



ABSTRACT

Bank and other Financial Institutions Act, 2020 repealed the Bank and other Financial Institutions Act, Cap. B3, 2004 to among other things regulate banking and business of other financial institutions in Nigeria; and for related matters. The Act spell out duties to

A N EXAMINATION OF BANKER'S OBLIGATION TO APPOINT AN APPROVED AUDITOR AND REPORT UNDER THE BANK AND OTHER FINANCIAL INSTITUTIONS ACT, 2020

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Introduction

The history of Banking in Nigeria can be traced back to colonial era, when the 1st Nigerian Indigenous Bank was established in 1933 known as National Bank of Nigeria Limited, prior to this development, Banking in Nigeria was monopolized by the Standard Bank of Nigeria Limited – now known as the First Bank of Nigeria Limited the Barclays Bank (DCO,) now known as Union Bank Plc. British entrepreneurs owned both Banks.

The First Banking related legislation was enacted in Nigeria was the Banking Ordinance of 1952. The said legislation was initiated within the background of the mushrooming of Banking



Bankers mandating them to appoint Auditor and the Auditor in turn to make report to the Central Bank of Nigeria. This work examines the statutory obligation of the Banker under the Act to appoint the Auditor, the report he made to the Central Bank vis a vis the consequences for the Auditor's negligent conduct. The provisions of Companies and Allied Matters Act, 2020 relevant to the duties and appointments of Auditor were also studied.

Keywords: Examination, Banker's Obligation, Auditor, Report, Bank and Other Financial Institutions Act, 2020

institutions hence the loss of confidence in relation to banking business consequences of which were felt within and outside Nigeria. As time passed and banking business developed in Nigeria, there was recognition of the fact that banks occupy a very sensitive position not only in the nation's economy but the world at large. Thus, the popular saying goes "**when the bank sneezes, the economy catches cold**".

Consequent upon this, several legislation have been enacted to checkmate the activities of Banks in Nigeria. One of such legislation is the Banks and Other financial Institutions Act (BOFIA).

One of the ways by which the BOFI Act regulated the activities of banks is imposing certain duties on the banks, to either do or refrain from doing an act, failing which the banks or their Directors, Managers or other officers of the bank will face prescribed legal sanctions which may lead to imprisonment.

THE CONCEPT OF DUTY:

Duty as a concept is expressed to mean " A human conduct which is conformable to the laws which require us to obey their legal or normal obligation ... mandatory obligation to perform R.W.M. Dias defines



duty as “... notional pattern of conduct that phrased in the imperative terms. The same concept is also expressed to be “.... The communal and prohibition which a man is owned or due to another to either do or refrain from doing an act and that need to be satisfied and obligation for which somebody else has corresponding right.

The individual, group or entity on whom or which a duty is imposed is not at liberty to chose to discharge the duty or not to do so. The sanction that follows a neglect or refusal to perform a duty may be moral or legal in nature, depending on whether the duty in respect of which the default is committed is moral or legal in nature:

Even though duty will be difficult if not impossible to be associated with imperative, some authors maintain their ground that the connection between their imperative form and duty is purely psychological. R.W.M. Dias, explains Professor Oliver Crone’s view of duty as “independent imperatives” to mean that they are independent of personal relationship between the commander and the commanded because they operate through the power of suggestion and not by direct communication. Both authors viewed duly as that which “ought” to be done and not that which “must” be done.

They concluded that the idea of command should be discarded from the concept of duty. Professor P.N. Oche, the learned Professor of Law submitted that the discard of the ideal if command from the notions of duty would include the discard of the form of command as well, the position which we humbly associated ourselves with. More so, to view duty as a mere “ought” to in law is to strip the law of its ability to achieve the functions of social engineering and thereby making it sterile.

Obligation is another concept intimately associated with duty. It has been defined as that which constitutes a legal or moral duty and which renders a person liable to punishment or sanction for neglecting it.



Therefore, from the foregoing, it has been shown that whenever, there is duty or obligation, liabilities or sanctions follow there from for failure or neglect to perform.

This is the rationale of the choice of duty as the backbone of the statutory control of Banking business for a person licensed or authorized to carry on banking business is aware of the penalties, which sometimes may lead to imprisonment, where he is found liable for default of any of his duties impose on him by law.

Banks and Other Financial Institution Act, 2020 (BOFIA) has enumerate some duties which it imposes on every licensed Bank in Nigeria. These duties can be classified into positive and negative duties. The former imposes obligation to act, while the latter prohibits the doing of specified acts.

Some of the positive duties provided for by BOFI Act includes maintenance of reserve fund, duty to seek prior consent in writing of Central Bank of Nigeria (CBN) by a licensed bank before granting advance loan or credit facility or give financial guarantee to incur any liability on behalf of any person whereby such undertaking, exceeds twenty percent (20%) of shareholders funds unimpaired by loss, duty to keep proper books of account and duly to appoint an approved auditor

The negative duties recognised by BOFI Act included the duty not to pay dividend on shares until capitalised expenses not represented by tangible assets have been completely written off and duty not to employ any person adjudged bankrupt or has suspended payment or has compounded with his credits or has been convicted by a court of an offence involving fraud or dishonesty or professional misconduct and the bank is under a duty not to be managed by a management agent except approved by the bank.



BOFI Act, therefore, provided more duties, both positive and negative than these we have mentioned, but for the purpose of this work we have enumerate few of these duties to buttress our point that infact BOFI Act imposes duties on a licensed bank other than that which is the subject matter of this paper.

We now focus henceforth on the bankers duly to appoint approved Auditor and Report which is provided Under Section 28 of the BOFI Act.

METHODOLOGY

Both primary and secondary sources of information will be used in doing that, case laws, statutes will be explored. The Secondary sources shall include research materials obtained from text books, periodicals such as journals, seminar papers and conferences in addition to the above reports and internet materials relevant to the subject matter will be utilized.

BANKER'S DUTY TO APPOINT AN APPROVED AUDITOR AND REPORT SECTION 28 (1) BOFI ACT

This is one of the duties of a Banker which is couched in positive terms as it obligates the banker to appoint a person approved by the CBN as an auditor annually.

Section 28 (1) BOFI Act provides:

“subject to the approval of the bank, every bank shall appoint a firm of auditors (in this section referred to as, “the approved auditor”) whose duties shall be to present to the shareholders a report of the annual statement of financial position and statement of profit or loss and comprehensive income of the bank and every such report



shall contain statements to the matters pertaining thereto and such other information as may be prescribed, by the bank:"

QUALIFICATION OR REQUIREMENT OF AN APPROVED AUDITOR:

Apart from the requirement by BOFI Act to appoint approved auditor the Act did not stop at that but went further to provide for the requirement or qualification of the approved auditor, that is to say the approved auditor must pass certain criteria before he/she be qualified. It is further provided at (4) (a) of the said Section as follows;

“for the purpose of this section, the approved auditor shall be an auditor who is:

- (i) A member of one of the relevant professional bodies recognised in Nigeria;
- (ii) Approved by the bank.
- (iii) Resident in Nigeria; and
- (iv) Carrying on professional practice as account and auditor.

(b) a firm comprising persons to whom paragraph (a) applies.

The above mentioned items are the requirement or qualification for a person to be appointed as an approved auditor. That is to say, where a person is short of either items he is not qualified to be an approved auditor.

Moreover, apart from the qualification required for an approved auditor, certain persons are disqualified to be an approved auditor as provided in subsection (5) of the said section;

“Any person-

- (a) Having any interest in a bank otherwise than as a depositor; or
- (b) Who is a director, Significant Shareholder, officer or agent of a bank; or



- (c) Which is a firm in which a director or significant shareholder of a bank has any interest as partner or director; or
- (d) Who is indebted to a bank, is not eligible for appointment as the approved auditor for that bank;
- (e) *And a person appointed as such auditor who subsequently'*
 - (i) *Acquires such interest; or*
 - (ii) *Becomes a director, officer or agent of the bank; or*
 - (iii) *Becomes indebted to partner in a firm in which a director of a bank is interested as partner or director shall cease to be such auditor.*

Where an approved auditor is already appointed and subsequently acquires interest in the bank or become a director, officer or agent of the bank or becomes indebted to a partner in a firm in which a director of a bank is interested as partner or director shall cease to be such auditor immediately such interest is disclosed.

CONSEQUENCES OF FAILURE TO APPOINT AN APPROVED AUDITOR:

It is a legal duty on the bank to appoint an approved auditor where there is failure of such duty, the Central Bank of Nigeria (CBN) is empowered by the BOFI Act to appoint a suitable person for the purpose of auditing of the bank's account and the CBN is mandated to fix such remuneration to be paid by the bank of such auditor.

Where an approved auditor contravenes or fails deliberately or negligently to comply with the provisions of Section 28 of the Acts shall be guilty of an offence and liable on conviction to pay the CBN a fine of not "less than N2,000,000 and where the approved auditor is a firm, the individual partner or partners are, in addition, be liable on conviction to imprisonment for a term of not less than three years or a fine of not less than N 2,000,000 or both.



The above provision is provided in order to ensure compliance of duty imposed by BOFI Act. This is because failure to act or to act negligently amount to a crime, this will definitely ensure compliance not only on the part of the bank but on the approve auditor appointed.

AUDITOR'S REPORT:

The approved auditor report is required to contain statements as to matters and such other information as may be prescribed from time to time by the Central Bank of Nigeria (CBN).

The approved auditor's report is required to be read together with the report of the board of directors at the Annual General Meeting (AGM) of the shareholders of the bank.

It is required in addition, two copies of each report together with the auditor's analysis of bad and doubtful advances in a specified form be sent to the CBN.

It is mandatory for any given analysis to be sent in the specification in force at the time of it being sent.

Also, there is a duty imposed on the approved auditor to forward two copies of the domestic report on the bank's financial activities to the CBN **not later than 3 months** after the end of the bank's financial year.

The ability of the approved auditor to perform his duty by providing an accurate report and analysis depends, among other, met by the right of access at all times to the books, accounts and vouchers of the banker created in favour of the approved auditor by the BOFI Act. The approved auditor is entitled to enquire from directors, managers and officers of the bank such information and explanation as he deems necessary for the performance of his duties under the BOFI Act. That is to say the approved auditor has virtually all the sources of information at his disposal.

In RE LONDON AND General Bank (No.2)²⁸. Lindly L.J. with Lopes L.J.



Concurring held that the auditor's "... business is to ascertain and state the true financial position of the company at the time of the audit and his duty is to confined to that. Elaborating, the court said:

"But then comes the question, how is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquirer and without taking any trouble to the books themselves shows the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than an idle force. Assuming the books to be kept as to show the true position of a company, the auditor has to frame a balance sheet showing that position according to the books and certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Sterling J. in Leeds Estate and Investment CO.V. Shepherd 36 Ch. 15 802.

The principle contained in the above pronouncement is that an auditor owes a duty of care. An auditor is however, not bound to do more than exercise reasonable care and skills in inquiries and investigation.

Moreover, the standard of duty of an auditor under the Companies and allied Matters Act, 2020 (CAMA) Section 407 (1) requires that auditor should carry out such investigation as may enable them to form an opinion as to whether;



- a. *Proper accounting records have been kept by the company and proper refunds adequate for their audit; have been received from branches not visited.*
- b. *The company's balance sheet and (if not consolidated) its profit and loss account are in agreement with the accounting records and refunds.*

This simply implied that an auditor under CAMA (as amended) has to investigate, irrespective of whether or not suspicion is aroused. That is to say he cannot rely on the representation of any officer or manager of the company to form an opinion on matters he is required to report. The approved auditor is in addition to the reports already mentioned, requires to report specified matters to the CBN. The report is that in the course of his duties as an approved auditor where he is satisfied that;

- a. *There has been a contravention of the BOFI Act or an offence under any other law has been committed by the bank or any other person; or*
- b. *That losses have been incurred by the bank which substantially reduce its capital funds; or*
- c. *That he is unable to confirm that the claim of depositors or creditors is covered by the asset of the bank.*

He is required to report any such matters, immediately on becoming satisfied with what is obtains to the CBN.

The requirement prescribed by Section 29 (7) of the BOFI Act, as amended, are in pari material with conditions specified by Section 32 (1) of the same statute for the institution of specified examination or investigation., Perhaps any of such actions will be ordered by the Governor of the Central Bank of Nigeria on receipt of such report.



CONCLUSION:

Form the foregoing; it is clear that the requirement of appointing annually an Approved Auditor and Report by a bank and upon its failure, to appoint, by the Central bank of Nigeria (CBN), as provided by Section 28 of the BOFI Act 2020, is a strong indication that the carrying on banking business in Nigeria is not lightly regulated.

It is equally provided under Section 28 (12) BOFI Act that where an approved auditor contravenes or act negligently to comply with the provisions of BOFIA has committed an offence which he may be sentenced to imprisonment for a up to three years or ask to pay a fine or both. This is strong indication to make sure an approved auditor does his job required of him by law.

Moreover, by imposing duties on bankers, not only to document their transactions in a prescribed manner but also to put such document under scrutiny by an independent person approved by the CBN known as an “approved auditor” and equally held him liable for his negligence or inaction, that give a lot of confidence to carry on banking business in Nigeria.

RECOMMENDATION:

In view of the sensitive nature of banking business not only in Nigeria but the world at large, it is our humble opinion that the sanction of Two Million Naira (N2, 000,000.00) or and an imprisonment of three years or both against erring approval auditor is good enough a punishment to put them on their toes to do their jobs deliberately and professionally.

However, we recommend that in addition the license of the approved auditor who may be found guilty for five years in the case of first instance and subsequently be revoked.



Also where the approved auditor is a firm the individual partners shall be held liable on conviction to imprisonment up to three (3) years and the firm to pay the required fined which may be up to Twenty Million Naira (N20,000,000.00).

We humbly and strongly believed this will ensure diligence on the part of an approved auditor.

We equally recommended that the report of the approved auditor be published in the National Dailies in order to give a constructive notice to the whole world on the status of the bank.

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