

THE ASSET  
MANAGEMENT  
REVIEW

SIXTH EDITION

Editor  
Paul Dickson

THE LAWREVIEWS

THE ASSET  
MANAGEMENT  
REVIEW

The Asset Management Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Asset Management Review, - Edition 6  
(published in September 2017 – editor Paul Dickson)

For further information please email  
[Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

THE ASSET  
MANAGEMENT  
REVIEW

SIXTH EDITION

**Editor**  
Paul Dickson

THE LAWREVIEWS

PUBLISHER  
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER  
Nick Barette

BUSINESS DEVELOPMENT MANAGERS  
Thomas Lee, Joel Woods

ACCOUNT MANAGERS  
Pere Aspinall, Sophie Emberson,  
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE  
Rebecca Mogridge

RESEARCHER  
Arthur Hunter

EDITORIAL COORDINATOR  
Gavin Jordan

HEAD OF PRODUCTION  
Adam Myers

PRODUCTION EDITOR  
Tessa Brummitt

SUBEDITOR  
Janina Godowska

CHIEF EXECUTIVE OFFICER  
Paul Howarth

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2017 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2017, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-910813-82-9

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND  
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND  
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW  
THE DOMINANCE AND MONOPOLIES REVIEW  
THE AVIATION LAW REVIEW  
THE FOREIGN INVESTMENT REGULATION REVIEW  
THE ASSET TRACING AND RECOVERY REVIEW  
THE INSOLVENCY REVIEW  
THE OIL AND GAS LAW REVIEW  
THE FRANCHISE LAW REVIEW  
THE PRODUCT REGULATION AND LIABILITY REVIEW  
THE SHIPPING LAW REVIEW  
THE ACQUISITION AND LEVERAGED FINANCE REVIEW  
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW  
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW  
THE TRANSPORT FINANCE LAW REVIEW  
THE SECURITIES LITIGATION REVIEW  
THE LENDING AND SECURED FINANCE REVIEW  
THE INTERNATIONAL TRADE LAW REVIEW  
THE SPORTS LAW REVIEW  
THE INVESTMENT TREATY ARBITRATION REVIEW  
THE GAMBLING LAW REVIEW  
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW  
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW  
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW  
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW  
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW  
THE CONSUMER FINANCE LAW REVIEW  
THE INITIAL PUBLIC OFFERINGS REVIEW  
THE CLASS ACTIONS LAW REVIEW  
THE TRANSFER PRICING LAW REVIEW  
THE BANKING LITIGATION LAW REVIEW  
THE HEALTHCARE LAW REVIEW

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA

ALLEN & OVERY LLP

APPLEBY

ARTHUR COX

BONELLIEREDE

CYRIL AMARCHAND MANGALDAS

DE PARDIEU BROCAS MAFFEI

FANGDA PARTNERS

HENGELER MUELLER

HENRY DAVIS YORK

KING & SPALDING LLP

LENZ & STAHELIN

LIEDEKERKE WOLTERS WAELEBROECK KIRKPATRICK

MAPLES AND CALDER

MORI HAMADA & MATSUMOTO

PINHEIRO NETO ADVOGADOS

ROPES & GRAY LLP

SLAUGHTER AND MAY

STIKEMAN ELLIOTT LLP

UDO UDOMA & BELO-OSAGIE

URÍA MENÉNDEZ

WMWP RECHTSANWÄLTE

# CONTENTS

PREFACE.....	vi
<i>Paul Dickson</i>	
Chapter 1 EUROPEAN OVERVIEW.....	1
<i>Nick Bonsall</i>	
Chapter 2 AUSTRALIA.....	38
<i>Nikki Bentley, Jon Ireland and Vinod Kumar</i>	
Chapter 3 AUSTRIA.....	54
<i>Roman Hager and Martin Wiedenbauer</i>	
Chapter 4 BELGIUM .....	66
<i>Thierry Tilquin, Tom Van Dyck, Laurence Pinte, Thérèse Loffet, Karolien Decoene and Steven Peeters</i>	
Chapter 5 BERMUDA .....	78
<i>Tonesan Amisshah and Sally Penrose</i>	
Chapter 6 BRAZIL.....	90
<i>Fernando J Prado Ferreira and José Paulo Pimentel Duarte</i>	
Chapter 7 BRITISH VIRGIN ISLANDS .....	104
<i>Jeffrey Kirk</i>	
Chapter 8 CANADA.....	111
<i>Alix d'Anglejan-Chatillon and Jeffrey Elliott</i>	
Chapter 9 CAYMAN ISLANDS.....	126
<i>Jonathan Green, Tim Coak and Luke Stockdale</i>	
Chapter 10 CHINA.....	140
<i>Richard Guo, Zhen Chen and Zhiyi Ren</i>	



## Contents

---

Chapter 11	FRANCE.....	156
	<i>Arnaud Pince</i>	
Chapter 12	GERMANY.....	170
	<i>Thomas Paul and Christian Schmies</i>	
Chapter 13	HONG KONG .....	182
	<i>Jason Webber, Peter Lake and Ben Heron</i>	
Chapter 14	INDIA .....	200
	<i>Cyril Shroff and Shagoofa Rashid Khan</i>	
Chapter 15	IRELAND .....	212
	<i>Kevin Murphy, Elizabeth Bothwell, David O'Shea, David Kilty and Sarah McCague</i>	
Chapter 16	ISLE OF MAN .....	226
	<i>Simon Harding and Katherine Johnson</i>	
Chapter 17	ITALY .....	236
	<i>Giuseppe Rumi, Giulio Vece, Benedetta Volpi, Riccardo Ubaldini and Michele Dimonte</i>	
Chapter 18	JAPAN .....	253
	<i>Yasuzo Takeno and Fumiharu Hiromoto</i>	
Chapter 19	NETHERLANDS .....	272
	<i>Jochem Kin, Daphne van der Houwen, Naomi Reijn and Ellen Cramer-de Jong</i>	
Chapter 20	NIGERIA.....	284
	<i>Dan Agbor, Folake Elias-Adebowale and Christine Sijuwade</i>	
Chapter 21	NORWAY.....	297
	<i>Peter Hammerich and Markus Heistad</i>	
Chapter 22	PORTUGAL.....	312
	<i>Carlos Costa Andrade, Marta Pontes, Diogo Tavares, Gerard Everaert and Mariana Prelhaz</i>	
Chapter 23	SAUDI ARABIA.....	325
	<i>Nabil A Issa, James Stull and Macky O'Sullivan</i>	

## Contents

---

Chapter 24	SPAIN.....	338
	<i>Juan Carlos Machuca Siguero and Anna Viñas Miquel</i>	
Chapter 25	SWITZERLAND.....	358
	<i>Shelby R du Pasquier and Maria Chiriaeva</i>	
Chapter 26	UNITED ARAB EMIRATES.....	372
	<i>James Stull and Macky O'Sullivan</i>	
Chapter 27	UNITED KINGDOM.....	382
	<i>Paul Dickson</i>	
Chapter 28	UNITED STATES.....	421
	<i>Jason E Brown, Leigh R Fraser and John M Loder</i>	
Appendix 1	ABOUT THE AUTHORS.....	441
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	461

# NIGERIA

*Dan Agbor, Folake Elias-Adebowale and Christine Sijuwade<sup>1</sup>*

## I OVERVIEW OF RECENT ACTIVITY

On 21 February 2017, the federal government, through the Presidential Enabling Business Environment Council, released a 60-day action plan to further facilitate doing business in Nigeria. Thirty-one reforms are proposed across eight priority areas: starting a business; construction permits; getting electricity; registering property; getting credit; paying taxes; trading across borders; and entry and exit of people.<sup>2</sup> Reforms implemented by the Corporate Affairs Commission include online business registration and company incorporation. Other proposed reforms include simplifying the business and tourist visa processes.

On 21 April 2017, the Central Bank of Nigeria (CBN) introduced a new foreign exchange trading window (FX Window) for special investors and exporters with a view to boost liquidity in the foreign exchange market, and ensure timely execution and settlement for eligible transactions. This further liberalisation of the Nigerian foreign exchange market and other significant developments are discussed in this chapter.

## 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 (the 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 (the 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 2017 (the PenCom Regulations) issued further to 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 managing associate, at Udo Udoma & Belo-Osagie. The authors are grateful to Joseph Eimunjeze, managing associate, and Edidem Basiekanem, associate, at Udo Udoma & Belo-Osagie for their assistance with this chapter.

2 <http://pebec.gov.ng/>.

## 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. It also collaborates with relevant stakeholders to introduce new products and processes to develop the market. It 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.<sup>3</sup> 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.<sup>4</sup> With the exception of private equity funds with investor commitments above 1 billion naira,<sup>5</sup> 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 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.

---

3 Section 38, ISA.

4 Sections 153 and 160, ISA.

5 Rule 558 of the SEC Rules.

## 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.<sup>6</sup>

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<sup>7</sup> is regarded as a unit trust. All unit trusts must be registered with the SEC.<sup>8</sup> 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 2017 stood at about US\$908.27 million.<sup>9</sup>

### i Sources of investment

The main source of investment into asset-managed funds in Nigeria is the NSE. The NSE's market capitalisation as at 31 March 2017 stood at 16.498 trillion naira.<sup>10</sup>

---

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 <http://investadvocate.com.ng/2017/05/24/total-value-capital-imported-nigeria-q1-2017-estimated-908-27m-nbs/>.

10 [www.nse.com.ng/market\\_data-site/other-market-information-site/NSE%20Fact%20Sheet/Q1%20Fact%20Sheet%20-%202017.pdf](http://www.nse.com.ng/market_data-site/other-market-information-site/NSE%20Fact%20Sheet/Q1%20Fact%20Sheet%20-%202017.pdf).

## 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 2017, the total amount of pension fund assets was in excess of 6.5 trillion naira.<sup>11</sup>

### *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 10.29 per cent from 350 billion naira in 2015 to 386 billion naira in 2016;<sup>12</sup> the government is optimistic that this figure will continue to increase and is projected to spend 22.4 billion naira on insurance premiums in 2017.<sup>13</sup>

### *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 of 7 July 2017, the net asset value of the various collective schemes in Nigeria stood at 316.988 billion naira.<sup>14</sup>

### *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 June 2017, the SEC revised the current Rules to include, among others, a new three-tiered know-your-customer framework for capital market operators, fund and portfolio management operation rules, and amendments to the Investor Protection Fund Rules, rules on real estate investment schemes and rules on infrastructure funds.

The SEC's new fund and portfolio management rules provide that funds managed under a discretionary fund portfolio management mandate should only be invested in certain permissible assets and securities such as units of registered collective investment schemes. Other amendments to the SEC Rules are discussed below.

Amendments to the PenCom Regulations were published in April 2017. These are the first set of investment regulations made under the Pension Reform Act of 2014 (PRA).

Finally, also in April 2017, the CBN liberalised the Nigerian foreign exchange market by introducing the investors' and exporters' FX Window. The main highlights are the supply

---

11 <http://towncrieronline.net/2017/06/21/nigerian-pension-funds-assets-grow-by-3-between-march-and-april-2017-to-a-record-n6-5-trillion-pension-commission-of-nigeria/>.

12 [www.blueprint.ng/nigerias-insurance-sector-hits-top-10-in-africa/](http://www.blueprint.ng/nigerias-insurance-sector-hits-top-10-in-africa/).

13 [www.lagostelelevision.com/presidency-mdas-spend-n22-4bn-insurance-premium-2017/](http://www.lagostelelevision.com/presidency-mdas-spend-n22-4bn-insurance-premium-2017/).

14 <http://sec.gov.ng/net-asset-value-data-weekly/>.

of foreign exchange to the FX Window by portfolio investors, exporters, authorised dealers and other parties, and rates for transactions carried out in the FX Window can now be agreed between parties and are not fixed by the CBN or banks.<sup>15</sup> Eligible participants in the FX Window can access it to obtain foreign exchange for certain invisible eligible transactions including loan and interest payments, dividends, capital and income remittances, consultancy, technology transfer and management services fees. The CBN will participate in the FX Window from time to time to promote liquidity and professional market conduct.

## VI SECTORAL REGULATION

### i Insurance

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

### ii Pensions

The PRA is the principal legislation that governs pension asset management in Nigeria. 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 April 2017, PenCom released the amended PenCom Regulations, which govern the investment of pension fund assets. The Regulations, which replaced the 2012 regulations, authorise the investment of pension fund assets in various asset classes.

The 2017 regulations retained certain provisions from the 2012 regulations such as in relation to the institutional framework for investment of pension fund assets, authorised markets, allowable instruments, quality of instruments, conflict of interest issues, investment limits, performance benchmark, violation of investment limits, closed pension funds and approved existing schemes. The key changes, however, comprised the replacement of

---

15 [www.proshareng.com/news/Forex/CBN-Announces-the-Establishment-of-Investors----Exporters--FX-Window/34551](http://www.proshareng.com/news/Forex/CBN-Announces-the-Establishment-of-Investors----Exporters--FX-Window/34551).

provisions on the retirement savings account (RSA) retirees funds with new regulations on a multi-fund structure (MFS). The MFS prescribes different categories for the placement of RSA funds, namely:<sup>16</sup>

- a Fund I – membership is strictly by formal request from a contributor and suitable for contributors who want to invest in high-risk projects with higher rewards;
- b Fund II – active contributors who are 49 years or below as of their last birthday;
- c Fund III – active contributors who are 50 years and above as of their last birthday; and
- d Fund IV – exclusively for retirees.<sup>17</sup>

Other factors to be considered in classifying such assets include the contributors' age, work status and risk exposure. Fund types I and II are required to have a minimum of 2.5 per cent of pension fund assets under management invested in alternative assets like infrastructure, private equity and real estate.<sup>18</sup>

Unlike the 2012 regulations, Islamic bond instruments (sukuk) issued by eligible state and local governments or their agencies or wholly owned companies, have now been included in the list of allowable instruments into which pension fund assets may be invested.<sup>19</sup>

The 2017 PenCom Regulations still contain detailed restrictions in relation to the various asset classes in which pension fund assets may be invested – private equity funds<sup>20</sup> 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 remains dependent on whether the fund has multilateral development finance organisations (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 60 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 still 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,<sup>21</sup> 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.

---

16 Section 7, PenCom Regulations 2017.

17 Section 7.3, PenCom Regulations 2017.

18 Section 7.3.4, PenCom Regulations 2017.

19 Section 4, PenCom Regulations 2017.

20 Section 5.2.11, PenCom Regulations 2017.

21 Section 5.2.8, PenCom Regulations 2017.



### iii Real property

#### *Structure of real property funds*

Real property funds or real estate investment schemes (REIS) in Nigeria can be structured as a REIT or a real estate investment company (REICO), or any other corporate structure approved and regulated by the SEC.<sup>22</sup> 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.<sup>23</sup> A minimum of 90 per cent of a REIS's revenue must be derived from rental or dividend income.<sup>24</sup> A REIS is now required to make at least an annual distribution or risk the withdrawal of its licence by the SEC.<sup>25</sup>

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;
- 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.

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

#### *REICOs*<sup>26</sup>

A REICO may be registered with the SEC if it:

- a* is a body incorporated under the CAMA;
- b* has 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.

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.<sup>27</sup> The minimum level of subscription for a REICO must

22 Rule B.2 SEC (Amendment) Rules on Real Estate Investment Schemes, 2017.

23 Section 193, ISA.

24 Rule B.2 SEC (Amendment) Rules on Real Estate Investment Schemes, 2017.

25 Rule B.2 SEC (Amendment) Rules on Real Estate Investment Schemes, 2017.

26 Rules 510 (a) and 511 SEC Rules.

27 Rule 517, SEC Rules.

be at least 50 per cent of the percentage underwritten before the offer may be cleared by the SEC.<sup>28</sup> A maximum of 25 per cent of a REICO's total assets may be invested outside Nigeria, but within Africa.<sup>29</sup> Such investments outside Nigeria must be in countries with investment grade credit ratings assigned by international rating agencies, and in assets that are classified as real-estate-related assets. Features of such real estate assets must be consistent with similar assets in Nigeria and no asset may constitute more than 25 per cent, by value, of the gross asset value of the fund.

A REICO must file a valuation report of its assets with the SEC every two years<sup>30</sup> 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.<sup>31</sup>

While a REICO may borrow, its borrowing power is limited to 25 per cent of the shareholders' funds.<sup>32</sup>

### **REITs<sup>33</sup>**

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.<sup>34</sup> 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;
- 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.

---

28 Rule 520, SEC Rules.

29 Rule B.2, SEC (Amendment) Rules on Real Estate Investment Schemes, 2017.

30 Rule 522, SEC Rules.

31 Rule 524, SEC Rules.

32 Rule 525, SEC Rules.

33 Rule 526, SEC Rules.

34 Rule 532, SEC Rules.

### ***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.<sup>35</sup> This, however, discouraged real property funds, as the funds would 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, 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.<sup>36</sup> 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.

### ***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.<sup>37</sup>

#### **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,<sup>38</sup> 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.<sup>39</sup>

---

35 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.

36 Rule 509, SEC Rules.

37 Rules 521 and 539, SEC Rules.

38 Rule 557, SEC Rules.

39 Rule 558, SEC Rules.

Under the SEC Rules, private equity funds are not allowed to solicit funds from the general public; only solicitation of qualified institutional investors<sup>40</sup> 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.<sup>41</sup>

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<sup>42</sup> (some of which are discussed above).

## **vi Other sectors**

### ***Sovereign wealth funds***

The Nigeria Sovereign Investment Authority (Establishment, etc.) Act 2011 (the NSIA Act) establishes the Nigeria Sovereign Investment Authority (NSIA). The NSIA Act created three sovereign wealth funds (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)).<sup>43</sup> 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 foreign direct investment (FDI), economic diversification and growth; and
- 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.<sup>44</sup>

A key feature of the SWFs is that they are intended to operate free from political pressures,<sup>45</sup> 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.<sup>46</sup> 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

---

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

41 Rule 560, SEC Rules.

42 Section 5.2.11, PenCom Regulations 2017.

43 Section 32, NSIA Act.

44 Section 4, NSIA Act.

45 Section 1(4), NSIA Act.

46 Section 29, NSIA Act.

appoint asset managers and custodians.<sup>47</sup> The NSIA, its wholly owned subsidiaries and its wholly owned affiliates can issue bonds and other debt instruments,<sup>48</sup> and are exempted from all taxes in Nigeria.<sup>49</sup> 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, there is still 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 amended its rules on infrastructure funds in June 2017. Under the amended 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 loans, 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.<sup>50</sup> The new rules also amend the conditions for establishing an infrastructure fund, by removing the requirement for the fund to be listed on a 'recognised' exchange (where such funds did in fact choose to list).<sup>51</sup> Such funds may now be listed on any exchange. Fund managers of infrastructure funds are now subject to minimum subscription requirements – at least 3 per cent of the fund, held for a minimum of three years,<sup>52</sup> unless an SWF established by the government or any MDFO of which Nigeria is a member is an investor in the fund, in which case, the manager must subscribe for at least 1 per cent of the fund.<sup>53</sup>

In terms of governance, all underlying assets of an infrastructure fund are now required to be domiciled with a SEC registered custodian and each fund must have an advisory board. Furthermore, a fund manager is now required to display the link to the fund's annual reports prominently on its website, once the units of the fund have been listed.<sup>54</sup>

Infrastructure funds registered with the SEC are now required to invest at least 60 per cent of their net assets in infrastructure companies, infrastructure capital companies and infrastructure projects of SPVs in Nigeria.<sup>55</sup>

---

47 Section 6, NSIA Act.

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

49 Section 57, NSIA Act.

50 Rule B3 (1), SEC (Amendment) Rules on Infrastructure Funds, 2017.

51 Rule B3 (4) (2), SEC (Amendment) Rules on Infrastructure Funds, 2017.

52 Rule B3 (4) (6), SEC (Amendment) Rules on Infrastructure Funds, 2017.

53 Rule B3 (4) (6), SEC (Amendment) Rules on Infrastructure Funds, 2017.

54 Rule B3 (13) (4), SEC (Amendment) Rules on Infrastructure Funds, 2017.

55 Rule B6 (6), SEC Rules on Infrastructure Funds.

### *Trading in unlisted securities*

The SEC's Rules on Trading in Unlisted Securities<sup>56</sup> 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 Rules impose penalties<sup>57</sup> 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 31 unlisted public companies are currently listed on the National Association of Securities Dealers platform.<sup>58</sup>

## 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,<sup>59</sup> 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.<sup>60</sup>

Where managers invest in corporate 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 (the Order) (made pursuant to the CITA), however, income and interest earned on bonds issued by federal, state and local governments and their agencies, and corporate bodies including supranational agencies as well as 'Short Term Federal Government of Nigeria Securities such as Treasury Bills and Promissory Notes'<sup>61</sup> are exempt from any tax. In relation to corporate bonds, the tax exemption on the interest payable on such bonds is designated to last for 10 years<sup>62</sup> (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 (i.e., shares or loans), the relevant investee company will withhold tax on the dividends or interest 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 or interest due to the offshore

56 [http://sec.gov.ng/files/New%20rules%20April%202015/Update%2017APR2015/RULES%20ON%20TRADING%20IN%20UNLISTED%20SECURITIES\\_17415.pdf](http://sec.gov.ng/files/New%20rules%20April%202015/Update%2017APR2015/RULES%20ON%20TRADING%20IN%20UNLISTED%20SECURITIES_17415.pdf).

57 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.

58 [http://nasdng.com/issuers/Admitted\\_Securities](http://nasdng.com/issuers/Admitted_Securities).

59 Section 40(1), CITA.

60 Section 80, CITA.

61 Paragraph 1 of the Order.

62 Paragraph 2 of the Order.

investor will, when remitted to the FIRS, be the final tax due in Nigeria on that income in the hands of such offshore investor.<sup>63</sup> If an offshore investor is domiciled in a country with which Nigeria has entered into a double taxation treaty,<sup>64</sup> the rate for the withholding of tax on dividend or interest payments to such investor will be reduced from the rate of 10 per cent to 7.5 per cent.<sup>65</sup> On this basis, the Nigerian investee company will withhold tax on the dividends or interest due to the investor at a rate of 7.5 per cent and will remit the tax withheld to the FIRS.

Under the Capital Gains Tax Act 2004, no capital gains tax is payable on gains arising from a disposal of any government securities, stocks or shares in Nigeria.<sup>66</sup> There is, however, capital gains tax on gains arising from a disposal of debts instruments issued by companies.<sup>67</sup> 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 the rate of 10 per cent.

## VIII OUTLOOK

Notwithstanding the recent economic challenges, a number of potentially impactful steps – including the legislative review of draft bills on investments and securities, companies and allied matters, trustees investment, financial reporting and competition, among others, and towards the liberalisation of the foreign exchange market – are being taken to facilitate both investment and the regulation of investment and asset management business in Nigeria. To the extent that such steps are practical and address current challenges, the overall outlook for investment and asset management business in Nigeria should remain positive.

## DAN AGBOR

*Udo Udoma & Belo-Osagie*

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

---

63 Section 80(4), CITA.

64 Nigeria has entered into double taxation treaties with, *inter alia*, the United Kingdom, France, the Netherlands, Canada, South Africa and China.

65 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.

66 Section 30 (1), Capital Gains Tax Act.

67 Section 3(a), Capital Gains Tax Act imposes tax on gains realised from a disposal of options, debts and incorporeal property generally.

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*.

## **FOLAKE ELIAS-ADEBOWALE**

*Udo Udoma & Belo-Osagie*

Folake Elias-Adebawale 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 *IFLR's Private Equity Reports* 2014, 2015 and 2016, 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-Adebawale 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*.

## **CHRISTINE SIJUWADE**

*Udo Udoma & Belo-Osagie*

Christine Sijuwade is a managing 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, 2015 and 2016, *Elexica*, and the credit and security section of the World Bank's annual 'Doing Business in Nigeria' surveys.



**UDO UDOMA & BELO-OSAGIE**

St Nicholas House (10th, 12th and 13th Floors)

Catholic Mission Street

Lagos

Nigeria

Tel: +234 1 462 2307 10

Fax: +234 1 462 2311

[dan.agbor@uubo.org](mailto:dan.agbor@uubo.org)

[folake.adebowale@uubo.org](mailto:folake.adebowale@uubo.org)

[christine.sijuwade@uubo.org](mailto:christine.sijuwade@uubo.org)

[www.uubo.org](http://www.uubo.org)



Strategic Research Sponsor of the  
ABA Section of International Law



ISBN 978-1-910813-82-9