

THE ROLE OF COMPANY SECURITIES IN SECURED CREDIT TRANSACTIONS, A CALL FOR HARMONY IN REGULATION

OKORO, KALU EMMANUEL,
HND, PGD, MBA, LLB, BL, LLM, Ph.D.

*Emma K. Okoro Chambers,
24 Old Aba Road, Rumuogba, Port Harcourt, Rivers State (08139013401)*

ABSTRACT

In order for businesses to thrive, firms need to raise funds as capital to achieve their business objectives. Company and Allied Matters Act, 2020 being one of the enabling Laws regulating Companies, has set out various products as we can see in our discussions hereafter, through which companies can raise these funds. However, these products are further regulated by various other Laws which make raising of funds through them rather very cumbersome. One of the things this paper set out to achieve was to bring out the various forms permitted by our Laws through which business organizations can raise funds, the enabling Laws and then eliciting the procedures through which funds/capital can be raised through the any of the products. From its findings the paper found out that each of these products which are used in raising capital are further regulated by different laws, thereby making the procedures required of each product to be distinct from each other. This paper which is a call for the harmonization of these laws since the essence and the common denominator running through all these products is the raising of capital by firms. When therefore, there is uniformity of laws, it could be easy to simplify the process and that will allow businessmen raise capital easily. This will in turn rub off on the pricing of their end products and increase consumption which is very key to their developmental role in the society.

1.0 INTRODUCTION

Upon registering a company, the registered company becomes an entity distinct from the owners¹. It becomes a personality of itself capable of suing and being sued and holding of assets in its name. Agreeing with this view, Orojo² said

The general effect of incorporation is that from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company become a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act.

Adding his view, Ogbuanya N.C.S.³ said “Upon incorporation, a company obtains a separate legal personality and can operate independent of the shareholders, who may become their employees and contractors”.

¹ Marina Nominees Ltd v. Federal Board of Inland Revenue (1986) 2 NWLR, 48.

²Orojo J.O. *Company Law and Practice in Nigeria*, 5th Edition, Lexis Nexis Butterworths, Cape Town (2008) pg. 44.

³Ogbuanya N.C.S, *Essentials of Corporate Law Practice in Nigeria*, Novena Publishers Limited (2010) 53.

Giving a statutory flavour to the discussion, *Section 42*⁴ as the enabling law provides as follows:

As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as it mentioned in this Act.

The implication of the foregoing is that being a distinct personality from its owners, a company that needs to raise capital for her needs either to commence business and/or carry on its business objectives does so pursuant to her inherent powers to do so. Agreeing with this, Orojo⁵ said “a trading company has an implied power to borrow money for the purposes of its objectives”. This borrowing the company does through raising of its securities in form of debentures and charging her assets pursuant to the provisions of *Section 19*⁶ which provides that “A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party”. The company may also offer her shares to the public if it is the company that is permitted by the Act⁷ and its Articles of Association to sell shares to public.

This seminar paper will first look at what is a company and company securities, then secured credit transactions and the need for harmony. This, the seminar paper will do by firstly looking at company securities on one hand and on the other hand, secured credit transactions, various ways company securities can be used to secure loans, laws regulating the creation of security and the need to harmonize transactions relating to company securities. The paper will lastly make a summary, conclusion and recommendations based on its finding.

1.1 MEANING OF COMPANY

The Court succinctly put the meaning of company when it held in the case of *Pan African Int'l Supply v. Jkpeez Impex Co. Ltd*⁸ that a company is a union or association of persons carrying on a commercial or industrial enterprise.

1.2 COMPANY SECURITIES

According to Goggle.com company securities are⁹ “The Securities mostly commonly issued to the Public are shares or debentures. Public issue of shares or debentures takes three principal

⁴ Companies and Allied Matters Act, 2020.

⁵ Orojo, J.O. *Company Law and Practice in Nigeria*, *Ibid*, pg. 167.

⁶ Companies and Allied Matters Act, *Ibid*.

⁷ Companies and Allied Matters Act, *Ibid*.

⁸ (2010) 3, NWLR 441.

⁹ Goggle.com, *company securities*, accessed from <https://www.google.com/search?q=what+are+company+securities&aq=chrome.0.0i512j69i57j0i512i4j0i22i30i4.6626j0j15&sourceid=chrome&ie=UTF-8>.

forms: " Rights issues and open offers - This is a situation where the Company invites its existing shareholder or debenture holders to subscribe to further capital required". To Nwoye¹⁰ Company's securities are the bases or the foundation of every company with shares. Securities include shares, debentures, debenture stock, bonds, notes (other than promissory notes) and units under a unit trust scheme.

It is the view of this paper that the above definitions only described company securities are without defining it as a concept. However, this seminar paper agrees with J.E.O Abugu when he proffered that "Company securities on the other hand are a species of investment instruments issued by companies for the purpose of raising capital for their undertaking which confer on the investor several rights including in particular a right to an economic return by way of dividend or fixed income on the amount thus invested.¹¹ Securities are fungible and tradable financial instruments used to raise capital in financial markets and in the case of Nigeria, in markets such as the Nigeria Securities Exchange. These securities can be in the form of equity debt that is, shares, it can also be debt securities that is, debentures or bonds; or it can be a hybrid, which combines aspects of debt and equity securities. Buttressing this point further, Olusola E.¹² opined that when we talk about company securities, we looking at the contributions to the capital of companies which is made with a view to obtaining some profitable returns by the investors.

Giving a Statutory flavour of what constitutes company securities, The Investments and Securities Act, 2007¹³ provided as follow:

Securities means:-

- (a) debentures, stocks or bonds issued or proposed to be issued by a government;
- (b) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate;
- (c) any right or option in respect of any such debentures, stocks, shares, bonds or notes, or
- (d) commodities futures, contracts, options and other derivatives and the term securities in this Act includes those securities in the category of the securities listed in (a) – (d) above which may be transferred by means of any electronic mode approved by the Commission and which may be deposited, kept or stored with any licensed depository or custodian company as provided under this Act.

For our discussion in this paper, reliance will be placed on the definition of securities as proffered by *Section 868* of the Act¹⁴ as follows, being the regulating Act for companies "Securities includes shares, debentures, debenture stock, bonds, notes (other than promissory

¹⁰ **Nwoye I.S.**COMPANY'S SECURITIES: SHARES, SHARE CAPITAL AND SHARES TRANSACTIONS, accessed from <https://www.nwoye-law.com/l/paper-series-iv-a-company-s-securities-shares-share-capital-and-shares-transactions/> on 20/8/21.

¹¹ Abugu J.E.O "Company Securities, Law And Practice" university of Lagos press, 2005 at p.4

¹² Olusola Egbetola, 'Corporate Law Practice: Company Security in Nigeria', accessed from <http://group4hub.blogspot.com/2017/03/corporate-law-practice-company.html>, on 20/8/2021.

¹³ *Section 315, Interpretation, Securities, The Investment and Securities Act, 2007.*

¹⁴ Companies and Allied Matters Act, 2020, *Ibid.*

notes) and units under a unit trust scheme.” Taken from the above, items constituting company securities in Nigeria can be summarized as follows:

- i). Shares;
- ii). Debentures;
- iii). Debenture Stock;
- iv). Bonds;
- v). Notes (Global Depository Receipts); and
- vi). Unit Trust Scheme.

2.0 COMPANY SECURITIES IN THE UNITED STATES OF AMERICA

In order for the paper to fully discuss company securities in Nigeria, the paper will here look briefly at company securities in the United States of America to see if they are in *tandem* with company securities in Nigeria.

In the United States, the term company securities broadly covers all traded financial assets and breaks such assets down into three primary categories. They are as briefly discussed below:

2.1 EQUITY SECURITIES:

Equity securities refer to shares and they include stocks ownership in a company which are possessed by the shareholder. Equity securities usually generate regular earnings for shareholders in the form of dividends. An equity security does, however, rise and fall in value in accord with the financial markets and the company's fortunes;

2.2 DEBT SECURITIES:

Debt securities differ from equity securities in an important way; they involve borrowed money and the selling of securities. They are issued by an individual, company, or government and sold to another party for a certain amount, with a promise of repayment plus interest. They include a fixed amount (that must be repaid), a specified rate of interest, and a maturity date (the date when the total amount of the security must be paid by). Debentures, Bonds, bank notes (or promissory notes), and Treasury notes are all examples of debt securities. They all are agreements made between two parties for an amount to be borrowed and paid back with interest at a previously established time which includes bonds and banknotes;

2.3 DERIVATIVES:

This includes options and futures. Derivatives are a slightly different type of security because their value is based on an underlying asset that is then purchased and repaid, with the price, interest, and maturity date all specified at the time of the initial transaction.

The individual selling the derivative doesn't need to own the underlying asset outright. The seller can simply pay the buyer back with enough cash to purchase the underlying asset or by offering another derivative that satisfies the debt owed on the first.

A derivative often derives its value from commodities such as gas or precious metals such as gold and silver. Currencies are another underlying asset a derivative can be structured on, as well as interest rates, Treasury notes, bonds, and stocks.

Derivatives are most often traded by hedge funds to offset risk from other investments. As mentioned above, they don't require the seller to own the underlying asset and may only require

a relatively small down payment, which makes them favorable because they are easier to trade.

A closer look between the company securities in Nigeria and the United States of America, shows no significant difference. This paper therefore, will continue its discussion on company securities based on items constituting company securities under the Companies and Allied Matters Act, 2020. These are briefly discussed seriatim below. Further discussions on them will be made later while discussing the nexus of company securities and secured credit transactions and need for harmony.

3.0 DISCUSSING ITEMS CONSTITUTING COMPANY SECURITIES IN NIGERIA

3.1 SHARES:

According to Bhadmus Y.H.¹⁵ “A share in a company is a security and is an expression of proprietary relationship. It represents the totality of rights and liabilities that a shareholder has in a company as provided in the terms of issue and the Articles of Association.” Agreeing with this, Osamolu S.A.¹⁶ said, “Shares constitute an integral part of company securities with profound implication.” Having explained that shares are company securities, then what is shares. According to Buckley J. in *Re Stanley*¹⁷ A share may be described as the legal interest of a shareholder in the authorized and issued capital of a company measured by a sum of money for the purpose of liability in the first place and participation in the second place. Concisely held by the Court in the case of *Borland's Trustee v. Steel Brothers and Co. Ltd*¹⁸ “A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders”. Adding to this Ogbagbe K.N.¹⁹ said “Share is defined as the interests of members of a body corporate who are entitled to share in the capital or income of such body corporate.”

Section 868(1) of Company and Allied Matters Act (CAMA)²⁰ defines shares as “Shares means the interest in a company's share capital of a member who is entitled to share in the capital or income of such company and except where a distinction between stock and shares is expressed or implied, includes stock”.

Business Dictionary.com defines shares as “A unit of ownership that represents an equal proportion of a company's capital which entitles its holder to an equal claim on the company's profit and an equal obligation for the company's debts and losses.”²¹

To Orojo²² “A share in a company is the expression of a proprietary relationship, the shareholder is the proportionate owner of the company but he does not own the company's asset which belongs to the company as a separate and independent legal entity”.

¹⁵ Bhadmus Y.H., “*Bhadmus On Corporate Law Practice*”, Chenglo Limited, Enugu (2009), 294.

¹⁶ Osamolu S.A., “*Corporate Law Practice in Nigeria*”, Law Lords Publications, Abuja, (2019), 303.

¹⁷ (1906)1 CH 131 p.134

¹⁸ *Borland's Trustee v. Steel Brothers and Co. Ltd* (1901) 1 Ch. D 279 at 288.

¹⁹ Ogbagbe K.N., *Company Law In Nigeria: A Contemporary Perspective*, Zubic Infinity Concept, Owerri, (2015),134.

²⁰ Companies and Allied Matters Act, 2020.

²¹ www.businessdictionary.com/definition/share.html

²² J.O. Orojo, *Company Law and Practice in Nigeria* (Fifth Ed.), Lexis Nexis, Lagos (2008), 125

These ‘units of ownership’ as a requirement of law entitles the owner’s name to be entered in the share holders books of the issuing company that is kept at its head office. It also entitles the holder to be issued with a certificate which states the value and number of the shares held by the holder.²³

It is good to point out that this interest or unit of ownership is transferable from the original owner to another person as shares are seen as chose in action. This position has been given a statutory flavor in Section 115 of CAMA²⁴ when it provides that:

The shares or other interest of a member in a company shall be property transferable in the manner provided in articles of association of the Company.

This transferability of shares is what has led the foundation of using shares as collateral or an instrument on which security can be created in a loan transaction. This view was amplified by Igweike K.I.²⁵ when he said “Stock and shares of corporate bodies are often accepted by Banks as Securities for lending to their customers.” The same view was further expressed by Ogbagbe K.N.²⁶ when he said “Shares are in the nature of personal estate and freely transferable subject to statutory restrictions.”

3.2. DEBENTURES

This is another form of company securities. By virtue of *Section 191*²⁷ “A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.”

According to Ogbuanya N.C.S.²⁸. “Debentures are instruments issued by the company to its lenders to acknowledge the indebtedness by the company”. To Ogbagbe K.N.²⁹ a “Debenture is a written acknowledgement of debt or indebtedness by the company setting out the terms and condition of the loan”. A debenture denotes in a modern commercial usage an instrument issued by a Company normally but not necessarily called on the face of it a debenture and providing for the payment of, or acknowledging the indebtedness in a sum at a fixed date with interest thereon.³⁰ A debenture therefore, is an instrument acknowledging a distinct debt. I may be issued in units or almost invariably in the case of public offers, in stocks.³¹ The debenture is a document giving details of a company’s indebtedness to a creditor, called the debenture holder. It is usually secured by a charge created on the property of the company and this charge may be a floating charge or a fixed charge. The issue of debenture is a means by which companies raise money for their operations.³² Summing it up, Omotola J³³ said, “Generally, companies borrow

²³Section 83, Companies and Allied Matters Act, *Ibid*.

²⁴Section 115, Companies and Allied Matters Act, *Ibid*.

²⁵ Igweike K.I., *Law of Banking And Negotiable Instruments*, African First Publishers Limited (2005), 177.

²⁶ Ogbagbe K.N. *Company Law in Nigeria: A Contemporary Perspective*, *Op Cit*.

²⁷ Companies and Allied Matters Act, 2020.

²⁸ Ogbuanya, N.C.S. *Essentials of Corporate law Practice in Nigeria*, Novena Publishers Ltd, Lagos ((2010), 502.

²⁹ Ogbagbe K.N. *Company Law in Nigeria: A Contemporary Perspective*, *Op Cit*.

³⁰ Osamolu S.A. *Corporate Law Practice in Nigeria*, Law Lords Publications, Abuja (2019), 334.

³¹ Smith I.O., *Nigerian Law of Secured Credit*, Ecowatch Publications Limited, Lagos (2001) 293-294.

³² Bhadmus Y.H., *On Corporate Law Practice*, Chenglo Limited, Enugu (2009) 316.

money through the issuance of debentures. Under section 650³⁴ of CAMA, a debenture is a written acknowledgment of indebtedness by the company, setting out the terms and conditions of such indebtedness and includes debenture stock, stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not.”

Giving a Statutory definition, the Act³⁵ defines debenture when it states in its *Section 868* that “debenture means a written acknowledgment of indebtedness by the company, setting out the terms and conditions of the indebtedness and includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not.” With due respect to this elaborate provision of the CAMA, it is the humble view of this paper that defining debenture to include all forms of company securities including bond, is too wide as a form of definition. Rather, all that the definition has done is to say that debt security is the same thing as debenture. Better still that all forms of company securities apart from equity securities are debentures.

However, for emphasis, it is necessary to look at debenture stock:

3.3 DEBENTURE STOCK

This is also form of company securities. According to Goggle.Com³⁶ Debenture stock is “A registered participation in debt issued by a company which is normally freely transferable and is generally listed on a recognised investment exchange. Debenture stock will typically be secured by a floating charge over all the undertaking and assets of the issuing company.”

To Thomson R.³⁷ Debenture stock is A registered participation in debt issued by a company which is normally freely transferable and is generally listed on a recognised investment exchange. Debenture stock will typically be secured by a floating charge over all the undertaking and assets of the issuing company.”

Debenture stockholders are entitled to dividend payments at fixed intervals. Like regular debentures, debenture stocks are normally not backed by any collateral. The way that debenture stocks operate is nearly identical to preferred stock.

3.3.1 Debenture Stocks Versus Regular Debentures

Debenture Stocks

Debenture stockholders are entitled to dividend payments at fixed intervals. Like regular debentures, debenture stocks are normally not backed by any collateral. However, a form of protection may be sought through a trust deed that names a trustee to act on behalf of stockholders.

Debenture stocks are an equity security, not a loan. This means debenture stockholders are put in

³³ Omotola J, *The Law of Secured Credit*, Evans Brothers (Nigeria Publishers) Limited, Ibadan, (2006),162.

³⁴ Now *Section 191*, Companies and Allied Matters Act, 2020.

³⁵ Companies and Allied Matters Act, *Ibid*.

³⁶ Goggle.com. ‘What is debenture stock?’, accessed from <https://www.google.com/search?q=what+is+debenture+stock&oq=what+is+debenture+stock&aqs=chrome..69i57.5029j0j15&sourceid=chrome&ie=UTF-8>, on 26/8/2021.

³⁷ Thomson R., *Practical Law*, access from <https://uk.Practicallaw.thomson-reuters.com> accessed on 19/1/24

position behind debentures and all other forms of debt for liquidation purposes. The way that debenture stocks operate is nearly identical to preferred stock.

Debenture stocks are not perceived to be less safe than other equities since they carry the same degree of risk as other types of stock issue. Unlike traditional stocks, debenture stocks provide a more reliable stream of returns.

Debentures

Regular debentures act as loans against the company, which make the owner of the debenture a creditor with preferred status in case of liquidation. This means debenture stockholders are put in position behind debentures and all other forms of debt for liquidation purposes.

Debentures are perceived to be less safe than other bonds because they lack collateral security, although an exception is made in the case of government debentures such as United States Treasury Bills.

3.4. BONDS

Bonds are forms of company securities used by companies in raising money for their operations. It is a fixed income security issued as debt instrument, with low interest yield but guaranteed return on investment over time³⁸. Bonds are classified as Government Bond and Corporate Bond. While the Government Bonds are issued by the Federal, States and Local Governments, Corporate Bonds which is where our interest lies in this paper, are issued by the Public Companies to the investing public to finance expansion of their industrial base and market penetration of their products.

According to Osamolu S.A.³⁹ “Bonds are debt securities that are issued to lenders of long term loans. It is basically an I-Owe-You “IOU” issued by one part to another. The bond holders, or investors, are the lenders, while the issuer is the borrower. The borrower promises to make periodic interest payments (called coupons) on the bond, as well as to repay the original loan (the principal) to the bond holder on a stipulated date (the maturity date).” According to Black’s Law Dictionary⁴⁰ a bond is “A written promise

to pay money or do some act if certain circumstances occur or a certain time elapses, a promise that is defeasible upon a condition subsequent; esp. an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes that if the public officer does not do so, the surety will be liable in a penal sum.”

To Ogbuanya N.C.S.⁴¹ “Bond is basically a fixed income security, issued as debt instrument, with low interest yield, but guaranteed return on investment over time”.

According to BusinessDictionary.com⁴² “A written and signed promise to pay a certain sum of

³⁸ Ogbuanya N.C.S. *Essentials of Corporate Law Practice in Nigeria*, Bi-Fantasy, Lagos (2010), 571.

³⁹ Osamolu S.A. *Corporate law Practice in Nigeria*, Law Lords Publications, Abuja (2019) 344.

⁴⁰ Black’s Law Dictionary, Eight Edition, Bryan A.G. Editor In Chief, West Publishing Co. USA (2004).

⁴¹ Ogbuanya N.C.S. *Essentials of Corporate Law Practice in Nigeria*, Novena Publications Ltd, Lagos (2010), 571.

⁴² BusinessDictionary.com, accessed at www.businessdictionary.com/definition/bond.html, accessed on 3/2/2016

money on a certain date, or on fulfillment of a specified condition.”

InvestinginBonds.com⁴³ said “A bond is a debt security, similar to I.O.U. When your purchase a bond you are lending money to a government, municipality, corporation, federal agency or other entity known as an issuer, in return for that money, the issuer provides you with a bond in which it promises to pay a specified rate of interest during the life of the bond and to repay the face value of the bond (the principal) when it matures or comes due”.

The Black’s Law Dictionary⁴⁴ said that a bond is “A long-term, interest-bearing debt instrument issued by a corporation or governmental entity usually to provide for a particular financial need; esp. such an instrument in which the debt is secured by a lien on the issuer’s property.” It is therefore, within this ambit that I am going to discuss the issue of bond.

There are four common types of bonds listed and traded on the Nigeria Stock Exchange. They are:

- A. Federal Government Bonds which are issued by the Federal Government of Nigeria through the Debt Management Office and listed on the Nigeria Stock Exchange;
- B. State/Local Government Bonds which are issued by a state or local government;
- C. Supranational Bonds. These types of Bonds are issued by supranational organizations or institutions, such as the African Development Bank, World Bank and such like organizations.
- D. Corporate Bonds. This is the type of Bond that are issued by private and/or public companies. It is here that the interest of this paper lies. They normally have higher interest rates than the other types of Bonds. Some corporate Bonds can be converted to equity if certain provisions are met. This particular type of Bond is known as convertible Bonds.

It is good to take note that Bonds are bought and sold through stockbrokers the same way shares are bought. The difference being that while shareholders may be members of the companies if their names have been entered into the register of members of the company. Bond holders are seen as lenders who invested funds in the company with a view to be repaid with interest as return on their investments.

3.5. GLOBAL DEPOSITORY RECEIPTS

This is another form of company debt securities which is an instrument by which a company may issue one or more of her shares or other convertibles bonds outside her domestic country where it is registered⁴⁵. The procedure is such that an overseas depository bank in correspondence with the company’s local bank, issues the company’s shares and sells same to persons overseas in form of depository receipts or certificates and when they are paid for, the company immediately raises funds to carry out their business objects. Due to globalization, Global Depository Receipts is now one of the most important sources of finance to local companies. It also provides local companies access to foreign capital market. Just like shares earlier treated, they are equity debts and are also convertible depending of the enabling laws.

⁴³ InvestinBonds.com accessed from www.investinginbonds.com/learnmore.asp?catid=46&id=2 on 3/2/2016.

⁴⁴ *Ibid.*

⁴⁵ Osamolu S.A. *Corporate law Practice in Nigeria*, *Ibid*, 342.

3.5.1 Procedure For Issuing Global Depository Receipt (GDR)

Issuing GDR is carried out under strict guidelines as follows:

- i). The domestic company enters into an agreement with the overseas depository bank for the purpose of issue of GDR;
- ii). The overseas depository bank then enters into a custodian agreement with the domestic custodian of such a company;
- iii). The domestic custodian holds the equity shares of the company; and
- iv). On the instruction of the domestic custodian, the overseas depository bank issues shares to foreign investors.

3.6. UNIT TRUST SCHEME

The unit trust scheme is a type of collective investment scheme. While *Sections 152* of The Investments and Securities Act⁴⁶ provides that “unit trust scheme means any arrangement made for the purpose, or having the effect, of providing facilities for the participation of the public as beneficiaries under a trust in profits or income arising from acquisition, holding, management or disposal of securities or any other property whatsoever.” *Section 315* of the same Act provides that “unit trust scheme means any arrangement made for the purpose, or having the effect, of providing facilities for the participation by persons as beneficiaries under a unit trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property.” From these Statutory provisions, one can deduce that while *Section 152* made provision for participation of the public in the unit trust scheme, *Section 315* made provision for participation of persons for the same purpose.

A unit trust scheme is usually administered as a limited liability company (private or public), which is approved and registered by Securities and Exchange Commission (SEC), with the main object to pool resources of small savers in order to build a portfolio of securities to earn income and capital gains for the investors being the Unit Holders. The scheme is designed to attract the savings of small investors and is managed by Fund Managers who will manage the scheme in accordance with the policies and objectives of the trust scheme.⁴⁷

Having looked at company securities, it is ripe for the paper to discuss the second ambit of our topic before looking into the need for harmony.

4.0 SECURED CREDIT TRANSACTIONS

Credit contracts often require borrowers to pledge collateral as a way of providing security for the debt. Such credits are described as secured. Secured credit transaction therefore, refers to the practice in which the debtor or a third party creates an interest in an asset in favour of the creditor, as a guaranty to repay a loan, which upon the debtor’s default entitles the creditor to possess and sell the asset to satisfy the obligation. Agreeing with this view, Nwuba said “Credit contracts often require borrowers to pledge collateral as a way of providing security for the debt. Such credits are described as secured. Secured credit transaction therefore refers to the practice

⁴⁶ Investments and Securities Act, *Ibid*.

⁴⁷ Ogbuanya N.C.S., *Essentials of Corporate Law Practice in Nigeria*, Novena Publishers, Lagos (2010), 564.

in which the debtor or a third party creates an interest in an asset in favour of the creditor, as a guaranty to pay a loan, which upon the debtor's default entitles the creditor to possess and sell the asset to satisfy the obligation. In contrast, unsecured credit transaction has no pledge of asset but considers the personal integrity, the social status and record of accomplishment of the borrower as well as guarantee of a third party⁴⁸. As observed by Brown and Evangel "where one person lends money to another, he may be satisfied with the consequent personal obligation of the debtor to repay the loan and upon default sue for the money. In many cases, the lender requires security transcending the mere personal obligation of the debtor to repay the loan. As a result, the creditor is granted rights over a tangible or intangible asset of the debtor or of a third party."⁴⁹

It is good to point out that, it is this second ambit of transaction whereby a security is required in addition to assurance for payment that is referred to as secured credit transaction. In the view of Chianu,

Individual and corporate money lenders desire to recover the money they lend. They have a choice between relying on a borrower's promise to repay and asking for something in addition to the bare promise. Most prudent lenders realize the precariousness of a bare promise: the borrower may drop dead, he may become bankrupt, or he may simply obdurately refuse to pay. Consequently, most shrewd lenders insist on something to assure them that on the borrower's default they would not have lost their investment.⁵⁰

Let me add that this is because, they will resort to such security given to them on the event of default by the borrower. The learned author further observed that "foresightful lenders prefer security of a proprietary character, security that has property backing, real security. This elevates the creditor to the status of a secured creditor, giving him something out of which he is entitled to have his debt paid in preference to the unsecured creditor."⁵¹

4.1 DISTINCTION BETWEEN SECURITY AND SECURITIES

In order to fully understand the mix between company securities and secured credit transaction, it is pertinent to understand the distinction between security and securities as it relates to this seminar paper.

Securities are fungible and tradable financial instruments used to raise capital in financial markets and in the case of Nigeria, in markets such as the Nigeria Security Exchange. These securities can be in the form of equity debt that is, shares, it can also be debt securities that is, debentures or bonds; or it can be a hybrid, which combines aspects of debt and equity securities.

Security on the other hand as it relates to secured credit transaction is that instrument a debtor gives the credit for comfort and further assurance to honour his obligation as at when due. The court in the case of *Bristol Airport PLC v. Powdrill*⁵² defined security when it held that:

⁴⁸ Nwuba C.C. *et al*, 'The Application of Real Estate as Loan Collateral in Nigeria's Banking Sector' [2013], *Research Journal of Finance and Accounting*, (Vol. 4, No. 11), 63.

²³¹ Brown, M.E. and Evangel A., 'Mortgage, Pledge and Charge Transaction in Nigeria: Comparative/Distinctive Analysis and Legal Examination'[2013] *IOSR Journal of Business and Management* (Vol. 13, Issue 6) 100.

⁵⁰ Chianu, E. *Law of Securities for Bank Advances (Mortgage of Land)*, Benin City, Ambik Press, 2007, 1

⁵¹ Chianu E, *Ibid*, 1.

⁵² (1990) 2 All E.R. 493 at 502.

Security is created where a person (“the creditor”) to whom an obligation is owed by another (“the debtor”) by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some property in which the debtor’s obligation to the creditor.

Agreeing with the above view, Omotola J⁵³ said “security properly so-called is a right from transaction, which involves some considerations whereby a person to whom an obligation is owed by another is afforded, in addition to the personal promise of the debtor to discharge the obligation rights exercisable against some property of the debtor in order to enforce or discharge the obligation.” Smith I.O.⁵⁴ in his own view said that “security is indeed an assurance provided by the debtor in addition to the personal promise to discharge an obligation owed the creditor. It demonstrates the debtor’s good intention to meet his obligations and provides an incentive on the part of the creditor to provide credit.”

Taking from the foregoing, security being what someone who owes an obligation to another gives to that other as further assurance to honour his obligation as at when due, simply means what such instrument of company securities that one who owes an obligation to another that can act as further assurance to honour his obligation, such that in the event that he is not able to honour his said obligation as at when due, that person will be able to sell of the security in order to recoup his exposure.

5.0 COMPANY SECURITIES AND CREDIT SECURED TRANSACTIONS: THE MIX

This paper has so far discussed company securities, the instruments that are company securities and what they are used for by the companies using them. The paper has also discussed secured credit transactions, the difference between ‘security and securities’ in the light of secured credit transactions. It is now ripe for the paper to find out the nexus between the divide.

Let me begin by bringing out the common features of company securities:

- i. They are all chose in action;
- ii. They are all forms of ways companies raise funds to carry on their business ventures;
- iii. All company securities are transferable;
- iv. They are forms of investments made with a view to recoup such investment together with returns on investment;
- v. They are all forms of secured credit transactions as they are ways through which companies raise money and in exchange give out their securities as comfort on which charges may or may not be created on their assets. More so, the holders can use them as instruments to secure loans.

The paper will then discuss the above features, one after the other.

i. Company securities as chose in action:

This is very fundamental feature of company securities as all of them are all legal chose in action. Agreeing with this, Osamolu S.A.⁵⁵ said “a share is a legal chose in action

⁵³ Omotola J, *The Law of Secured Credit*, Evans Brothers (Nigeria Publishers) Limited, Lagos, (2006), 7.

⁵⁴ Smith I.O. *Nigerian Law of Secured Credit*, Ecowatch Publications Limited, Lagos (2001), 2.

⁵⁵ Osamolu S.A. *Corporate Law Practice in Nigeria*, *Op Cit*, 303.

which constitutes the holder a member of the company”. Permit me to observe that it is how it is for all the other company securities, except some of them do not translate to membership of the company they hold their securities but merely seen as investors whom debts are owed only. That is why they are seen as debt securities.

ii. *Instruments of raising of funds by companies:*

This is another form of similarity running across all company securities. *Section 191*⁵⁶ provides that “A company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party.” It is good to observe that this provision is not limited to debentures and debenture stock but includes other company securities.

iii. *Transferability of company securities:*

All company securities are transferable from one holder to another. *Section 214(1)*⁵⁷ provides that “except as expressly provided in the terms of any debenture, debentures shall be transferable without restriction by a written transfer in any usual or common form, or any other form which the directors of the company may approve, and that the transferee is entitled to the debenture and to the money secured thereby without regard to any equity, set-off or cross-claim between the company and the original, or any intermediate, holder.” The same goes for shares and the other company securities. For example *Section 175(1)* of the Act⁵⁸ says that “the transfer of a company’s shares shall be by instrument of transfer and except as expressly provided in the articles, transfer of shares shall be without restrictions, and instruments of transfer shall include electronic instrument of transfer.” This view was further shared by Ogbuanya NC.S⁵⁹ when he explained that “shares or other interest of a member in a company is personal property transferable subject to the articles.” This is further given Statutory flavour when *Section 139*⁶⁰ provided that “The shares or interests of a member in a company are personal property transferable in the manner provided in articles of association of the company. This quality of company securities makes it a veritable instrument for secured credit transaction not only to the company but to a third party.

iv. *Company securities as investment:*

Company securities are forms of investment by persons who subscribe them. The common intension for subscribing them is to invest with a view to receive interest in form of dividends and to recoup the invested sum. This view was amplified in the case of *Borland’s Turstee v. Steel Brothers and Co. Ltd*⁶¹ the court held that a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability and of interest.

⁵⁶ Companies and Allied Matters Act, *Ibid.*

⁵⁷ Companies and Allied Matters Act, *Ibid.*

⁵⁸ Companies and Allied Matters Act, *Ibid.*

⁵⁹ Ogbuanya N.C.C. *Essentials of Corporate Law Practice in Nigeria, Ibid.*, 494.

⁶⁰ Companies and Allied Matters Act, *Ibid.*

⁶¹ *Borland’s Trustee v. Steel Brothers and Co. Ltd, supra.*

6.0 COMPANY SECURITIES AND SECURED CREDIT TRANSACTIONS.

Having seen the common features of company securities, this paper will then see the linking point between company securities and secured credit transactions. The correlation of the two concepts will be discussed in two folds, namely:

- i. In relation to the issuing companies; and
- ii. In relation to individuals holders of company securities.

6.1 COMPANY SECURITIES AS FORM OF SECURITY TO ISSUING COMPANIES

Generally speaking, securities are a means through which commercial enterprises raise new capital as an attractive alternative to a bank loan. Companies can generate a lot of money when they go public, selling stock in an initial public offering to raise funds for particular projects. Whoever creates the securities for sale is called the issuer; and it is investors who buy them⁶². These securities serve as collateral and security to the investors thereby giving them comfort to invest in those companies. They can generally be classified as equity securities and debt securities, although there could be other hybrid but this paper is limited to the securities as found in Companies and Allied Matters Act, 2020. A little recap of this classification is done hereafter.

Equity securities are shares and stocks in a company, partnership or trust. Shareholders aren't usually entitled to regular payments but paid dividends. Investors buying equity securities further benefit from profit from capital gains when they sell the securities provided they've risen in value. Equity securities also give the holder some influence over the issuing company for example, through voting rights at its annual general meeting.

Debt securities are money that's borrowed and must be paid back at the end of a fixed term. Examples of debt securities are debentures, corporate bonds, collateralised debt obligations and certificates of deposit. Holders are usually entitled to regular interest payments and repayment of principal, though not to voting rights. Debt securities can be secured or unsecured. A closer look at bonds will reveal this salient point. From the definitions of bonds as earlier stated reveal that bonds like any other credit transaction involves lending of money by an investor and in return as security, the investor is given a bond, which is promise to repay at a later date both the principal sum invested and agreed interest as a return on investment. The usefulness of bonds in a credit transaction typically are the reasons why bond transactions are preferred to the other credit transactions that involve lending or investing of funds to be repaid at a later date.

From the foregoing, company securities can be said to have direct relationship with secured credit transaction as those who acquire these company securities are mere investors who in clear terms have lent their money to the company with a view to recoup their investment thereafter. To further buttress this point the respective companies issuing these company securities do issue these securities to the holders (investors) as form of security for their investments. More so, as most often, the companies further attach these securities to their assets. Thereby, making the transactions purely secured credit transactions.

6.2 COMPANIES SECURITIES AS FORMS OF SECURITY TO INDIVIDUAL HOLDERS

As earlier seen from our discussions on common factors running through all the company securities ranging from their being chose in action to their being transferable from a holder to

⁶² Capital.Com, accessed from <https://capital.com/securities-definition> on 28/8/2021.

another, these features make company securities veritable instrument as security for loan. These features are the nexus and correlation between company securities and secured credit transactions. Let us now discussed how these instruments can be used in securing loan facilities. To further proof this let us see how these company securities are used as security in secured credit transactions by reviewing these company securities seriatim.

6.2.1 Shares:

A. *Creating Legal Mortgage On Shares*

In creating a legal mortgage as security for a loan using shares, the holder or owner of the shares shall do the following:

- i) Surrender the share certificate to the Bank or the lender where he intends getting the loan from;
- ii) Execute the instrument of transfer of the shares in favour of the lender;
- iii) Execute a mortgage deed with the lender as mortgage;
- iv) Then the registration of the mortgage deed, though in practice, this done by the mortgagee, but the charge is born by the mortgagor.

B. *Creating Equitable Mortgage On Shares*

Just like the other methods of creating equitable mortgage on the other types of instruments, creating equitable mortgage on shares requires the depositing of the share certificate(s) with the lender and executing a memorandum of deposit in favour of the lender and expressing that the deposit is for security purposes pursuant to a loan granted the holder of the share certificate(s) by the lender.

C. *Blank Transfer Of Shares*

In order to run away from problems that may be associated with either legal or equitable mortgage, Banks now use this third method asking the customer to do the following:

- i). to deposit his share certificates with the Bank,
- ii). to execute a memorandum of deposit with the Bank,
- iii). to execute a blank transfer of the shares,
- iv). to give notice of transfer of the shares to the issuing company, in favour of the Bank,
- v) to execute a dividend mandate form in favour of the Bank.

The customer is then required to fill in his names as stated on the shares certificate in the form provided, stating his position as transferor and the Bank as transferee. The maturity date and value are left open and to be filled by the Bank whenever they want to enforce the transfer upon default.

6.2.2 Debentures

Debentures are negotiable instruments transferable by mere delivery. A bona fide transferee for value without notice is not affected by any defect in the title of the prior holder. It is transferable free of all equities or cross claims between the company and the original or any intermediate holder. Adding statutory flavour to this, *Section 214(1)*⁶³ provides that “Except as expressly provided in the terms of any debenture, debenture shall be transferable without restriction by a

⁶³ Companies and Allied Matters Act, *Ibid*.

written transfer in any usual or common form, or any other form which the directors of the company may approve, and that the transferee is entitled to the debenture and to the money secured thereby without regard to any equity, set-off or cross-claim between the company and the original, or any intermediate, holder.”

In using debentures as collateral for secured credit transaction, by a written transfer agreement between the holder of the debenture and the secured creditor and by so doing, interest in the debenture is transferred to the creditor but when the obligation is fulfilled the transfer agreement is cancelled. This is the way debentures are used as instrument for secured credit transaction.

6.2.3 Debenture Stock

The debenture stock is also a transferable instrument just like debentures. If there is any restriction that is imposed on it that could debar its transferability, it shall be endorsed on the face of it. Agreeing with this *Section 214(2)*⁶⁴ provides that “provided that if any restriction is imposed on the right to transfer any debenture, notice of the restriction shall be endorsed on the face of the debenture or debenture stock certificate and in the absence of such endorsement, the restriction shall be ineffective as regards any transferee for value, whether or not he has notice of the restriction.”

From the foregoing, the certificate evidencing debenture stock holder is a transferable instrument which confers value to a transferee and is used as security for secured lending.

6.2.4 Bonds

Bonds are assignable from a holder to another. In creating security using bonds in a secured credit transaction, the bond agreement is assigned as a legal mortgage or deposited with the lender as in equitable mortgage of shares. However, in the case of assignment of bonds being highly regulated company securities transaction it needs not only be registered with Securities and Exchange Commission, but with other regulatory authorities as was further explained by Ogbuanya N.C.S⁶⁵ he said that bonds are “highly regulated Security transaction by Investment & Securities Act, 2007 and Securities and Exchange Commission Rules and Directives of the Debt Management office pursuant to The Debt Management Office (Establishment) Act No. 13, 2003. Trustee Investment Act also applies to the operation of the bond”. For instance the FGN bonds are Federal Government of Nigeria securities issued under the authority of Debt Management Office (DMO). Since 2003, DMO has been regulating the activities of the FGN bonds market, while the Central Bank of Nigeria acts as the Issuing House and the Registrar.”

7.0 NEED FOR HARMONY

Having seen the various company securities and their enabling laws, having also found out that the essence of offering company securities by firms is to raise money and to offer investors comfort for their investments and having found that the core nature of these forms of transactions are secured credit transactions, then the need for harmony cannot be overemphasized. More so, the company securities by themselves are forms of security and can be used by their holders to secure loan facilities in secured credit transactions.

This need is principally to be seen from two perspectives. Firstly, is the need to harmonize all laws relating to company securities. The most challenging issue here is the

⁶⁴ Companies and Allied Matters Act, *Ibid*.

⁶⁵ Ogbuanya N.C.S., *Essentials of Corporate Law Practice in Nigeria, Ibid*, 572.

compartmentalization of laws creating company securities. For instance, issuance of bonds are regulated by over 5 Laws. Ranging from Investments and Securities Act, 2007 to Companies and Allied Matters Act, 2020, to Securities and Exchange Commission Rules, to Directives of the Debt Management office pursuant to The Debt Management Office (Establishment) Act No. 13, 2003. Even Trustee Investment Act also applies to the operation of the bond. This is worrisome. There is therefore an urgent need to harmonize all transactions relating to company securities under a singular Act. By so doing, company securities and secured credit transactions mode of creation, satisfaction and enforcement will be streamlined and practice in this area of the law will be made less cumbersome.

Secondly, forms of creating company securities need be harmonized. All the above enumerated company securities should have a streamlined singular method of creation. This will help ease the enforcement procedures arising from how these securities were created.

8.0 SUMMARY

Companies borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital or any part of it and issue their securities. These securities are issued as security for the borrowed money. They are forms of agreement entitling the lenders to periodic payments as returns on their investment. They include how their invested sums are to be repaid and other different kinds of rights accruable to the holders. These securities include the following:

- i. Shares;
- ii. Debentures;
- iii. Debenture stock;
- iv. Bonds;
- v. Global Depository Receipt; and
- vi. Unit trust scheme.

A closer look at the company securities further reveals a common thread linking them. They include:

- i. They are all chose in action;
- ii. They are all forms of ways companies raise funds to carry on their business ventures;
- iii. All company securities are transferable;
- iv. They are forms of investments made with a view to recoup such investment together with returns on investment;
- v. They are all forms of secured credit transactions as they are ways through which companies raise money and in exchange give out their securities as comfort on which charges may or may not be created on their assets. More so, the holders can use them as instruments to secure loans.

However, from the findings of this paper, despite these common threads, company securities have different laws regulating their administration distinctly. The implication is that their issuance, placement for public participation, rights arising from holding them and enforcement differ from one type of company securities to the other. While shares are regarded as equity securities, almost all the other types of company securities are seen as debt securities.

All these distinctions, since company securities seek to perform the same function, which is raising of funds for the company that issue them and also the fact that they are all forms of

secured credit transactions, arose the need for harmony.

This seminar paper in an attempt to harmonize company securities as forms of secured credit transactions made recommendation that company securities be brought under one encompassing Act and suggested it be made part of Secured Transactions in Movable Assets (Collateral Registry Act), 2017.

9.0 CONCLUSION

It is inevitable that in running a Company, capital is generally required. This capital can be raised in various ways. One of the most important ways of raising capital is issuance of company securities, ranging from shares, debentures, debenture stock, bonds, Global Depository Receipts, to Unit trust scheme. These company securities are forms of secured credit transaction. Hence they serve the same purpose, arises the need to harmonize them by making them subject to a singular Act and not to be regulated by some Acts and Rules as it is presently done.

10.0 RECOMMENDATIONS

Since company securities transactions are actually secured credit transactions, there is then the need for harmony. This seminar paper, therefore, recommends that since the President has assented to the Bill on Secured Transactions in Movable Assets, and Secured Transactions in Movable Assets (Collateral Registry Act), 2017 being the enabling law regulating secured credit transactions on movable assets, this paper then recommends that company securities be made subject to this Act which aims to provide for the registration and regulation of security interests in movable assets, by enhancing financial inclusion in Nigeria, stimulating responsible lending and facilitating access to credit secured with movable assets.

The Act⁶⁶ should further be expanded to regulate the transactions made between holders of the company securities who use them for loans. This will not only solve the need for harmony but will provide for smooth transaction and the leverage in running of any business.

⁶⁶Secured Transactions in Movable Assets (Collateral Registry Act), 2017.