



## Corporate criminal liability in Nigeria: Converging ethics and prescriptive compliance principles to minimize money laundering and terrorism financing risks

**Dr. Mohammed Suleh-Yusuf**

Post-Doctoral Researcher on Corporate Criminal Liability, Money Laundering, Terrorism Financing and Cyber Security.  
Nasarawa State University, Keffi, Nigeria

### Abstract

This Paper looks at the issues around criminal liability in Nigeria as it relates to prosecution of companies for money laundering and terrorism financing in the last five years. It also reflects the nature of the approach adopted by Investigators and Prosecutors in Nigeria in cases bordering on money laundering and terrorism financing. This approach clearly shows that the investigating and prosecuting agencies had a broad mindset in their determination of corporate criminal liability; without the narrowing and restrictive impact of reliance on one doctrine or completely relying on traditional elements of intent. It also points to a reliance on a wide ranging band of intents and acts wrapped around intents and acts of employees and agents; not merely attributing the intents and acts of the alter egos to the company. Therefore, when reviewing the trend of the prosecution of companies in Nigeria there is clearly an open-ended approach that leaves companies exposed to multiple layers of risks. Hence the traditional compliance frameworks being deployed by companies are not adequate to cover all the risk zones and the companies are open to prosecution for intents and acts of all its employees and most of its agents.

**Keywords:** regulatory, compliance, money laundering, terrorism financing, ethics, criminal liability

### Introduction

This Paper will show that companies in Nigeria are facing multi layers of risks in relation to money laundering and terrorism financing. These multi layers of risks are in context and nature outside the narrow angles of the traditional compliance frameworks and programmes. These exposures put the companies in the fire line of investigators and prosecutors; and the lack of mitigants makes the situation perilous.

The current approach to compliance is based on a prescriptive mindset and rules driven understanding of the risks and the necessary mitigation processes. This Paper believes it is inadequate to meet the challenges of willful blindness<sup>[1]</sup> as a base point of corporate criminal liability in Nigeria as it relates to money laundering and terrorism financing. Clearly the approach of prosecutors and law makers in Nigeria is to apply broad classification of what constitutes criminal liability for companies and by extension under the willful blindness doctrine the same characteristics apply. Hence the attribution principles are mere judicial directions in Nigeria but most prosecuting agencies, particularly the Economic and Financial Crimes Commission (EFCC) that deals with money laundering, do not attribute the mens rea and acts of only an alter ego to the company but broadly apply these principles to all employees, agents and related persons. Therefore, the best solution is to build programmes that marry the rules-based principles of traditional compliance with the values-based conditions of ethics; this will create a sustainable business

climate that is based on a culture of transparency and fairness.

Ethical business cultures are based on alignment between formal statutes, processes and policies with consistent ethical behaviour of top leadership and an inspiration of all employees and agents to behave in a manner consistent with high ethical standards that have been set by the top leadership. Stucke<sup>[2]</sup> stated that a recent business ethics survey found that 'a values-based culture does not detract from high performance but rather provides a competitive advantage' to companies. He states that the US Sentencing Guidelines, while not offering a model programme that marries ethics and compliance, provides seven attributes that may define such a programme. One, clear compliance standards and procedures designed to prevent and detect criminal conduct for different business units based on the types of risks that may likely occur there. Two, senior management's knowledge, commitment, oversight and support for such programme. Three, proper screening of staff during hiring and promotion to ensure unethical persons do not enter or remain in the system. Four, continuous training of employees and other stakeholders on the values and rules of the programme. Five, monitoring, auditing and reporting requirements and periodic self-assessments of the programme's effectiveness. Six, disciplinary enforcement and incentives consistent with compliance. Lastly, taking corrective measures after detecting criminal conduct. These attributes have been replicated in most compliance programmes of US

<sup>1</sup> This Paper looks at Willful blindness as a supplement of the traditional mens rea

<sup>2</sup> M. E. Stucke, In Search of Effective Ethics and Compliance Programs (2014) The Journal of Corporation Law, 39, 4, pg. 769

companies and remain reference points for regulators and enforcement agencies across the US and Europe.

To illustrate how the convergence of compliance and ethics works we need to review one of the works of Verschoor<sup>[3]</sup> when he wrote on benchmarking ethics and compliance. He reviewed how the Open Compliance and Ethics Group (OCEG) created a compliance framework that is dynamic and in line with the discussions on a merger of compliance and ethics. The OCEG framework demonstrates how to integrate governance practices, risk management, ethics and compliance into the normal business operating practices of a company. The OCEG framework is touted to provide benefits such as avoidance of social, reputational, economic risks, civil liability as well as possible criminal penalties. The OCEG Framework has six principles driving it; one, to integrate ethics and compliance by combining the set of core values intrinsic to the company with its commitment to ethics and compliance, with the design of a programme. Two, embed compliance and ethics management processes into the business. Three, the company's senior management should consistently put the company's values into practice and clearly communicate the programme's expectations to all employees. Integrity and ethical behaviour should be included as part of the normal evaluation and periodic appraisals of employees. Four, the ethics and compliance programme should motivate a culture within the company that recognizes the premise that individuals should be responsible for their actions. Five, provide an open culture to enable employees speak up about sensitive issues without fear and lastly to measure performance and results of the implementation of such a programme in any company.

It is now becoming increasingly common for scholars to distinguish between compliance with law and regulations on the one hand and ethics (or morality, values and integrity) on the other. The conventional expression of the ethics and compliance distinction is that compliance is ordinarily a necessary but insufficient condition for ethical business practice. Therefore, compliance with law is a minimum requirement while in contrast ethics is a much higher standard that outstrips compliance. Ethics-oriented approach to business conduct management is more sophisticated and advanced than mere compliance programmes.

### **The Octagon Business Ethics Framework<sup>[4]</sup>**

This Paper believes that there is a widening application of corporate criminal liability in Nigeria and the inadequacies of traditional compliance programmes to meet these challenges and risks. The Octagon Business Ethics (OBE) framework is built by this Paper as a multi-layered process that merges the principles of compliance and ethics; this will close out gaps that were opened up by the identified risks.

The OBE is based on eight approaches that isolate and mitigate peculiar risks that faces different aspects of the company and its activities. It has provisions for board level business ethics principles and compliance processes; there are principles specific for management of the company, its employees, vendors and other stakeholders. The OBE also made provisions for cross border transactions; a viable and vulnerable point in relation to terrorism financing and money laundering. The OBE also made provisions that will

create a wall of ethics that will separate some key aspects of the business.

First, the OBE has board level exculpatory principles that ensures the board takes charge of the company's compliance and ethics health; to avoid both corporate and personal criminal liabilities. These exculpatory principles are designed to ensure that the board has oversight over the management and also provide direction in the enforcement of the OBE across the business. Secondly, the OBE has made provisions for senior management level ethics guidance that empowers the Chief Executive Officer (CEO) to drive the building and enforcement of the OBE within the business. It is to be guided by management-specific principles that required full disclosure of interests by all senior management as well as submission of periodic activity reports that document compliance levels at the management level.

Thirdly, the OBE has some guiding principles to regulate the behaviour and activities of employees. This guidance is to be driven by a compliance and ethics programme to be managed by the Chief Compliance and Ethics Officer (CCEO). Remarkably the guidance requires that the review of an employee's compliance levels should be made part of the customary annual performance appraisal processes; this creates an avenue for reward and retribution. The fourth part of the OBE framework took into consideration the risks that third parties pose to a business, even where is by itself compliant. It made provisions for vendors and third parties, who may act for the company and may also have their intents and acts attributed to it. This responsibility is bestowed on the board through its Ethics Committee. The tool for this process is the review of Vendors' prequalification's and the requirement that vendors indemnify the company against any acts that is outside its scope.

Fifthly, the OBE framework took into consideration the high risks levels of politically Exposed Persons (PEPs) and entities under their control. The duty is also placed on the board to ensure that all PEPs are disclosed and annually a review is conducted to check all relationships with PEPs. More importantly the process has a PEP Disclosure angle that requires all staff, management and board to report such a relationship. The sixth part deals with control of all cross-border transactions through the ethics programme. The process requires that all transactions that have cross border angles must be approved by the board before it commences or where it only becomes a part of the process after their disclosures.

The seventh process is key to the OBE and this Paper is not specific as to the contents of the Ethics Compliance Principles. Therefore, companies should build the principles in line with their corporate culture, regulatory requirements and sectoral needs. The last part of the OBE creates a wall that separates curtains arms of the company from one another. This separation is to ensure that there are no overlaps that may create ethical dilemmas for company. A good illustration is that the Audit function should not be part of the management of the company but should report to the board. Likewise, because of the wall cannot cross the wall without prior board approval.

### **Board Level Exculpatory Principles**

The board of a company holds a key position in the scheme of things and has a responsibility to ensure that it is being

<sup>3</sup> C. Verschoor, *Benchmarking Ethics and Compliance Programs* (2005) *Strategic Finance*, pg. 17

<sup>4</sup> This Framework was part of the outcomes of a Doctorate in law research by this Author

run in line with regulations and law. Although it is necessary to acknowledge that under the alter ego doctrine the main persons driving a company maybe in its board, its management or even amongst its employees. The essence of the exculpatory principles is to outline the role of the board in ensuring that the company meets its statutory and regulatory obligations.

The board level exculpatory principles will guide the board members and sets out a combination of compliance and ethical requirements that will ensure they are in line with the law. These principles are to be managed by a Board Ethics Committee that has powers to approve the principles, review them and enforce them. The Board Ethics Officer, to be selected amongst the members of the board, will report to the committee and ensure these principles are complied with. There are two mechanisms to ensure the effectiveness of these principles and its enforcement. First, there will be a full data disclosure by all members of the board and it will ensure that all business and commercial interests of board members are documented. Secondly the Periodic Activity Report will ensure that the Board Ethics Committee keeps a continuous track of all activities of members of the board and put mitigants in place where there are blurred lines or grey territories in the Reports.

The exculpatory principles are not directly related to the traditional corporate governance regimes but rather a tool that enhances the governance process by holding the board responsible for all acts they individually or collectively undertake while being on the board. The exculpatory principles will manage conflict of interests and reduce insider-based abuses that have crippled businesses. More importantly the exculpatory principles will ensure that the board acts in a manner that is consistent with the company's ethical and compliance culture. Likewise, to strengthen its application, the exculpatory principles should form part of the company's report at Annual General Meetings (AGM) and Shareholders' Conferences (SCs).

This Paper is not oblivious to the diversity in business practices, recommends that each company builds its exculpatory principles in a form and content that meets its distinct business culture as well as the expectations of its immediate regulatory environment.

### **Senior Management Level Ethics Guidance Principles**

The senior management of the company have roles that exposes the company to the attribution principles and hence the need to mitigate that gapping risk. The senior management ethics guidance principles rest on the Chief Executive Officer (CEO) who oversees operational management of the company and the enforcement of these principles. Beneath the CEO is the Chief Compliance and Ethics Officer (CCEO), who is the process owner and manages the implementation channels for all management level persons within the company. The company needs to create these principles as a combination of the traditional compliance requirements as well as a corporate ethical standard that will create a long-lasting corporate culture.

The principles are to be enforced and monitored through two mechanisms. First, the full data disclosure process that will require all senior management to provide all details of other business transactions and relationship that may impact on the discharge of their duties within the company. The second mechanism requires periodic activity reporting by

every senior manager to the CCEO, who in turn will submit to the CEO on quarterly basis.

The alter ego of a company will most likely be in a senior management position and his acts are liken to that of the company. Therefore, these principles will ensure that all acts of the senior management are well guided and the company insulated from any consequences based on the attribution principles. The two layers of control are intended to ensure that all the fulcrums of law and operational risks are catered for. The ethics principles will make senior management act with integrity, transparency and openness. While the management compliance programme will ensure they act within the ambits of the law.

### **Employee Level Ethics Guiding Principles**

The CEO has an oversight over the employees' ethics and compliance programme and manages its implementation through the CCEO. The employees are to be guided by a fused compliance and ethics programme that is based on principles of regulatory compliance and ethics. The employee will be evaluated on his adherence to the programme during the annual appraisal process. More so the employee must file compliance and activity disclosure reports every quarter; highlighting his investments, business interests and other matters that may impact on his duties and responsibilities.

The main aim of the guiding principles is to regulate the behaviour of all employees and guide them on ethical codes and compliance themes that impact on corporate activities. Therefore, the principles of compliance with regulations such as tax remittances by all employees will be accentuated by ethical codes on integrity, honesty and openness.

In Nigeria the approach to corporate criminal liability has vacillated between the dominant doctrines of alter ego and respondeat superior; leaving companies open to uncertainties. This guiding principle are built in a manner to mitigate the risks of a respondeat superior approach that may aggregate acts of employees and attribute them to the company. Hence the guiding principles has deep dived down to the employee level and not focused on the alter go; who may be heart of soul of a company. Secondly the company can build and sustain a corporate culture by cultivating all employees, rather than a select group of senior executives.

### **Vendors and Third Parties Ethics Compliance Principles**

It is clear from the provisions of the UK Anti-Bribery Act and the United States' FCPA that third party's non-compliance with their provisions can be attributed to the company and punitive actions taken accordingly. The attribution is closely linked to the tenets of the agency-principal relationship that commercial and contract laws have long established as a bond of responsibility. Thus, there is a need to insulate the company from acts of its vendors, suppliers and other third parties through a programme that identifies these risks and mitigates them. Due to the importance of this issue the recommended programme will be guided, implemented and supervised by the company's board through its ethics committee and the Board Ethics Officer will have operational management of the programme and report periodically to the Committee. The mechanism to ensure this risk is insulated is through a close management of the company's prequalification processes by empowering the board to be the approving

authority for all steps in the process. Therefore during prequalification, requisition and all precontract stages the management must seek and obtain board's clearance after submitting a detailed outline of the projects and full information of all shortlisted bidders. The second mechanism requires the companies that get such board approvals to also indemnify the company against any act that may lead to criminal investigation or prosecution.

**Politically Exposed Persons (PEPs) and Public Officials Ethics Restrictive Rules**

This aspect of the OBE is intended to mitigate the risks posed by public officials and Politically Exposed Persons (PEPs) who are vulnerable to money laundering offences. It is noticeable from the cases analyzed in this Chapter that a lot of companies fall into criminal liability due to badly managed relationship with public officials and PEPs. The board will be empowered through its ethics committee to manage a two-pronged process that requires all employees, senior management and the board to make quarterly disclosures on any relationship with a public official or a PEP. This disclosure will enable the company to manage its conduct and review that of the impacted employee.

The second mechanism requires the company to conduct a mandatory annual PEP review of its employees, transactions and stakeholders. The annual review will enable the company to locate any impacted person, process or transaction that may have not been adequately captured through the quarterly disclosure process.

**Cross Border Ethical Control Principles**

The OBE appreciates the risks posed by cross-border transactions and activities in relation to money laundering and terrorism financing. To mitigate these risks the Framework requires that all transactions and activities that have cross-border elements must be pre-approved by the Board through its Ethics Committee. Therefore, any transaction or activity that qualifies for such pre-approval should be presented to the Board Ethics Officer who reviews it and present to the Ethics Committee for approval before the process commences. This will ensure that the Board takes full responsibility of all transactions and activities that fall within this parametre rather than leaving it out for operational decision making by the company's senior management.

**Ethics Compliance Principles**

Compliance-based ethics management has become the primary method of maintaining high ethical standards in many companies that are focused on best business practices. There are several reasons why companies have embraced compliance regulation as the key method of keeping public confidence in their integrity. Compliance-based management provides companies a certain level of immunity from illegal acts committed by their employees and officials, and significantly reduces pressures to implement integrity-based programs by lowering organizational ethical expectations. The heavy reliance on compliance ethics has made it much more difficult for employees and officials to hold organizations accountable for actions that fall outside the scope of compliance-based ethics laws and regulations.

This Paper recommends that each company build its own compliance principles that will drive the OBE or any part of

it they may have adopted. This is to ensure that the OBE is tailored to meet unique and distinct corporate cultures that should form the basis for the compliance principles. This aspect of the OBE is important because it will put flesh to the OBE and ensure it captures regulatory prescriptions, statutory provisions and corporate ethical standards. It is clear that a fusion of compliance principles and ethical standards will have a divergence point that will make it unwieldy to adopt a one-shoe-fits-all approach.

Although this Paper will not provide an ideal Ethics Compliance Principles, it provides certain key attributes that every Ethical Compliance Principles must cater for in one way or the other. The five key attributes are:

**Ethics and compliance to form part of the Company's corporate and business strategy.**

The best ethics and compliance programmes must be part of the corporate and business strategy of the company and not merely guidance to corporate behaviour. The ethics and compliance function should have an independent and transparent structure with a Chief Compliance Officer, that officer should be counted on to contribute to a company's strategic discussions and daily operations. Proposals for new initiatives should be measured by alignment with a company's values. In other words, an ethics and compliance department doesn't exist only when a crisis related to an ethical lapse arises. Reports on compliance performance or audit results are regularly shared with company stakeholders and regulators.

- 1.
2. **Ethics and compliance risks are identified, owned, managed, and mitigated.**

Risk assessments can help the company identify key risks and assign a risk leader or owner to each risk. Companies with high-quality ethics and compliance programmes communicate regularly with the workforce to explain how risks can be mitigated and to create a risk response plan. Clear policies and standards, and systems for raising risk concerns are all part of a strong ethics and compliance function. This is also a recurrent point in all Statutes and Regulations on Money laundering and terrorism financing in Nigeria.

- 3.
4. **Board and Senior Management build and sustain a culture of integrity.**

The building and sustaining of a corporate culture of integrity must be driven by the Senior Management and the Board to ensure acceptability. More so the acts and behaviour of the Senior Management and Board members will influence the corporate culture. A strong drive from the top will ensure alignment by all elements within the company and guarantee continuity of such a culture as the company evolves in any form.

5. **The Company encourages, protects, and values the reporting of concerns or suspected wrongdoing.**

The company must encourage its employees to speak up about possible abuses related to ethics and compliance, even high-quality training and clear policies won't do much good unless such a mechanism exists. Senior management and the Board must create an environment of openness that makes employees comfortable raising issues early, before those issues become outright misconduct. Companies' intent on establishing high-quality ethics and compliance programmes

should listen to employees' concerns and should praise those who speak up.

### **The Company acts and holds itself accountable when wrongdoing occurs.**

While fewer ethics and compliance lapses are likely in companies with a strong culture of compliance, those companies can demonstrate accountability through fast and responsible action. Investigation of alleged misdeeds should be thorough and fair, but should not drag on. Consequences should be appropriate, regardless of who violated the ethics and compliance standards. And when wrongdoing does happen, a company should use the incident as a learning opportunity for employees.

### **Ethics Wall Principles**

There is a need to build a compliance system that manages, tracks and enforces ethical walls and information barriers. This approach ensures the independence and integrity of the Compliance and Ethical framework that a company may have deployed. Historically, firms implemented barriers procedurally, by distributing memoranda, restricting access to physical records, and relying on the professional diligence of its policing departments and staff. However, with more and more information stored electronically in easily accessed repositories, firms must extend protections to document management, records management, portal and other systems.

Therefore as part of the Compliance and Ethics framework a Wall will separate certain work functions and ensure information are restricted in a way to ensure a part does not have any impact on the other part. This segregation takes into cognizance the nature of the functions and their cross impact on the related and non-related aspects of the business. A good illustration is the segregation of the Audit function from any form of control and oversight of the company's management; hence while the Audit function performs operational tasks it will not be overseen by the management. The second illustration is the segregation of the Corporate Operations functions from the function that collates reports, statistics and data; in a manner that ensures that while the latter depends on the former for its sources of collation, it will not be under it or in any manner under its supervision.

Strong ethics and compliance functions are designed and implemented as part of a company's culture. Ethics and compliance practices cannot be carried out by a single department or division. They're ingrained in a company's strategy, not applied on a decision-by-decision basis. Third-party risk, such as supply chain abuse or corruption, reflects poorly on not just the vendor but also the parent company. If a supplier is aware of a company's stance on ethical behaviour, and is offered training on how to respond to potentially compromising scenarios, it is more likely to take the high road.

### **Conclusion**

This Paper has opened another area for discussion as it relates to exposure of companies to money laundering and terrorism financing risks in a country that has struggled to counter these activities. It has shown that it will be speculative to conclude that the current approach of companies to the widening risks to money laundering and terrorism financing prosecution will be guided by

established principles and processes. This Paper has shown that prosecutors, and the courts in the long run, can rely on intent attributable to companies, this will provide both prosecutorial options and also support cases that are not based on strong and positive evidences. While concluding that Nigeria has not developed a definite approach to the application of criminal liability to companies, it is imperative to acknowledge that there are open opportunities for prosecution of companies. Furthermore as outlined in this Paper it also shows that there are open risks for companies in Nigeria and the traditional compliance programmes are inadequate to cater for these evolving risks. Therefore it is imperative to combine prescriptive compliance with a culture of ethics that will drive internal processes as well as compliance processes. Yet we cannot lose track of the fact that it is never easy doing business in Nigeria, but a prepared company or organization can make adequate mitigation plans that will reduce and possibly eliminate risks associated with money laundering and terrorism financing.

### **References**

1. Clapham A. The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court Liability of Multinational Corporations under International Law, 2000, 139.
2. Daniel AR, Wilful Blindness: The Hazards of an Evolving Standard of Knowledge. Law Student Scholarship Paper, 2013, 347.
3. De Maglie C. Models of Corporate Criminal Liability in Comparative Law Washington University Global Studies Law Review, 2005; 4:548.
4. Diamantis M. Corporate Criminal Minds Notre Dame Law Review. 2016; 91(5):2050.
5. Ekhatior EO. Regulating the activities of oil multinationals in Nigeria: A case for self-regulation?. Journal of African Law, 2016, 1-28.
6. Ekhatior E, Anyiwe L. Foreign direct investment and the law in Nigeria: a legal assessment. International Journal of Law and Management, 2016; 58(1).
7. Emem CE, Uche P. A New Dawn of Corporate Criminal Liability Law in the United Kingdom: Journal of Law and Criminal Justice. 2015; 3(2):63-72.
8. Engle E. Corporate Social Responsibility (CSR): Market-based remedies for international human rights violations. Willamette Law Review, 2004, 40.
9. Engle E. Corporate Social Responsibility (CSR): Market-based remedies for international human rights violations. Willamette Law Review, 2004, 40.
10. Erhaze S, Momodu D. Corporate Criminal Liability: Call for a New Legal Regime in Nigeria. Journal of Law and Criminal Justice. 2015; 3(2):63-72.
11. Erhun MO. A Legal Framework of Sustainable Environmental Governance in Nigeria. Frontiers of Legal Research, 2015; 3(4).
12. Esoimeme EE. A Comparative Study of the Money Laundering Laws/Regulations in Nigeria, the United States and the United Kingdom: Reporting Requirements. Professionals Center for Business Research, 2015; 2(06).
13. Eze NM, Nnamdi AC, Ibrahim MM. Fraudulent Practices in Nigeria: Auditors Responsibility. Journal of

- Business Management & Economics. 2015; 3(12):19-27.
14. Famuyiwa O. Forum Issues in the Enforcement of Regulatory Obligations of Nigerian Public Companies. *Journal of Sustainable Development Law and Policy (The)*. 2015; 5(1):72-100.
  15. Ferran E. Corporate Attribution and the Directing Mind and Will, 27 *LQR*, 2011, 239-259.
  16. Fischel D, Sykes A. Corporate Crime, *Journal of Legal Studies*, 1996; 25:319-323.
  17. Fons JJ. The Case for Compliance: Now it is a Necessity, Not an Option *Business Law Today*. 2003; 13(1):26-29.
  18. Garcia A. Corporate Liability for International Crimes: A Matter of Legal Policy Since Nuremberg. *Tul. J Int'l & Comp. L*, 24:97-315.
  19. Grantham R. Corporate Knowledge: Identification or Attribution, 59 *The Modern Law Review* at, 1996, 733.
  20. Granville W. *The Foundation of Tortious Liability*. The Cambridge Law Journal, 1939.
  21. Greenfield W. Attention to People and Principles is Key to Corporate Governance and Ethics Employment Relations Today. 2004; 30(4):6-10.
  22. Gruner R. *Corporate Criminal Liability and Prevention* Law Journal Press, 2005.