and experience.
[272]Part VIII, ISA 2007
[273] Agom op.cit p. 41
[274] S. 80 ISA 2007
[275] S. 65 ; S. 66 ibid
[276] (2013) 7 NISLR, p.144

Also in **SEC v. Prudential Securities & 9ors**[277] , the SEC brought an action against the defendants seeking to restrain them, their agents, privies and servants from participating in the capital market, until they have duly registered with SEC as required by law. It also sought prohibition from acting within the capital market as stockbrokers, dealers, issuing houses, investment advisers, fund managers and registrars without registering with the Commission. An interim injunction was granted the applicant. The defendants subsequently complied with the law by registering with SEC. Thus the case was withdrawn for that reason by the SEC. In **SEC v. Dominion Trust &11ors**[278] the defendants commenced operation as capital market operators without registering with SEC as required by law. On realizing this, SEC issued several warnings and notices in national newspapers requesting these operators to desist from carrying on securities business without registration with the Commission. Due to their failure to comply, SEC took out a summons against them. Its application was for an interim injunction asking the court to restrain the defendants, their servants and privies from dealing in securities business within the Nigerian capital market. The court granted the interim injunction against the defendants and reserved ruling for interlocutory; while these court processes were ongoing the defendants perfected registration, thus SEC withdrew the action. However, in **Owena Bank (Nig) Plc v. Nigeria Stock Exchange Ltd**[279] – On the issue whether or not the SEC can exercise power to suspend registration of securities, the Supreme Court held that by virtue of section 24(1) of the Securities and Exchange Commission Decree No. 29 of 1988, the SEC has the power to suspend the registration of any person's security for a period of twelve calendar months and no more or to obtain the approval of the Minister in order to remove the registration of a person's securities.

The essence of monitoring and inspection is to ensure that market operators comply with the provision of the ISA, 2007 and the Rules and Regulations made there under. The

[277](1992)1 SLR 34.
[278](1992) 1 SLR, 53.
[279] (1999) 5 SLR,1

SEC is empowered to monitor and ensure that capital market operators comply with market and global best practices. Effective monitoring can forestall deviant practices in the market. The capital market is integrity driven. When the SEC receives complaints of defalcation in the market, it commences investigation. If at the conclusion of preliminary investigation a breech is identified, it is referred to the enforcement and compliance department for further action.[280] In 2013 SEC handled 3,269 complaints. 1,879 were new complaints while 1,390 were complaints brought forward from the year 2012[281]. In 2013 1,147 complaints were resolved; 30 complaints were transferred to the Enforcement and compliance department while, 2092 complaints were outstanding as at December 31st 2013[282]. From this continued backlog log of unresolved complaints it shows that the present machinery on ground available to the SEC is inadequate to address complaints in the Nigeria capital market.

The Commission does not prosecute criminal offences.[283] Where in the course of investigation, it discovers allegation of crime it is obliged to pass such information to the appropriate prosecuting authorities.[284]. A total of 31 cases were transferred to the police in 2013 for criminal investigation and prosecution[285]. These cases bordered on; operating in the market without registration; misappropriation of funds; conversion; forgery and other suspected crimes. For other infractions, it has the responsibility to ensure that the erring party is appropriately sanctioned after an opportunity of being fairly heard.

Section 313 of the ISA authorizes the SEC to make rules and regulations for the purpose of giving effect to its provisions. Rule making is a dynamic tool of regulation to meet the changing situations in the market. The SEC in July 2003, created the Rule Making

[280]Agom, A. R (2009) The Legal Framework for the Regulation of the Nigerian Capital Market (unpublished) Ph.D. Thesis Faculty of Law, Ahmadu Bello university, Zaria. P.55
[281] SEC Annual Reports And Accounts 2013
[282] ibid
[283] S. 304, ISA
[284] Agom (2009) op.cit p. 42
[285] SEC Annual Report , op cit.

Division in the Secretariat and Rule Making Department.[286]. In 2013 new rules were finalized thus[287]: Rules on Sukuk Issuance in Nigeria; Rules on Private Equity Fund and Rules on the Use of Nominee Accounts. This Division reviews and updates SEC Rules from time to time as the need arises.

The SEC's regulatory mandate has been challenged in recent times by happening on the Nigerian corporate score. A few examples illustrate this point. In 2013, SEC published a list of 14 illegal companies as soliciting for deposits from member of the public with a promise of high return on their investment.[288] It warned the public to desist from patronizing them as they are not licensed /registered to engage in any function in the Nigerian capital market. In SEC **v. All Green Investments Nig. Ltd & 53 Ors**[289].; the respondents solicited and advertised to members of the public to deposit funds with them with a promise to pay huge returns periodically. The SEC sought among others a declaration that the 1st-35th respondents transaction as fund managers without due registration by the SEC was illegal. The IST so held.

On the nature of duty of SEC to an investor, the tribunal held in **FolarinGbadebo-Smith & 33 Ors v. First Bank of Nigeria plc.& 4 ors.**[290]., that the SEC under section 13(a) SEC has a duty to protect the integrity of the securities market against all forms of abuses including insider dealing and also a general duty to prevent fraudulent and unfair trade practices relating to the securities industry. The SEC is also empowered to establish specialized departments to enable it achieve its set goals and objectives.[291] Pursuant thereto, the Commission has created some key departments that handle different aspect of market regulations. The Securities and Investment Services Department is charged *interalia* with the

[286] Agom (2009) unpublished Ph.D. Thesis p.56
[287] SEC Annual Report.
[288] See appendix 1.
[289] (2012) 4 NISLR, p.
[290] (2013)7 NISLR
[291] S 14 ISA

responsibility of securities registration, evaluation and clearance of allotment proposals, clearance of transfer, conversion of debt securities amongst other.[292] The Legal Division vets legal document submitted in respect of public officers and related matters and advice accordingly. The Registration Department carries out the function of registering all capital market operators. This entails the registration of individuals and corporate organizations for capital market operators.

The enforcement and compliance department ensures compliance with all securities laws and regulations and deals with defaulters.[293] It prosecutes violators and ensures compliance with the decisions of the Administrative Proceedings Committee (APC). Thirty four new cases were referred for enforcement action in 2013[294]. It included cases of unauthorized sale of shares, non-allotment of shares and non-execution of mandate. In addition enforcement activities carried out by SEC includes[295]:

a. Suspended operators 17
b. Matters referred to the police 31
c. New cases received 34
d. Resolved cases 58
e. Pending cases 70
f. Illegal operators closed down 21

The Monitoring and Investigation Department investigates complaints against operators and monitors the activities of the operators in the market.[296] It also reviews the quarterly returns from market operators, annual report of quoted companies, on-site inspection, monitors the utilization of issue proceeds and unclaimed dividends. The

[292]Agom (2009) op.cit
[293]Okechukwu, I. A. (2006) The Role of the Securities and Exchange Commission in the Regulation of the Nigerian Capital Market (unpublished) LL.M Dissertation, Faculty of Law, Ahmadu Bello University p. 161
[294]SEC Annual Report 2013.
[295] ibid
[296]Okechukwu, op cit. p. 151

Recognized Investment Exchanges Department, undertakes physical monitoring of transactions on the floors of the exchange to check sharp practices.[297] The Research and Market Development department is the engine room of the development activities of the commission.[298]

To enhance its performance in combating fraudulent investment schemes in the capital market, some aspects of the SEC need to be revisited. Section 13(s) provided that the SEC is to "promote investors" education and the training of all categories of intermediaries in the securities industry, one of the major areas requiring investors education is the area on fraudulent investment scheme. The SEC Annual Report and Account for 2013[299] listed out her enlightenment campaign targeted at fostering investor education to include:

1. Hosting students from 29 institutions on excursions aimed at inculcating savings and investment culture in order to expose them to opportunities in the capital market.
2. Lectures organized on the theme "Opportunities in the capital market"
3. Enlightenment campaign tagged "Health and wealth" to educate market women in Aba on financial inclusion and health enhancement initiatives among others.

No mention of any enlightenment organized to educate the general public on fraudulent investment schemes that is, 'wonder banks' and illegal fund managers. These above listed activities are inadequate to educate investors. Thus, attention must be directed to this area. In the U.S SEC there is an Office of the Investor Education and Advocacy charged primarily with the enlightenment and education of investors and the general public on fraudulent investment schemes among others.[300] In Nigeria no such body exists. In the present advancement of information and communication technology the internet has become one of the fastest means of circulating information. Yet the Nigeria SEC website is behind in

[297] Agom, op.cit p.70
[298] Ibid
[299] Securities and Exchange Commission's Annual Reports and Accounts (2013) Accessed from www.sec.gov.ng on 6/7/2015
[300] www.investor.gov accessed on 5/7/2015

information dissemination. Examination of the SEC website provides very sparse information on fraudulent investment schemes. The U.S Office of Investor Education through its website provides ample information that can help one identify fraudulent investment schemes. Since identifying fraudulent investment schemes may be difficult because their originators make them appear similar to legitimate ones, investors need all the information they can get to identify fraudulent investment schemes but the Nigerian SEC website provides grossly insufficient information in this regard. In addition, the data it provides on some events are not up to date. As at the time of this research the SEC Annual Reports and Account for the year 2014 was not available on line.

The total number of cases in various courts and tribunal instituted by SEC as at 2013 were 132. Out of this 105 are pending cases; 20 are new cases; 7 are on appeal and 25 were concluded[301]. Again this backlog of unresolved cases shows that the task before the SEC is an enormous one, hence adequate machineries must be in place if these cases are expected to be resolved in the nearest future.

4.3.2 The Investments and Securities Tribunal

One of the far reaching innovations of the ISA[302] is the establishment of the Investment and Securities Tribunal (IST). It is the main dispute resolution mechanism established by the ISA. The IST was established with the vision to adjudicate all disputes arising within the capital market in a speedy, informal and yet business-like manner.[303] To realize its core objective of speedy justice dispensation, it was constrained to conclude any matter before it within three months of the commencement of the action before it. Conceived as a flexible institution in an enabling informal environment, it was not to be hindered by undue technicalities of the regular courts.

[301] SEC Annual Report 2013
[302] No. 29, 2007
[303] Agom, A. R (2009) An Expose on the Investments and Securities Tribunal, Journal of Private and Comparative Law, Ahmadu Bello University, Zaria, Vol. 2 $ 2, p. 59

The ISA 2007 re-established the IST, formalized it as a civil court and substantially sacked the twin pillars of speed and flexibility on which the IST was originally conceived and erected.[304] This redirection is manifested in the composition, scope and power of the IST. The IST now consists of ten members to be appointed by the Minister of Finance, one of whom shall be the chairman.[305] The chairman shall be a legal practitioner of not less than fifteen years post call with cognate experience in capital market matters.[306] There are four other full time members, three of whom shall be legal practitioners of not less than ten years post call experience and knowledgeable in capital market matters.[307] Five others are to be part time members and shall be persons of proven ability and expertise in corporate and capital market matters.[308] The Tribunal shall maintain a fund, which shall be applied towards the discharge of its functions under the Act.[309] Annual subventions or grants from the Federal Government and fees collected for services rendered shall be paid into the fund. The salaries and allowances of the chairman, members and chief registrar of the tribunal shall be equivalent to that of the chief judge, judges and chief registrar of the Federal High Court respectively.[310]

Section 284(1) ISA, 2007, prescribes the jurisdiction of the IST. According to this section, the tribunal shall to the exclusion of any other court of law or body in Nigeria exercise jurisdiction to hear and determine any question of law or dispute involving:

a. A decision or determination of the commission in the operation and application of the Act and in particular, relating to any dispute:
    i. Between capital market operators;
    ii. Between capital market operators and their client;
    iii. Between an investor and a securities exchange or capital trade point or clearing and settlement agency.

[304] Ibid, .
[305] S. 275(1) ISA
[306] S.275(a) Ibid
[307] S.275(b) Ibid
[308] S.275(c) Ibid
[309] S.285(1)
[310] S.280

iv. Between capital market operators and self regulatory organizations;

b. The Commission and self regulatory organizations;
c. A capital market operator and the Commission;
d. An investor and the Commission;
e. An issuer of securities and the Commission
f. Disputes arising from the administration, management and operations of collective investment schemes.

And any other matter as may be prescribed by any other Act of the National Assembly.[311]

The Pension Reform Act has vested the IST with the power to hear disputes arising from the application of the Pension Reform Act.[312] Flowing from the Act, it means that victims of fraudulent investment schemes can bring actions before the Tribunal. Any person aggrieved by any action or decision of the SEC may institute an action in or appeal against such decision to the IST. The onus of proving any complaint shall be on the complainant or appellant as the case may be.

Proceedings before the Tribunal shall be deemed to be judicial proceedings and the Tribunal shall be deemed to be a civil court for all purposes.[313] The Tribunal shall conduct its proceedings in such manners as to avoid undue delay and shall dispose of any matter before it within three months from the date of commencement of the hearing of the substantive action.[314] The Tribunal may in its judgment impose sanctions such as fines, suspensions, withdrawal of registration or license, specific performance and restitution among others as it may deem appropriate in each case. Award or judgment of the IST shall be enforced as if it were a judgment of the Federal High Court. Decisions of the IST can be appealed against to the Court of Appeal on points of law alone or mixed law and facts.[315]

The Tribunal is obliged to dispose of cases before it within three months from commencement of hearing the action. This provision, unless watched carefully may frustrate

[311]S. 284 (2) Ibid
[312]Section 93(i), Pension Reform Act, No. 2 2004, (39) S.290(3) ISA
[313]S. 290(3) ISA
[314]S. 289(5) ISA
[315]S. 289 Ibid

the purpose of establishing a separate court for the capital market which was to remove delays in proceedings.

There is no gain saying the fact that the emergence of the IST has altered the landscape of capital market litigation in Nigeria. The Tribunal has delivered some landmark decisions that have deepened the jurisprudence of the Nigeria capital market. The Tribunal has also recovered millions of investors' money that would otherwise have been lost to scam or fraudulent investment schemes. In the case of **Chief LivinusEzemgbev. The Nigerian Stock Exchange**[316]**,** involving the misappropriation of client's investment by a capital market operator. The NSE and SEC were directed by the IST to compensate the applicant from the Investors' Protection Fund and further to draw up and make public within ninety days guidelines for the implementation of the Investors Protection Fund. This decision was followed in the case of **Boat Nig. Ltd V. Nigerian Stock Exchange**[317]**.** The implication of the decision is far reaching. It breathed life into the rules on investor's protection funds and spurred the regulatory bodies to action to do the needful.

Another landmark decision on investors' protection is the case of **Blue ChipAcquisition and Investment Co. Ltd V. Zenith Bank Plc. & 3 Ors**[318]**.** The tribunal laid down the rule that once an applicant for shares in the primary market subscribes for a number of shares and his application is neither declined nor his money returned to him, the investor has an equitable interest in the shares applied for. If such investor incurs loss arising from the non-remittance of the share certificate, the issuer may be damnified to the extent of the loss sustained. Decisions of the tribunal have taken judicial notice of ethical and customary practices in the capital market thus making them a matter of customary practice with normative value. Thus, in **Molten Trust Ltd & 1 Or. v. SEC**[319] the tribunal stated the

[316]IST/OA/06/20/06 (2012) 3 NISLR, 112.
[317] IST/OA/2007(2012) NISLR, 155
[318] Case No. IST/OA/04/2004.
[319] IST/APP/03/2004

procedure for sale of shares in the secondary market in Nigeria. In the same case the court made clear the target of justice dispensation in capital market disputes in Nigeria. In the words of the tribunal;

> The justice in the capital market jurisprudence is three dimensional. Justice to the appellant to ensure that he gets a fair hearing and where this is not done, to have the case against declared a nullity: justice to the respondents (SEC) by ensuring that the tribunal gives credence to its statutory responsibility; and to the public and capital market community….

Notwithstanding the giant strides, some aspects of the IST have generated controversies among stakeholders of the Nigerian capital market. The major controversy centres on the constitutional place of the IST. Scholars[320] have opined that the establishment of the IST was unconstitutional. The proponents of this view held onto section 6(5), Constitution of the Federal Republic of Nigeria, 1999, which provides the list of Superiors Courts of record in Nigeria. Although section 6(4)(a) of the constitution empowers the National Assembly or State House of Assembly to establish other courts, such courts however shall be of subordinate jurisdiction to the High Courts. It was canvassed that the said section 6(5) has closed the gate to the creation of any superior court of record in Nigeria. To the extent that the ISA sought to establish the IST as a court of coordinate jurisdiction with the Federal High court, and thus a superior court of record, it was inconsistent with the constitution. To the extent of this inconsistency, the sections 241(3) and 243(1) ISA stands null and void.

However, a careful digest of section 6(5)(j) of the same Constitution shows that the judicial powers of the federation shall also rest on such other courts as may be authorized by law to exercise jurisdiction on matters to which the National Assembly may make laws.[321] The ISA, which came into effect on the 26/05/1999, before the enactment of the 1999

[320]Raji, K. J (2002) Constitutional Limitations of the Investment and Securities Tribunal*, Modern Practice Journal of Finance and Investment Law,* Vol. 6, No. 1 - 2
[321]Agom op. cit p. 68

constitution on the 29/05/1999 is an existing law deemed passed by the National Assembly fully aware of its provisions before the promulgation of the 1999 Constitution, ISA is deemed to convey the legislature's intention.

As it stands currently, the real issue is not the constitutionality or legality of the IST. Law and case law are unanimous that the IST has scaled these two[322]. The real challenge is on the exclusivity of its jurisdiction on the subject matter for which it was vested jurisdiction. While the constitution appears to confer jurisdiction on the subject on the Federal High Court and State High Courts, the ISA 2007 exclusively preserves jurisdiction in respect thereof on the IST. Case law is split on the issue. In **SEC v.Kasunmu& 1 or[323],** the question was whether a legal practitioner must register with the SEC pursuant to the IST as a capital market operator before he could act as a solicitor to issue. The preliminary objection against the Federal High Court assuming jurisdiction on the matter since it was a subject for which exclusive jurisdiction had been vested on the IST was over ruled. On appeal to the Court of Appeal, it was held that the jurisdiction of the Federal High Court was ousted by section 242 of the ISA which granted exclusive jurisdiction to the IST thus it was void. Also, in **MuftauAjayi v. SEC[324],** the question whether the Federal High Court could entertain a motion an application for judicial review of the decision of the APC of the SEC in respect of an allegation of authorizing the issuance of a prospectus containing untrue statements. The preliminary objection against the jurisdiction of the Federal High Court that the subject matter was the exclusive preserve of the IST was sustained and the matter transferred to the IST. On appeal, the Court of Appeal held that the IST had exclusive jurisdiction on the matter and that the jurisdiction was not shared with the Federal High Court.

[322]Agom, A.R(2015)., "Investments And Securities Act: A Veritable Tool For The Development And Growth In The Nigerian Capital Market"; A Paper Presented at the Investments and Securities Tribunal Workshop Held at the Oriental Hotel Lekki, Lagos on the 8th day of December, p.34
[323] (2009) 10 NWLR, (pt. 1150),509
[324] (2009) 13 NWLR, (pt. 1157), 1

Recently another dimension has been added to the discourse. It has been held that when an agency of the Federal Government like SEC or CBN is a party to the suit, only the Federal High Court would have jurisdiction to entertain the cause or matter involved. In **Nospecto Oil and Gas Ltd. v. Olorunnimbe**[325], the subject matter was collective investment scheme. The applicants had SEC and CBN as parties to the suit. Before the IST, the preliminary objection against its jurisdiction was overruled. On appeal against the IST, the Court of Appeal held:

> There is no doubt that to ensure speedy disposition of certain genre cases, the national assembly had thought it fit to create specialist tribunals, however, such creation must conform with the constitution… by the provision of section 284(i) of the ISA, the areas where the tribunal has exclusive jurisdiction is limited to disputes relating to powers of the securities and exchange commission vis-à-vis capital market operators, investors etc. section 284(f) gives the tribunal exclusive jurisdiction to adjudicate in disputes arising from the administration, management and operation of a collective investment scheme. I have held earlier that the appellant and the 1st to 14th respondents were engaged in a collective investment scheme-thus if the claims by the 1st – 14th respondents were limited to claim (i) compelling the appellant to stop its allegedly illegal and fraudulent business and banking activities, then the tribunal would have had exclusive. However, since the principal claims are against SEC and CBN, the tribunal has no jurisdiction to determine them. As I said earlier, no matter how laudable the reasons, the parties and the tribunal cannot by complicity confer jurisdiction on it. That would be ultra vires the constitution[326].

In obvious sympathy, Danjuma JCA volunteered an amendment[327];

> Let me however say at this stage that the situation created by this decision… is such that the legislature i.e. national assembly may amend section 251(1)(r) of the 1999 constitution to qualify such exclusivity of jurisdiction by the addition of such phrase as:
>
> > 'without prejudice to the determination of all such causes or matters as are by any statute or Act of the national assembly vested in any specialized court or tribunal, the parties thereto not withstanding'

[325](2012) 10 NWLR, (pt. 1307), p.115.
[326] Ibid, p.161
[327] Ibid, p. 163

There is no gain saying the fact that the establishment of the IST marked a new dawn in commercial litigation in Nigeria. Therefore the need to clearly define the jurisdiction of the IST in the constitution becomes compelling because the IST was created for speedy resolution of capital market disputes which are time sensitive and not to be tried at the normal courts which are usually not time sensitive. Also, in view of the nature of fraudulent investment schemes (FIS) which may result to criminal sanctions and fines, the time is now right for criminal jurisdiction to be vested on the IST.

4.3.3 The Administrative Proceedings Committee

The Administrative Proceeding Committee (APC) is an internal quasi-judicial committee of SEC set up pursuant to the ISA; to resolve conflicts, disputes, grievances and violations requiring enforcement in the capital market.[328] The Committee is made up of the Non-Executive Commissioners of SEC (who preside) some members of the Board of SEC, Directors in the operations departments of SEC. The committee also allows observers who represent capital market operators and capital market trade associations to attend its sittings and advise it on issues.

The jurisdiction of the APC covers all disputes in the capital market between capital market operators and their client; SEC and capital market operators; and the SEC and stock or commodity exchanges or capital trade points[329]. Thus in **SEC v. NALMerchant Bank Plc. &Anor**[330], a complaint bothering on the offering of unregistered prospectus and securities by the respondents, the APC interalia warned the respondents to cease and desist in future from violation of the rules on registration of offer documents before an offer is opened to public subscription. Future recurrence of this it said would attract additional penalty of suspension from capital market activities.

[328] Introduction, Schedule vii, SEC Rules and Regulations made pursuant to ISA, 1999,
[329] Rule 3, ibid
[330] APC/19/2000, SEC Records of the Proceedings of the APC (2000-2002), vol.4 2004

Parties invited to the APC may attend the proceedings in person, send in their representations by sworn testimony or retain a counsel to represent them at the proceedings[331]. The proceedings of the APC may be in written or electronic form. At the end of the proceedings the decision of the committee is dispatched to affected parties not later than five days of the confirmation of the decision by the Commission. The decisions of the APC are subject to the confirmation of the board of SEC[332].

The APC proceedings are purely administrative and its procedures are prescribed by the SEC and contained in the rules and regulations. Decisions of the APC after ratification by the Board of SEC are subject to appeal to the IST in compliance with the provision under ISA[333]. Complaint are received by the SEC and if the investigation report raises a *prima facie* case of violation of securities laws or rules and regulations made pursuant there to and parties fail to reconcile, the matter is referred to the APC. Matters referred to the APC are usually very contentions and portend serious consequences to the integrity of the market such as fraudulent investment schemes or considered as capable of having a systematic impact on the system.

The decisions of the APC are enforced except and until reversed, amended or otherwise as directed by a competent Court or the IST upon appeal by a party dissatisfied with the decision. In **SEC v. African Petroleum plc.**[334] a case before the APC- the complaint of Sadiq Petroleum Nigeria Limited against the directors of AP Plc., who signed or consented to the prospectus bearing material omissions during the privatization offer of 2000, the APC decision interalia was that the NNPC is liable to pay compensation to all persons who subscribed to the AP plc. shares, relying on the prospectus, for the loss or damage they might

[331] Rule 2, SEC Rules op cit.
[332] Rule 12, ibid
[333] Rule 13, ibid
[334] APC/22/2002; Proceedings of the APC , 2004, published by SEC.

have sustained by reason of the untrue statement included in the prospectus as provided in section 62(2) & (4) of the ISA 1999.

The SEC's APC was reconstituted by the Board of the commission at its 69th meeting of February 6 and 7 2013 and inaugurated May 15/2013. This was to ensure better transparency, fairness and participation of the stakeholders as well as the efficiency in the decision process. SEC report for the year 2013 shows that a total four cases were referred to the APC. Two (2) were decided by the APC and confirmed by the SEC Board while two (2) others are still pending. On the APC of SEC, the tribunal in Union bank of Nigeria v. SEC held that the APC of SEC should not be equated with an ad hoc committee. As a committee of SEC it is still part of SEC. Without the APC, SEC would still carry out the quasi-judicial aspect of its regulatory functions one-way or the other.

The competence and constitutionality of the APC has being challenged on grounds of lack of fairness due to its composition and ratification of its decision by SEC. In the case of **SEC V. Osindero&ors**[335] the Court of Appeal was invited to determine whether the SEC'S APC proceedings was not in violation of the constitutional principles of the right to fair hearing as envisaged under section 36 of the constitution[336]. The respondents who were the plaintiff/applicant at the lower court were registered with SEC as Auditors/Reporting accountants. The SEC after conducting investigation on the matter involving the respondents invited the respondents to appear before the APC and defend the allegations of the complaint. The respondents refused to appear before APC and filed a case at the Federal High Court challenging the jurisdiction of APC on the ground that the SEC was the accuser and judge thus the proceedings were contrary to fair hearing and in violation of section 36 of the CFRN. The FHC gave judgment in favour of the respondent/ applicant. On appeal by the SEC the

[335] CA/A/222/05
[336] Constitution of the Federal Republic of Nigeria.

Court of Appeal held that the proceedings before the APC were not in violation of the constitution since the parties were give opportunity to be heard.

It is submitted with due respect that the decision of the Court of Appeal was erroneous. According to the rule of natural justice encapsulated in section 36 of the constitution, fair hearing does not only constitute hearing both parties but that one cannot be a judge in his own cause. The APC is constituted by SEC and more than half of its members are the staff of SEC. Additionally, the decision of the APC must be ratified by the SEC board before it can be termed as valid. These two points illustrate that the APC is not independent and thus in violation of the rule of fair hearing as regards administrative proceedings. Since the SEC may choose to ratify only decisions that favours it. The lack of autonomy in the manner of constitution of the APC questions the integrity of the SEC as the apex regulator of the Nigerian capital market.

4.3.4 The Economic and Financial Crimes Commission

The Economic and Financial Crimes Commission (EFCC) is another institution that can be used to fight fraudulent investment schemes in the Nigeria capital market. The EFCC is established as a body corporate with perpetual succession. It is the Financial Intelligence Unit (FIU) in Nigeria charged with the responsibility of coordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria. The EFCC Act[337] provides that the Commission shall be the coordinating agency for the enforcement of the provisions of:

a. The Money Laundering Act, 2004
b. The Advance Fee Fraud and other Related Offences Act 1995
c. The Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act as amended;

[337]S. 42 EFC Act 2004

d. The Banks and Other Financial Institutions Act, 1991 as amended;

e. The Miscellaneous Offences Act; and

f. Any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code,

As the FIU, the Commission in fighting financial crimes must include that of the capital market such as fraudulent investment schemes which appears excluded. The Commission is composed of the Chairman who is also the Chief Executive and Accounting Officer of the Commission, serving or retired officer not below the rank of Assistant Commissioners of Police or its equivalent, possessing 15 years cognate experience and the Governor of Central Bank of Nigeria. Representative of the Ministries of Finance, Foreign Affairs, Justice; Chairman National Drug Law Enforcement Agency or his representative, the Director General of National Intelligence Agency or his representative, and the Department of State Security Services or his representative. Other members are Registrar General Corporate Affairs Commission or his representative; the Director General Securities and Exchange Commission or his representative; the Managing Director Nigeria Deposit Insurance Corporation or his representative; the Commissioner for Insurance or his representative; the Postmaster General of the Nigerian postal service or his representative; the Chairman Nigerian Communications Commission; Comptroller-General customs; Comptroller General Immigration; Inspector General of Police and their representatives, four eminent Nigerians with cognate experience in any of the following that is, finance, banking, Law or accounting.[338]

The functions of the Commission as stated in section 6 include the following:

a) Enforcement and due administration of the provisions of the Act;

[338]S. 2 Ibid

b) The investigation of all financial crimes including advance feed fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam etc.;

c) The coordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority;

d) The addition of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crime related offences on the properties the value of which corresponds to such proceeds.

e) Adoption of measures to eradicate the commission of economic and financial crimes;

f) The adoption of measures which include co-ordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial relate crimes;

g) The facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes;

h) The determination of the extent of financial loss and such other losses by government, private individuals or organizations;

i) Carrying out and sustaining rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria.

There is no doubt that the functions of the EFCC are enormous. As the coordinating head of all other ministries in the fight against Economic and Financial Crimes, combating fraudulent investment schemes can be attainable if these functions are carried out. In **FRN V. Amadi**[339] the accused was charged by the EFCC on an amended five count charge of obtaining money by false pretenses contrary to the Advance Fee Fraud and other related

[339] (2005) 2 QILR 129

offences act. The accused testified in his own defense and admitted the ownership of the website www.efcconline.com used for the alleged offence but the accused denied committing the offence. The trial court convicted him of the offence. On appeal, the Court of Appeal upheld the decision of the trial court. Dissatisfied he appealed to the Supreme Court. The appellant contended that the trial court had no right to assume jurisdiction on the case as the proper parties were not before the court. That by virtue of section 211 of the CFRN 1999, only the AGF of a state or an officer of his department to whom he delegates such power has the right to institute and undertake criminal proceedings against the appellant. Therefore the respondent (EFCC) in this case lacked the prerequisite power to prosecute the appellant and by implication the trial court lacked jurisdiction. Unanimously dismissing the appeal, the Supreme Court held that;

> ... The EFCC is a common agency responsible for both the federal and state economic and financial crimes and as such it qualifies as any other authority to institute criminal proceedings under section 211(1) (b) of the 1999 CFRN, thus Mr. Hassan being a staff of the EFCC who signed the charge was competent to do so…

While the special powers of the Commission should be commended as it vests power on the EFCC to cause investigations to be conducted into the properties of any person if it appears to the Commission that the person's lifestyle and extent of the properties are not justified by his source of income,[340] their use of the power in Nigeria regime came under heavy criticism from different strata of the society.[341] This was due largely to the incessant criticism of the class opposed to the elongation of power bid of the then president.[342] This it is agreed muddled the erstwhile impeccable image of EFCC, from which it is yet to recover.[343] Also section 7(b) on the investigation of a person's lifestyle has also generated controversy.

[340] 7(b) Ibid
[341] Alubo, A. O (2009) "Wining the War Against Corruption through Effective Legislation in Nigeria in Merging Issues in Nigeria Law": Alubo, A. O; Ibrahim A.; Izere, G.(ed) Essays in Honour of Justice Adejumo, B.A, Constellation (Nig) Publishers, Abuja, p. 2
[342] Ibid
[343] Ibid

While the provisions remain relevant and germane the Commission must act based on its own findings uninfluenced by external authorities. For effective performance of the Commission, section 12 of the Act suggests the establishment of units such as: the General and Assets investigation units; the legal and persecution unit, the research unit, the administration unit and training unit. In 2013 the EFCC had a record of 117 convictions[344]

As part of the efforts to stem the menace of "wonder banks" in Nigeria, there is currently an inter-agency committee on illegal fund managers comprising the Central Bank of Nigeria, Nigeria Deposit Insurance Corporation, Securities and Exchange Commission, Economic and Financial Crimes Commission, Corporate Affairs Commission and the Police.[345]

In addition the Commission shall seek and receive information from any person, authority, corporation or company without hindrance in respect of offences it is empowered to enforce under this Act.[346] Any person who willfully obstructs the Commission or any of its authorized officers in the exercise of any of the powers conferred on the Commission by this Act or fails to comply with any lawful enquiry or requirements made by any authorized officer in accordance with the provision of this Act commits an offence and is liable on connection to imprisonment for a term not exceeding five years or to a fine not below the sum of at N500, 000 or both.[347]

Officers of the Commission enjoy certain immunities as they cannot be compelled to disclose the source of information or identity of their informants except by the order of the court.[348] This provision is a welcome one, as it enables the officers of the Commission to carry out their investigation without fear and favour and also for individuals who have

[344] www.efccnigeria.org
[345] CBN: depositors claim N107billions from 'wonder banks', articles… retrieved from www.thisdaylive.com/...wonder-banks-/...on 6/7/2015. See also CBN press release- retrieved from www.cenbank.org/.../...
[346] S. 38(1) Ibid
[347] S. 38(2) Ibid
[348] S. 39(1) Ibid

information to approach the commission without fear that they would be arrested for furnishing the Commission with information. But then any person who gives to the Commission any false, untrue or misleading statement shall be guilty of an offence and shall on conviction be liable to fine not exceeding one hundred thousand naira or to imprisonment for a term not exceeding two (2) years or both.

Subject to the provisions of this Act, an officer of the Commission while investigating or prosecuting a case under this Act shall have all the powers and immunities of the police officer under the Police Act, and any other law conferring power on the police or empowering and protecting law enforcement agents.[349] But such officer must act within the confines of their enabling law. Thus in **Moore vs. EFCC**[350], it was held that sections 6 and 7 of the EFCC Act 2004 are clear on the functions of the Commission. This case as stated in the petition of the respondents relates to forgery of signature on a document purportedly filed by a private company of an individual. It was held that the crime if it occurred did not violate existing legislation governing economic activities of government and its administration. The alleged crime cannot by any stretch of imagination be ascribed to any of the functions stated in section 6 and the special function in section 7 of the EFCC Act. This is not to send the wrong signal that the court is stifling investigation of crime. It is important that special law enforcement agencies stick to the law establishing them in order to avoid disorder.

Section 43 provides that the Attorney-General of the Federation may make rules or regulations with respect to the exercise of any of the duties, functions or powers of the Commission under this Act. While in Section 5(i) and (k) it provides that the EFCC shall be responsible for *inter-alia* taking charge of, supervising, controlling, and coordinating all responsibilities, functions and activities relating to the current investigation and prosecution

[349] S. 41 Ibid
[350](2010) ECLR 312 at 314.

of all officers connected with or relating to economic and financial crimes, in consultation with the Attorney General of the Federation.

The relationship between the EFCC and the Attorney General of the Federation (AGF) has generated controversy.[351] The EFCC Act in section 43 gives the AGF power to make laws in relation to the Act and in section 5 enjoins the EFCC to carry out their functions in consultation with the AGF. This has indeed being a point of controversy. Owing to the fact that the AGF is the chief prosecutor of the country and has the power to institute, take over or discontinue criminal proceeding at any stage before judgment; In the case of former governor of Abia state, Orji UzoKalu where criminal proceedings were instituted against him at the Federal High Court by the EFCC, for money laundering and other financial crimes, the AGF exercising his constitutional power, took over prosecution. It was indeed a great debate.[352]

The overriding power of the Attorney General of the Federation and of the States on matters pertaining to criminal prosecution in Nigeria, cannot by any stretch of imagination, be denied. However, the struggle for supremacy by other prosecutors like the EFCC can be avoided if the EFCC sticks to the provisions of the law that says it should act "in consultation with the AGF".

4.3.5 The Police

The Constitution provides that the Nigerian Police Force (NPF) shall be organized and administered in accordance with such provisions as may be prescribed by the Act of the National Assembly. In the exercise of the powers vested on it by the constitution as aforementioned the National Assembly enacted the Police Act.[353] The Police Act clearly provides for the command structure of the force. This is to clearly identify the flow of power command and channel of discipline in the force. The Police Act creates the office of the

[351]Shuwa, B. (2009) The Prosecution of Criminal Cases in Nigeria: The Role of Attorneys-General vis-à-vis Other Prosecutors In Emerging Issues in Nigeria Law, Alubo,et al (ed), op. cit, p.107
[352]Ibid
[353]S. 214(2)1(a) CFRN 1999

Inspector General (IG) and that of a number of Deputy Inspector Generals and Assistant Inspector Generals as the Police Council may deem necessary.[354] The Police Act also vests the IG with enormous powers over the command of the entire NPF. For administrative convenience, the Nigeria Police Command structure is divided into three categories, as the command structure at the force Headquarters; the Zonal Command; and the State command.

The NPF is designated by the Constitution of the FRN as the National Police of Nigeria with exclusive jurisdiction throughout the country.[355] Constitutional provision exists for the establishment of separate NPF branches forming part of the armed forces of the Federation or for the protection of harbours, waterways, railways and airfields. The vision of the police force is to make the country safe and secure for the attainment of National aspiration.[356] To deliver qualitative and efficient security and law enforcement services to the citizens of Nigeria.[357]

The primary function of the police are the prevention and detection of crimes; the apprehension of offenders; the preservation of law and order; the protection of life and property; and the due enforcement of all laws and regulations with which they are directly charged and to perform any other military duties within or without Nigeria as may be required of them under the authority of this or any other Act.[358] The police are also empowered to prosecute cases in any court in Nigeria including the apex court as held in the case of **Olusemo vs. C.O.P.**[359]

One of the basic function of the police which is the prevention and detection of crimes is vital in order to combat fraudulent investment schemes. This duty is paramount because of the importance attached to "nipping a crime in the bud" rather than expending tireless efforts

[354] S.5 Police Act LFN 2004
[355] S. 214(1) CFRN 1999
[356] www.psc.gov.ng/files/combatingcorruption accessed on 5/8/2015
[357] Ibid
[358] S.4 Police Act
[359] (2006)ALLFWLR, pt. 3, 12

investigating the crime afterwards. However, it is rather unfortunate that societal advancement in information and technology is often welcomed with a corresponding advancement in the pattern and mechanisms for perpetrating crimes. Consequently, insecurity of persons, and property, hence the need for the police to be alert by taking steps towards evolving policies, strategies and the technical 'know how' for fighting crime in the environment particularly fraudulent investment schemes.

In carrying out its function in various parts of the country, the police have stations at various parts of the country, lack of scientific and modern equipment for detecting crime has hindered the performance of the police in detecting and preventing crime and the powers of the police under the law are read without responsibilities. In addition, the way the police force is perceived in the country has affected it in carrying out its function. It is observed that the attitude of the police is to intimidate and extort Nigerians. This has placed the police in a bad light and persons who have complaints to make usually refrain from going to them.

4.3.6 The Judiciary

In line with the practice of federalism and separation of powers the Nigerian government is structured amongst the legislature, the executive and the judiciary. While the legislature is responsible for law making and the executive is charged with the implementation of such laws, the judiciary is responsible for the interpretation of the laws. The constitution provides for the independence of the judiciary.[360] Judicial powers of the Federation and States are vested in the courts established for the Federation and States.[361] The courts established by the constitution relate to the Supreme Court, the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; the High Court

[360] S. 6 CFRN 1999
[361] Chapter VII CFRN 1999

of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja among others.[362]

The Supreme Court of Nigeria is the highest court in the country. Appeals from the Court of Appeal lie directly to the Supreme Court.[363] The Court of Appeal hears appeal directly from State High Courts and Federal High Courts.[364] The Federal High Court has exclusive Jurisdiction in the matters listed in section 251 of the constitution.[365] It also has all the powers of the High Court of a state. Although, the Federal High Court has jurisdiction to hear matters relating to investments which would consequently extend to cases on fraudulent investment schemes, the introduction of the IST appeared to have eroded the exclusive jurisdiction enjoyed by the federal high courts. However, it has been held that when an agency of the Federal Government like SEC or CBN is a party to the suit, only the Federal High Court would have jurisdiction to entertain the cause or matter involved. In **Nospecto Oil and Gas Ltd. v. Olorunnimbe**[366], the subject matter was collective investment scheme. The applicants had SEC and CBN as parties to the suit. Before the IST, the preliminary objection against its jurisdiction was overruled. On appeal against the IST, the Court of Appeal held:

> … I have held earlier that the appellant and the 1st to 14th respondents were engaged in a collective investment scheme-thus if the claims by the 1st – 14th respondents were limited to claim (i) compelling the appellant to stop its allegedly illegal and fraudulent business and banking activities, then the tribunal would have had exclusive. However, since the principal claims

[362] S. 6(5) Ibid
[363] S. 230 Ibid
[364] S. 237 Ibid
[365] S. 249 Ibid
[366] (2012) 10 NWLR, pt. 1307, p.115.

are against SEC and CBN, the tribunal has no jurisdiction to determine them.

On the function of the courts, the Supreme Court in **Magit v. University ofAgriculture, Markurdi Stated** thus:[367]

> It is said that the function of the court is to interpret laws made by the legislature and not to make laws. In theory it is so. But it must be equally admitted that judges are not robots (or *zomb*ies) who have no minds of their own except to follow precedent. They are intrepid by their great learning and training and can distinguish in order to render justice to whom it is due. As the society is eternally dynamic and with fast changing nature of things in the ever changing world and their attendant complexities, the court should empirically speaking, situate its decision on realistic premise regard being had to the society's construct and understanding of issues that affect the development of jurisprudence.

[367] (2006) ALL FWLR pt 298, p.1313

CHAPTER FIVE.

SUMMARY AND CONCLUSION.

5.1 Summary

This research considered the legal framework for fighting fraudulent investment schemes in the Nigerian capital market. In doing so, the study examined various laws and institutions in Nigeria in order to determine how effective they have been in fighting the menace of fraudulent investment schemes and also how much has been done in educating investors about these fraudulent schemes. The ISA has made significant effort at control of invitations made to the public in addition to other guidelines. The Criminal Code, Penal Code, EFCC Act and AFF Act have also made important contributions at fighting financial crime.

5.2 FINDINGS.

The research finds as follows:

1. **Gaps in the Existing Laws:**
    a. Lack of Definition of Fraud: except for the Penal Code which attempts a definition of the word 'fraudulently', neither in the Criminal Code Act, the Economic and Financial Crimes Commission Act or Advance Fee Fraud Act is there clear provisions defining fraud. It is submitted that fraud is key in most financial crimes, it is, therefore, important that the various law targeted at combating financial crime should include the definition of the key concept fraud. This is to ensure that no crime goes unpunished and that criminals do not rely on the inadequacy of the laws to claim the defence that their action

does not constitute an offence under the law, just because of the failure to define the crime or its scope.

b. Absence of clear provisions against fraudulent investment schemes:by virtue of section 67 of the Investments and Securities Act only the ISA clearly provides against fraudulent investment schemes. Neither the EFCC Act, the AFF Act, the Criminal nor Penal codes provide specifically against FIS and other capital market offences.This implies that only the SEC is charged with the great task of combating fraudulent investment schemes, making the assignment too burdensome on SEC.

2. **Investors Difficulty in Identifying Fraudulent Investment Scheme**: Fraudulent investment schemes appear similar to legitimate investment vehicles, thus investors have great difficulty in differentiating them. Also, much of investment regulation-and consequently investment marketing and practice remains shrouded in verbiage incomprehensible to the average person. High investor ignorance on fraudulent investment schemes and how to identify fraudulent investment schemes is a major reason why fraudulent investment schemes still thrive in the Nigeria capital market.In addition, failure of Investors to Investigate Investment Opportunities has further strengthened fraudsters. Usually, the fraudsters leverage in on investors greed and ignorance about investment vehicles; these two factors have continued to lead to increase of these scams. Especially for investors who want to get rich very quickly and want investment opportunities that offer high interest rates beyond that offered by banks they are the usual victims of FIS.

3. **Absence of authoritative information on the size and scope of fraudulent investment scheme in Nigeria.** While newspaper reports show that there are over 400 wonder banks or illegal fund managers in Nigeria, the SEC list of illegal fund managers on its website enumerates only about thirty. As a result of this lack of public information, and

data, it is difficult if not impossible to gain an accurate measure of the prevalence of fraudulent investment schemes in Nigeria and the associated harm to the Nigerian economy and investors.

4. **Inadequacy of investors' enlightenment programmes.** An examination of the SEC activities carried out in 2013 targeted at deepening the market and fostering investor education is inadequate to enlighten investors or educate them about fraudulent investment schemes. The SEC website also provides skeletal information about fraudulent investment schemes hence inadequate to educate investors.

5. **Poor Information Update on SEC Website**. Information update on SEC website is inadequate to meet the demands of the changing society in order to provide current information to investors and the general public especially about fraudulent investment schemes. SEC annual report for 2014 was not available on the internet as at the date of this research.

6.3 RECOMMENDATION

In view of the foregoing this dissertation recommends:

1. Legal Reforms.

a. Clear provisions defining fraud should be included in the Criminal Code, Penal Code, EFCC Act and the Advance Fee Fraud Act. The definition of fraud given in the case of **Solomon &ors.v Monday&ors**[368]as:

"Fraud implies a willful act on the part of anyone, where by another is sought to be deprived by illegal or in equitable means, of what he is entitled to". Should be adopted.

[368] (2014)LPELR-22811CA. Cited In Okojie, E (2015) "Corporate Fraud In Nigeria And The Dialectics OfManagement Of Evidential Burden In Litigation*",Journal of Policy And Globalization*,vol.38, p.105, retrieved from www.iiste.org

b.. The enactment of an Act to cover specifically capital market offences like fraudulent investment schemes; with stiffer penalties for violation and in addition empowering the EFFC in this regard.

2. Duty of Investors:

Investors must exercise due diligence in critically assessing investment proposals and cultivate the discipline to keep a lid on their greed. Investment proposals with unusual high return on short term and without a visible justification for such earning must arouse suspicion. Investors must go beyond the offer to evaluate the structure of the investment, managers and the sort of business the pooled funds will be invested in. The legal status of the scheme should be of concern to investors. Simple incorporation of the company promoting the scheme does not substitute for registration by the SEC.

3.Framework to collect and Track Report on FIS: Nigeria SEC must have a framework in place to collect, track and report on fraudulent investment schemes complaints and aggregate that information both at states and national level. The SEC and the government should prioritize the collection of data regarding investment fraud complaints. Each state should have a centralized reporting repository connected to a single federal centralized repository so that there could be a database for handling complaints and for efficiency in investigation. In the alternative the police officers who are usually the first port of call by victims of investment scams should be trained about investment scheme and an office created for complaints on fraudulent investments which will then be forwarded to the SEC office. A clear place to report fraudulent investment scheme would allow for better data collection, investigation, and the ability to analyze the data to better understand fraudulent investment scheme and the extent of its impact on the Nigerian economy.

4. **Constant and Continuous Awareness Campaign by SEC**: a general recommendation arising out of this research is for the regulators to continue efforts to provide plain language

information to investors and to coordinate the approach to FIS awareness. For instance the U.S. SEC has an Office of Investor Advocacy and Education charged with awareness and other matters relating to investors to call when having issues. It publishes articles on various fraudulent investment schemes and how investors can identify illegal from legal investment. The Nigerian SEC can create this office and empower it with funds and manpower to carry out this function. While resources are being produced to enlighten investors, these regulators must ensure that these materials actually get into investor's hand. By determining where the investors encounter fraudulent investment scheme (particularly ones where they are likely to invest) regulators would be better placed to deliver the information needed and publishing them in simple language.

5. Constant Information Update on the SEC Website. The SEC must keep her website updated particularly in this era where the world has become a global village and a good percentage of Nigerians are internet users. It is important that the SEC steps up by keeping her website updated constantly with the information that would educate investors about fraudulent investment schemes. Additionally, SEC should provide assistance to investors who do not have access to the internet and those who are not computer savvy. There should be a phone network number where an intending investor can call to have the relevant information required as registration check before investing will reduce the incidence of fraud.

These actions must be urgently carried out by SEC in conjunction with other agencies; this is because of the grievous harm that the continuation of these fraudulent investment schemes could have on the Nigerian economy. It is in the nature of these schemes to collapse suddenly without warning. No one knows what event may send the Nigerian economy and the global economy as a whole back into crisis.

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