



**ENFORCING GOOD CORPORATE GOVERNANCE
PRACTICE IN THE NIGERIAN BANKING SECTOR:
AN APPRAISAL OF CBN'S REGULATORY POWERS
AND ENFORCEMENT STRATEGY**

CULJ

ISSN 2957-8647

Volume 1

pp. 138-160

August 2022

www.cavendish.ac.ug

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Abstract

Discourse relating to Corporate Governance have become topical in the last decade as a result of numerous corporate governance themed crisis both in financial and non-financial sectors. One of the fallouts of such numerous debates and crisis is the proliferation of regulations on corporate governance usually described as codes of corporate governance. As indicated in this paper, the existence of codes does not indicate an end to corporate governance failures. It is therefore clear that an integral part of an effective of code is the regulator. In other words, a code might not be effective with its aims and objectives unachievable where the regulator is incapacitated. This paper is focused on the banking sector and bulk of the responsibility for good corporate governance in the sector resides with the Central Bank of Nigeria. It is therefore the aim of this paper to evaluate the powers of CBN and other wider enforcement issues may aid or limit the CBN's ability to promote good corporate governance practices in the banking sector. The paper also considers other allied non-statutory themed issues like enforcement strategies and the measurement of the success or otherwise of enforcement strategies of regulatory bodies. The paper concludes that towards achieving good corporate practice in Nigerian banks, CBN might be ill equipped to carry out its statutory regulatory and enforcement functions.

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Introduction

This paper focuses on the role and ability of The Central Bank of Nigeria (CBN) as a regulator and monitor in driving up standards. The review includes a critique of the detailed provisions that apply to CBN and also comments on wider issues which impact on enforcement. It is important to note that first CBN corporate governance code was published before the last major banking crisis in 2009¹. This fact alone is therefore good ground for questioning its ability to effectively carry out the functions delegated to them. This review will therefore focus on factors that may impact CBN's ability to enforce good corporate governance practice in the Nigerian banking sector. In other words, whether CBN lacks necessary powers to carry out their regulatory functions effectively or whether the explanation simply lies in the lack of enforcement, or a combination of both.

In addition to both technical and bureaucratic explanations for the lack of effectiveness of the existing regime, there are possibly other wider explanations. Deficiencies in the Rules and Regulations are not always a sufficient explanation for non-compliance and some of the key observers have suggested that some of the problems can be explained by wider cultural factors. For instance, in words attributed to a former CBN Governor Ahmed Albukadir, admittedly uttered before the last banking crisis,

*“...there appears to be a certain built in stubbornness in the attitude of the typical Nigeria economic agent... It manifests itself in a strong propensity to circumvent laid-down rules of economic behaviour and to resist control and regulation... it tends to encourage a kind of softness and lukewarmness in the application and implementation of legitimate rules of economic conduct. Hence it provides a fertile ground for bribery, corruption, idleness and the contrivance of get-rich quick attitude which are antithetical to hard work and discipline.”*²

¹ Since the first CBN code of corporate governance, other sectoral codes have been published and CBN has similarly published a revised code. These codes are however not the focus of this paper.

² No record of original report available but the quotation is cited as Ahmed 1996 Pg. 16 in B Ahuwan, 'Corporate Governance in Nigeria' (2002) 37 *Journal of Business Ethics* 269, 271. The individual concerned served as governor of CBN for some 10 years between 1982 and 1993. Source CBN website.

In addition to the wider cultural obstacles referred to above, there are other functional issues that need to be discussed. For instance, issues of capacity in relation to manpower, expertise and technical resources are discussed since they would clearly impact on the ability of the bodies to carry out their roles. Similarly, the paper analyses the regulatory enforcement strategies used by CBN and how effective or otherwise they have been.

Legal Framework of Central Bank of Nigeria

The Central Bank of Nigeria was established in 1958 under an Act of Parliament of the same year. It is a statutory body created by the National Assembly with specific and general powers. It is obliged to operate in accordance with the provisions of its enabling statutes and other related statutes³. The founding Act has been the subject of several amendments⁴, the last and most recent being in 2007. As such, CBN currently derives its power as a regulatory body from the combination of the CBN ACT 2007⁵ and the Banks and Other Financial Institution Act 2020 (Bofia 2020).

The CBN Act provides the CBN with a clear but very wide and all-embracing mandate:

*“In order to facilitate the achievement of its mandate under this Act and the Banks and Other Financial Institutions Act, and in line with the objective of promoting stability and continuity in economic management, the Bank shall be an independent body in the discharge of its functions.”*⁶

In addition to its very wide powers under S 1(3) of the CBN Act, CBN is further clothed with exclusivity in terms of bank regulation under Bofia 2020:

*“Notwithstanding anything to the contrary contained in this Act or in any other enactment, the Bank shall have and exercise regulatory and supervisory power over banks, other financial institutions and specialised banks to the exclusion of any other agency or institution”*⁷

³ CBN Act and BOFIA 2020

⁴ It has been amended six times

⁵ Central Bank of Nigeria (Establishment Act) Chapter C4, 2007. Like the CAC, s 1(2) CBN Act 2007 provides that CBN shall be a body corporate perpetual succession and common seal and may sue or be sued in its corporate name.

⁶ Section 1(3) of CBN Act 2007

⁷ Section 29(1) BOFIA 2020

The appointment arrangements relating to the senior officers of the Bank perhaps compromise the ability of those involved to be independent⁸. Be that as it may, the discretion provided to the Bank is very wide since the breadth of the mandate has been expanded to include the promotion and maintenance of adequate and reasonable financial service for the public;⁹ to ensure high standards of conduct and management throughout the banking system;¹⁰ and further such policies not inconsistent with this Act as shall in the opinion of the bank be in the national interest.¹¹ More specific and lower order duties and powers have been added in supplementary legislation; BOFIA 2020. These duties and powers, among others, include the granting¹² and revocation¹³ of banking licences, setting the minimum required paid up capital of banks¹⁴, the approval of mergers and acquisitions¹⁵ and intervening when a bank is failing¹⁶. As per its exclusive regulatory powers over banks, other financial institutions and specialised banks and in order to ensure that some of the provisions of BOFIA are implemented, the CBN Governor is required under BOFIA to appoint from within cadre of officers of the bank that not lower than directors, to specifically oversee the supervision of Banks, Other Financial institutions and specialised banks¹⁷. Such officers shall periodically¹⁸ examine the books and affairs of each bank and shall have access to all the books of the bank and the officer has the power to ask for any information that is deemed necessary for the performance of his duty from any director of the bank¹⁹. Although it is Interesting and quite surprising that BOFIA 2020 does not require officers in charge of banking supervision to satisfy any requirement or qualification, it is speculated here that in appointing those officers, the Governor would take into consideration relevant experience and soft skills. Under the existing management arrangement however, it is clear that the persons appointed have wide ranging and

⁸ Section 8 (1) of the CBN Act 2007 stipulates that all the principal officers of CBN including the Governor are appointed by the President of the Federal Republic of Nigeria subject to the confirmation of the Senate on such terms and conditions as maybe set out in their letters of appointment.

⁹ Section 42(1)a CBN Act 2007

¹⁰ Section 42(1)b CBN Act 2007

¹¹ Section 42(1)c CBN Act 2007

¹² Section 3 BOFIA 2020

¹³ Section 5 and 12 BOFIA 2020

¹⁴ Section 9 BOFIA 2020

¹⁵ Section 7 BOFIA 2020

¹⁶ Section 34 BOFIA 2020

¹⁷ Section 31 BOFIA 2020.

¹⁸ Unfortunately the Interpretation Section of this Act does not define what periodic means. It is however submitted that in the absence of any interpretation by a court of law, it is vague and open ended and as such provides minimum guidance on the frequency of banking examination.

¹⁹ Section 31(2) BOFIA

very challenging role. Listed amongst the responsibilities are the conduct of off-site surveillance and on-site examination of commercial banks; specialised institutions Credit Registry Bureaux, and related institutions; and the development of standards for examinations and consolidated supervision²⁰.

In addition, the CBN Governor has the power in certain circumstances to order a special investigation into the affairs of a bank²¹ if the Governor is satisfied that it is in the public interest to do so²², or the bank has been carrying on business in way that is detrimental to its depositors or creditors²³ or the bank has “insufficient” assets to cover its liabilities to the public; or the bank has been contravening the provisions of this Act; or an application is made for such special investigation by a director or shareholder or a depositor or creditor of the bank²⁴. The power to undertake a special investigation can be initiated by an insider in the Bank, but the Governor has complete discretion as to whether to act on such requests²⁵. The discretionary nature is sensible because the CBN needs to be protected from the possibility of having to undertake frivolous or malevolent investigations, but what is disappointing is that there is no obligation to provide reasons for a refusal to investigate. It is therefore not possible either to determine how often insider requests for special investigations occur or what the regulatory body’s approach to such requests may be. This process needs to be more transparent²⁶. For instance, some explanation was warranted for the Governor’s decision not to order a special investigation in to the problems of Spring Bank despite a series of the requests to do so by the then chairman of the Bank. No special investigation was undertaken until a petition was published in the National newspapers²⁷. Regrettably, the legal and constitutional scrutiny of the CBN Governor’s use of his powers is unsatisfactory.

²⁰ See CBN website <http://www.cenbank.org/AboutCBN/Dir-FSS.asp>

²¹ See for instance special investigation into 24 banks in 2009. <https://www.cbn.gov.ng/Out/2011/pressrelease/gvd/NDIC%20PRESS%20RELEASE.pdf>. Visited in November 2021

²² S 33(1)a BOFIA. An example of when the CBN governor ordered special examination of banks was in 2009 when 14 deposit banks were subjected to special examination by the CBN.

²³ S 33(1)b BOFIA

²⁴ S 33(1)c (i) BOFIA

²⁵ S 33(1) BOFIA

²⁶ Whilst it is accepted that such transparency could potentially affect the share value, such risk is minimal given that the Report would postdate the investigation.

²⁷ M. Awosika, ‘Mind The Gap: A Critical Analysis of Corporate Governance Failures in Nigeria’ (2019) *Lead City University Law Journal*

Although, there is a statutory requirement for the Governor to appear before the National Assembly's relevant committees from 'time to time' and additional powers to summon his attendance where there are allegations of abuse of power²⁸, regrettably, there is no guidance as to what the term 'time to time' should mean. However, on the premise that the CBN Governor is regularly invited by the National Assembly, it could indeed be interpreted to mean 'at the pleasure' of the National Assembly. The evidence to date, however, is that there is little detailed scrutiny of such actual decisions. Indeed, the questioning and challenges tend to be political in nature and of little relevance to achieving good governance practices in particular cases²⁹. The approach seems very different to the detailed questioning of Bank officials under the UK system by Parliamentary Select Committees³⁰. In the case of failing banks or under capitalised banks, CBN governor has draconian powers³¹. He or she has the power to remove directors of banks that have failed to comply with the provisions of BOFIA³² or of failing banks notwithstanding the provision of CAMA³³ or the articles and memorandum of association of such banks. The right of a removed director to subsequent compensation is a moot point³⁴.

The determination of whether a bank is failing or undercapitalised can happen in two ways. First, the bank in question volunteers information which indicates that it is failing³⁵ or secondly, the CBN concludes that the bank is failing as a result of an investigation.³⁶ Given the draconian nature of the power to remove, it is not surprising that the legality of the process has been subject to legal challenge. In *Danson I Zedowen & Ors v Union Bank & Ors*³⁷ the Governor after undertaking a special examination into the affairs of Union Bank of Nigeria Plc, removed the executive directors and appointed replacements. The applicant shareholders challenged the legality of the Governor's

²⁸ S 8(5)b CBN ACT.

²⁹ <http://www.vanguardngr.com/2014/02/sanusi-banking-reforms-suspension-controversies/amp/> accessed 11th November 2021

³⁰ <http://www.theguardian.com/business/blog/2014/jun/24/bank-of-england-governor-mark-carney-interest-rates-mps-live>

³¹ Section 34 BOFIA 2020

³² Section 49 of BOFIA 2020

³³ Section 53 BOFIA 2020

³⁴ Executive directors who are removed by the board may be entitled to compensation however it is not clear as to whether directors that are removed by the CBN Governor would also enjoy such protection. It is arguable that the contractual rights would not apply since the contract had been frustrated. Those that have been removed are subject to criminal investigation so not surprisingly their civil rights have not been a subject of media attention.

³⁵ S 34(1)a-c BOFIA

³⁶ S 34 (1) d BOFIA

³⁷ *Danson Izedowen & Anor v Union Bank & Anor* [2011] LPELR-CA/L/1205/10

actions on the basis that it was ultra-vires claiming, amongst other things, that the provision only permitted the removal of one director at any given time. They also claimed that the Governor had overreached his powers by acting contrary to the provisions of the Memorandum and Articles of Association of the Bank. The court held that the powers of the Governor are exercisable ***'notwithstanding anything in any written law' or any limitation contained in the memorandum and articles of association of the bank.*** Considering the gravity of the intervention, it is not surprising that the power has been confined to a situation of effective insolvency or under capitalisation.

In addition to the powers of CBN and its Governor, BOFIA provides the Governor with the power to make regulations that would give full effect to the objects and objectives of BOFIA³⁸. Again, the powers are extensive since they enable the Governor to make rules and regulation for the operation and control of all institutions under the supervision of CBN³⁹. Also, it is mandatory for the Governor to issue corporate governance regulations and guidelines for banks and other financial institutions⁴⁰. It was in the exercise of this power that CBN, amongst other regulations, made the CBN Code of corporate governance (post consolidation) 2006 and 2014. When the provisions of the CBN Act and BOFIA are read together, it is clear that CBN has statutory powers to both investigate and intervene in a decisive way. The right to intervene applies to both the conduct and the omissions of the relevant bank. It applies not only to situations where there is a risk of bank failure, but also to lower level issues⁴¹. However, the number of corporate failures in the banking sector over the past three decades provides good ground to question the CBN's effectiveness in its role as a regulatory body set up to pre-empt and prevent serious failure. As outlined above, some legislative changes are necessary to encourage and reinforce the CBN's preventative role. However, as will be outlined below, such changes may not be enough to ensure better and earlier interventions. As highlighted in relation to CAC, the CBN may also be facing challenges in terms of capacity resources and expertise, and it is also a matter of serious concern. Another more specific issue is that there is no easy access venue to challenge the CBN's decisions.

³⁸ Section 56(1) BOFIA 2020.

³⁹ Section 56(2) BOFIA 2020

⁴⁰ Section 67 BOFIA 2020

⁴¹ For instance under section 17 BOFIA 2020, directors are expected to disclose their interest in any loan or credit facility etc. Also, at Section 18 of BOFIA 2020 directors are barred from holding interlocking directorship. A breach of any of these provisions comes with penalties; the adequacy or inadequacy of such penalties is a moot point.

There is no tribunal provision to respond to the concerns of aggrieved petitioners. The only option would be to commit to the expense of a Court hearing. The need for a quick and inexpensive forum is indirectly evidenced from information in the CBN's Annual Report 2011 where it is admitted that "*it was inundated with many cases of litigation*"⁴² and in the draft CBN's Annual Report 2018, it was stated that out of the 835 litigations CBN was involved in, about 321 bordered on regulatory powers of the bank, breach of contract, banking/ financial operations and revocation of banking licences amongst others⁴³.

Fundamental challenges encountered by CBN in its enforcement role

Published information, besides the CBN's Annual Report, on the activities and the capacity of the CBN to perform those activities is not readily available. The CBN's Annual Reports provide little reflection on how the organisation thinks it is meeting its objectives and the problems that it faces. The Reports simply refer to the number of banks that were examined, and the number of banks that made changes to their board in compliance with the provision of the CBN regulation on tenure limit⁴⁴. It provides a short summary of what was done saying nothing about what was left undone. It is customary that the Annual Report's discussion on the extent of compliance with Corporate Governance requirements is thin and the 2018 Annual Report provides a good example:

*"The CBN sustained the implementation of various initiatives for monitoring and assessment of compliance to ensure adherence to the provisions of the Code of Corporate Governance for Banks. In this regard, the Bank carried out a maiden edition of Corporate Governance Scorecard Assessments on few banks in 2017 to ascertain the level of the bank's compliance with the Code. In addition, a follow-up exercise was conducted on over ten (10) banks in the review year. The findings revealed that banks have been largely in compliance with the Code, including rendition of quarterly returns on or before the stipulated deadlines, and submission of annual board appraisals prepared by independent consultants for CBN's approval."*⁴⁵

⁴² CBN Annual Report 2011 at Pg. 9

⁴³ Draft CBN Annual Report 2018 at pg 7

⁴⁴ See The Revised edition of CBN's Annual report for 2011, published on 27th February 2013.

⁴⁵ Chapter 2, par 2.4.4 of the CBN's Annual Report for 2018, . Pg. 48. See Also Par. 2.4.4 of the CBN's Annual Report for 2019 at Pg 50.

1.1. Manpower

The enormity of the task which has been delegated to the CBN becomes clear in the light of the number of organisations it is mandated to oversee. Information available on its website indicates that it presently oversees 22 commercial banks⁴⁶, 900 micro-finance banks⁴⁷, 5 discount houses⁴⁸, 33 primary mortgage institutions⁴⁹, 2991 bureau de change⁵⁰, 6 development finance institutions⁵¹, and 45 finance companies⁵². No information relating to the manpower of the organisation is referred to on the website, the latest figures available therefore relate to 2017 published in the draft 2018 Annual report published on the CBN's website. In December 2017, CBN's staff strength stood at 7893⁵³. As is with the discussion about corporate compliance above, the Annual Report is very descriptive and provides no evaluation as to whether the staff profile is sufficient.

The CBN is required under the law to carry out periodic routine inspections of the banks⁵⁴. The relevant legislations, Annual Reports and the CBN website are silent on the meaning of periodic. In contrast, CBN's sister regulatory agency, Nigerian Deposit Insurance Company states that a routine examination is expected to be carried out at least once every year⁵⁵. Given the number of organisations involved, and the number of staff a similar target would seem unrealistic in relation to the CBN. Admittedly, as a result of the banking crisis and the forced re-capitalisation, the number of deposit banks in Nigeria has fallen from 89 to the current figures. In approximate terms, the number has been reduced by two-thirds, however, the number of other financial institutions has remained on a similar footing. Indeed it should be noted that even though the CBN has established a separate department called the Other Financial Institutions Department (OFID) to manage the so called other financial institutions, the staffing complement referred to above includes those employed in OFID activities.

⁴⁶ <https://www.cbn.gov.ng/Supervision/Inst-DM.asp> last accessed on 20th December 2021. Prior to the recapitalisation of banks in 2005, CBN was overseeing around 89 legacy banks.

⁴⁷ <https://www.cbn.gov.ng/Supervision/Inst-MF.asp?NAV=46> last accessed on the 20th December 2021.

⁴⁸ <https://www.cbn.gov.ng/Supervision/Inst-DH.asp> last accessed on the 20th December 2021

⁴⁹ <https://www.cbn.gov.ng/Supervision/Inst-PMI.asp?NAV=2> last accessed on the 20th December 2021.

⁵⁰ <https://www.cbn.gov.ng/Supervision/Inst-BDC.asp?NAV=150> last accessed on the 20th December 2021

⁵¹ <https://www.cbn.gov.ng/Supervision/Inst-DFI.asp> last accessed on the 20th December 2021

⁵² <https://www.cbn.gov.ng/Supervision/Inst-FC.asp?NAV=3> last accessed on the 20th December 2021

⁵³ <https://www.cbn.gov.ng/Out/2019/RSD/2018%20AR%20KAMA1.pdf> last accessed on the 20th April 2020.

⁵⁴ S 32(1) BOFIA 2020

⁵⁵ <https://ndic.gov.ng/supervision/supevisory-activities/> accessed on the 10th October 2021.

The delayed publication of the CBN's Annual Report, a fact which in itself may indicate inadequate staffing, means that it is not possible to comment on whether there has been an increase in the staffing available and if so, whether it is sufficient. What can be said is that the work undertaken is labour intensive. In some instances, periodic routine examination can take from nine months to more than a year and sometimes the supervisory resources are stretched. Indeed, CBN's capacity to enforce and monitor was called to question by a former CBN Governor. He conceded that one of the reasons the Corporate Governance infringements by banks in 2008 went unnoticed was because there was no proper internal structure in place for enforcement at CBN. He went on to suggest that no CBN official was given the responsibility of enforcing compliance. In the catalogue of shortcomings listed by him was the failure to address issues relating to risk management, corporate governance, fraud, money laundering, cross-regulatory co-ordination, enforcement, and legal prosecution. In other words, he suggested that the examination policies and procedures were not well adapted to the prevailing environment. He also acknowledged some of the practical difficulties involved in managing off-site investigations and the allied difficulties in putting together well-integrated and effective supervisory teams⁵⁶. It is a fact that some of the shortcomings identified by Sanusi in his paper were addressed during his time as the head of CBN, it can only serve as a reminder of how CBN under performed and of what could go wrong in case of complacency or weak leadership where institutional structures are not robust and or in the alternative not strong.

1.2. Knowledge and Information.

The supervisory and regulatory requirements are continuously changing because of the changes in banking and higher expectations in accounting standards. It has been noted that due to the unabating appetite of financial institutions for the development and introduction of financial products which are esoteric, it is increasingly important that examiners have deep knowledge of these instruments in order for them to appraise the risks that surround them⁵⁷

⁵⁶ S. Sanusi, 'The Nigerian Banking Industry: what went wrong and way forward' (2010) convocation lecture delivered by CBN Governor pg 9 available at http://www.cenbank.org/OUT/SPEECHES/2010/THE%20NIGERIAN%20BANKING%20INDUSTRY%20WHAT%20WENT%20WRONG%20AND%20THE%20WAY%20FORWARD_FINAL_260210.PDF

⁵⁷ <http://www.vanguardngr.com/2014/05/weak-corporate-governance-threatens-bank-examination/> last accessed on the 10th October, 2021

Notwithstanding that the CBN's Banking Supervision 2019 Annual Report⁵⁸ provides information about trainings, seminars and works with the number of staff involved, the highlight of how it trains its staff, is, again thin and very descriptive and gives no indication as to objectives of such training or assessments as to what was achieved. A highly trained and workforce is essential if the ambitious objectives of the CBN are to be achieved. In the past, for instance, it was alleged albeit indirectly that trained incapacity of the CBN contributed previous corporate failures⁵⁹. The failure of pre-examination questions to cover some fundamental issues resulted in the investigation being superficial, and the information deficit was compounded in subsequent roll over inspections. As a consequence, there was a failure to recognise the impending crisis and the information deficit was growing year on year.

*“With examination cycles between 6 and 12 months, follow-up on examination recommendations rolled into the following year's examination. **The prevailing view that the sector was healthy, a culture of tolerance, and acceptance of the status quo** and the shortage of specialist skills compromised supervision's effectiveness.”⁶⁰*

Successful monitoring and supervision is not possible without prompt good information. The information provided also has to be sufficient, reliable and timely. Regrettably, the information received by CBN may be late. This is because some of the required information may not come to CBN's notice until it carries out a periodic examination of the bank or when there is a special investigation or when some of the documents are filed at the end of a financial year. The longer the delay, the worse the problem becomes, and as indicated above, *periodic* can become very periodic.

1.3. Political Factors

The CBN's performance can be the subject of political controversy. This is hardly surprising given the political nature of Governor, and other senior officials' appointment. The Governor and the Deputy Governors are nominated by the President subject to confirmation of the National

⁵⁸ <http://www.cbn.gov.ng> pg 19 last accessed on the 14th October 2021.

⁵⁹ http://www.cenbank.org/OUT/SPEECHES/2010/THE%20NIGERIAN%20BANKING%20INDUSTRY%20WHA%20T%20WENT%20WRONG%20AND%20THE%20WAY%20FORWARD_FINAL_260210.PDF

⁶⁰ *ibid*

Assembly⁶¹. Nigeria is a multi-ethnic nation and ethnicity is a sensitive issue⁶². Political appointments among other types of appointments are made on a zoning basis and distributed amongst the various ethnic groups so as to avoid marginalisation, and with the aim of ensuring an equal representation of the ethnic groups in government⁶³. Merit is therefore not the only consideration⁶⁴.

Indeed, beyond the present danger of nepotism, it places the appointed CBN Governor under undue pressure for favours from kinsmen who usually feel entitled to special benefits once any government agency is headed by their tribesman because of the perception that the occupant of that seat- their tribesman- holds it not for himself alone but for the benefit of the entire ethnic group. It also places the CBN Governor under pressure from politicians who sponsored and supported his appointment. The risks are obvious, especially given that the same politicians can be major stakeholders in the banking sector either directly or by proxy. The independence of the CBN is therefore not on firm ground. A detailed examination of the relevance of ethnic and political influence is beyond the scope of this paper but the topic has been a subject of socio-political interest and considerable speculation in the press.⁶⁵ Indeed the biographies of some of the Governors provides testimony of the seriousness of the problem.

For instance, during the tenure of Professor Charles Soludo as Governor, a southerner, between 2004 and 2009, there was a radical reform of the banking sector. This involved the recapitalisation of banks and mergers and acquisitions where recapitalisation was not possible. The impact was a reduction in the total number of deposit banks from over 89 to just 25⁶⁶. Critics subsequently claimed that the impact reflected a southern agenda because out of the 25 banks that survived the

⁶¹ Section 8(1) CBN Act

⁶² According to A.H.M Kirk Greene, 'The Genesis of the Nigerian Civil War and the Theory of Fear' (1975) *Nordic African Institute*, Uppsala 19, "fear has been constant in every tension and confrontation in political Nigeria. Not the physical fear of violence, not the spiritual fear of retribution, but the psychological fear of discrimination, of domination. It is the fear of not getting one's fair share, one's dessert".

⁶³ Abdul Raufu Mustapha, 'Institutionalising Ethnic Representation: How effective is the Federal Character Commission in Nigeria?' (2007) *Center for Research on inequality, Human Security and Ethnicity, Department of International Development, University of Oxford. Crise Working paper no. 43*

⁶⁴ The immediate past three CBN Governors have come from three different geo political zones of the country.

⁶⁵ <http://www.mynewswatchtimesng.com/de-politicise-cbn-governors-appointment/>

⁶⁶ U. Guru, 'The Impact of the Banking Recapitalisation on Employment in Nigerian Banks' (2009) 11 (3) *European Journal of Social Sciences* 486

reform, only one could be regarded as being of Northern ownership⁶⁷. At the expiration of Prof Soludo's first term in office, the option of renewing his tenure was not taken by the then newly elected President who instead nominated a Northerner, Mallam Sanusi Lamido Sanusi, as his replacement. On taking his appointment, the new Governor, after an examination of the various money deposit banks, removed five Managing Directors and bailed banks deemed to be in danger of imminent collapse. The Banks on this occasion were mainly Southern in ownership and management configuration which led to the reverse criticism, that the Governor was committed to a Northern agenda⁶⁸. It was suggested that the objective was to regularise the imbalance in ownership between the Northern and Southern Ownership of banks, in order to counter balance, the effects of Prof Soludo's previous reform.

Indeed, prior to the appointment of Mallam Sanusi, it was reported in one of the national dailies that a certain group was pushing for a northerner to take over from Prof Soludo with the aim of discrediting the reforms carried out by Prof Soludo. According to the Vanguard Newspaper's report on the 23rd March 2009;

“The group is using this means to make depositors panic and undertake massive withdrawal of funds from the targeted banks in an attempt to cause liquidity problems in the banks. In that state, they hope to cause take-over by the government which may buy a stake in the banks and later sell to members of the privileged Northern groups who may be appointed in the interim into the boards of the banks⁶⁹”.

Again, the suspension which eventually led to Mallam Sanusi's vacation of office as CBN governor was not without its controversy. Although, according to the federal government, he was suspended for financial recklessness and far reaching irregularities, it was alleged that the said suspension was politically motivated considering that it came almost after Mallam Sanusi submitted a comprehensive evidence to a senate investigating committee on alleged fraud at the Nigerian National Petroleum Corporation⁷⁰.

⁶⁷ S Ebohon Snr, “Hurricane Sanusi in a Swollen ‘Mono-Industry’: The Politics of Banking Sector Reforms in Nigeria” (2012) 4 (1) *British Journal of Humanities and Social Sciences* 55

⁶⁸G. Kwanashie, *The Making of the North in Nigeria: 1900-1965* (Ahmadu Bello University, 2002) northern politicians promoted Northernisation in the 1950s despite that the colonial government was promoting Nigerianisation

⁶⁹ http://waado.org/NigerDelta/Essays/sanusi_lamido/vanguard_plot.html last accessed on the 19th October,2021

⁷⁰ <https://www.ft.com/content/9c09b882-9a18-11e3-a407-00144feab7de> last accessed 24th July 2022

Regulatory Enforcement strategies

Regulatory enforcement strategies are the tools or mechanisms that help to dictate the mode or process regulatory enforcement can take. In essence they provide a framework which enable regulatory agencies to be clearer as to the manner in which they target their investigations and subsequently enforce their decisions in relation to the group in question. In deciding the enforcement strategy to adopt, regulators need to consider the implications of non-strict adherence to the regulations. Opting for a particular regulatory enforcement strategy however, provides no guarantee that enforcement will be successful; it merely enhances the prospect of succeeding.

In brief, there are two contrasting enforcement strategies which have been variously described but in essence the distinction is between enforced compliance and negotiated or voluntary compliance. Much of the theoretical literature dates from the 1980s and is American or Australian in origin. Only recently has there been any reference to adopted strategies in a Nigerian context. Moreover, such references are only to be found in business literature such as Annual Reports which provide no clear guidance as to which of the theoretical positions the agencies adopt.

The two approaches have the same objective; ensuring compliance. They differ only in the manner in which such compliance is best achieved. Indeed, it can be argued that neither perspective provides an absolute model. In other words, both can be co-ordinated in a way that provide for some flexibility. Some suggest that the most effective approach is enforced compliance. This approach is premised on the belief that businesses generally have a tendency to be uncooperative with regulatory agencies. Business people are deemed to be amoral calculators, who will only obey the law where the cost of adhering or complying with the tenets of the law is lower than the cost incurred by the penalties for non-compliance⁷¹. Put simply, deterrence is effective if the punishment for non-compliance is sufficient⁷².

The alternative approach is softer; more result oriented, and focuses less on rules. It places an emphasis on responsiveness and forbearance. It is inclined towards trade-offs, negotiation, and

⁷¹R Kagan and J Scholz, "The "Criminology of Corporation" and Regulatory Enforcement Strategies" in Hawkins and Thomas (eds), *Enforcing Regulations*", (Massachusetts: Kluwer Nijhoff, 1984), 67-95

⁷²P Grabosky and J Braithwaite, "Of Manners Gentle: Enforcement strategies of Australian business regulatory agencies (Oxford University Press,1987)

persuasion⁷³. This approach takes the view that businesses can be considered to be similar to political citizens who believe in the law and naturally want to comply with regulation. In such situations, cooperation between the business and a regulator is regarded to be the norm. Compliance in such circumstances can therefore be usually achieved through consultation and conciliation without the need for punitive enforcement. The latter is regarded as merely a background threat.

As suggested above, the two strategies are not necessarily mutually exclusive. Indeed, it can be argued that a strict adherence to one or other of the two could be counter-productive. For instance, an enforcement strategy built entirely on a deterrence strategy may well antagonise regulated bodies that are willing to comply. Moreover, organisations might resist enforcement if they see the focus on punishment as unfair with the result that resistance or avoidance becomes a form of subculture. Conversely, if the only strategy adopted is negotiated compliance, there is no fall back when non-compliance becomes a norm. This in turn could have a negative impact on those willing to comply because non-compliance is left unpunished⁷⁴.

Ayles and Braithwaite⁷⁵ sensibly suggest that the two approaches are not mutually exclusive and that a merger of the two is possible which they describe as '*responsive regulation*'. They argue that for regulatory bodies to effectively deploy regulatory enforcement strategies, it is necessary to ensure that both strategies are synergised in order to achieve the optimum outcome. This combination has been described as a 'tit for tat' approach which in practice means that enforcers begin by adopting a negotiated compliance approach with the understanding that where this is not successful, the approach will change to become increasingly punitive⁷⁶. The model has been described as an enforcement pyramid ranging from persuasion at its base and proceeding incrementally to warning, fines, criminal penalties, licence suspension and licence revocation⁷⁷. This enforcement strategy has three main features that come with its implementation: firstly, a clear and fully outlined explanation as to the nature of the breach; secondly, a presumption that

⁷³ N. Shover and D A Clelland and J Lynxwiler, 'Enforcement or Negotiation? Constructing a Regulatory Bureaucracy', (State University of New York Press, 1986)

⁷⁴ J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *U.B.C.L* 475 at 488

⁷⁵ I.Ayres and J. Braithwaite, "Responsive Regulation" (Oxford : Oxford University Press, 1992)

⁷⁶ Frederique E. Six, 'Trust in Responsive Regulation Theory: A Critical Appraisal from a Trust Perspective' (2012) Paper presented at ECPR Standing on Regulation & Governance Exeter, pg 2

⁷⁷ J Freedman, 'Responsive Regulation, Risk, and Rules: Applying the Theory to Tax Practice' (2011) 44 *UBC Law Review* 627 at 628

the regulated entities are predisposed to comply and can be persuaded to do so; and finally, that any escalation of intensity in the regulatory response will occur only in the absence of a genuine effort by the regulated to meet the required standards.⁷⁸ The pyramid upward escalation approach has itself been a subject academic criticism⁷⁹. The theory offers no guidance as to when and under what circumstances a more punitive approach should be implemented.

Questions have been asked of how regulatory agencies determine when to punish and when to persuade. Regulatory agencies may not always be able to risk a step by step application regime. In some situations where the breach is deemed serious, the appropriate response will be to move a higher level on the pyramid⁸⁰. Escalation and de-escalation is not always easy⁸¹. Effective regulation can only be achieved in enforcement communities in which the regulator and the regulated understand the strategy that each party is making use of and with that they can easily predict each other's response to differing regulatory situations⁸². This becomes less likely when there is more than one regulator⁸³.

In addition, critics suggest that other factors often intervene in the nature of the relationship

“There are also practical limitations on the operation of the pyramid in practice. Escalating through the layers of pyramid may simply not happen again because enforcement is not simply a two-actor game in which the only factor that shapes the enforcer's reaction is the co-operative or uncooperativeness of the regulatee”⁸⁴.

⁷⁸ Braithwaite, ‘Responsive Regulation and Restorative justice’ (Oxford: Oxford University Press, 2002)

⁷⁹Some of the critiques of responsive regulation include N.Gunningham and P Grabosky, ‘Smart Regulation Designing Environmental Policy’ (Oxford : Clarendon Press, 1998); J Mendeloff, ‘Overcoming Barriers to Better Regulation’ (1993) 18 (4) *Law and Social Inquiry* 711 – 729; R. Johnstone, Putting the Regulated Back into Regulation (1999) 26 *Journal of Law and Society* 378.

⁸⁰ K Murphy, ‘Moving Towards a More Effective Model of Regulatory Enforcement in the Australian Tax office’ (2004) *British Tax Review* 603-19 argues that where possible, persuasion should be the strategy of first choice because preserving the perception of fairness is important to nurturing voluntary compliance.

⁸¹ R Baldwin and J Black, ‘Really Responsive Regulation’ (2007), *LSE Law, Society and Economy working papers* 15

⁸² C Parker, ‘Compliance professionalism and regulatory community: The Australian trade practices regime’ (1999) 26(2) *Journal of Law & Society* 215

⁸³ F Haines and D Gurney, ‘The Shadows of the Law: Contemporary approaches to Regulation and The Problem of Regulatory Conflict’ (2002) Paper presented at the Current Issues in Regulation: Enforcement and Compliance Conference convened by the Australian Institute of Criminology pg 2

⁸⁴ R. Baldwin and J. Black (n148)

These other factors might include the level of the regulatory agency's resources, the size of the regulated entities, the nature of standard imposed, the visibility of non-compliance, compliance costs, the financial assistance available for compliance and the penalty structure⁸⁵. Enforcers might have sub-consciously developed an affinity with a particular compliance approach which once established, becomes the normative approach. A proposition for change might not be well received⁸⁶. Also, the agency might lack the necessary facilities needed in terms of tools and resources⁸⁷ needed in order to escalate to more stringent punitive strategies; it may fear political consequences of progression and in addition lack judicial, public or political support for escalation.

Responsive regulation may not be possible in a situation where the statute has stipulated that certain offences give rise to automatic prescribed penalties. For instance where an insolvent director participates in the management of a company, CAMA classifies it as crime and prescribes a specific penalty⁸⁸. There is no opportunity for negotiation in such circumstances.

Another challenge that responsive regulatory strategy encounter is whether or not it can be said to be fair, proportional and consistent in determining sanctions. It has been argued that though responsive regulatory strategy seeks to adopt a more rational, sensible and flexible approach, the lack of formality ultimately undermines both the rule of law and constitutional values⁸⁹. Regulatory responses are said to be influenced by the cooperation or otherwise that regulated entities give to the regulator notwithstanding the nature of the non-compliance.⁹⁰ More seriously, the flexible nature of the potential responses gives rise to serious risk of abuse and possible cronyism.

1.4. CBN's Regulatory Enforcement Strategy

The CBN's supervisory intervention framework for the Nigerian banks expressly stipulates that their general supervisory approach is risk based and it is predicated upon a coordinated action plan

⁸⁵ J Mendeloff, 'Overcoming Barriers to Better Regulation' (1998) 18 *Law and Social Inquiry* 711-729

⁸⁶ R. Baldwin and J. Black (n148)

⁸⁷ See earlier discussion on regulatory capacity in relation to staff and technology.

⁸⁸ S 253(1) CAMA

⁸⁹ K. Wehrman, 'Delegalizing Administrative Law' (1996) *University of Illinois LR* 423; K. Yeung, '*Securing Compliance: A Principled Approach*' (Oxford: Hart Publishing, 2004)

⁹⁰ For instance, if the non-compliance is not weighty and as such negligible and would ordinarily attract a punishment at the base of the pyramid. Under the responsive regulatory strategy, however, such negligible non-compliance could attract a heavy penalty in the middle or at the top of the pyramid if the defaulting company is deemed to be uncooperative.

in the lifecycle of a financial institution⁹¹. A risk based approach supervision includes the review of major risk management control functions, such as the board and senior management oversight, internal audit, risk management, compliance, and financial analysis.

The CBN lists its supervisory measures and by implication highlights the bank's ability to adopt a responsive approach⁹². The CBN, however, is silent on why it opted for this particular enforcement strategy and provides no evaluation as to how successful the strategy adopted has been.

CBN's Supervisory intervention framework for the Nigerian banking sector indicates that the usual regulatory actions taken as a result of non-compliance can either be formal or informal. The nature of action would be determined by the nature of the particular circumstances. The guidance lists the possible factors to be considered but provides little assistance in determining how much weight should be given to particular breach. The list is very open-ended, unspecific and provides for very wide discretion. The key considerations are listed below:

- Nature of the situation;
- Cause and/or motivation – these could arise from any or the combination of the following situations:
 1. Lack of understanding of the potential risks relating to a particular business entity,
 2. Lack of fundamental knowledge or awareness of the operating or other requirements for critical business activities,
 3. Motives may not be consistent with their institutions' best interests,
 4. Weak or ineffective risk management programs,
- History of compliance;
- systemic impact to-date;
- risk exposure or profile;
- parties involved (e.g. insiders);
- management attitude; and

⁹¹<http://www.cenbank.org/OUT/2011/PUBLICATIONS/BSO/CBN%20SUPERVISORY%20INTERVENTION%20GUIDELINE%202011%20FINAL%20TO%20PUBLISH%20V%202.PDF> at page 2 accessed on the 25th August 2021

⁹² 'Supervisory Intervention Framework for the Nigerian Banking Sector'. Banking Supervision/ financial Policy and Regulation Department (2011) at 3-6.
<http://www.cenbank.org/OUT/2011/PUBLICATIONS/BSO/CBN%20SUPERVISORY%20INTERVENTION%20GUIDELINE%202011%20FINAL%20TO%20PUBLISH%20V%202.PDF> accessed on the 25th October 2021.

- Prospects⁹³.

The guidance distinguishes between four categories - low, moderate, above average and high risks and implies that the informal approach should be adopted in relation to categorise one and two. However, the guidance provides no triggers as to what breaches and how many breaches would lead to the more serious categorisations. There is clearly a need for further benchmarking to both protect the regulator from the dangers of been manipulated when justifications for intervention arise.

The guidance is also confusing as to the nature of disclosure in relation to informal actions. It stipulates⁹⁴ that informal actions⁹⁵ may not be publicly disclosed by institutions and are generally not enforceable in law. The wording therefore implies that CBN may be free to disclose such actions whereas the particular bank would not enjoy similar rights. Whilst it is probably the case that most banks would rarely want to publicise such actions, there seems to be no justification in law for making the distinction. Owing to the fact that informal actions are usually confidential in nature, specific examples of CBN's informal interventions are not readily available. However, the informal actions include, supervisory Letter, board Resolutions, and Memorandum of Understanding.⁹⁶

In contrast, the guidance indicates that formal actions are legally enforceable agreements requiring a bank to take remedial measures towards enforcement and these actions can be disclosed to the public and can be enforced. Again, the wording is confusing and perhaps misleading. It is not clear as to how why a particular bank would enforce the regulation, its responsibility is to comply. The wording may be simply the result of bad drafting but it is indicative of the confusion that can arise. Similarly, the claim that publicity can be given to such actions is made without reference to any

⁹³ 'Supervisory Intervention Framework for the Nigerian Banking Sector'. Banking Supervision/ financial Policy and Regulation Department (2011) at 3-4

⁹⁴ Ibid at Para 1.1 pg 3

⁹⁵ The informal option might be appropriate if among other things; it meant to serve as a wakeup call to the board/ management of the non-compliant bank, if action is needed to address specific concerns, if CBN has confidence in the board/management of the bank or if violations involve a subsidiary of the bank.

⁹⁶ Supervisory Intervention Framework for the Nigerian Banking Sector'. Banking Supervision/ financial Policy and Regulation Department (2011) at Par 1.2 Pg. 4.

statutory authority.⁹⁷ The formal actions include; termination of NDIC Insurance, consent order, temporary cease and desist order, removal and prohibition, monetary penalties. It could also order further investigations or refer concerns to other agencies such as Economic and Financial Crimes Commission (EFCC). For instance, the CBN's report in relation to the revocation of the operating licence of Peak Merchant Bank, indicates that CBN adopted a wide span of interventions ranging from informal actions to formal actions and that the severity of the formal actions increased as the levels of compliance showed no improvement.⁹⁸ As indicated at Par 8.3 of the report, CBN alleges *that "in spite of all regulatory prodding to get the bank recapitalised and restructured, the lack of seriousness, inability and unwillingness of the shareholder had made it impossible"*.

As highlighted above however, the existing guidance provides little indication as to what is to be regarded as serious or when the response of the bank in question is to be regarded as 'unserious'. Indeed, the lack of adequate benchmarking in terms of the regulatory system means that the same criticism of being 'unserious' could be directed against the CBN. For instance, in the example referred to above, the revocation of Peak Merchant Bank's licence, there are examples of some six extensions being given which may well have given the impression that the CBN was not intending to take serious steps. Indeed, on one occasion there was a five months gap between a stipulation for compliance within two weeks and a further review formal of the response⁹⁹. On some occasions it is impossible to decide how much time was given for compliance and how flexible the CBN's response had been. For instance, in the case of Express Discount Ltd, an investigation which apparently spanned some 7 years (2006-2013), the CBN's published report provides little detail, the whole report consisting only of some two scanty pages. Clearly, there is a need for more transparency and justification.

The lack of transparency and justification makes it impossible to measure the success or otherwise of the existing enforcement strategies¹⁰⁰. Published reports and literature on measuring compliance to date seems to be confined to environmental issues. In the light of the frequency of corporate

⁹⁷ Admittedly, S 56(2) of BOFIA provides CBN with very wide powers to make rules and regulations for the operation and control of all institutions under the supervision of the bank but makes no specific reference to powers of disclosure and what circumstances if any, would justify wide spread publication.

⁹⁸ <http://www.cenbank.org/OUT/PUBLICATIONS/PRESSRELEASE/GOV/2003/PRESSBRIE-28FEB.PDF>

⁹⁹ See Paras 2.2; 2.3.5; 6.1; 6.2; 6.4 and 6.7 of the Press release on the revocation Banking Licence of Peak Merchant Bank of 28th February 2003

¹⁰⁰ M Sparrow, *'The Regulatory Craft Controlling Risks, Solving Problems, and managing Compliance'* (The Brookings Institution Press, 2000)

failures, there appears to be good ground for suggesting that similar measurement equivalents are needed.

Regulating the regulator

In the last one decade, regulators of corporate institutions in Nigeria have come under public scrutiny for various reasons and have been accused of serious misdemeanours ranging from corruption to financial recklessness. As indicated at the outset of the paper, the appointments of senior regulators are vulnerable to political, regional and ethnic pressures and therefore some allegations may therefore lack merit and may be the subject of unjustified publicity. Be that as it may, however, the allegations are so numerous that the credibility and integrity of the regulatory role is undermined. For instance, the immediate past CBN Governor was suspended before the end of his tenure based on allegation of financial recklessness¹⁰¹. The Financial Reporting Council of Nigeria in its briefing note to the then President of Nigeria dated 7th June 2013 among other things raised issues pertaining to CBN's governance practice, failure of the CBN to comply with the Public Procurement Act, failure of the CBN to adopt the IFRS accounting standard, and fraudulent activities at the CBN¹⁰².

CBN as a regulator is subject to the oversight of the National Assembly. However, there is a significant disconnect between the National Assembly's usual line of questioning and the monitoring that is required for the regulatory bodies. The National Assembly's ad hoc supervision of regulatory bodies has been marred by political intrigue, accusations of bribery and all too often the allegations are left unchallenged, and unresolved. The system sometimes appears like a process of allegation without conclusion. For instance, in March 2012, the House of Representatives committee on capital market and other institutions attempted to carry out an investigation of the Nigerian Capital market. The Director-General of SEC, accused the chairman of the investigating house committee of corruption. She alleged that, twenty-four hours before the hearing, the chairman of the committee demanded a sum of five million Naira from her. She also questioned the committee's request that SEC should sponsor the hearing with the sum of Thirty-Nine million

¹⁰¹ <http://www.telegraph.co.uk/finance/economics/10652266/Nigeria-suspends-central-bank-governor-for-financial-recklessness.html> accessed 1st November 2021

¹⁰² <http://www.premuimtimesng.com/news/156827-suspended-cbn-governor-lamido-sanusi-responds-to-allegations-of-financial-recklessness.html> accessed 1st November 2021

Naira. The Director-General countered the allegation by questioning the credibility of the chairman of the investigating committee. All the allegations summed up turned into personality clashes and ultimately marred the investigation¹⁰³. Clearly the process provides little protection against conflicts of interest. It seems an eccentric suggestion that the regulatory body should be asked to sponsor an investigation into its own activities. Despite the allegations and counter allegations, there had been no public adjudication as to the validity of any of these claims with the result that public confidence in the integrity of the post and similar positions has been compromised.

The ad-hoc nature of the existing arrangements is very unsatisfactory and benefits no one. As outlined above, the existing arrangement may undermine the integrity and ability of those appointed to the office to undertake their work. Where serious allegations of misconduct are involved, investigations should be conducted in manner which provides for procedural and constitutional safeguards. More formality is required. The procedure should specify how issues such as conflict of interest, corporate practices, Annual Reports, rules, and the coordination of the multiple regulatory agencies should be investigated.

Conclusion

CBN has statutory responsibilities to regulate, monitor, supervise and enforce activities of entities in the financial sector. The importance of this role is very obvious since the success of the corporate activity, such as banking, is of public interest and of primary importance to the stability and viability of the nation-state. On that premise, an examination of the legal framework of CBN was carried out in this paper. This involved an examination of its powers, functions and mode of operations.

Firstly, the analysis reveals a number of shortcomings in the existing regulatory provisions. For instance, the statutory powers of the CBN Governor to remove directors of banks was reviewed and it is clear that the Governor can only exercise the power only in case of a failing and, or, under-capitalized banks. The power cannot be used where there is a history of gross disregard for good corporate governance practice. On a more general level, it is clear that there are a number of

¹⁰³ <https://www.vanguardngr.com/2012/03/otehs-bribery-allegation-reps-battle-to-save-face/> accessed 1st November 2021.

significant variations in the regulations that apply and that this variety provides opportunities for avoidance.

Secondly, the paper examined the capacity of CBN to carry out its supervisory role and provides evidence to suggest that currently, the monitoring agency may be ill equipped in terms of both staff numbers and resources to carry out its statutory functions.

Thirdly, the paper examined the regulatory enforcement strategies of CBN and the evidence highlight the lack of clarity and of benchmarking, in particular, with the result that success and failure in this context is difficult to measure.

More importantly, the politicisation of the supervisory powers of the National Assembly over the regulatory body is indeed a source of concern. There is no guidance for 'from time to time'. The ad-hoc style presently used by the National Assembly to supervise CBN is inadequate and undermines the integrity of both the National Assembly and the CBN. It is fundamental to put in place constitutional and procedural guidance on how issues that relate to conflict of interest, misconduct, corporate practices, Annual Reports, and rules of CBN are investigated and dealt with.