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Trading Suspensions in Nigeria: To Save or to Kill?

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Background:

On April 26, 2018, the Nigerian Securities and Exchange Commission (**SEC**) approved the Nigerian Stock Exchange (**NSE**) drafted Rules on Suspension of Trading in Listed Securities (**Trading Suspension Rules**). About 180 days earlier, SEC had instructed the NSE to suspend trading in the listed securities of a Nigerian oil and gas company (**NigerianCo**) with the trading suspension commuted to technical suspension after two days. Both the trading and technical suspensions lasted for about 170 days; when, further to another SEC directive, the suspension was lifted on April 11, 2018. According to SEC, the suspension was required to enable it conduct a forensic investigation into the affairs of NigerianCo in the wake of its preliminary findings on petitions by 2 shareholders of NigerianCo where they had alleged breaches of Nigerian securities laws, among others. Being dual-listed, trading in NigerianCo's securities was also suspended in its foreign secondary listed market. It is relevant that the process for making the Trading Suspension Rules arguably began on November 29, 2016 when the draft form of the Trading Suspension Rules was approved by the Rules and Adjudication Committee of the NSE's National Council (the **Council**) for exposure to stakeholders. The draft Trading Suspension Rules was submitted to SEC for approval on June 16, 2017, and approved by SEC 314 days later, on April 26, 2018. In this brief, we review the concept of trading suspensions, with focus on regulator and bourse imposed trading suspensions, with the example of a developed securities market; we then undertake a brief review of the Trading Suspension Rules; and conclude with our reasoned thoughts.

Trading Suspensions - What they are and not:

A trading suspension is the suspension of trading activities of identified listed securities. Such trading suspension could be demanded by any of: the regulator of the relevant bourse where the securities are listed; the bourse itself; or the issuer of the securities. Naturally, it takes the bourse to give effect to a trading suspension as it will stop dealers from trading the securities.

Trading suspensions differ from trading halts. Trading halts are, in some cases, temporary measures used by the bourse to halt sharp fluctuations in the price of listed securities. Trading suspensions on the other hand can be effected for a number of reasons, depending on the authority requesting the trading suspension.

Regulator-imposed trading suspensions are often the most lethal as they are widely regarded as measures used by the regulator to communicate the regulator's current vote of no confidence in the affected securities. Thus, in the in the United States of America (US), its Securities Exchange Commission (US SEC) may impose trading suspensions in the following instances, that is, where:

1. the issuer fails to provide current, accurate and adequate information about itself; for example, where it fails to file its periodic reports;
2. there are doubts about the accuracy of information available on the company's operational status, financial condition or business transactions;
3. there are evidence of securities fraud, for example, insider trading, market manipulation etc.

According to the US SEC, it will impose trading suspension when it is of the opinion that it is in the interest of the investing public to do so. In its words "Because a suspension often causes a dramatic decline in the price of the security, the SEC [US] suspends trading only when it believes that the public may be making investment decisions based on a lack of information, or false or misleading information. A suspension may prevent potential investors from being victimized by a fraud".
The length of trading suspensions differ in jurisdictions. In the US, a trading suspension will last for no more than ten (10) trading days. The decision to suspend trading of any listed securities is based on the outcome of a preliminary investigation on the relevant issuer. US SEC will, prior to the suspension, issue a press release or order detailing the reason for the suspension and thereafter proceed to impose the suspension which will not exceed 10days. It will not, during or after the suspension period, comment publicly on the status of the investigation, which investigation may continue even after the suspension. Its process for trading suspensions accordingly features an ordered process of: (i) preliminary investigation, (ii) trading suspension imposition/order with the certainty of the maximum duration of the trading suspension; and (iii) a decision to continue or not to continue with the investigation after the suspension until it decides to take enforcement action. In Q1 2018, the US SEC imposed not less than 23 trading suspension orders on listed securities for infractions majorly based on the failure of the listed securities to meet up with their filing obligations.

The Trading Suspension Rules:

The Trading Suspension Rules stipulate the procedure for trading suspensions on the NSE. Prior to the Trading Suspension Rules, SEC or NSE-imposed trading suspensions were not a function of defined or ordered set of rules and were limited to the circumstances provided by Rule 15.45 of the Dealing Members Rules (powers of the CEO of the NSE to, in a particular or general circumstance, suspend trading) and Rule 2.6 of the Issuers Rules (suspension of trading in the event of issuance of shares for consideration other than cash), both of the NSE Rulebook, 2015. Accordingly, and per the wordings of the Trading Suspension Rules, they were designed to inform issuers and their advisors on the procedures for trading suspensions, with the aim of removing any ambiguity or speculation from the trading suspension process.

By way of synopsis, the Trading Suspension Rules now provides that:

1 **Regulator Trading Suspensions:** Only SEC can direct the NSE to place any listed securities on "technical suspension". Per the Trading Suspension Rules, a "technical suspension" differs from a trading suspension in light of the varied definitions for the concepts, "Suspension of Trading" and "Technical Suspension". While the former halts trading activities outright, the latter interrupts price movement, such that even though trading continues, there will not be a change in the price of the suspended listed securities. The Trading Suspension Rules implies that neither the NSE nor an issuer can require listed securities to be placed on technical suspension, save on SEC's directive. It may be recalled that SEC had sought to investigate the NSE in 2014 after the NSE placed the listed securities of a Nigerian Bank on technical suspension.

The technical suspension was following an application by the Nigerian Bank for its securities to be placed on technical suspension for the duration of its capital restructuring (rights issue) process. SEC had raised the concern that the NSE's action might be viewed as an unfair market practice. The concern was rather puzzling in view of the fact that the SEC Rules validated a technical suspension in a capitalization scenario – see for example, Rule 340(2)(f) on technical suspension during private placements by public companies. What is left unsaid in the Trading Suspension Rules, and as may be reasoned from the nature of NSE Trading Suspensions, is whether the NSE can proceed to place on trading suspension, listed securities that SEC has directed to be placed on technical suspension?

2 **NSE Trading Suspensions:** The powers of the NSE to suspend trading in the following instances are preserved by the Trading Suspension Rules:

(a) where it will be in the interest of the investing public and in accordance with SEC Rules;
(b) where consideration other than cash is proposed or received by the issuer for any of its shares;
(c) where the issuer goes to press or its financial results are leaked without informing the NSE;
(d) where such action is necessary or appropriate for the maintenance of a fair and orderly market or for the protection of investors or public interest.

It may be recalled that Rule 198 of SEC Rules allows an exchange effect a trade suspension in accordance with the exchange's rules. The exchange only has an obligation to notify SEC within 24 hours of such decision, of the effective date and reasons for the trading suspension. The effect of this rule is that even where SEC decides not to grant technical suspension, NSE has full powers to grant a "suspension of trading".

3 **Issuer Requested Trading Suspension:** The NSE can, upon an application in that regard by the issuer, grant a trading suspension in any of the instances of: (a) share capital restructuring including the creation of holding companies or spin offs; (b) voluntary delisting; (c) mergers and acquisitions that will result in the delisting of an issuer; (d) such other transactions as the NSE will approve from time to time. The Trading Suspension Rules provide for the procedure to effect these types (a to c) of trading suspensions, with (a) and (c) requiring SEC's prior approval.

Our Thoughts:

It is insufficient that SEC and NSE have the powers to put securities on technical or trading suspensions, without providing guidelines on the instances in which it, especially for SEC, will exercise the power and for what duration. It is not within the remit of the Trading Suspension Rules to provide for the instances where SEC will impose a technical suspension. It is for SEC to
spell this out. The Trading Suspension Rules spelt out the scope and basis of the NSE's decision to impose a trading suspension, although it fell short of stating time limitations of the trading suspension - a very important feature. For SEC to rely on its amorphous statutory power (which essentially is a public trust) of being the regulator or acting in the interest of the public, is inadequate to appease the sophisticated securities market that Nigeria is evolving to. How and when it will exercise such power will be good international best practice. SEC's powers are not absolute as the rights of an issuer or investor to successfully proceed against SEC, where it can establish that actions have not been taken in good faith is rife in the extant law. Simply, a situation where the scope and limits of regulator-imposed trading suspensions are left open-ended is not desirable for investor's confidence and will not aid conversations on the regulator's neutrality. Regulator-imposed trading suspensions should be stop-gap measures used in subtly communicating established infractions to the investing public. They should not be used as death blows and left untamed. Eventually, the market will decide, the regulator should only provide the materials to aid such decision. Scope and time limitations for trading suspensions in Nigeria is a topic worth engaging. Also worth mentioning is the ordinate length of time it took the Trading Suspension Rules to be approved. 314 days is rather too expensive for the 8-paragraph Trading Suspension Rules. Time is a limited resource that the Nigerian securities market must value. That said, the NSE's Trading Suspension Rules is another good step in the miles ahead.

For further information on the foregoing, please contact: Ifureuwem Udofa (*ifureuwem.udofa@ao2law.com*) or Bidemi Olumide (*bidemi.olumide@ao2law.com*) *with the subject:* ***"Trading Suspensions in Nigeria: To Save or to Kill?"***