

# Workability and Effectiveness of Assets Management Corporation of Nigeria Act 2010: Intervention in the Nigeria Banking Sector Crisis

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## ABSTRACT

*The challenges and prospects of rescue interventions to corporate failures and the Banking Sector Crisis in Nigeria are the focus of this paper. In Nigeria, the impact of the global economic crisis shifted from the capital market to the banking sector where an estimated \$10 billion of toxic assets were held by banks whose assets suffered capital erosion due to market collapse. This paper assesses the rescue intervention by the Central Bank of Nigeria through the Assets Management Corporation of Nigeria Act 2010 (AMCON Act) and employs as a method, analytical exposition of the Act in this work. The paper finds that lack of corporate governance and incentive problems caused Nigeria's banking sector crisis. It argues that though the provisions of the AMCON Act are aimed at compelling corporate governance and international best practices, inherent weaknesses and inconsistencies with superior legislations leave a big question mark on its applicability and effectiveness. The paper calls for legislative rethink if Nigeria must prevent future failures in the banking sector and rebuild confidence in the investing public as well as in bank depositors.*

**Keywords:** *Bank Crisis, Rescue Intervention, AMCON Act, Nigeria.*

## INTRODUCTION

The litany of corporate frauds perpetuated by hitherto acclaimed first class banks in Nigerian such as Afribank, Bank PHB, Oceanic Bank, Union Bank, Intercontinental Bank, Finbank, Equatorial Trust Bank and Spring Bank Plc<sup>1</sup>, woke the banking public from its inebriate slumber. The ensuing outcry and public dissatisfaction with the scandals that tainted the banking sector in Nigeria galvanized stakeholders particularly the Central Bank of Nigeria (the CBN), the Nigeria Deposit Insurance Corporation (the NDIC) and the Economic and Financial Crime Commission (the EFCC) into action. This has resulted into far reaching reforms and consequences in the Corporate Governance System as well as radical reforms in the Nigerian banking sector. In Nigeria, the banking sector was a near collapse. Investors lose total confidence in the shares of banks even as families find it extremely difficult to meet their daily financial needs due to the huge lost of their investments in these banks - the capital market had crashed! According to Olisaemeka<sup>2</sup>, the crash of the Nigerian Capital Market was unprecedented in its historic evolution since 1960 to date. Its market capitalization nose-dived from an all time high of N13.5 trillion in March 2008 to less than N4.6 trillion by the second week of January 2009. Besides, the All-Share Index (a measure of the magnitude and direction of general price movement) also plummeted from about

66000 basis points to less than 22000 points in the same period. The stock prices experienced a free-for-all downward movement regime with more than 60% of slightly above 300 quoted securities on constant offer (supply exceeding demand) on a continuous basis. Consequently many of the quoted stocks of these banks lack liquidity as their holders are trapped, not being able to convert them to cash to meet their domestic and other investment needs. On the other hand, fresh investors are cautious of jumping into a vehicle that does not seem to have a brake should they wish to disembark<sup>3</sup>. The financial crisis sent tsunami ripples and wave shocks across the economic and political institutions. Tension mounted everywhere as job cuts were on the increase, while many corporations including banks shut down their operations and a few are declaring bankruptcy<sup>4</sup>. The legislature was moved to regulate these banks through enactment of remediable legislation<sup>5</sup>.

At present, Nigeria's economy still suffers the devastating effect of this financial tsunami. With businesses and other financially related activities grounded to a halt, the Central Bank of Nigeria in what could be best describe as a rescue mission, embarked on radical reformative intervention to savage the country from sliding totally into economic Golgotha. It set the framework for reform even as there was total loss of confidence by the investing public in the Nigerian Banking industry. How come these banks were winning awards (nationally and internationally) in face of the huge financial mess in their cupboards?<sup>6</sup> Why did the CBN and allied regulatory agencies not alert the nation of the great doom ahead, or did they simply closed their eyes and turned the other way to the detriment of the investing public?

Thus, the banking sector crisis came as a shock to the banking public whose confidence in the strengths of these banks was unshaken following the bank consolidation exercise of 2004/2005 which saw the banks consolidating into 25 'stronger' ones. On or about July 6, 2004, the CBN through its Governor Charles Soludo made a regulation increasing the Minimum Paid up Capital for Nigerian Banks from Two Billion Naira to 25 Billion Naira. This regulation nicknamed Soludo Solution<sup>7</sup>, sent panic and jitters through the Nigerian economic polity. The CBN was said to have acted pursuant to Sections 9 of Banks and Other Financial Institutions Decree (BOFID)<sup>8</sup> which gives legal authority to the President to determine from time to time the minimum paid up share capital of banks. The consolidated banks were to meet the development challenges of the 21st century<sup>9</sup>. The Nigerian banks were among the most profitable in the world before the 2008 banking crisis with Return on Equity (ROE) on average exceeding 25 percent for most of them with prospects that ROE will recover to a more sustainable level.

Resurgence in the banking sector has seen assets and profits recover to beat pre-crisis levels as wide-sweeping financial reforms improve the nation's investment image. However, these expectations and projections were not to be. The banking public were wrong in their belief. Many of these banks rolled out drums daily to celebrate one award or another including international awards for their efficiencies in service delivery among others<sup>11</sup>. But in the wake of 2008 and the global financial meltdown, many of them began to show signs of distress and unable to meet their daily cash withdrawal obligations to their customers and downsizing their work force. These were the tell tale signs of imminent

danger in the industry when Malam Lamido Sanusi came on board as the Governor of the CBN in 2009. The question therefore, on why the CBN had to embark on another banking sector reform four years after the previous one was begun finds answer in the recent global financial crisis which the CBN noted, strained the gains that were made in the Nigerian financial services sector from the 2004/2005 banking sector consolidation<sup>12</sup>. Some of the banks were in grave condition and faced liquidity problems, owing to their significant exposure to the capital market in the form of margin loans and share-backed lending, which stood at about N900.0 billion as at the end of December, 2008<sup>13</sup>. The excessive exposure resulted in some weaknesses, notably liquidity problems, exhibited by some of the banks towards the end of 2008. Further investigation by the CBN identified eight interdependent factors as the main origin of the crisis in the banking sector. These include:

- i. Sudden capital inflows and macroeconomic instability
- ii. Poor corporate governance and character failure
- iii. Lack of investor and consumer sophistication
- iv. Inadequate disclosure and lack of transparency
- v. Critical gaps in regulatory framework and regulations
- vi. Uneven supervision and enforcement
- vii. Weaknesses within the CBN
- viii. Weaknesses in the business environment<sup>14</sup>.

Threatened by the following challenges and as a remedial and proactive measure, the CBN moved decisively to strengthen the industry, protect depositors and creditors' funds, safeguard the integrity of the industry and restore public confidence. To this end the CBN sacked the chief executives/executive directors of the banks, injected the sum of N620.0 billion into the banks in an effort to prevent a systemic crisis. Provisions were also made to recover non-performing loans from the banks while guaranteeing all foreign credits and correspondent banking commitments of the affected banks.

Part 2 of the Paper examines the crises in the Nigeria banking sector and the rationale behind the CBN intervention. The merits and demerits of the intervention are also analyzed in this part. In Part 3, the paper examines the provisions of the Assets Management Corporation of Nigeria Act 2010 (AMCON Act) and the creation of the Assets Management Corporation of Nigeria as a Special Purpose Vehicle of Assets Management to ascertain their workability and effectiveness in checking corporate fraud and failures in banks. In doing this, the paper attempted a comparative analysis of the AMCON Act with similar rescue interventions like the US Sarbanes-Oxley Act 2002 to discover if indeed such intervention in Nigeria was necessary in the first place. In Part 4, the paper is concluded by proffering suggestions and recommendations for reform.

### ***The Banking Sector Crisis in Nigeria and the Central Bank Rescue Mission***

Worried by what he called 'monumental rot' in the banking industry, the CBN governor unleashed radical reforms that swept the Chief Executive Officers and Directors of eight banks from office as the heads of those banks. The reforms started in 2009 and continued through 2010 and 2011. In a November 26, 2010 speech, Sanusi set the framework for future reform efforts after what analysts called 'the dramatic and expensive rescue' of eight

insolvent banks in the fall of 2009<sup>15</sup>. In this speech, Sanusi delineated and identified eight interdependent factors as the main causes of the banking crisis:

*Sudden capital inflows and macroeconomic stability, poor corporate governance and character failure, lack of investor and consumer sophistication, inadequate disclosure and lack of transparency, critical gaps in regulatory framework and regulations, uneven supervision and enforcement, weaknesses within the CBN, [and] weaknesses in the business environment<sup>16</sup>.*

He reiterated the immediate, short-term efforts to rescue nine distressed banks<sup>17</sup> by injecting capital of NGN462 billion and removing certain bank officers and directors of the insolvent banks whom he noted contributed to the rot in the banks<sup>18</sup>. Sanusi announced a critical reform measure - the creation of the Asset Management Corporation of Nigeria (AMCON) as a resolution vehicle designed to remove 'toxic assets' from the banking system<sup>19</sup>.

The question asked is whether the CBN intervention to rescue these banks actually produced any benefit or only exacerbated the crisis in the sector. Do these reforms worth the sacrifices, pains and losses Nigerian shareholders, the labour force and bank depositors are currently grappling with as a result of loss of jobs, investment and confidence in the banking sector? Pro-CBN reforms advocates had argued among others that without the intervention, the Nigeria banking industry would have collapsed totally and that the CBN as a super regulator, should be commended for the bold decision to intervene in the banking crisis at a time when government officials find it difficult to act proactively in matter as grievous as this. A report<sup>20</sup> by FSDH securities, a capital market service firm, late January 2012 stated that the total value of the Nigerian banking industry's assets increased by 7.62 percent to N15.74trillion (\$96.6billion) by December 2011, as against N14.63trillion (\$89.8billion) in December 2009. In the same period, customer deposits is said to have improved by 5.42 percent to N10.99trillion (\$67.4billion)<sup>21</sup>. Meanwhile, profits is believed to have improved, with First Bank of Nigeria registering an increase to N49bn (\$300.7million) before tax in the third quarter of 2011, up to 20 percent from the same period in 2010. Likewise, Zenith Bank announced last October that its pre-tax profit rose 28.04 percent to N50.13billion (\$307.6million) in the nine months to September 2011, compared to N39.15billion (\$240.2million) in the same period of 2010, while Stanbic IBTC Bank's profits rose 10 percent in the first nine months of year 2011<sup>22</sup>. Analysts see this growth as a sign that banking reforms introduced by the government following the margin-lending crisis in 2009 are having an impact<sup>23</sup>.

This paper believes the CBN Governor has done some commendable things since being appointed to the office in 2009. For instance, the take-over of the eight banks in 2009 and the injection of funds then were steps in the right direction. The paper also applaud him for the enforcement of the CBN Code of Conduct for banks which Prof. Chukwuma Soludo, his predecessor merely paid lip-service to as Governor; the issuance of the new Prudential Guidelines for Loan-loss Provisioning and the creation of the bail-out fund for the real sector were other commendable steps he took<sup>24</sup>. The repelled Universal Banking Model was part of strategic initiative to reform the nation's financial system to

enhance the quality of banks, ensure financial system stability and promote evolution of healthy financial sector. Following this latest development, this paper believes competition in the Nigerian banking landscape has been anticipated to become vigorous this year if indicators from operators are anything to go by. There has been increasing expectation from bank customers in terms of service delivery in the recent, coupled with CBN's reiteration on financial inclusion. These have raised the bar of competition amongst commercial banks in the bid to retain their hard-won customers and even to attract new ones. On the other hand, the CBN rescue mission has left in its tail, legion of criticisms and disinfections among stake holders in the banking industry. This paper opined that the CBN intervention in the banks without given the shareholders of the banks opportunity to participate in the recapitalization and key decisions involving the future of their investments, is contrary to the principles of fair hearing and global corporate practices. This smacks of a premeditated agenda to deny shareholders of the banks of interests in their investments. From the beginning of the so-called banking reforms, CBN never gave the shareholders any real chance of re-capitalizing their banks. The Centre for Social Justice, CSJ, came down hard on CBN for revoking the banks' licenses weeks before its deadline. In a statement by its Lead Director, Eze Onyekpere, in Abuja, the centre said CBN should have honoured its own deadline and particularly given the fact that the banks could still find buyers within the period left<sup>25</sup>. The centre said:

*We recall that CBN had given the banks up to the end of September 2011 to recapitalize. We further recall that one of the banks had negotiated with investors to infuse new capital into the bank but CBN refused to approve the investors. Revoking the licence of the banks about seven weeks to the expiration of the deadline of September 30 is not only an abuse of powers but a vindictive action without precedence. Why did CBN fix a deadline if it had no intention of respecting same? No economy thrives in arbitrariness of the type perpetuated by CBN. This is simply not the rule of law but the rule of the jungle and the rule of the whims and caprices of CBN. The manner of taking over the three banks appears desperate and intends to overreach any challenges. First, CBN revokes the banks' licence, NDIC creates three bridge banks to run them on a temporary basis, possibly for three years and AMCON acquires the bridge banks the following day. All these were done over a weekend, which days are not official working days. This smacks of a premeditated agenda to deny shareholders of the banks of interests in their investments. From the beginning of the so-called banking reforms, CBN never gave the shareholders any real chance of re-capitalizing their banks<sup>26</sup>.*

This paper argues that justifying this action in the name of protecting depositors' funds creates the impression that this is the only way that depositors' funds can be protected. This is not true. There are a number of other ways to protect depositors' funds and regulate banks without unnecessarily running down the banking system. CBN failed to consider the interest of shareholders in these banks. This is not the best way to create an enabling environment for private sector investment in the economy. CBN's action creates unnecessary

panic and fear and does not promote confidence in the Nigerian economy. This paper queries the takeover of these banks and questions the competence of the 'turn-around experts' who were posted to these banks by CBN. What value did they add to these banks and why were they not able to save the banks from this unwarranted takeover? The CBN's policies since the Sanusi era, from the controversial stress test for banks and the attempt to sell the banks, up to the present arbitrary revocation sent a strong message to the public that the regulation of the Nigerian banking system is not based on legal principles, logic or reason but by sheer dictatorship and unquenchable avarice to consume the hitherto gains Nigerians had enjoyed from the sector and enrich pockets of the oligarchic few in the economic echelon of this country. According to the Centre for Social Justice:<sup>27</sup>

*This cannot be the economic democracy we longed for. CBN needs a leadership that understands the role of the banks in the economy and the political economy of the underdevelopment of Nigeria. It does not need a leadership with a score and a grudge to settle, experimenting with people's lives and livelihoods. CSJ calls on the President and the National Assembly to review this take-over in the national interest. The CBN leadership has shown a lack of capacity to properly regulate the banking sector, a sector which is so vital to social and economic development. It should either be made to change its ways or leave the podium for more informed and experienced personnel<sup>28</sup>.*

As Sanusi's rampaging approach to banking reforms continues, the reality, however, is that the banking sub-sector would continue to operate in an environment of uncertainty. This, no doubt, is bad for foreign direct investment because the impression being created is that the sector must anticipate an operating environment based on the mood swings of the CBN Governor. The CBN intervention and subsequent creation of the AMCON has been criticized as there are tell tale signs that the AMCON Management may not as yet have fully familiarized itself with the Nigeria banking legal and regulatory environment. According to Eyieyien of the Vanguard Newspaper<sup>29</sup>, the AMCON Managing Director obviously did not realize that the Nigeria Deposit Insurance Corporation (NDIC) is actually the only government agency empowered by law via sections 38 and 39 of the NDIC Act 2006 to do what AMCON is being asked to do. Rather than face its primary objective of managing the non-performing assets of failed and failing banks it is being led by the CBN and NDIC on a misadventure which they have no competence or experience to handle. Continuing on the above line of argument, Eyieyien noted as follows:

*In response to his assertion that AMCON had been 'very thorough' in the way it has gone about appointing the new management teams, I raised the issue that the evidence was to the contrary and cited the appointment as an Executive Director of an ex-staff of Nigeria International Bank (now Citibank Nigeria) who committed a fraud in 1991 and was sacked by the bank. I refrained from mentioning the person's name. Chike-Obi's response was to say AMCON 'is not perfect' and that 'it was a mistake'. To his credit, he owned up to the blunder*

*and offered apologies to the nation there on live television. If AMCON could make that kind of blunder about an issue as simple as the appointment of credible Executive Directors and its MD/CEO was compelled to acknowledge error and apologize to Nigerians on national television, then what other 'mistakes' might have already been made but of which we are yet unaware?*<sup>30</sup>

This paper warns that we have real problems in the banking industry and the CBN, NDIC and AMCON are clearly not on top of their game in addressing them. The statutory functions of NDIC and AMCON are very explicit and unambiguous. AMCON is not the agency saddled with the power to 'own' a failed bank; that is NDIC's role which is spelt out in sections 38 and 39 of the NDIC Act 2006. The NDIC set up bridge banks on Friday, 5th August, 2011, and 'sold' them to AMCON on Saturday, 6th August, 2011. The following day, AMCON announced new management teams and even released the new bank logos<sup>31</sup>. What uncommon surgical inefficiency! What was the haste all about? Why intervene 50 clear days before the CBN self-imposed dead-line? What was the hurry for? Could the CBN and NDIC not have waited just ten more days for the then new Minister of Finance, Dr. Ngozi Okonjo-Iweala, to assume office and make an input into the decision-making process? Why the enormous effort to present her with a *fait accompli*? This paper shudders to ask!

The NDIC Act allows the NDIC to operate a bridge bank for up to 5 years. What magic is AMCON going to perform which NDIC is unable or incompetent to do? NDIC would not have had to inject N678.5 Billion into the banks as 'Share Capital to achieve 15 per cent Capital Adequacy Ratio' because the law says a bridge bank needs no Share Capital. All NDIC would have done is provide liquidity by way of 90-day 'Accommodation Bills' which it is empowered by law to issue as 'Financial Assistance' to the banks which is one of its fundamental functions<sup>33</sup>. To date, the CBN and AMCON have doled out N1, 298,500,000,000 (One Trillion, two hundred and ninety-eight Billion, and five hundred Million Naira only!!) to salvage the eight banks it took over in 2009. Is Nigeria so much in need of what to do with money again as it was during the Oil Boom years of the early 1970s such that spending N1.3 Trillion to save eight banks has become inconsequential? Is the cost-benefit analysis of a failure resolution option no longer relevant in choosing the most viable path of action which makes the best economic/financial sense? Are we not operating a free market economy where the principle of 'Free Entry and Free Exit' holds sway? This paper maintains that the latest injection of N678.5 Billion into three nationalized banks is an unnecessary waste of funds since the NDIC could have statutorily managed them as bridge banks without them needing to have any Share Capital and NDIC would only provide them temporary liquidity support until they are sold to new owners.

On its part, the Independent Shareholders Association of Nigeria, ISAN, denounced the action of the CBN and urged President Goodluck Jonathan to declare a state of emergency in the banking sector. ISAN described the revocation of the licenses of the banks as "a calculated subversion to the nation's economy and a threat to the people of Nigeria"<sup>34</sup>. This paper reasons that the CBN's resolution of recapitalization through bridge

banks remains an attestation of failure and inept leadership by the current management of the apex bank toward finding a permanent answer to the nation's induced banking problems.

***AMCON as Interventionist Tool For Bank Failures:*** The use of Special Purpose Vehicles (SPVs) to rehabilitate the books of troubled financial institutions has been an age-long practice<sup>35</sup>. There are documented examples of the use of SPVs in the U.S., Sweden, Germany and Ireland<sup>36</sup>. Recently in the U.S., the Troubled Asset Relief Program (TARP) was set up under the terms of the Emergency Economic Stabilization Act of 2008<sup>37</sup> which authorized the U.S. Department of the Treasury to establish programmes to stabilize the U.S. financial system and prevent its systematic collapse. The TARP has nine components; namely: capital assistance programme; consumer and business lending initiative; making home affordable programme; public-private investment programme; regulatory reform; capital purchase programme; asset guarantee programme; targeted investment programme; and automotive industry financing programme<sup>38</sup>.

According to Kane, any SPV set up to buy up troubled assets of financial institutions should be proficient in four activities; namely: taking over the distressed assets (rescue); valuation of the assets (appraisal); protecting and enhancing the value of the assets (property management); and disposing of the assets (sales and related activities)<sup>39</sup>. In addition, the SPV must have experts in each core activity together with experts in the types of assets within its supervision. On the hand, Cassell and Hoffman highlight ten lessons from the U.S. Home Owners' Loan Corporation and the Resolution Trust Corporation as follows:<sup>40</sup>

1. A temporary, dedicated administrative entity was key.
2. Clear formulation of the critical task is crucial.
3. Autonomy and discretion are needed in performing critical tasks.
4. Flexibility to adapt in the field is essential.
5. The temporary administrative entities must understand and be responsive to market conditions.
6. Government must have the expertise to hit the ground running in responding to a financial crisis.
7. Government must have the ability to effectively monitor and manage contractors.
8. Government must have sufficient financial and personnel resources to complete the task.
9. Government must have exit strategies.
10. There must be clear and transparent oversight.

According to Thomson<sup>41</sup>, Cassell and Hoffman's ten lessons complement Kane's four principles for asset salvage. However, eight key features can be deduced for SPVs used in the resolution of the troubled assets of banks. These are: temporary, dedicated entity; formulation of critical task; autonomy; flexibility; management of contractors; availability of financial and personnel resources; transparency; and exit strategy<sup>42</sup>. These can be said to be international best practices on such SPVs as can be gleaned from experiences in other jurisdictions. It is apposite to undertake an evaluation of the existing framework for AMCON against these features of such SPVs as enunciated. International best practices in the use of SPV in the resolution of troubled assets of financial institutions

are that they are separate entities established for such special assignment. They may be under the supervision of a Department or other agency of government, but they are usually a temporary, dedicated entity. This applies to the AMCON which is specifically created 'for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria.' While it is clear that the AMCON is a dedicated entity, its temporariness is not as certain. In the first place, the AMCON Act has no provision on the life span of the AMCON. It contemplates that it would be liquidated at some future date, but that date is not provided for in the AMCON Act. The general impression is that the AMCON would exist for ten years<sup>43</sup>. A position that is supported by the fact that the bonds it creates should have a term of not more than seven years<sup>44</sup>.

Transparency is another crucial factor in the success of SPVs set up to resolve nonperforming debts of financial institutions. Its benefits include ensuring stakeholders buy-in regarding the plans and actions of the SPV, providing a framework for effective monitoring of the performance of the SPV, freely and fully communicating with stakeholders on the activities of the SPV, and keeping the SPV focused on its goals. There are several provisions in the AMCON Act designed to make the AMCON transparent in its operations and activities. For example, section 20 enjoins the AMCON to keep proper books of accounts which comply with approved accounting standard. Also, the accounts of the AMCON are required to be audited by an independent audit firm<sup>45</sup>. Moreover, AMCON's audited financial statement is to be published 'in widely available media within six months of its year-end'<sup>46</sup>. Also, copies of the audited accounts are to be given to the National Assembly, the Federal Ministry of Finance and the CBN. Furthermore, examiners or any other person may be appointed by the CBN to undertake special or routine examination of the books or affairs of the AMCON. Again, the AMCON is required to submit an annual report to the Federal Ministry of Finance and the CBN within three months after the end of each financial year, the Federal Ministry of Finance or the CBN may require it to report to it, at any time and in any format, on any matter, including the performance of its functions and any information or statistics relating to such matters. The AMCON is also required to submit to both Houses of the National Assembly, through their relevant Standing Committees, a quarterly report of its operations.

Certainly, it is clear that a deliberate effort was made to ensure that there is transparency in the operations of the AMCON. What may be suggested to improve on the transparency measures provided for in the AMCON Act is that the AMCON should use its website a lot more to publish information relating to its activities. For example, all reports, whether quarterly or annual, it submits to the Federal Ministry of Finance, CBN or National Assembly should be made available to the general public on its website. It is important that it communicates a lot with the general public as this would go a long way in dousing the negative impression being expressed about its intention and the purpose for its creation. In order for the AMCON to be truly effective and to restore confidence in the Nigerian banking system, it must be insulated from political pressure. Fraudulent practices among some of the rescued banks, previously ignored by certain regulators and encouraged by some politicians, contributed significantly to the banking crisis. One way to insulate the

AMCON from political pressure is to strengthen its governance through an independent board of directors. The AMCON Act attempts to do so. The board of AMCON consists of 10 directors appointed by the President of Nigeria and confirmed by the Nigerian Senate<sup>47</sup>. The Chairman of the Board is nominated by the Ministry of Finance; the Managing Director serving as the Chief Executive Officer is nominated by the Central Bank of Nigeria. The CBN also nominates 3 executive directors. The remaining five members of the Board are non-executive directors, two of whom are nominated by the Ministry of Finance, two by CBN, and one by the Nigerian Deposit Insurance Corporation. All directors serve a five year term, with the possibility of a reappointment to a second five year term<sup>48</sup>. CBN appoints 6 of the 10 directors of the AMCON board and, therefore, has significant influence on the management of AMCON.

However, this paper criticizes the broad ability of the President and CBN governor to remove members of the board does not support the independence of AMCON because the board members could be susceptible to pressure from these two senior government officials. While the Jonathan administration appears to respect the independence of AMCON and the CBN, this statutory provision does not create a strong institutional barrier to removal of AMCON directors as they can be removed merely for expediency<sup>49</sup>. While other provisions of the AMCON Act appear to state AMCON is an independent agency, these provisions include the following language: 'except as otherwise provided in this Act'<sup>50</sup>. This proviso creates an exception that is used in other provisions of the Act<sup>51</sup>. Section 8 of Part I of the Act provides: 'The Central Bank of Nigeria, in consultation with the Federal Ministry of Finance, may issue guidelines and directions in writing to the Corporation in connection with the performance of any of the Corporation's functions under this Act'<sup>52</sup>. Furthermore, the AMCON Act provides that the CBN can supervise and regulate AMCON as necessary<sup>53</sup>.

One commentator stresses the lack of independence of AMCON could forecast its potential failure to reform the banking system of Nigeria<sup>54</sup>. Other successful asset management companies designed to remove non-performing assets from the banking system similarly lacked independence from bank regulators. For instance, the Resolution Trust Corporation ('RTC') established in the late 1980s in the United States was created 'to manage and resolve failed savings associations that were insured by the Federal Savings and Loan Insurance Corporation'<sup>55</sup>. The RTC, officially established on the August 9, 1989, was to terminate all of its functions no later than Dec. 31, 1996<sup>56</sup>. The Thrift Depositor Protection Oversight Board was responsible for the general oversight and periodic review of the performance of the RTC<sup>57</sup>. The Board is required, in consultation with the Resolution Trust Corporation, to develop and establish overall strategies, policies, and goals for the Corporation's activities, including the Corporation's overall financial goals, plans and budgets.

The governance of the RTC and AMCON is remarkably similar. While the AMCON legislation enumerates several areas in which the CBN may regulate AMCON's activities and the CBN in effect appoints a majority of the AMCON board, the Oversight Board of the RTC consisted of the senior officials of the central bank and other bank regulatory agencies in the United States who are political appointees. The RTC is considered one of

the more successful asset management companies created within the last thirty years<sup>58</sup>. Unlike the RTC legislation, the AMCON Act contains no termination date. The current AMCON Managing Director Chike-Obi and Governor Sanusi have implied that AMCON will not operate for more than ten years. The maximum term of the bonds to be issued by AMCON, one of AMCON's principal sources of funds, is limited to seven years<sup>59</sup>. This time limit is a strong indicator that AMCON is intended to operate for a limited time<sup>60</sup>. The effects of the AMCON purchase of NPLs should become more apparent in 2012. AMCON's resolution of the rescued banks should release liquidity currently trapped in the banking system and encourage lending by banks. A key indicator of success will be an increase in prudent lending by Nigerian banks in 2012. According to a few initial reports, some debtors of banks were refusing to pay on existing loans with the idea that the loan would become non-performing and sold to AMCON. The debtor was expecting to obtain better terms from AMCON. AMCON and CBN have condemned this behaviour because widespread refusal by debtors to pay would undermine financial stability.

The creation of AMCON does raise the issue of moral hazard - both improper behaviour by debtors and risky behaviour by bank executives if they know they will be bailed out by the federal government. The recoupment of significant value from the NPLs purchased by AMCON will be a significant measure of success. However, the amount of recovery will not be known for several years as was the case with Danaharta in Malaysia and the RTC in the United States. The Nigerian banking sector has decreased from the 24 banks to 19 banks. With additional consolidation in the banking sector, competition will likely decrease resulting in higher charges to banking clients in an already high cost operating environment. On the other hand, the abolition of the universal banking model will allow for different types of financial institutions to operate in Nigeria and may attract some Nigerian or foreign investors who were discouraged by the high initial capital investment required to open a universal bank. The proper management and subsequent disposition of the three nationalized banks indicate the continued emphasis on reform of the banking system.

In addition to stabilizing the banking system, a stated goal of the nationalization of the three banks was to protect jobs in those banks. For instance, Mainstreet Bank employs 4,000 people in an economy with a high unemployment rate<sup>61</sup>. A restructuring of the three banks, including a reduction or redeployment of staff, will be necessary to prepare the banks for eventual sale. Finally, Sanusi has made some provocative statements regarding the role of a central bank as an agent for economic development in an emerging market<sup>62</sup>. Sanusi has forcefully expounded on the role of the central bank in developing the economy not merely by focusing on price stability and financial stability, but also by directly encouraging growth in specific sectors.

The CBN has identified three key sectors for growth - power, transportation, and agriculture - and proposed specific financing programs for these sectors.<sup>58</sup> Responding to criticism about expanding the CBN's mission beyond its original intent, Sanusi states: Some schools of thought have questioned the rationale for any central bank to pursue the so called multiple objectives. Let me emphasize the fact that in a developing economy such as ours in need of strong growth, typically a central bank's objectives should include

developmental role in addition to its core mandate of ensuring price stability. Indeed during the global financial crisis, most central banks subordinated the price stability objective to achieving financial stability and initiating growth. A concern with this additional role is that the CBN may be expanding its mission without the necessary financial or human resources to meet all these objectives successfully. The regulatory reform initiatives undertaken by the CBN and AMCON - more stringent banking regulation and supervision, the creation and ongoing management of AMCON, the sale and recapitalization of five rescued banks, and the management and eventual sale of the three nationalized banks - as well as monetary policy implementation consume a large amount of personnel and senior management time. Adding development initiatives to CBN's existing responsibilities could prove to be an enormous challenge. Additional monitoring is warranted.

## CONCLUSION

From the arguments and submissions reached in this paper, it is clear that no nation, no matter how economically buoyant, can boast of complete insulation from corporate fraud. Concerted efforts are put in place to check incidences of failures and minimize effects it may have on investors and the economy as a whole. The United States and European experience have clearly revealed that governance system should not be left to the whims and caprices of the corporation. The deficiencies in the self-regulatory regime of governance system are indeed very glaring. There is much apprehension on the destination of the banking industry in Nigeria. The running of the banks leaves much to be desired. From all indication, it is evidently clear that we do not have a minimum acceptable standard of corporate governance on accountability in the Nigeria system.

As clearly seen from the submission of this paper, the Oxley Act is not a perfect legislation and indeed possessed certain inherent weaknesses. Be that as it may, it is the firm position of this paper that Nigeria banking sector has much to gain from studying and adopting certain provisions of the reform especially as it relates to accountability and disclosure. Scandals have no nationalities. What happened in other jurisdiction can and is happening in our Nation with more destructive consequences.

The case of Cadbury Nigeria Plc and the banking sector crisis which AMCON is established to savage, buttress the above assertion. The Cadbury's case was a bit pathetic as the dramatis persona in the financial imprudence was hitherto credited to be of impeccable character. Also culpable are auditing firms of the highest credentials in Nigeria. The Nigerian investing public was shock to their marrow when the financial saga broke in late 2006. The Bunmi Oni led Board of Cadbury was engaged in stock buy-back, cost deferrals, trade loading and false supplier stock certificates since 2002. Quite interestingly, Oni was named by Pricewatercoopers in September of the same year as the most respected Chief Executive Officer in Nigeria<sup>63</sup>. The regulators of Nigeria's securities market can no longer behave like the proverbial ostrich. It is high time they came out clearly with governance system that will change the unacceptable corporate culture to ensure best practice. We cannot shy away from the fact that our system need heavy dose of reform. As such this paper calls on

all stakeholders to wake up and scrutinize the integrity of corporate governance in Nigeria's banking sector.

The paper submits that the AMCON is designed to play a very crucial role in savaging the situation and by extension, the economy. A lot of people are depending on it succeeding. Thus, it must not fail. Its failure would have disastrous consequences. In spite of all the positive wishes for the AMCON, this paper is convinced that the AMCON is faced with an uphill task which is bound to negatively impact on its success.

Firstly, there are fears that the AMCON may be bogged down by litigations and other bureaucracy<sup>64</sup>. Already some cases have been instituted in court against the AMCON<sup>65</sup>. It is reasonable to expect the deluge of litigations against the AMCON by the debtors to these EFIs in respect of non-performing loans<sup>66</sup>. This contention is predicated on the fact that the AMCON did not contact the debtors before purchasing the EBAs from the EFIs. Most of the bank debtors are contesting the amount of indebtedness their banks claimed against them as was evident when the names of bank debtors were published in 2009.

Secondly, the special powers<sup>67</sup> conferred on the AMCON which are rather arbitrary and unilateral could stir up some legal challenges when implemented. Another concern about AMCON is the valuation method for troubled assets as the shareholders of the assets have no say in the determination of the value of the assets. Moreover, the fact of the enabling statute not providing for the terminal date for the AMCON could occasion some needless distractions and scheming. Already, there are calls for the extension of the ten-year generally accepted terminal date for the AMCON<sup>68</sup>. Lastly, the most touted evidence that the AMCON is designed to fail is the pervasive and domineering influence of the CBN over the AMCON. The CBN has such pervasive and domineering influence over the AMCON that can be stifling. Though CBN holds 50 per cent equity in the AMCON, the level of control the CBN has over the AMCON *ex facie* would suggest that the AMCON is a wholly owned subsidiary of the CBN; which is not the case. It is conceded that the creation of the AMCON is the brain-child of the CBN, but that is not an excusable justification for such pervasive dominance.

This paper contends that numerous provisions of AMCON Act are unambiguously in breach of the Constitutional provision on Fair Hearing<sup>69</sup> and by extension, offends the Supremacy of the Constitution<sup>70</sup>. This paper submits that such provisions should be declared null and void when tested in court. The declaration of debt obligations by members of AMCON's Board of Directors and its employees; indemnification against worthless collateral; non-prejudice by lack of notice to debtors by EFIs; subrogation of rights of EFIs; dedication of a special judge to handle AMCON-related matters by the Attorney-General of the Federation or any other person appointed by him being designated to handle AMCON-related matters without recourse to the rights of the shareholders to determine the faith of their investment; and the exemptions granted to the AMCON in respect of certain statutes; all lend credence to the submission that AMCON is designed to fail.

While Enron Corporation, like the eight troubled Nigerian banks was so highly

praised by the outside observers, internally these companies had highly decentralized financial control and decision-making structure, which made it practically impossible to get coherent and clear view on their activities and operations. Family and ethnic affiliations in the management and running of Nigerian banks should be de-emphasis, if not totally removed. Code of corporate governance and allied regulations and legislations should be given primacy in decision making and in the policy trust of the corporate entity - else sooner than later, Nigerian banks and by extension, the economy, become endangered species to the avarice of greedy executives and their cronies in government.

## NOTES

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- <sup>2</sup> A.G. Olisaemeka, 'The Meltdown of the Nigerian Capital Market: Causes and Consequences'. Available at <<http://www.nairaland.com/241080/meltdown-nigerian-capital-market-causes>> accessed June 18, 2012.
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- <sup>4</sup> T.M. Fapohunda, 'The Global Economic Recession: Impact and Strategies for Human Resources Management in Nigeria', *International Journal of Economics and Management Sciences*, Vol.1, No. 6, pp. 07-12, 2012.
- <sup>5</sup> The Sarbanes-Oxley Act 2002 of the US was enacted by Congress in 2002 to combat future corporate failure, while the Assets Management Corporation of Nigeria Act 2010 was enacted in 2010 to salvage the fast collapsing banking sector of Nigeria.
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- <sup>12</sup> F. Ogundare, 'Sanusi: Corporate Governance, Key to Financial Stability', *ThisDay* (February 11, 2010).
- <sup>13</sup> *Ibid.*
- <sup>14</sup> See C. M. Anyanwu, 'An Overview of Current Banking Sector Reforms and the Real Sector of the Nigerian Economy', *Central Bank of Nigeria Economic and Financial Review Volume 48/4* December 2010.

- <sup>15</sup> D. Alford, 'Nigerian Banking Reform: Recent Actions and Future Prospects', 25 *Journal of Int. Banking & L. Reg.* 337 (2010).
- <sup>16</sup> L. Sanusi, 'Growth Prospects for the Nigerian Economy', 13, November 26, 2010. Available at <[http://www.cbn.gov.ng/OUT/SPEECHES/2010/GOV\\_CONVOCATION\\_LectureIgbinedionUniversity](http://www.cbn.gov.ng/OUT/SPEECHES/2010/GOV_CONVOCATION_LectureIgbinedionUniversity)> accessed May 20, 2012.
- <sup>17</sup> *Ibid* at 13-14; see also Alford, *supra* note 68. The banks rescued in the fall of 2009 are Afribank, Bank PHB, Oceanic Bank, Union Bank, Intercontinental Bank, Finbank, Equatorial Trust Bank and Spring Bank.
- <sup>18</sup> Sanusi, *supra* note 16 at 13.
- <sup>19</sup> Lamido Sanusi, 'Banks in Nigeria and National Economic Development: A Critical Review', March 7, 2011 <[www.cenbank.org/OUT/SPEECHES/2011/GOV\\_BANKS%20IN%20NIGERIA%20AND%20NATIONAL%](http://www.cenbank.org/OUT/SPEECHES/2011/GOV_BANKS%20IN%20NIGERIA%20AND%20NATIONAL%20)> accessed May 20, 2012.
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- <sup>26</sup> *Ibid.*
- <sup>27</sup> *Ibid.*
- <sup>28</sup> *Ibid.*
- <sup>29</sup> Eghes Eyieyien, *supra* n 24.
- <sup>30</sup> *Ibid.*
- <sup>31</sup> *Ibid.*
- <sup>32</sup> Section 39 NDIC Act.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*
- <sup>35</sup> J.B. Thomson, 'Cleaning up the Refuse from a Financial Crisis: The Case for a Resolution Management Corporation', *Federal Reserve Bank of Cleveland Working Paper 10-15* of September 2010, p2. Available online at [www.clevelandfed.org/research](http://www.clevelandfed.org/research) accessed May 20, 2012. For a complete historical perspective, see generally, J.H. Jones and E. Angly, *Fifty Billion Dollars: My Thirteen Years with the RFC, 1932-1945*, New York: The Macmillan Company 1951.
- <sup>36</sup> *Ibid* at p.3.
- <sup>37</sup> It was signed into law by the then President of the United States, George W. Bush, on 3rd October 2008.
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- <sup>39</sup> E.J. Kane, 'Principal-Agent Problems in S&L Salvage', (1990) 45(3) *The Journal of Finance*, 755 at pp.756-757.
- <sup>40</sup> M.K. Cassell and S.M. Hoffmann, *supra* note 38 at p. 32.
- <sup>41</sup> J.B. Thomson, *supra* note 35 at p. 8.
- <sup>42</sup> On the features of such SPVs, see generally, O.E. Ergungor and J.B. Thomson, 2006. 'Systemic Banking Crises' in A.H. Chen (ed.) *Research in Finance* (Elsevier 2006) and O.E. Ergungor, 'On

- the Resolution of Financial Crises: The Swedish Experience', *Federal Reserve Bank of Cleveland Policy Discussion Paper No. 21*, June 2007, at pp.7 - 9.
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- <sup>44</sup> AMCON Act section 26(1).
- <sup>45</sup> AMCON Act section 23(1).
- <sup>46</sup> AMCON Act section 23(2). The financial year of the AMCON starts on 1 January and ends on 31 December: section 21(3).
- <sup>47</sup> AMCON Act, Part I, § 10.
- <sup>48</sup> AMCON Act at Part I, § 10(3).
- <sup>49</sup>The Oxford English Dictionary defines 'expedient' as 'hasty,' 'expeditious', 'speedy.' Oxford English Dictionary (2d ed. 1989).
- <sup>50</sup> AMCON Act, Part I, §§ 1(4),6(3).
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- <sup>52</sup> AMCON Act, Part I, §8.
- <sup>53</sup> AMCON Act, Part VIII, § 58.
- <sup>54</sup> N. Ofo, *supra* n 51 at 24 (Section 5.3).
- <sup>55</sup> U.S. Government Manual 693 (1990-91).
- <sup>56</sup> 2 U.S.C.A. § 1441b(C) & (E) (2011).
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- <sup>60</sup> N. Ofo, *supra* n 51 at 23 (Section 5.1).
- <sup>61</sup> L. Sanusi, *supra* n 19.
- <sup>62</sup> L. Sanusi, *supra* n 19.
- <sup>63</sup> Since 2003, Cadbury Nigeria, Plc. had overstated its financial position by naira 13bn to naira 15bn. This information came to light following the company's discovery of accounting irregularities in November. After a special audit conducted by PricewaterhouseCoopers (PWC), the company fired its Chief Executive Officer and Finance Director. Cadbury's handling of this mismanagement is a show of corporate responsibility and could signal a growing awareness of Nigerian firms of good corporate practice. See detail at <<http://leaks.hohesc.us/?view=07LAGOS10>> accessed June 20, 2012.
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- <sup>65</sup> T. Oyesina, 'Challenging the Assets Management Corporation of Nigeria, (AMCON) Act 2010', *The Tribune* (September 06, 2011).
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- <sup>68</sup> O. Chima, *supra* n 43.
- <sup>69</sup> See section 36 of the 1999 Constitution of the Federal Republic of Nigeria.
- <sup>70</sup> *Ibid* section 1(3).