The Asset Management Review

Fifth Edition

Editor
Paul Dickson

Law Business Research

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Paul Dickson

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EDITOR'S PREFACE

While the global financial crisis of 2007–2008 may feel like an increasingly distant memory, its effects continue to be felt across the whole of the financial world. Despite significant improvements in the global economic landscape in the intervening years, global growth was hampered in 2015 by various geopolitical factors, including a slowdown of economic activity in China and weakening energy and commodity prices. In the UK, the prospect of the referendum on membership of the EU in June 2016 created an uncertain political environment. The impact of the UK's decision to leave the EU is expected to be significant, in particular for the UK and across the European continent but also more widely.

Nevertheless, the importance of the asset management industry continues to grow. Nowhere is this truer than in the context of pensions, as the global population becomes larger, older and richer, and government initiatives to encourage independent pension provision continue. By way of example, in the UK, changes to the rules governing what retirees can do with their pension benefits are creating new opportunities and challenges for discretionary managers and product providers.

The activities of the financial services industry remain squarely in the public and regulatory eye, and the consequences of this focus are manifest in ongoing regulatory attention around the globe. Regulators are continuing to seek to address perceived systemic risks and preserve market stability through regulation. In Europe, major changes to the regulatory landscape for investment funds were introduced by the Alternative Investment Fund Managers Directive, which has applied in full since July 2014, and more recently by certain changes to the UCITS regime. The next key regulatory milestone in the investment business space – the revisions to the Markets in Financial Instruments package – has been delayed by a year, reflecting the challenges for implementation of such significant and wide-reaching regulatory reforms. In the UK, the Financial Conduct Authority continues to focus on the asset management industry. In 2015, a market review of financial advice was completed, and a wide-ranging market study on the industry and the charges it levies on investors was launched.

It is not only regulators who continue to place additional demands on the financial services industry in the wake of the financial crisis; the need to rebuild trust has led investors to call for greater transparency around investments and risk management from those managing their funds. Industry bodies have noted further moves away from active management into passive strategies, illustrating the ongoing pressure on management costs. The increasing impact of technology on the industry has also been observed, including developments such as 'smart beta' management strategies and the nascent emergence of automated (or 'robo') advice services.

This continues to be a period of change and uncertainty for the asset management industry, as funds and managers act to comply with regulatory developments and investor requirements and adapt to the changing geopolitical landscape. Although the challenges of regulatory scrutiny and difficult market conditions remain, a return of risk appetite has also evidenced itself. The industry is not in the clear but, prone as it is to innovation and ingenuity, it seems well placed to navigate this challenging and rapidly shifting environment.

The publication of the fifth edition of *The Asset Management Review* is a significant achievement, which would not have been possible without the involvement of the many lawyers and law firms who have contributed their time, knowledge and experience to the book. I would also like to thank Gideon Roberton and his team at Law Business Research for all their efforts in bringing this edition into being.

The world of asset management is increasingly complex, but it is hoped that the fifth edition of *The Asset Management Review* will be a useful and practical companion as we face the challenges and opportunities of the coming year.

Paul Dickson
Slaughter and May
London
September 2016

Chapter 20

NIGERIA

Dan Agbor, Folake Elias-Adebowale and Christine Sijuwade[1]

I OVERVIEW OF RECENT ACTIVITY

In November 2015, the Nigerian Securities and Exchange Commission (SEC) presented its Nigerian Capital Market Master Plan (Master Plan), a 10 year-capital markets master plan aimed at facilitating the growth and development of the Nigerian capital markets.[2] This, and other developments, are discussed below.

II GENERAL INTRODUCTION TO THE REGULATORY FRAMEWORK

i Regulatory regime

The key statutes and regulations governing asset management in Nigeria are:

a the Investment and Securities Act 2007 (ISA);
b the rules and regulations issued by the SEC pursuant to the ISA (SEC Rules);
c the Companies and Allied Matters Act 2004 (applicable where the asset management vehicle is structured as a limited liability company);
d the Partnership Law of Lagos State (as amended) 2009 (Partnership Law) (applicable where the asset management vehicle is structured as a partnership in Lagos state);
e the PenCom Regulations on the Investment of Pension Fund Assets (PenCom Regulations) 2012 issued further to the Pension Reform Act 2004, which has been repealed and replaced by the Pension Reform Act 2014; and
f the Nigerian Stock Exchange Listing Rules, which regulate funds listed on the Nigerian Stock Exchange (NSE) (e.g., exchange-traded funds).

1 Dan Agbor and Folake Elias-Adebowale are partners and Christine Sijuwade is a senior associate at Udo Udoma & Belo-Osagie. The authors are grateful to Joseph Eimunjeze, senior associate at Udo Udoma & Belo-Osagie for his assistance with paragraph VII of this chapter.
2 http://sec.gov.ng/nigerian-capital-market-masterplan/.

ii Regulators

The SEC regulates the capital market; its main focus is to protect investors and market operators, and to ensure and preserve market integrity. The SEC also collaborates with relevant stakeholders to introduce new products and processes to develop the market. The SEC is empowered to impose sanctions on market participants for breaches of the ISA and the SEC Rules.

Other regulators include the NSE, which regulates listed funds and is itself regulated by the SEC; and PenCom, which regulates pension funds.

iii Regulated activity

Asset and fund managers that operate within the Nigerian capital markets, as well as other persons who carry on investment and securities business in Nigeria, must be licensed by the SEC.[3] In considering whether to grant a licensing application, the SEC will, *inter alia*, seek to confirm whether an applicant has good knowledge of the Nigerian capital market, and whether the sponsored individuals (i.e., the key employees) of the applicant are sufficiently knowledgeable regarding the activities and role of a fund or portfolio manager.

Under the provisions of the ISA, funds and collective investment schemes that are offered to the public are subject to the regulatory regime and must be approved by the SEC.[4] With the exception of private equity funds with investor commitments above 1 billion naira,[5] funds that are offered privately to select investors are not required to be registered with the SEC.

III COMMON ASSET MANAGEMENT STRUCTURES

The main structures used for asset management in Nigeria are as follows:

a limited liability companies – private and public;

b partnerships – general partnerships and, in Lagos state, limited partnerships or limited liability partnerships; and

c unit trusts.

i Limited liability companies

An asset management vehicle may be structured as a company limited by shares, and the liability of its members is limited in each case to the amount (if any) unpaid on their shares. Where a fund is structured as a limited liability company, it must be incorporated at the Corporate Affairs Commission (the Nigerian companies' registry), as required by the CAMA.

There are two types of company limited by shares – private or public – and either form may be adopted. The principal difference between a private and a public limited liability company is that a private limited liability company is limited to a maximum of 50 shareholders, while there is no maximum in relation to public limited liability companies. Private limited liability companies are, therefore, more commonly used for closed-ended funds, while public

3 Section 38, ISA.

4 Sections 153 and 160, ISA.

5 Rule 558 of the SEC Rules.

companies have been the preferred structure for open-ended funds. Another important difference is that the securities of public companies have to be registered with the SEC, and the approval of the SEC is required for a public company to issue shares.

ii Partnerships

Asset management vehicles may also be structured as a general partnership or, in Lagos state, as a limited partnership or a limited liability partnership under the provisions of the Partnership Law (see Section II, *supra*). As the limited liability partnership structure is relatively new, we find that most funds are structured as limited partnerships.[6]

The relationship between the partners in both limited partnerships and limited liability partnerships is governed by a partnership deed. The principal difference between these two types of partnership is that in limited partnerships, there is a general partner (usually the fund manager) who manages the fund and is liable for all the debts and obligations of the partnership, while the liability of the fund's investors (i.e., the limited partners) is limited to the extent of their respective contributions. In limited liability partnerships, on the other hand, there is no general partner. The Partnership Law refers, instead, to designated partners who are responsible for the administrative functions of the limited liability partnership. The liability of these designated partners, like that of all the other partners in a limited liability partnership, is limited to the amount of their contributions.

iii Unit trusts

Section 154 of the ISA recognises unit trusts and real estate investment trusts (REITs). REITs may be open-ended or closed-ended. This is discussed further in Section VI.iii, *infra*.

Any arrangement made for the purpose, or having the effect, of providing facilities for the participation of the public as beneficiaries under a trust in profits or income arising from an acquisition, holding, management or disposal of securities[7] is regarded as a unit trust. All unit trusts must be registered with the SEC.[8] The trust deed is the governing document of an authorised unit trust and is entered into by the fund manager and the trustees. While the ISA and the SEC Rules provide for open-ended and closed-ended REITs, this distinction is not made in relation to unit trusts.

IV MAIN SOURCES OF INVESTMENT

The total amount of foreign investment into Nigeria in the first quarter of 2016 stood at about US$710.97 million.[9]

6 The Lagos State Partnerships Registry in 2015 suspended the registration of limited liability partnerships until the Lagos state government determines whether it should continue to register this sort of structure, which appears to convey limited liability status on a partnership (a status that only incorporated companies enjoy).

7 Section 152, ISA.

8 Section 160(1), ISA.

9 National Bureau of Statistics, 'Nigerian Capital Importation - Summary Report: Quarter 1 2016 - www.nigerianstat.gov.ng/download/393.

i Sources of investment

The main source of investment into asset-managed funds in Nigeria is the NSE. The market capitalisation of the NSE as at 31 March 2016 stood at 15.881 trillion naira.[10]

ii Most significant investors

The major investor groups in the Nigerian asset management market include the following:

Pension funds

These funds are made up of funds jointly paid by employers and employees under the contributory pension scheme that came into force in 2004 under the Pension Reform Act. By the end of the first quarter of 2016, the total amount of pension fund assets was in excess of 5.46 trillion naira.[11]

Insurance funds

Funds held by insurance companies in the form of premiums also contribute significantly to Nigeria's investment pool. The pool of insurance premiums grew by 16.67 per cent from 294 billion naira in 2014 to 350 billion naira in 2015,[12] and the government is optimistic that this figure will continue to increase.

Funds (non-pension) held under management

The total funds (excluding pension funds) under management in Nigeria amount to between 275 billion naira and 300 billion naira. As at 13 May 2016, the net asset value of the various collective schemes in Nigeria stood at 286.377 billion naira.[13]

Retail investors

Retail investors include high-net-worth individuals who invest in private equity and similar kinds of retail funds, as well as investors from the general public who invest in publicly offered collective investment schemes.

V KEY TRENDS

In December 2014, the SEC issued a publication to the effect that by 30 September 2015, all fund managers must have increased their minimum share capital from 20 million naira to 150 million naira. Although fund managers seeking registration with the SEC had, *inter alia*, raised a concern that the cost of implementing this increase would create an unnecessary financial burden, the SEC held the view that the 20 million naira share capital was too low for any entity that seeks to manage several million naira in investors' funds. In order to avoid sanctions, licensed fund managers have begun implementing this directive and new managers seeking registration are taking steps to comply with the capital requirement.

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10 The Nigerian Stock Exchange (www.nse.com.ng).

11 http://pencom.gov.ng/docs/1462891258_Summary_March_2016.pdf

12 www.thisdaylive.com/index.php/2016/07/04/insurance-industry
s-total-premium-hits-n350bn/.

13 www.sec.gov.ng/net-asset-value-nav-data/.

In April 2015, the SEC also issued rules establishing the Investor Protection Fund (IPF). The IPF, which will be incorporated as a legal entity, is proposed to mitigate pecuniary losses suffered by investors due to the insolvency or bankruptcy of, or negligence or misappropriation of funds by, capital market operators or any of their officers in relation to securities or any property entrusted to, received or deemed to be received by such capital markets operators during the course of business. The effect of this is that, subject to such investors meeting the eligibility criteria specified in the SEC Rules, they will be entitled to receive from the IPF a maximum of 200,000 naira or its equivalent in shares or other securities subject to such adjustments as may be made by the board of directors of the IPF at their discretion. The SEC is required by the new regulations to provide an initial take-off grant to the IPF, with other funding derived from sources including annual contributions that will be required to be contributed by capital market operators including fund managers. The amount of such annual contributions, however, has not yet been published by the SEC.

The National Association of Securities Dealers (NASD), which had launched NASD plc as Nigeria's first formal over the counter (OTC) trading platform for unlisted public company securities in July 2013 and which is SEC-registered, is optimistic that the new SEC regulations[14] on unlisted public company securities will promote best practices for operators, price discovery and transparency in the OTC market in Nigeria, thereby facilitating private equity activity and secondary market trading for unlisted public securities in Nigeria.[15]

Another key development was the SEC's preparation of a Master Plan in November 2015[16] which, among other things, outlined the SEC's strategies for improving the attractiveness of the Nigerian capital market, creating an enabling and facilitative regulatory framework supportive of the development of the capital market and driving capital-raising to fund national economic priorities.[17] The SEC envisions that the implementation of the Master Plan will propel Nigeria 'to be Africa's most modern, efficient and internationally competitive capital market'.[18]

In addition, prior to June 2016, there were two foreign exchange (FX) markets in Nigeria – the Inter-Bank and CBN FX markets. In order to achieve a stable FX regime, particularly in relation to FX exchange rates, in June 2016 the Central Bank of Nigeria (CBN) introduced a flexible FX market. The main change for funds with foreign investors is that they are now able to convert their capital into Naira at a market determined exchange rate, as the applicable rate is no longer linked to or capped at a CBN-determined rate.

14 See further Section VI, 'Trading in unlisted securities trading', below. New rules on unlisted securities took effect on 13 April 2015. See www.sec.gov.ng/files/New%20rules%20April%202015/Update%2017APR2015/RULES%20ON%20TRADING%20IN%20UNLISTED%20SECURITIES_17415.pdf.

15 www.nasdng.com/media/press_update.php?id=46; see also www.punchng.com/business/capital-market/nasd-expects-increase-in-private-equity-activities.

16 http://sec.gov.ng/nigerian-capital-market-masterplan/.

17 Id.

18 Id.

VI SECTORAL REGULATION

i Insurance

There are no legal or regulatory rules that apply specifically to insurance asset management in Nigeria.

ii Pensions

The Pension Reform Act 2014 (PRA) was approved and signed by the President in July 2014, and it repealed the Pension Reform Act of 2004. Under the PRA, employers in both the private and public sectors are required to make contributions towards the pension savings of each employee. The PRA established a scheme for the payment of retirement benefits to all employees in the private and public sectors (Scheme). The PRA applies to every organisation with at least three employees and requires a minimum total contribution of 18 per cent of the monthly remuneration of each employee to be paid to a pension fund administrator (PFA) of the employee's choice (although organisations with less than three employees are also entitled to participate in the Scheme subject to guidelines issued by the PenCom). The employer is obliged to contribute at least 10 per cent of the employee's salary, while the employee contributes the outstanding 8 per cent (employers can choose to bear full responsibility of the entire pension contribution of an employee, in which case the contribution made by the employer is required to be at least 18 per cent of the employee's salary). Several PFAs have been established and licensed to administer pension fund contributions. These assets, held by pension fund custodians, are invested and managed by PFAs licensed by PenCom.

Investment by pension funds

In 2010, PenCom released the PenCom Regulations, which govern the investment of pension fund assets. The Regulations, which were revised in 2012, authorise the investment of pension fund assets in various asset classes.

PFAs are required to invest pension fund assets in a manner that will ensure the safety of the investment and high returns. They may not trade on margin accounts with pension fund assets, and are prohibited from borrowing or lending pension fund assets.

Equity investments by PFAs must be effected through public offerings approved by the SEC. Where the investment is in bonds, debentures or other debt instruments, it must be conducted through public offerings or private placements approved by the SEC. The restriction in relation to bonds is not applicable where the bonds or securities are being issued or fully guaranteed by the federal government, the Central Bank of Nigeria or eligible multilateral development finance organisations (MDFOs).

Primary market investments by PFAs in the units of open-ended, closed-ended or hybrid investment funds (including exchange traded funds), and specialist investment funds such as REITs and private equity funds, must be conducted through public offerings or private arrangements.

Secondary market trading of pension fund assets must be conducted on a securities exchange recognised by the SEC or a trading facility recognised by the Central Bank of Nigeria. There is, however, an exemption that allows PFAs to obtain approval from the SEC to acquire or trade in the eligible securities of a Nigerian corporate entity that is listed or quoted on an offshore securities exchange.

Pension fund assets may also be invested in global depository receipts or notes, and eurobonds issued by listed Nigerian companies that are certified and approved by the SEC.

The PenCom Regulations also contain detailed restrictions in relation to the various asset classes in which pension fund assets may be invested. For instance, private equity funds[19] must be registered with the SEC and managed by experienced fund managers licensed by the SEC. The fund must have well-defined and publicised investment objectives and strategies, and the pricing of the underlying assets must be disclosed. The minimum subscription by the fund's manager is also dependent on whether the fund has MDFOs as co-investors: if there are MDFO co-investors, the manager must subscribe for at least 1 per cent of the fund; if the fund does not have MDFO co-investors, the manager must subscribe for at least 3 per cent of the fund. A minimum of 75 per cent of the private equity fund must be invested in companies or projects within Nigeria, and the private equity fund must have satisfactory predefined liquidity or exit routes.

The requirements relating to infrastructure funds are very similar to those outlined above for private equity funds. In addition, the value of such infrastructure funds must be at least 5 billion naira.

The key principals of the managers of infrastructure funds or private equity funds must each have at least 10 years' experience in investment and management of third-party assets, or relevant project management experience in sectors of the economy in which the funds will invest; five of these years must have been spent gaining relevant experience. These key principals may not exit the fund without at least 90 days' notice being given to PenCom through the relevant PFA.

In relation to REITs,[20] managers are required to have a minimum investment manager rating of BBB, and the value of the issue may not be less than 1 billion naira. Promoters of a REIT are also required to subscribe for at least 5 per cent of the REIT.

iii Real property

Structure of real property funds

Real property funds in Nigeria can be structured as a REIT or a real estate investment company (REICO).[21] Under the ISA, a real property fund refers to a body corporate incorporated for the sole purpose of acquiring intermediate or long-term interests in real estate or property development that may raise funds from the capital market through the issuance of securities.[22] Participants in a REICO are entitled to ordinary shares in the company, thereby giving the investors voting rights in the management of that company. Participants in a REIT are entitled to an income certificate that gives the investor a right to share in the income of any property or property development.

All real property funds are required to:

a have an investment committee comprising a minimum of three persons knowledgeable in investment and financial matters, one of whom must be independent of the fund manager, trustee and custodian;

b ensure that the sponsor of the scheme subscribes for and maintains a minimum of 5 per cent of the scheme's units at inception and throughout the life of the scheme;

19 Section 5.2.11, PenCom Regulations 2012.

20 Section 5.2.8, PenCom Regulations 2012.

21 Section 154, ISA.

22 Section 193, ISA.

c ensure mandatory distribution of a minimum of 25 per cent of the scheme's income annually in the case of schemes with a stated objective of distributing incomes; and
d invest in the unlisted securities of a company that has been rated to be of investment grade by a reputable or SEC-registered rating agency.

Due to the difference in their legal structure, the SEC Rules provide different rules for REICOs and REITs.

REICOs[23]

A REICO may be registered with the SEC if it:
a is a body incorporated under the CAMA;
b has a capital and reserve as prescribed by the SEC from time to time;
c carries on business as a collective investment scheme that invests solely in properties; and
d complies with the requirements prescribed by the SEC from time to time.

A REICO can be open or closed-ended – this distinction is important, as there are different asset allocations for closed-ended and open-ended companies. Underwriting of a REICO's offer is at the discretion of the issuer, but where it is underwritten, no less than 35 per cent of the issue must be underwritten.[24] The minimum level of subscription for a REICO must be at least 50 per cent of the percentage underwritten before the offer may be cleared by the SEC.[25]

A REICO must file a valuation report of its assets with the SEC every two years[26] and its assets must be insured. Evidence of the insurance must be filed with the SEC within 90 days of the commencement of the scheme and within 30 days of any subsequent acquisition.[27]

While a REICO may borrow, its borrowing power is limited to 25 per cent of the shareholders' funds.[28]

REITs[29]

Unlike a REICO, which is an incorporated entity, the REIT is constituted under a trust deed entered into between the fund manager and the trustees, and is registered with the SEC. A REIT may only offer units to the public upon registration of the trust deed with the SEC.

The SEC Rules stipulate the mandatory contents of the trust deed as the principal document governing the REIT.[30] These provisions include:
a a statement regarding the units being offered to the public;
b the investment policy of the REIT;
c a statement to the effect that the underlying assets of the REIT shall reside in the trustees;

23 Rules 510 (a) and 511 SEC Rules.
24 Rule 517, SEC Rules.
25 Rule 520, SEC Rules.
26 Rule 522, SEC Rules.
27 Rule 524, SEC Rules.
28 Rule 525, SEC Rules.
29 Rule 526, SEC Rules.
30 Rule 532, SEC Rules.

d a statement that the title to the real estate assets will be held by the trustees of the REIT on behalf of the unitholders; and

e an indication of the fund manager's fees, which shall not exceed 5 per cent of the net asset value of the fund, and an incentive fee not exceeding 30 per cent of total returns in excess of 10 per cent of the REIT's net asset value.

In the case of an open-ended trust, the trust deed must also state the manner for redemption of units by the manager.

While a REIT offer may be underwritten at the discretion of the issuer, the SEC Rules are silent on the minimum percentage of the offer that must be underwritten. The REIT is required to file quarterly reports with the SEC on its performance, and a valuation report of its assets every two years. The underlying assets of the REIT must be insured by the fund manager.

Title to assets held by real property funds

Under Nigerian law, the acquisition of legal title to real property interests is subject to the consent of the governor of the state in which such property is located. The process of transferring title involves the payment of stamp duty, consent fees and registration fees, which, in some states in Nigeria, can have a significant financial implication on the transaction.[31] This has discouraged real property funds, as the funds have to bear the transfer costs when acquiring interests in real property. In response to this, and as a means of encouraging real property funds, in February 2013 the SEC revised its rules to provide that a real estate investment scheme may hold title by acquiring legal title to its assets or hold beneficial or equitable title under a deed of trust.[32] Where the fund decides to hold beneficial title, the fund must:

a register a caution indicating the interest of the scheme in the relevant land registry where that property is located;

b affix plaques and other notices on the relevant property indicating the interest of the scheme;

c deposit the original title documents and other relevant pre-signed documents with the scheme's custodian; and

d provide such indemnity to the scheme as may be necessary in the circumstances.

The option of holding beneficial title is more advantageous to real property funds, which can avoid incurring transfer costs since such costs are set off against the net proceeds of the scheme's offer. This will generally leave the fund with lower capital for its investment and may significantly affect the yield on the fund's investment.

31 For example, with effect from 5 January, 2015, the cost for perfecting an assignment of title to real property in Lagos is 3 per cent (where both parties are individuals) and 4 per cent (where either party is a corporate entity) of the fair market value of the property.

32 Rule 509, SEC Rules.

Restrictions on investment by real property funds

There are various restrictions on investment by real property investment schemes. These restrictions vary depending on whether the scheme is a REIT or a REICO, open-ended or closed-ended, and mortgage-based or equity-based.[33]

iv Hedge funds

There are no legal or regulatory rules that apply specifically to hedge funds in Nigeria.

v Private equity funds

Under the SEC Rules,[34] a private equity fund is defined as a type of collective investment scheme that invests primarily in private equity or unlisted companies, regardless of whether such investment is an attempt to gain control of such investee companies. The rules only apply to private equity funds with a minimum commitment of 1 billion naira of investors' funds.[35]

Under the SEC Rules, private equity funds are not allowed to solicit funds from the general public; only solicitation of qualified institutional investors[36] is permitted. The Rules also restrict the investment amount to not more than 30 per cent of the fund's assets in a single investment.[37]

Managers of private equity funds are required to have a minimum share capital of 150 million naira and to be registered with the SEC as a capital market operator. There are also continuous reporting obligations; the fund manager is required to submit quarterly returns and the annual account or report of the fund to the SEC. The SEC also requires that the investors are issued semi-annual reports.

The PenCom Regulations authorise the investment of pension fund assets in private equity funds registered with the SEC, provided that such private equity funds meet certain requirements[38] (some of which are discussed above).

vi Other sectors

Sovereign wealth funds (SWFs)

The Nigeria Sovereign Investment Authority (Establishment, etc.) Act 2011 (NSIA Act) establishes the Nigeria Sovereign Investment Authority (NSIA). The NSIA Act created three SWFs, which are jointly owned and supervised by the three tiers of government (federal, states (including the Federal Capital Territory), and local governments or area councils (governments)).[39] The three SWFs are:

a the Future Generations Fund: an intergenerational savings fund for the benefit of future generations of Nigerian citizens;

b the Infrastructure Fund: a fund focused on investing in critical infrastructure that will attract and support FDI, economic diversification and growth; and

33 Rules 521 and 539, SEC Rules.

34 Rule 557, SEC Rules.

35 Rule 558, SEC Rules.

36 Defined in the SEC Rules to mean 'a purchaser of securities that is financially sophisticated'.

37 Rule 560, SEC Rules.

38 Section 5.2.11, PenCom Regulations 2012.

39 Section 32, NSIA Act.

c the Stabilisation Fund: this fund will serve as a secondary source of funding to support the national economy in periods of budget revenue shortfalls.[40]

A key feature of the SWFs is that they are intended to operate free from political pressures,[41] with more stringent procedures for withdrawal and transparent application of funds. The NSIA Act provides that initial funding for the SWFs should be provided by the governments.[42] In 2011, the NSIA received initial funding in an amount of US$1 billion and, in 2013, received additional funding of US$500 million. Future funding for the SWFs will be derived from residual monies received into the Federation Account from excess oil revenues. The initial funding and all subsequent allocations to the SWFs will then be allocated to the three funds discussed above.

In the exercise of its powers and performance of its duties, the NSIA Act empowers the NSIA to set up wholly owned subsidiaries and wholly owned affiliates. The NSIA can also appoint asset managers and custodians.[43] The NSIA, its wholly owned subsidiaries and its wholly owned affiliates can issue bonds and other debt instruments,[44] and are exempted from all taxes in Nigeria.[45] The NSIA is permitted to invest in other companies in the discharge of its duties, but is prohibited from giving guarantees for the benefit of such companies. The NSIA may, however, give guarantees for its wholly owned subsidiaries and wholly owned affiliates, provided it receives valuable and commensurate consideration for giving the guarantees.

While the creation of the NSIA is an improvement in the management of Nigeria's inflow from oil exploration funds, it is still in its infancy, and there can be no assurance as to:

a whether it will have the necessary safeguards in place to shield it from fund misappropriation and political pressures;

b whether it will continue to have sufficient funding (as this is dependent on the price of oil);

c whether it will make profitable investments or achieve its strategic objectives; or

d how it will be perceived by ratings agencies or other parties.

Infrastructure funds

The SEC issued rules on infrastructure funds in May 2014. Under these rules, an 'infrastructure fund' is defined as a specialised fund or scheme that invests primarily (a minimum 90 per cent of the scheme's net assets) in securities or securitised debt instruments of infrastructure companies, infrastructure capital companies, infrastructure projects, special purpose vehicles (SPVs), which are created for the purpose of facilitating or promoting investment in infrastructure, and other permissible assets including revenue-generating projects of infrastructure companies or projects or SPVs.[46]

The rules provide that, before an infrastructure fund may be registered with the SEC, the fund manager must have at least two key personnel with the relevant experience in the

40 Section 4, NSIA Act.

41 Section 1(4), NSIA Act.

42 Section 29, NSIA Act.

43 Section 6, NSIA Act.

44 Section 5(1) (c), NSIA Act.

45 Section 57, NSIA Act.

46 Rule A1, SEC Rules on Infrastructure Funds.

infrastructure sector.[47] The SEC may then grant its approval for registration of the fund if the sponsor or the parent company of the sponsor proves that it has carried on activities or business in the infrastructure financing sector for a period of at least five years, and has fulfilled the SEC's requirements for registration as a fund manager.[48]

The rules also permit registered infrastructure funds to invest in equities and convertibles, including mezzanine financing instruments of companies engaged in infrastructure and infrastructure development projects, whether or not these are listed on the Nigerian Stock Exchange; or money market instruments, structured loans and bank deposits for liquidity purposes to cover costs and other expenses associated with the operations of the fund.[49]

Infrastructure funds registered with the SEC are required to invest at least 80 per cent of their net assets in infrastructure companies, infrastructure capital companies and infrastructure projects of SPVs in Nigeria.[50]

Registered infrastructure funds may be open or closed-ended, maturing after seven years, or may be structured as an interval scheme with a lock-in period of five years and an interval period not longer than one month as may be specified in the scheme information document.[51] The units of an SEC-registered infrastructure fund may also be listed on a recognised stock exchange, but such units may only be listed if they have been fully paid up. This provision, however, does not apply to infrastructure funds that are established as private equity funds.[52]

Trading in unlisted securities

In April 2015, the SEC issued new regulations[53] that require all securities of unlisted public companies to be bought, sold or transferred on SEC-registered securities exchanges via an SEC-approved system and upon such terms and conditions as the SEC may from time to time prescribe. The regulations impose penalties[54] on unlisted public companies, directors, company secretaries, registrars, brokers and dealers, and other persons who facilitate trading otherwise than in accordance with the new regulations. Some companies have started to comply with this directive, and 28 unlisted public companies are currently listed on the NASD platform.[55]

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47 Rule A3 (1), SEC Rules on Infrastructure Funds.

48 Rule A3 (2), SEC Rules on Infrastructure Funds.

49 Rule A.6 (2), SEC Rules on Infrastructure Funds.

50 Rule A.6(6), SEC Rules on Infrastructure Funds.

51 Rule A.4(1), SEC Rules on Infrastructure Funds.

52 Rule A.4(2), SEC Rules on Infrastructure Funds.

53 See footnote 16.

54 Any unlisted public company, director, company secretary, registrar, broker or dealer, or such other persons who facilitate the buying, selling or transfers of the securities of an unlisted public company otherwise than through the platform of a duly registered securities exchange shall be liable to a penalty of not less than 100, 000 naira in the first instance and not more than 5,000 naira for every day of default.

55 http://nasdng.com/issuers/Admitted_Securities.

VII TAX LAW

Generally, asset management funds and investment managers (managers) incorporated in Nigeria are subject to tax in Nigeria. Under the Companies Income Tax Act 2004 (as amended) (CITA), managers have an obligation to pay tax on profits that they make in Nigeria at a rate of 30 per cent,[56] and to pay tertiary education tax at a rate of 2 per cent, pursuant to Section 1(2) of the Tertiary Education Trust Fund (Establishment, etc.) Act, 2011. Where managers invest in shares, any dividends payable by the investee company to the managers will be liable to the withholding of tax at a rate of 10 per cent.[57]

Where managers invest in bonds, the issuers of the bonds have an obligation under the CITA to withhold tax on interest payments to residents and non-resident companies, except where such interest is specifically exempted from tax. By virtue of the Companies Income Tax (Exemption of Bonds and Short Term Government Securities) Order, 2011 (Order) (made pursuant to the CITA), income and interest earned on 'bonds issued by Federal, State and Local governments and their Agencies, corporate bodies including supranational agencies' as well as 'short term Federal Government of Nigeria Securities such as Treasury Bills and Promissory Notes'[58] are exempt from any tax on the interest payable in relation to those securities under the CITA. In relation to corporate bonds, the tax exemption on the interest payable on such bonds is designated to last for 10 years[59] (i.e., from 2 January 2012 to 1 January 2022), unless extended by the federal government beyond that date. Accordingly, income derived by managers from investments in the instruments set out above will be exempt from tax. The tax exemption provided by the Order also applies to non-resident companies such as offshore investors.

Where offshore investors invest in Nigerian companies, the relevant investee company will withhold tax on the dividends due to the offshore investors at the applicable rate of 10 per cent and will remit the tax withheld to the Federal Inland Revenue Service (FIRS). The tax withheld from dividends due to the offshore investor will, when remitted to the FIRS, be the final tax due in Nigeria on that income in the hands of such offshore investor.[60] If an offshore investor is domiciled in a country with which Nigeria has entered into a double taxation treaty (DTT),[61] the rate for the withholding of tax on dividend payments to such investor will be reduced from the rate of 10 per cent to 7.5 per cent.[62] On this basis, the Nigerian investee company will withhold tax on the dividends due to the investor at a rate of 7.5 per cent and will remit the tax withheld to the FIRS.

56 Section 40(1), CITA.

57 Section 80, CITA.

58 Paragraph 1 of the Order.

59 Paragraph 2 of the Order.

60 Section 80(4), CITA.

61 Nigeria has entered into DTTs with, *inter alia*, the United Kingdom, France, the Netherlands, Canada, South Africa and China.

62 For instance, Article 10 of the Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains.

Under the Capital Gains Tax Act 2004 (CGT Act), no capital gains tax is payable on gains arising from a disposal of any government securities, stocks or shares in Nigeria.[63] There is, however, capital gains tax on gains arising from a disposal of debts instruments issued by companies.[64] Thus, gains arising from a disposal of corporate bonds or other debt instruments not issued by the federal government of Nigeria are subject to capital gains tax in the hands of managers at a rate of 10 per cent.

VIII OUTLOOK

The SEC's approach to the regulation of investments and asset management in Nigeria is more refined, particularly in relation to its desire to protect investors and this is reflected in its issuance of rules establishing the Investor Protection Fund. Its Master Plan is forward-looking and, if successfully implemented, has the potential to catapult Nigeria into the top tier of the global economy.

63 Section 30 (1), CGT Act.

64 Section 3(a), CGT Act imposes tax on gains realised from a disposal of options, debts and incorporeal property generally.

Appendix 1

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Dan Agbor is managing partner at Udo Udoma & Belo-Osagie and heads its corporate, banking and finance, power, private equity, capital markets and taxation teams.

He has advised on a wide range of matters, including Nigeria's earliest global depositary receipt programme, its first independent power project, the establishment of Nigeria's first discount house, Nigeria's first, as well as several recent Eurobond transactions, and the structuring of an international debt fund listed on the Nigerian Stock Exchange. He has also assisted a power sector regulator with the drafting of captive power regulations for that sector.

Mr Agbor delivers and publishes articles across his practice areas, including papers on Eurobond issuances, security, the Nigerian debt conversion programme, global depositary receipts and foreign investment. He is ranked as a leading lawyer in the corporate, M&A and banking and finance sections of *Chambers Global* directory, and by *Who's Who Legal* and the *Practical Law Review*. He is also ranked by *International Financial Law Review*, *The Legal 500* and *The Lawyer's 'Africa Elite' Private Equity Report*.

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Folake Elias-Adebowale is a partner at Udo Udoma & Belo-Osagie and co-heads the firm's private equity, corporate advisory, and energy and natural resources teams. Her specialisations include foreign investment, equity and asset acquisitions, corporate restructuring, private equity, and project finance for energy, gas and industrial projects. She has advised on various private equity and foreign investments in the food, beverage, beverage brewing, energy, telecommunications and health sectors.

She has written and presented papers on private equity, foreign investment and the local content requirements affecting participants in the Nigerian petroleum sector, and is a regular contributor to the International Law Office's Energy and Natural Resources newsletter. She has also contributed articles to the *IFLR Private Equity Report 2014* and *2015*, the *IFLR FDI Report 2014*, *The Lawyer* and EMPEA's *Legal & Regulatory Bulletin*. She represents the firm on the Emerging Markets Private Equity Association's legal and regulatory council, and heads the legal sub-committee of the committee on private equity and venture capital inaugurated by the Federal Minister for Industry Trade and Investment. Ms Elias-Adebowale is ranked as a leading lawyer in the corporate and M&A sections of *Chambers Global* directory, *IFLR*, *Who's Who Legal* and *The Lawyer's 'Africa Elite' Private Equity Report*.

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Christine Sijuwade is a senior associate at Udo Udoma & Belo-Osagie. She is a core member of the team that advises several local and international private equity firms in connection with their equity investments in various Nigerian companies, including companies in the telecommunications, insurance, food and beverage and manufacturing sectors. She has also advised on international lending transactions, including syndicated loans.

She has been involved in a diverse range of financial and capital markets transactions, including private placements, and, as part of her asset management and collective investment practice, the establishment of mutual and private equity funds. She also advises on issues relating to the Nigerian bond market.

As part of her corporate advisory practice, Ms Sijuwade coordinates due diligence reviews, in the course of which she evaluates regulatory compliance practices and credit portfolios of local companies to assess the viability of targeted businesses for merger, investment and financing transactions.

She has contributed to private equity articles in EMPEA's *Legal & Regulatory Bulletin*, IFLR's *Private Equity Reports* for 2014 and 2015, *Elexica*, and the credit and security section of the World Bank's annual *Doing Business in Nigeria* surveys.

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