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Changing Regulatory Landscape for Mergers and Acquisitions Transactions in Nigeria

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Introduction

In this Article, we will examine some of the recent changes to the regulatory regime for, and the impact on, mergers and acquisitions (“M&A”) in Nigeria.

Amendments to the Capital Gains Tax Act, Cap. C1, LFN 2004 (CGTA) by the Finance Act, 2021 (the “2021 FA”)

Capital Gains Tax (“CGT”) is a tax charged on the profit made from the sale of chargeable assets. Chargeable assets are tangible and intangible property, other than a Nigerian currency, whether situate in Nigeria or not.¹ Prior to the 2021 FA, no CGT was chargeable on disposal of shares. However, the provisions of the CGTA have been amended by the 2021 FA to now subject the proceeds on the disposal of shares arising from the transfer of shares in a Nigerian company registered under the Companies and Allied Matters Act, 2020 (“CAMA”) to ten per cent (10%) CGT of the shares, payable by the seller.²

This will increase costs for M&A transactions due to the additional burden of paying CGT on disposals of shares. Further, the CGT applies to both private sale and public sale of shares in Nigerian companies. In trying to reduce its transactional costs, the seller may push the cost burden to the buyer. Depending on the bargaining strength of the buyer and how attractive the stock/shares for sale are, buyers may accept to bear the cost (or share the burden) for this additional tax.

There are, however, exemptions to this provision under the 2021 FA which could reduce exposure to CGT. CGT will not be paid where the transfer: (i) qualifies as a “Regulated Securities Lending Transaction” within the meaning of the Companies Income Tax Act, 1977 (as Amended) (“CITA”);³ (ii) relates to aggregate share disposal proceeds of less than ₦100,000,000 (One Hundred Million Naira) in a period of twelve (12) consecutive months for the seller, and the seller renders appropriate returns to the Federal Inland Revenue Service on an annual basis; or (iii) relates to a transfer where the proceeds of the share disposal are fully or partially reinvested within the same year of assessment of the acquisition of such shares in any Nigerian company. CGT will, however, apply in respect of (iii) to the portion of the proceeds which are not reinvested.

It is important to note that the production of evidence of tax payments is required to effect the change of ownership of the shares transferred.⁴ There is, however, no express provision on the application of this provision, in terms of which regulatory authority the evidence of payment of tax is to be presented to, and at what stage it will be required.

Amendments to the Rules on M&A by the Securities and Exchange Commission (“SEC”)

The New Rules, Major and Sundry Amendments to the Rules and Regulations of the SEC dated August 30, 2021 (the “New SEC Rules”) made significant amendments to Public M&As. The New SEC Rules mandate public companies to obtain the SEC’s prior

¹ Section 3, CGTA.

² Section 30 (1), CGTA.

³ Regulated Securities Lending Transaction is defined by CITA as any securities lending transaction

conducted pursuant to rules made by the Securities and Exchange Commission.

⁴ Section 45, CGTA.

approval before the consummation of M&A transactions. Prior to the amendments, there was no requirement for the SEC's approval by public companies undertaking M&As. What was sought in practice, was the SEC's "No objection" to the M&A transaction in line with the SEC's supervisory powers of public companies and the capital markets.⁵ The SEC's supervision of such transactions was largely moved to the Federal Competition and Consumer Protection Commission (the "FCCPC"), thus, limiting the SEC's powers to ensuring minority protection and fairness of the M&A transactions where public companies were concerned.

Under the New SEC Rules, the SEC will give its approval if it is satisfied that the non-selling shareholders of the target entities are treated fairly and equitably and that those shareholders have been provided with sufficient information about the transaction.⁶ The New SEC Rules apply to (i) public companies which issue their shares as consideration for an acquisition, (ii) acquisitions of shares, assets, business, or subsidiaries of a public company, and (iii) divestments⁷ of or above 15% of the total assets of public companies or divestments which constitute a business line of the company.⁸

The New SEC Rules also amended the applicable notification fee payable to the SEC. By the amendment, the sum payable has now increased from ₦50,000 (Fifty Thousand Naira) to ₦100,000 (One Hundred Thousand Naira) per undertaking.

Further, with respect to divestments, the SEC may require the notification of such divestment, and in the absence of such demand by the SEC, a public company may voluntarily notify the SEC of the divestment.⁹ The following transactions by public

companies are caught under the New SEC Rules: (i) a share reconstruction or conversion of the company; (ii) carve-outs, spin-offs, split-offs or other reconstructions of the shares of the company; (iii) an acquisition or disposal resulting in significant change in the business direction of the company; and (iv) an amalgamation, merger or combination.¹⁰

The implication of the amendments in the New SEC Rules is that public companies involved in M&A transactions are required to undertake filings (and bear the relevant filing costs) at both the SEC and the competition regulator, as well as other sector regulators applicable to such public companies. These various approval requirements have significant impact on M&A transactions.

Impact of these Regulatory Changes on M&A Transactions

M&A transactions in Nigeria are regulated by a variety of laws, including the sector-specific regulations. Prior to the New SEC Rules, the Federal Competition and Consumer Protection Act, 2018 ("FCCPA") was the principal legislation which governed M&As in Nigeria.

The FCCPA regulated all M&A transactions within the corporate sphere resulting in a change of control in the target entity. However, when dealing with a public M&A, being one involving a public company, the New SEC Rules give the SEC power to also regulate such transactions. This power is pursuant to provisions in the ISA which empower the SEC to regulate takeovers, acquisitions, and other external restructuring patterns.¹¹

The SEC and the FCCPC, having regulatory oversight on M&As, thus, raises the question

⁵ Section 13, ISA.

⁶ Rule 3(2), New SEC Rules; Section 121(1)(d), Investments and Securities Act (the "ISA").

⁷ i.e., the disposal of total or a portion of an equity interest in a company.

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⁸ Rule 4, New SEC Rules.

⁹ Rule 4, New SEC Rules.

¹⁰ Rule 3, New SEC Rules.

¹¹ S. 13(p), ISA.

on whether transaction parties are expected to comply with both legislations. This is because the FCCPA did not repeal section 13(p) of the ISA, which provides as one of the functions of the SEC, the power to approve and regulate M&As.

An interesting sector-specific law is the Banks and Other Financial Institutions Act, 2020 (‘‘BOFIA’’). Pursuant to BOFIA, the Central Bank of Nigeria (the ‘‘CBN’’) assumes the regulatory position of the FCCPC in M&As and other corporate restructurings involving banks and other financial institutions licensed by the CBN.¹² This implies that the FCCPC no longer has regulatory oversight on M&A transactions involving banks and other financial institutions licensed by the CBN. Thus, a party to an M&A transaction that qualifies as a bank or other financial institution regulated by the CBN only has to seek approval of the CBN to the transaction and bear the attendant costs. However, if such a bank or financial institution is also a public company, the SEC’s approval would have to be obtained.

These regulatory changes will significantly impact M&A transactions in Nigeria in terms of increased cost involved in obtaining approvals, increased timeline for consummating transactions due to regulatory delays and increased burden on transaction parties to comply with the approval requirement.

The increased cost on parties to M&A transactions in consummating such transactions is manifestly evident in public M&As resulting in a change of control. Here, the transaction will require the approval of both the SEC and the FCCPC and in the case of a regulated entity (e.g., a pension fund administrator or an insurance company), the approval of the sector regulator will additionally be required.

The fees applicable for an approval by the FCCPC are calculated based on the last combined annual turnover of the merging parties or the value of the transaction consideration, whichever is higher.¹³ The fees payable were revised upward in 2021 and are calculated by threshold and based on the percentage of the consideration or combined turnover. This is in addition to an application fee of ₦50,000 (Fifty Thousand Naira) per entity.

Under the New SEC Rules, in addition to an application notification fee of ₦100,000 (One Hundred Thousand Naira) per entity, the applicable fee is calculated based on the value of the shares to be issued by the resulting company after the merger.¹⁴ It appears from Rule 7 of the New SEC Rules that the prescribed processing fees for the SEC’s approval of M&As apply to merger transactions and not acquisitions. This is because in an acquisition, there is no resultant company. There is however still a case to be made for the propriety or otherwise of the SEC charging such fee for approval given the role of the FCCPC as the merger authority and the applicable fees payable to the FCCPC for its approval.

Further, subject to any applicable exemption, the seller is required to pay ten per cent (10%) of the consideration as CGT on the disposal of such shares.

Conclusion

With recent announcements of notable divestments by some oil majors, banks and in the fintech space, we can expect to see more M&A transactions in the market. Further, with looming deadlines for implementing certain regulatory requirements, we can expect more M&A and restructuring activities in various sectors of the market, including pension and finance, all of which may be impacted by these changes.

¹² Section 65, BOFIA.

¹³ Reg. 2(1), Merger Review (Amended) Regulations, 2021.

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¹⁴ Rule 7, New SEC Rules.

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