

The Market Memorandum



**Technical Suspensions in the Market:
Considerations for Process & Practice on Technical Suspensions in the
Nigerian Capital Market**

Key Issues for NSE in the Regulation/Supervision of the Market

ISSN 1597 - 8842 Vol. 1 No. 104

The Upper Room
Lagos, Nigeria
September 17, 2014

ISSN 1597 - 8842 Vol. 1 No. 104

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Key Issues for NSE in the Regulation/Supervision of the Market

This report/article is an attempt to help set the records straight on a major development in our market for which the necessary response is both urgent as well as imperative – in continuance of the evolution of the market.

Up front, the report is motivated by the need to react to a decision from the NSE – something not seen in the last four (4) years and for which yesterday, market reflected its position vide a negative sentiment towards the stock for which over ninety (90) million shares were on offer. This is significant enough to warrant a response.

More importantly, the clarifications offered by the NSE seems to obliterate the simple understanding about the place of rules, a level playing field and the means of ensuring that shareholder interest is protected.

Bottom line, a conversation on the proprietary use of technical suspensions within the context of the reformed market we have offers the market a teachable moment. The good thing was that the market recognized that the listed entity, Access Bank Plc did nothing untoward but will like to move towards a quick resolution of same.

This end game inspires us and the coming together of the market on the above premise offers us further belief that the Nigerian Capital Market has matured and is able to take these developments as a learning opportunity to improve on how the market functions.

To help move beyond the immediate/expedient to a best practice model – the investor, trader and shareholder must be happy that we are moving in the right direction. Rules should be tested, shareholder interest must be protected, and a level playing field must remain sacrosanct. This is the basis of this memo to the market therefore.

In it, we hope to raise issues that should not be swept under the carpet as part of the learning curve and hopefully encourage a new set of conversation that we hope to learn from as well.

We are under no illusion that the points and comments made here are by far, the most appropriate, most researched, covers all legal grounds or represent the only course of action open to the market. We however remain convinced that it represents a veritable basis for a decision that appropriates the best intentions of the market we all deserve.

At its very core lies a simple, direct and bold insight into issues that defines our purpose and integrity as a market. This is the guiding philosophy in the choice of topic(s), style of writing and of presentation.

We have taken a long term view of the market and believe that tackling tomorrow's trends rather than today's headlines is the way to go.

This must however be done after addressing the foundational issues that have held us back for too long. Not theatre but performance. Not poetry but prose. Not expediency but the rule. That is the market we deserve.

In the very process of taking an action or invoking the principle of expediency-guided-interventions, we often lose sight of reasoning and the need for a destination; for a course of action that stands the test (*not of just a few days, weeks, or months*) but of years; and in this task, we ought to be more circumspect.

This is what we have stood for all these years. We remain committed to these ideals till date.

Our sense is that, in the final analysis, we should thank **Access Bank Plc** for the opportunity it has afforded us to match the ideals we all strive for. Maybe this is therefore a good development we should all embrace rather than castigate. I leave that for the market to decide. Yet, we remain convinced that we ought to be concerned with the vastness of the judgment of history, and the generational impact of the decision sought here.

This contribution therefore sets out our modest contribution to that process. Thank you.

Yours to serve,

Olufemi AWOYEMI *FCA, Fiapm, FICA, FIIM, ACIT*
GCEO, Proshare

Technical Suspensions, NSE as an SRO, Access Bank & Best Practice

Three major issues will be addressed here, arising from the technical suspension granted Access Bank Plc on Monday, September 15, 2014 by the NSE:

1. The role of rules in the management of the exchange/market as a barometer for a level playing field;
2. The paradigm shifting nature of the pronouncement/explanatory notes as a contentious basis for establishing a discretionary or arbitrary role for the NSE in the administration of an otherwise technical issue steeped in rules and definite interpretation; and
3. The best practice means of defending shareholder interest by listed entities seeking to approach the market.

We will start with the law, rules, regulations and the market understanding:

At its core, Technical suspension means that trading on the shares can continue without any change in price. It remains an intrinsic instrument of market regulation for a bourse to deploy when it believes that things are about to occur that is outside the ordinary. This in itself opens the door to some subjective deductions. Or does it?

According to the NSE – *“Technical suspension is the interruption of price movement in listed shares for a specified period **so that any dealings in the shares which occur during the period of the suspension will not result in any change in price**, which change may have occurred had the suspension not been implemented.”*

The relevant provision guiding this responsibility is in Chapter 2 of **The Exchange’s Green Book (Listings Requirement)** which addresses *Subsequent Listing of Securities (In Respect of Companies Whose Securities Are Already Listed on The Exchange)*. Clause 6 of Chapter 2 provides that:

“Subject to the provisions of this rule if the directors issue and/or offer to issue any

shares in the original or any increase in the share capital of the company:

- (i) For cash; or
- (ii) For consideration other than cash, ***dealings in all the shares of the company on The Exchange shall be suspended for such period as may be determined by the Council.***”

For most who understand the dealings of the exchange, the question has always been the question of whether the role/work of the council is delegated to the management and this technicality has often engendered a needless debate, and it is needless. Period!.

To further justify the role of the NSE and its responsibility, its rule book goes on to make the following clarifications / explanatory notes:

1. Clause 23 of the Amendments to the Listings Rules - (s.23, 23.1) *Request for Suspension at the instance of The Issuer which empowers the issuer to provide **specific reasons** which the issuer wishes The Exchange to take into account in The Exchange’s determination of whether or not trading in the issuer’s securities should be suspended;*
2. Clause 23 of the Amendments to the Listings Rules - (s.23.2) *The burden on the Issuer requesting a suspension of trading in its securities to satisfy The Exchange that a suspension would be necessary – (outside the norm).*

These **changes/Amendments to the Listings Rules will however not come into effect until 1 November 2014** – two (2) clear months before the request considered and approved.

We will come back to the reasoning or possible justification for this, later.

Let us stay on the rulebook and its amendments as a basis for engagement.

Under Rule 198 of the SEC Consolidated Rules 2013, it states inter alia:

*"An exchange may, **in accordance with its rules**, suspend from trading a security listed thereon and the Exchange shall within 24 hours notify the Commission of any such suspension, the effective date and the reasons therefore."*

That means, in taking the decision, the SEC had been informed of this action (*an approval is not deemed required in this case*); and the SEC not having any objections or seeing any contradictions to the SEC Rules (Amendment) 2006 (I), s. 27, (*which became Rule 82 of SEC Rules 2011*) providing for:

1. The timing implications in Rule 82 (a) wherein *"The Issuer shall ensure that existing shareholders receive a copy of the rights circular or become aware of the rights offer **not less than 21 days** before the opening of the offer"* and here we assume that that EGM planned for October 2014 took this into consideration (though we have no knowledge of any shareholder receiving a notice for the EGM or the rights);
2. That Rule 82 (b) stipulation requiring *"The Registrar to dispatch to the existing shareholders copies of the rights circular approved and registered by the Commission which have the same control numbers as the share certificates from which the rights are derived."* Has been complied with.
3. That Rule 82 (c) requiring *"**The Exchange(s) to act in the interval between the receiving of the application for the rights offer and the opening date of the offer, place the share price of the Issuer on technical suspension which suspension shall be lifted after the close of the offer.**"*

The above would indicate gaps and indeed reflect the possible issues which a timeline analysis can help us resolve. We would not complicate things but state that based on the above; there are provisions precedent to which was meant to deliver a shareholder engagement before a decision was taken. Yet how could a decision be taken if an EGM to ratify such was not in place or what should have happened where the listed entity perceives or believes there was an imminent threat to its shareholder value and was able to demonstrate that to the NSE?

What ought to have happened?

Simple - **A notice ought to have come before the suspension.** Any other conjectures here would be playing to the gallery so let us leave it as is.

Second, a definite four (4) month technical suspension 'in anticipation' is without precedent and an aberration that should not occur. **Why?** The extant laws only provides for a **technical suspension not more than the period of the Rights Issue which will be no more than thirty (30) days.**

Third, banking stocks are the most liquid in the market and as such it makes such a hair-pulling impression to imagine that such a decision was taking in a traditional slow market (*election period / slow cash availability / school resumption period*) without possibility of consequences on the overall well being of the market.

It did not matter at this stage if the bank, was rightly worried about its *book to price ratio*, or the intentions of astute investors/shareholders who saw an opportunity to take advantage of an obvious arbitrage in the market/share price of the listed entity. It was simply a case of how well the **communication about a change in the way the NSE responded** was going to be received by the market. The reactions thus far provides a learning opportunity.

That said, we have a situation where we have to review the law, the practice and the reality and understand what has to happen in the case of such a “force majeure” not envisaged but which in a more sophisticated environment we now have is subject to higher scrutiny.

Recall that in 2009, the Securities and Exchange Commission (SEC) directed The Nigerian Stock Exchange to **henceforth cease the practice of technical suspension for capital-raising exercises**.

According to the NSE “*when the SEC Rules 2013 were promulgated, **Rule 82(c) above was removed from the new SEC Rules, leaving in SEC Rule 198 cited above. This effectively left suspension of securities to the discretion of The Exchange, subject to notifying the SEC within twenty-four (24) hours.***”

Yet the NSE ought to have known that this did not preclude it from making CLEAR to the market the basis of its actions – the decision criteria and the need to ensure that it operated a even playing field.

The follow up statements on this rule by the NSE did little to address the gaps represented above.

The key test or criteria remains whether the actions of the NSE was consistent with known processes and the practice in the market (in the absence of a clarifying / explanatory note).

To infer that “The Exchange’s understanding is that the SEC currently has no extant prohibition against technical suspensions” is both correct and yet incomprehensible.

A major ingredient missing in the argument of the Nigerian Stock Exchange is the issue of “**appropriate circumstances**” – a term so loose it could easily be inferred to confer on the CEO/Quotations Committee/Council a power unintended by law.

The concerns about anticipatory approval may therefore be construed as a misuse of prefix or language as the law, as cited above, allows the granting of approval (TS) ahead of an EGM but one rarely used, and for good reasons too,

Why is that so.

A cursory look at the amendments will show you the basis and conditions precedent to where such should and could be used, viz:

Market Abuse

Every Issuer shall ensure **that investors and the public are kept fully informed of all factors which might affect their interest and in particular, that immediate disclosure is made of any information concerning their interest which might reasonably be expected to have material effect on market activity in, and the prices or value of, listed securities.**

Disclosure of Material Circumstances

Every Issuer shall disclose on ***an immediate basis all information on any material circumstance likely to affect its financial condition.***

Dealing with Insider Information

An Issuer shall establish effective arrangements to deny access to insider information to persons other than those who require it for the exercise of their functions within the Issuer's organization.

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In the case by **Access Bank Plc**, it would appear that there exists a basis for approaching the NSE to indicate that based on experience, special nature of ownership and the diverse nature of its shareholding – there exists concrete evidence that one or two of the basis above will likely take place.

The bank or any other quoted entity, operating in a competitive market place will be reluctant to disclose such information publicly but approach the NSE to lay down its evidence and make a case for the NSE to take all reasonable and expected actions to protect the following parties:

1. Minority shareholders;
2. The share value of the entity; and
3. Its ability to retain relevance as a entity listed on the bourse.

This we believe was what informed the justification for the 'formal request' to the NSE by the entity.

In granting this by the NSE, consideration ought to be given to some salient/critical factors such as:

1. The precedent setting nature of the request;
2. The need to articulate and discern how this request was different from other realities faced by other entities, coming from what had happened to Diamond Bank Plc stock who recently concluded a Rights Issue – apart from others which appear not only standard but consistent with global trends and practices;
3. The need to communicate to the market about what constituted the 'exceptional circumstances' as naturally intended by the law, rules, regulations and practice;
4. The possible reaction to the explanatory note that did everything but provide clarification to a market who had thought/believed that the issue of 'technical suspension' had gone with the past despite the value we all know it represented.

In all, some would consider this as a '*learning point*' on the part of the NSE but we see it as a positive and a teachable moment we can build upon.

SCENARIO 1 – What happens with a Rights Issue?

For a period of 14weeks, the stock had sustained a sideways trading pattern after hitting its peak on May 30th 2014; trading within a range-bound of N10.10kobo (a Year High) and N9.50kobo, trying to consolidate for a new high.

This failed as rumours of a rights issue pervaded/hit the market; the stocks broke its 11-week key support line at **N9.50kobo** three (3) weeks ago and closed the week **lower by -5.8%** as revealed in the weekly chart pattern.



This further revealed and suggested that the sentiments towards the RIGHTS ISSUE/Stock was already in a mixed state (*an arbitrage opportunity we insist on repeating and one for which those who had invested in the IPO had been waiting for*), which has strong potentials to turn bearish and depress the share price - below the offer price during the rights issue period.

This we believe remains one of the key decision points from an Access Bank Plc perspective and their basis for the formal request for a Technical Suspension as the law provided..

SCENARIO 2 – What would happen with a Tech Suspension of the Stock

The technical suspension would therefore have halted / hibernated market sentiments and impending action based on possible insider information/privilege information about timeline.

Further it would have enabled Access Bank Plc an opportunity to:

- Do the rights issue at the 'naturally intended' price that reflects its 'book-to-price' value and the approved price by the quotations committee – something that ought to have by now been agreed and a subject of what will be presented at the EGM for approval; and
- Eliminate any possible discounts as it can argue that its price is currently heavily discounted as is; and
- Stave off preying traders/investors who may come in and take on the stock at a knock-down price to the detriment of the shareholders

That said, we must now focus on what needs to happen next.

What must happen – Next Steps

Experienced regulators around the world, especially in developed markets have developed a robust regime of rules and regulations as a more efficient and effective weapon of oversight rather than relying on the dictates of the Law guiding the markets.

For one, Laws are a potent tool, subject to 360 degrees of interpretations by both the Bar and the Bench. Laws are easily subjected to suspension through injunctions, etc.

Hence, **regulators develop rules, regulations and conventions to achieve oversight functions** in a highly dynamic and fast-paced environment such as the financial markets.

What this market needs regarding TECHNICAL SUSPENSIONS is CLARITY and a well explained basis for engagement with the NSE.

We do not need to start suspecting a listed entity who invested in getting the best minds to purr over the extant laws, finding a way to protect both the minority shareholders as well as the shareholder value/worth of the entity; but must now move on to how we can build upon this to deliver a market that has the confidence of stakeholders, is able to learn quickly from changing moods, dynamics and realities.

To this end, here are our propositions for the market's considerations:

1. The blame game will not wash and we would only be appearing not to understand the learning opportunity we have on our hands;
2. The NSE has to step forward and show its leadership strengths in explaining/clarifying or otherwise expanding on what the extant rules are relating to:
 - a. Technical Suspensions;
 - b. How each and every entity can and should approach the NSE;
 - c. Circumstances that impact on the decision criteria of the NSE;
 - d. When such a request must be presented giving considerations to the appropriate timelines envisaged in the rules, regulations and amendments passed; and
 - e. The definition of appropriate reasons and its place within the laws guiding the market (*seeking to eliminate any possibility of arbitrariness*).
3. Specify what needs to happen in the case of Access Bank Plc based on the review conducted and contributions received which we are sure Access Bank plc would not object to; such as:
 - a. Clarifying that the Technical Suspension will hold till the EGM is held and up and until 30 days after the offer is opened;
 - b. That the Rights Issue/offer does not stay more than thirty (30) days; and
 - c. That the Rights issue will commence in October 2014 and not later than early November 2014.
4. Reassure stakeholders that protecting shareholder value and the interest of minority shareholders remains a key responsibility of entities which that NSE will continue to support.

Thank you.

Lagos, September 17, 2014

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ACKNOWLEDGEMENTS

- Olufemi Awoyemi, FCA – Founder/CEO Proshare Nigeria Limited
- A Future Foretold - NSE and the Challenge of Self Regulation: <http://www.proshareng.com/download.php?item=reports/2813.pdf>
- [The Market Memorandum - Fundamental Considerations for Capital Market Reforms in Nigeria ... - Sept 2010](#)
- The Share Support Service and Proshare NI research findings.
- Distinguished professionals, operators, analysts and regulators in the market who offered us their time, insight and documents.

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CREATION DATE: This document was created on 17th September 2014 and is based on the best information available at that time. To check for updates, kindly send us an e-mail at info@proshareng.com . Thank you.

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