



A state of the **Market Report**



Udo Udoma & SEC – **Legality, Perceptions and Sacrifice**

January 2010

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January 12, 2010; 0627 hrs, Omole, Lagos, Nigeria

“A man does what he must.. in spite of personal consequences, in spite of obstacles and dangers, and pressures.. and that is the basis of all human morality”. - *John F. Kennedy*

Often, we find ourselves in a situation where factors, other than logic influence the decisions we take and this ‘grey’ area of human decision making can go either way – often if it works out well, one is praised and celebrated but like in most life situations, when it turns out otherwise, we are left to rue the alternatives open to us which we ignored/rejected at the time of making such a decision.

I have found this to be true and I face one here as I seek to draw the markets’ attention to why it is hugely important to dimension the issues arising from the ‘conflicting status’ of holding the responsibility of a director of a quoted company and serving as the chairman of the Securities and Exchange Commission (SEC) – a position in which the revered Senator Udo Udoma finds himself.

Senator Udo Udoma, Chairman of SEC, Nigeria is a well accomplished man whom I, like so many others hold him in esteem. I have met the Senator and know a number of people who have had dealings with him in the past – the general consensus is that he is quite straight forward and principled; one of the best professionals around in terms of integrity and discipline – he represents a force for good. That is not surprising giving the antecedents that precede him and indeed the family tradition of excellence and ethical public service.

For all this and more, I find myself in a situation where the press release by UACN Plc published in most national newspapers on January 06, 2010 and his follow up clarification of January 11, 2010 in the BusinessDay newspaper (reproduced - <http://www.proshareng.com/news/singleNews.php?id=8671>) presented me with quite a difficult challenge, one I am unable to fully comprehend or ignore.

These development and the questions it raised continued to agitate my mind all as I made to review relevant literature on the subject of his compliance with the provisions of s11 of the ISA 1999 vis-à-vis the obvious corporate governance imperatives required in a clime like ours given our history of subservient stewardship, public perception defined by our recent history of incestuous relationship biased regulatory environment; and the steps needed to restore confidence in the financial market system, nay the capital market.

These considerations proved quite unsettling when juxtaposed against the Senators’ well-intentioned interview/response which sought to address the concerns raised in our January 06, 2010 blog post **Regulators, Reporting and Resolutions** (<http://proshareng.com/blog/?p=121>) where we highlighted what appears to be the existence or implied infusion of a real or perceived conflict of interest situation.

The import of this article/presentation therefore is to articulate the salient points to guide an understanding of why a decision is needed in respect of the dual positions, one that separates the two as a matter of precedence and necessary establishment of corporate governance rules.

When it comes to how the Senator should choose or behave on this matter, sovereignty over decision-making does not rest with citizens – capital market stakeholders and independent analysts like me; they rarely do. It will be one in which the Senator will have to make in the best interest of the market – a sacrifice or sentence?

The Original Sin

The corporate communications unit of UACN Plc did a good job in making sure that the media gave the announcement of Senator Udo Udoma an extensive coverage.

The job was so good we could not have failed to read all the reports where we noticed a consistent 'omission' across board - the senator's chairmanship of SEC had been conspicuously left out of the newspaper reports. A cursory check revealed that the 'omission' was from the press release.

One is left therefore to infer from this therefore that those at UACN Plc knew or had reasons to be concerned about the possible implications of such a disclosure to take the measured step of excluding such a high profile post from the chairman's profile.

In our case, our previous publication on the 'possible conflict of interest' situation in the SEC Chairman's office placed us on enquiry and prompted an immediate alert on the issue (see '**The BULL in The CHINA SHOP**' pages 62 to 65, August 22, 2009; <http://www.proshareng.com/reports/view.php?id=2016>).

In this report we had laid out our case with regards to the Chairman's office using three pressing issues at the time, viz:

1. The need to expunge the recommendation for the post of an executive Chairman for SEC from the Adedotun Sulaiman led Committee on the Capital Market Reforms;
2. The conflicting status apparent in the office of the SEC chairman who was a director in UACN Plc at the time (*subsequently he has confirmed that he is equally a **Director at Unilever Plc and Vice Chairman of the board of Linkage Assurance Plc***) – all quoted firms listed on the floors of the Nigerian Stock Exchange; and
3. The irrelevance of the belated query of August 19, 2009 from SEC to the DG of the NSE over the Transcorp Plc debt issue – which they got wrong both in context and timing.

The issues therefore was how to determine the possible areas of the anticipated conflict of interest scenarios and what if any, could make the declaration of interest as done by the SEC Chairman (in compliance with the disclosure rules and proper code of conduct best practice for boards) irrelevant because of other factors that affect the accomplishment of the objectives of the government agency – SEC.

A review of this possible scenarios and live cases in our recent past helped us reach a position – the general consensus was that this was a bad precedence and one that we needed to think in terms of institution building to resolve.

The fact must be stated though that we found nothing to suggest that Senator Udo Udoma had anything to do with the management of information by UACN Plc; it however raises the question of just how the dual positions begin to create an establish a pattern of behaviour that goes to the very heart of the concerns.

Legality and the Capital Market Reforms

A visit to the United States Securities & Exchange Commission will find you face-to-face with a very large, framed quote prominently displayed outside the Chairman's Office. It's a 1937 quote from a former Chairman (and later Supreme Court Justice) William O. Douglas and it is headlined - "**We are the investor's advocate.**"

World over, the SEC remains the only federal government agency dedicated to looking out for investors. The role of this institution has over the years become more pronounced for its failings rather than its successes. When things go on well enough, we take it for granted. When markets go into a tailspin as we have it, the role of SEC as the investors advocate comes into question.

Indeed, there has been no time in history that investors have been more in need of an advocate than today. Such an advocate therefore must not just be scrupulously clean but be seen to be indeed independent and devoid of any real or perceived doubts on his/her standing.

Nigerians have risen up and humiliated their political class over its handling of the financial crisis, and particularly of the level of impairment evident in the regulators ability to rise above the numerous incestuous relationships they cluttered themselves with (one in which Sanusi Lamido Sanusi, the Central Bank of Nigeria governor alluded to and which encouraged him to take steps to separate himself from ownership/directorship situations that could present a real or perceived conflicting status for him in the discharge of his function).

Having said that, Nigerians have come to accept and see nothing terribly unusual about their sense of powerlessness and alienation from the responsibility imperative of regulators, which it has been proven brought us to this rot.

Moving on from here would require more than compliance with existing rules – it requires setting new standards beyond rules to help us untangle roles and relationships.

Senator Udo Udoma is **correct in his submission** that "Section 11 of the Investment and Security Act (ISA) requires members of the board of SEC, who largely hold down part-time roles, and who have direct and indirect interest in the affairs of any quoted companies, to declare such interest and to excuse themselves when the board is deliberating on matters affecting such companies. I disclosed all my interests before I was appointed as chairman of SEC and asked the authorities if this posed a problem and they said no,"

By way of background, Senator Udo Udoma 'had been on the board of UACN for 10 years before he was approached to chair the SEC'. He has also explained that since becoming chairman of SEC, he has turned down invitations to the board of many publicly quoted companies.

This is good but not sufficient to resolve the larger issue facing the sovereign and we will explore this in greater detail.

Conflict of Interest – Laying out the Arguments

Conflict of interest is difficult to define, yet it often appears obvious to many people who think they know it when they see it. If ever there is an issue that captures this sentiment, this one scenario with the Senator does.

The legal definition of conflict of interest, usually set out in state laws governing non-profit corporations, is very specific and covers relatively few situations. Most conflicts fall into a 'grey area' where ethics and public perception are more relevant than statutes or precedents.

For our purpose, conflict of interest will be placed in the background to raise the much informed argument about the 'conflict of roles' (explained in detail later in the article) which arises whenever the personal or professional responsibilities of a quoted company board member are or appear to be **potentially** at odds with the best interests and objectives of the Securities and Exchange Commission.

We looked at such possible areas of conflict (in roles/interest) and narrowed it down to the following 'cultural' issues, viz:

- ❶ **CONFLICT BY ASSOCIATION:** The SEC Chairman is not involved in day-to-day enforcement and oversight issues and need not be present or involved in disciplinary review sessions but the mere fact the those who are in charge are aware of his involvement in those firms where he has declared interest, places them in a difficult position. Experience has shown that when placed in such positions, the tendency is to be influenced by that consideration in arriving at a conclusion.
- ❷ **CONFLICT ARISING FROM RELATIONSHIP WITH BOARD MEMBERS:** The likelihood of possible issues in business, commerce and politics from either the SEC board or any of the companies for which the Chairman is serving as a director may impact on perception of his role, person and indeed the SEC as an institution even if the matter does not come to the board of SEC for discussions. The public and individuals involved will bring into the equation his elevated position as the SEC Chairman.
- ❸ **CONFLICT ARISING FROM PROFESSIONAL RESPONSIBILITY:** Should UACN, Unilever or Linkage Assurance Plc be involved in a Cadbury Plc type situation, or on matters related to the (mis)conduct of one or several officers of the company, the SEC chairman becomes vulnerable to legal challenges and public misunderstanding.
- ❹ **CONFLICT ARISING FROM PRECEDENCE:** SEC has had its fair share of criticism – ranging from the role of NSE and CBN in its affairs up till and including the tenure of Senator Udo Udoma, and this continue and does not look to abate any time soon giving what transpired during the confirmation hearings for Ms. Aruma Oteh where a goodwill deficit perception defines the market. Under this scenario, recovery will be relative to the risk identified or involved.

The Public Perception

Importantly, and in an ideal world, Senator Udo Udoma should not have any eyebrows raised concerning this responsibility. This however is Nigeria where scepticism and distrust of constituted authority and government agencies is heightened by glimpses of possible conflicting circumstances which continues to widen the gap in public confidence in the regulators, and by extension the market.

The loss of public confidence is not strengthened simply by the honourable act of declaring one's interests upfront, as required by law.

This is necessary but not sufficient under this circumstance. Stakeholders in the market will see the evidence of **multiple interests in these dual positions** as one of which could possibly corrupt the motivation for an act in the other, mainly through a perception – it does not have to be real.

This has much more credence given the powers available to the office of the Chairman, SEC – the investors advocate. The SEC chairman is thus entrusted with some impartiality for which a modicum of unencumbered relationships is essential.

Just as the esteemed SEC Chairman explained in his clarification comment, the existence of or the possibility of such scenarios – of a conflict of interest/role circumstance may not, in and of itself, be evidence of wrongdoing.

In fact, for many of us professionals; it is virtually impossible to avoid having conflicts of interest from time to time. A conflict of interest can, however, become an ethical matter for example when looked at as a conflict of role. I would assume that the legal ramifications of this would provide sufficient grounds for action and redress.

Indeed, and with all apologies for any insinuation made in our earlier post, it is so easy to accuse anyone of **a conflict of interest in this country even where he/she has not acted improperly**. That is unfortunate but remains a recurring attribute of our make-up – the burden public officers have to carry.

On this matter however and based on the scenarios created above, we believe that we can easily establish **a "conflict of roles" situation** i.e. where a person with two roles—an individual who owns stock and is also a government official; may experience situations where those two roles conflict.

The conflict can be mitigated but it does not ignore the existence. This is the litmus test for any argument on this matter.

I cannot re-iterate enough the need to distinguish between simply having two roles at a time – which is not illegal; and having to recognise the differing roles that will certainly provide an incentive for improper acts in some circumstances.

This is what the public will and have often used as a yardstick to determine a conflicting status.

The Sacrifice

Officers of SEC surely understand sacrifice. The business of being the peoples advocate - requires a willingness to subjugate, at least temporarily, their own priorities, beliefs, and comforts to those of another (the objective of the organisation – creating a credible market place for all stakeholders).

Today, that willingness is being put to test and a demand made for an unprecedented step – one not driven through any measure of force or coercion.

In nearly every capital market, especially ours, heightened challenges in the regulatory environment has tipped the balance of power towards a commitment to investors needs and the regulators need to understand it's time to surrender more of their time and ego.

Conclusion

The natural approach would have been to insist on the notion that persistence will overcome resistance on matters such as this; believing that the force of the argument or platforms deployed will compel action. This is an uninformed approach which is not required and considered unconstructive.

We believe that Senator Udo Udoma is a qualified, competent and reasonable individual to hold any of the positions described on either side of the aisle; and possesses a superior insight into the issues raised above to inform a decision that would shape address our submissions. We, like others are prepared to learn from the choice/decision made.

While we are waiting on this, I might as well bring to your attention the growing disquiet about stock market analysts' growing conflict of interest situations – the roles and prominence of equity analysts (especially during the boom period) who make buy and sell recommendations on company stocks which they trade on; as well as investment bankers, who help provide companies loans or handle private placements and public offers (including mergers and acquisitions), whose discharge of responsibilities create opportunities for conflicts of interests and roles.

These are issues which we expect an untangled SEC Chairman to be able to deal with and help accelerate the rate of recovery of our markets by tackling head-on the negative perception and low level of confidence in the government institution.

The legality of this office does not and should not override the larger interest of the sovereign – even if it does not create a de facto conflict of interest situation but has the appearance of a conflict of roles situation.

Whichever decision Senator Udo Udoma takes here should not impair my regard and esteem for him even as I recognise the enormity of what is before him – yet he must know that we place no burden upon him on this matter - Legacy shall speak!

Olufemi Awoyemi, FCA
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Profile: **Senator Udoma Udo Udoma**

Mr. Udoma attended St. Catherine's College, Oxford University, where he obtained a Bachelors of Arts Degree (Jurisprudence) in 1976, a Bachelor of Civil Laws Degree (Law) in 1977 and a Master of Arts (Honoris Causa) in 1981.

He attended the Nigerian Law School and was called to the Nigerian Bar in 1978 as a Barrister and solicitor of the Supreme Court of Nigeria. He was a two-time member of the Nigerian Senate from 1999 to 2003.

Mr. Udoma had his working experience in the under listed places to mention but a few:-

- 📍 Lecturer in Law – University of Lagos
- 📍 Investment Analyst – Chase Merchant Bank
- 📍 Consultant to the Nigerian Liquefied Natural Gas(LNG) Project

- ❶ Founding Partner Udo Udoma & Belo Osagie (Barristers & Solicitors)
- ❶ Appointed a member of the team set up in 1984 by The Nigerian Government to implement the LNG Project.
- ❶ Consultant – Retained on a part time basis as a consultant by Sherman and Sterling.
- ❶ Member of the team set up by The Federal Government to carry out a review of the Legal Aspects of the Nigerian Privatisation and commercialization Programme in 1991.
- ❶ Member of the committee set up by the Federal Government to review existing policy on Solid minerals in 1996.
- ❶ Appointed Member of the 'Vision 2010 Committee' that was set up by the Federal Government in 1996 to articulate a national vision.
- ❶ Member, Nigeria Economic Summit Group.
- ❶ Member, National Senate, Federal Republic of Nigeria 1999 – Date.
- ❶ Chairman of the Senate Appropriations Committee, 2001 -2003.
- ❶ Chairman of the Senate Committee on National Planning.
- ❶ Chairman, Revenue Mobilisation and Poverty Alleviation, 2003-2005.
- ❶ Appointed Chief Whip of the Nigerian Senate, 2005-2007.
- ❶ Chairman, Securities & Exchange Commission, 2007 to date.

Mr. Udoma has attended and presented several Papers at local and international seminars and workshops including papers on:

- ❶ Nigerian trade and investment Laws
- ❶ The Legal Aspects of Privatisation and commercialization
- ❶ The Juridical Aspects of Private Sale and public Offering
- ❶ Winding up and striking off of Companies: Problems of Implementation.
- ❶ Incentives for Gas Projects in Nigeria

He specializes in advising on Nigerian investment laws and the investment environment generally, particularly in the petroleum, energy and natural resources sectors; advising Nigerian and international companies on company law, corporate restructuring, mergers and acquisitions and the raising of financing in the capital and money markets, as well as on major construction and engineering contracts; supervising commercial litigation and inheritance planning services.

He is a member of The Nigerian Bar Association and International Bar Association.