REGULATORY UPDATE - SEC AMENDED RULES ON MERGERS, ACQUISITIONS AND TAKE-OVER

Prior to 2019, the Securities and Exchange Commission ("**SEC**") was the primary body responsible for mergers, acquisitions and take-overs of public and private companies in Nigeria. With the enactment of the Federal Competition and Consumer Protection Commission ("**FCCPC**") Act 2019, the provisions within the Investment and Securities Act 2007 on mergers were repealed and the FCCPC became the primary body responsible for regulating mergers. Notwithstanding, SEC maintained its rights to regulate mergers and acquisitions affecting public companies on the basis that it is the primary regulator of the capital market in Nigeria.

Consequently, SEC released an Amendment to the SEC Rules on Mergers, Take-Overs, and Acquisitions ("**Amendment**") on August 30, 2021. In this article, we have highlighted some salient provisions of the Amendment.

1. What Transactions require the approval of the SEC?

Although all companies are required to obtain an approval for mergers and acquisitions from the FCCPC, the Amendment mandates public companies to apply to SEC for approval in respect of the following transactions.

a. Any amalgamation or merger involving a public company.
b. The conversion of a public company to any other form of company or the reconstruction of the shares of a public company or its subsidiaries.
c. Restructuring of a public company which includes offering or distributing the shares of a new entity incorporated from the public company.
d. Acquisition or disposal of assets which result in a significant change in the business direction or policy of the public company.

The Amendment also applies to the Acquisitions of the subsidiaries of a public company.

2. Whose obligation is it to apply for the approval?

It is the obligation of the public company involved in the transaction to apply to SEC for approval notwithstanding the involvement of other types of companies in the transaction.

3. What are SEC criteria for granting approval?

In obtaining the approval of SEC, the applicant must prove that all the shareholders of the public company are treated fairly, equitably and are given sufficient information in connection with the transaction.

4. What transactions are exempt from the requirement to obtain SEC approval?

The following are exempt.

a. Any acquisition by a public company of a business or asset which does not involve the issuance of shares of the public company as consideration for the acquisition. The company will, however, be required to provide pre and post-acquisition financial statements to its shareholder; and disclose any conflicting interest with respect to the transaction.

b. Any divestment of the asset of a public company that is less than 15% of the total asset of the company or any divestment of assets that do not form a core part of the business. The company may, however, voluntarily notify SEC of any such divestment.

5. What is the process of obtaining the approval of SEC?

In addition to complying with the requirements under the Companies and Allied Matters Act 2020 and the provisions of the FCCPC Merger Review Guidelines, a public company is also required to make an application to SEC. Prior to the merger, the public company is required to make a preliminary application to SEC and obtain an approval in principle before arranging court-ordered meetings for the shareholders of the respective companies. The public company is expected to invite SEC to this meeting. Upon approval of the shareholders of the respective companies, a formal application is to be made to SEC.

Conclusion

The Amendment helps to provide a level of clarity on SEC requirements pertaining to mergers, acquisitions and take-overs involving public companies. Please note, however, that not all changes introduced by the Amendment were highlighted by SEC in the document as new introductions. Companies are, therefore, advised to seek professional support when engaging in such transactions.