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About the Capital Market Solicitors Association

The Capital Market Solicitors Association (“CMSA”) is an independent self-regulatory Association of solicitors and commercial law firms engaged in capital market practice in Nigeria. The Association was established in 2001, as a platform to articulate and promote the interest of legal practitioners specializing or dealing in capital market transactions.

The Association is concerned with developing the legal framework within which the capital market operates and pursues its objectives by liaising with the Regulatory Authority and other trade groups, organizing training sessions, workshops and seminars for its members on topical issues arising in the capital market.

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The Capital Market Solicitors Association (CMSA), at its End of Year Party, in December 2019 had as its special guest Mr. Bismarck Rewane and he talked about the Nigerian Economy and the Prospects for 2020. We all left the party feeling pumped and hopeful for an exciting new year.

2020 came with a lot of pomp and pageantry as it was celebrated as the dawn of a new decade. The CMSA was geared with plans including the release of 2 newsletters in March and June 2020.

Alas! 2020 turned out to be a remarkable year globally but not the way the analysts had hoped! The COVID-19 pandemic changed the modus operandi for businesses globally and upended the conventional business models. Suddenly essentials seemed irrelevant and otherwise leisure activities like teleconferencing or online shopping became essential for survival.

With the first case in Nigeria on 27 February 2020, things indeed took a new turn and a new normal was born. As resilient people, we have adapted and are running with the times, making the best of what we have. This has seen the rise and increase in the use of technology like never before.

“Virtual” is the new slang. Thus, the CMSA had its first virtual Annual Business Luncheon and the focus was on the health sector. It was indeed an unusual but successful event. Thus, this newsletter starts with the thought provoking keynote address of Mr. Bode Agusto. This newsletter also features exciting Articles from CMSA Member Firms touching key and new issues within the capital market space.

I trust you would not only enjoy the read but would share your feedback with us at cmsanigeria@gmail.com

Happy reading.
How can the Capital Markets help improve the healthcare sector?

Keynote address to the Capital Market Solicitors Association
by Bode Agusto on 15 September 2020

Good morning Ladies and Gentlemen,

I thank the Capital Market Solicitors Association for inviting me today to speak on how to improve healthcare in Nigeria and the role the capital markets could play in helping. Therefore, this keynote address will try and answer the following questions

1. Who are the key stakeholders in the healthcare sector and what is of value to each stakeholder?
2. How much will it cost Nigeria to have a good healthcare system?
3. How should we pay for this?
4. What role should the Capital Markets play in ensuring that we are able to finance healthcare?
5. What role should the legal profession play in improving healthcare in Nigeria?
6. Why should we improve healthcare in Nigeria?

The key stakeholders in the healthcare sector are the:

- Patients
- Service providers (Doctors, Nurses, Other clinical staff, Nonclinical staff, Pharmaceutical companies, and Other Investors)
- Payers (Insurance companies, Government, Individuals, Philanthropists)
- Policy makers (Government, Regulators)

Patients want quality care at competitive prices and ready access to their medical records. Payers also want value for money and opportunities to invest their surplus funds in an environment where prices are fairly determined. Service providers who are employees want professionally and financially rewarding careers, whilst those who are investors want timely payment for services and competitive returns on their investments. Government as regulator, wants products and services that perform and fair trading in the industry. As a person who cares for its citizens, Government wants access for the poor and weak in society and cares about future healthcare concerns and how to plan for them.

How much will it cost Nigeria to have a good healthcare system? In his book, “Which Country Has the World’s Best HealthCare?" Ezekiel J Emmanuel set out the cost of healthcare in 11 countries namely USA, Canada, UK, France, Germany, Netherlands, Switzerland, Norway, Australia, China and Taiwan. According to him, the USA spends about US$11,000 per person per year, the most by any of these countries whilst China spends the least at US$960 per person per year.

China’s average income per person is five times that of Nigeria. Were Nigeria to spend
at China's level after adjusting for income levels, she should be spending about US$200 per person per year. This means US$40 billion per year or about 9% of nominal GDP. It also means spending NGN16 trillion per year, at current exchange rates, or almost two times the total amount shared by the Federation Account in 2019! Therefore, Government alone cannot fund this. How then do we then finance this level of healthcare spending?

In substance, only two groups of people are the ultimate payers for healthcare—individuals and employers. Under one model, they pay taxes to governments which these government use to provide healthcare services to the citizens. Under a second model, individuals and employers pay for health insurance and these insurance companies pay for healthcare from premiums received. I have not seen anywhere in the World where the third model of paying out of pocket has delivered a good healthcare system. However, all these mean that there is no free healthcare anywhere. It could be free at the point of receiving the service, but someone, somewhere is paying for it.

I believe that Nigeria should fund healthcare through a universal health insurance system. Under this system, health insurance should be made obligatory for all Nigerians. Workers will pay their premiums largely through employer sponsored programs, self-employed people will buy their own insurance while Government will then assist the poor and weak in society to buy insurance. The premiums paid to health insurance companies thus create a large pool of savings to pay for healthcare.

Know your role

What role should the capital markets play in ensuring that we are able to pay for healthcare? In my opinion, the biggest risk that the pool of savings will face is inflation risk. This is because the long-term rate of inflation on the Nigerian Naira is about 12% per annum. This means that savings held in NGN and debts that will be repaid in fixed Naira terms will lose purchasing power at about 12% per annum. It also means that the returns earned from investing the pool of savings (net of costs) must be at least 12% per annum to protect the buying power of the savings. Finally, premiums must also be adjusted at least annually to reflect the purchasing power of the NGN.

The bulk of the monies saved to pay for healthcare will be invested temporarily in fixed income instruments (i.e. lent to the federal government, state governments, banks and credit worthy companies in the real sector). Capital market regulators would need to help set rules that will help ensure that those who borrow money from these pools of savings pay back as and when due. This is usually done by setting risk tolerance limits and monitoring compliance with these limits.

In these debt markets, interest rates are usually fixed using the principle of RISK FREE RATE + CREDIT RISK PREMIUM.

The risk-free rate is of course the rate at which the FGN borrows NGN. Credit risk is measured through credit ratings from AAA to C and the market attaches premiums to the rate at which borrowers in each rating bucket raise funds. What happens to the purchasing power of our pool of savings if the risk-free rate is significantly below the rate of inflation and the credit-worthy borrowers to whom we want to lend our savings also borrow at rates significantly below the rate of inflation? If this situation persists for a considerable period the purchasing power of the savings will be significantly eroded!

If this universal insurance scheme is managed well, there will be a large pool of funds available to pay for healthcare and this should increase the effective demand for healthcare services and thus stimulate the supply side. Investors will build and equip hospitals, employ personnel and grow supply of services. These investors will also be able to tap into the capital markets to raise funds to partly finance their projects.
The role of the capital markets can therefore be summarized as protecting the purchasing power of our savings and providing credit to investors in the healthcare industry. What role should the legal profession (and indeed our leaders) play in improving healthcare in Nigeria? Our lawyers will of course help to draft the relevant laws and regulations that will guide the operations of the industry. However, it is important that the reforms that we embark upon in this industry follow these key steps:

1. Study and understand the operating models used in select countries where the impact of the healthcare system on the citizens is strong.
2. Come up with a draft healthcare model for Nigeria.
3. Use contributions from these debates to come up with the final healthcare model for Nigeria.
4. Encourage debate amongst the key stakeholders on this model.
5. Determine how we should tweak these models to reflect the realities of our environment.
6. Draft the relevant bills and regulations and get them passed.
7. Further tweak as needed as we implement.

Why should we improve healthcare in Nigeria? Life expectancy in Nigeria is 55 years and according to PopulationPyramid.net less only 4.4% of Nigerians are over 60 years old. In countries where healthcare systems are good life expectancy is usually above 75 years. Building a good healthcare system also creates jobs! For example, the UK NHS employs 1.4million people and is one of the largest employers in the World. Finally, a healthy nation is a more productive nation.

In conclusion, assuming we start with coverage of only 10% of the population and at an average annual premium of US$200 per person, we create an industry that has annual spending power of at least US$4 billion, the equivalent of the annual GDP of Sierra Leone. If well managed and over time it is able to raise coverage to 80% of the population, the annual spending power of the industry would be US$32 billion per annum, roughly twice the size of the economy of the oil producing nation of Gabon.

Thank you
The Nigerian Stock Exchange Growth Board: A viable Capital Raising Option for SMEs

By Jane Odili

Introduction

The quest for capital is a continuous and daunting exercise for companies and no less for Small and Medium-Scale Enterprises (SMEs). Following collaborative engagement with corporates towards understanding their funding requirements, growth strategies and proffering solutions for implementation, the Nigerian Stock Exchange (NSE), with the aim of supporting growth companies’ quest to access sustainable capital for business expansion and strategic growth and encouraging companies with a high growth potential to seize the opportunity of raising long term investment capital and promoting liquidity, created the Growth Board (“Board”) and issued the Growth Board Rules (“Rules”). The target issuers of the Board are fast-growth companies such as Fintech start-ups who are often challenged with raising long term capital, (especially during the formative stage) from the public through the NSE due to its stringent listing and post-listing requirements.

The Board appeals to companies that seek to raise capital albeit under a more regulated environment. The Rules are more flexible than what is obtainable on other listing platforms and was designed to address the perceived shortcomings of the Alternative Securities Market (ASeM) Board such as persistent low trading activity and narrow liquidity. The Growth Board offers relaxed entry criteria – less stringent listing requirements, that provide greater accessibility for growth oriented companies, making it easier to attract capital flows and at reduced post listing obligations. In addition, part of the Growth Board value proposition is to provide a transparent channel to facilitate potential exit for strategic investments and patient capital.

Listing Requirements

A listing on the Growth Board has significant attendant benefits, such as subsidized legal, advisory and audit services, and the value of these services has also been calibrated into the fee structure. The Board is divided into two (2) segments - the Entry segment and the Standard segment.

- The applicant must be a public company limited by shares that is already listed on the main Board or Alternative Securities Market Board of the NSE or is seeking to list on either segment of the Growth Board;
• A written application to the NSE and an executed general undertaking for listing on either segment of the Growth Board;
• The company must have been in operation for at least two (2) years;
• The audited financials of the company must be prepared in line with International Financial Reporting Standards;
• The revenue of the company has grown by a minimum rate of twenty percent (20%) cumulatively in its last two (2) years of operations; and
• The company shall appoint a professional adviser as may be prescribed by the NSE.

B. Different requirements for listing on either the Entry or Standard segment

• The market capitalization for listing on the “entry segment” is between fifty million naira (N50m) and five hundred million naira (N500m) whilst the “standard segment” is between five hundred million naira (N500m) and four billion naira (N4bn).

• The applicant is a new business that can provide evidence of; investment in it by a core investor or a strong technical partner that has a minimum of two (2) years' operating track record, or a majority shareholder who is either a High Networth Individual or is a director of a listed company for the entry segment and core investor or a strong technical partner who has a minimum of four (4) years’ operating track record, or a majority shareholder who is a High Networth Individual for the standard segment;

• Minimum free float of ten percent (10%) and fifteen percent (15%) of its issued share capital for the entry and standard segment respectively;

• The applicant has a minimum of twenty-five (25) and fifty-one (51) shareholders for the entry and standard segment respectively and undertakes to ensure that its promoters or directors retain a minimum of fifty percent (50%) of their shares in the company for a minimum period of twelve (12) months from date of its listing.

Furthermore, there are several post listing requirements and continuing obligations under the Rules relating to financial disclosures, corporate actions, compliance with the Securities and Exchange Commission’s code of corporate governance. Penalties and sanctions are imposed on Issuers in the event of breach of the Rules.

The advent of the Growth Board is a huge step in the right direction creating additional opportunities for SMEs to access capital for their growth and positively accelerating economic development as they account for ninety-six percent (96%) of businesses and eighty-four percent (84%) of employment in Nigeria.

Chris Ogunbanjo LP

Jane Odili

Associate, Corporate Commercial Department
Chris Ogunbanjo LP
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Introduction

Now, more than ever, there is a strong need to explore financing options that will address glaring social and environmental problems that exist in Nigeria. To address the lack of social infrastructure, the Government requires support from private capital. In addition to this, financing solutions tailored exclusively for social and environmental problems have become increasingly required. One of those exclusive financing structures is the issuance of Green Bonds.

Green Bonds are debt securities which proceeds are applied exclusively to finance green projects which include projects aimed at renewable energy, energy efficiency, sustainable agriculture and environmentally friendly technologies. Green Bonds may be issued by sovereigns, states, development institutions, government agencies and corporate entities.

Green Bond Issuance Framework

There are several legal framework, both binding and non-binding, that guide the issuance of Green Bonds. Even where these framework are not binding, it is prudent for would-be issuers to adhere to them to ensure that their Green Bonds are attractive to the wide range of interested investors.

1. ICMA Green Bond Principles (GBP)

The GBP are voluntary process guidelines developed by the International Capital Markets Association in 2014 and updated in 2018. The four components of the GBP are:

- **Use of Proceeds**: this requires that the utilisation of the proceeds of the bonds are solely for "Green" projects. In terms of legal documentation, the trust deed constituting the Green Bond and the prospectus must state the "green" project the proceeds of the Green Bonds will be utilized for;

- **Process for Project Evaluation and Selection**: the prospectus and other offer documents should state the process for determining how the project qualifies as a green project;

- **Management of Proceeds**: the net proceeds of the Green Bonds are required to be credited to an account monitored by the issuer in an appropriate and transparent manner. In terms of transaction agreements, the Trust Deed and the Accounts Agreement should incorporate this requirement; and

- **Reporting**: the issuer is required to keep records on the application of the proceeds of the Green Bonds and report on the impact of the same.

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1 Green bonds have been issued in Nigeria by the Federal Government of Nigeria, Access Bank Plc and an entity sponsored by North South Power Limited.
2. Securities and Exchange Commission (SEC) Rules on Green Bonds

In 2018, the SEC issued rules to guide the issuance of Green Bonds in Nigeria. Some of the requirements for issuing bonds under these Rules are:

- a letter from the issuer committing to invest all the proceeds of the bonds in projects that qualify as green project(s) or assets in line with the Rules;

- a feasibility study and report stating clearly the measurable benefits of the proposed green project or assets;

- a prospectus which shall include project categories, project selection criteria, decision-making procedures, environmental benefits, use and management of the proceeds; and

- an independent assessment or certification issued by a professional certification authority or person approved or recognized by the SEC.

On the reporting front, the issuer is required to file an annual impact assessment report with the SEC and the relevant securities exchange (where applicable) which includes a brief description of the projects, the amounts disbursed, expected impact of the projects, qualitative and quantitative performance indicators and measures of the impact of the project.

The SEC does not specify the implication of not complying with the annual impact assessment report publication. However, a likely consequence is losing credibility before investors that invest in Green Bonds.


The Federal Ministry of the Environment developed the Green Bond Guidelines (GBG) in 2016 to guide the process for issuance of Green Bonds targeted at the Nigerian market.

The GBG sets out the process for issuance of Green Bonds as well as the disclosure requirements for issuers, in order to guide investors and other stakeholders in assessing Green Bonds issued in Nigeria.
It is important to note that adherence to the GBG is not mandatory but merely intended to serve as a guide to potential issuers.

The Future of Green Bonds in Nigeria

We expect that there will be increased interest in the issuance of Green Bonds by corporate entities, particularly those in the renewable energy, agriculture and transport sectors because of the success recorded by the pioneer Green Bonds issuance in Nigeria. Green Bonds will not only provide the much needed capital for these capital-intensive sectors but will also increase chances of foreign investments from "responsible investors" who seek asset classes such as Green Bonds.

• This publication does not constitute legal advice and does not create a client-attorney relationship. For assistance with any legal issues please contact us at gelias@gelias.com; or capitalmarkets@gelias.com.
The Effects, Legality And Practicability Of The Proposed SEC Rules On Crowdfunding In Nigeria

By Afam Okeke & Esther Ekejiuba

Introduction

Following the prohibition of equity Crowdfunding activities by the Securities and Exchange Commission (“SEC”) on 15 August 2016, due to its contravention of the provisions of Section 67 (1) and (2) of the Investments and Securities Act (ISA) 2007 and Section 22 (5) Companies and Allied Matters Act, 1990 (CAMA), the SEC has by the provisions of Section 313 of the ISA released a document in March 2020 titled “Exposure of Proposed New Rules to the Rules and Regulations of the Commission” (“The Rules”) which is expected to guide and regulate future Crowdfunding market and provide a comfortable and conducive platform for investors.

Crowdfunding as defined by the Rules is “the process of raising funds to finance a project or business from the public through an online platform”. It is a veritable platform for Micro, Small, & Medium Enterprises (MSMEs) to raise the necessary capital to finance their business, through the issuance of investment instruments to a pool of willing investors, who in turn make contributions on the online Crowdfunding Portal.

Highlights of the PROPOSED SEC Rules on Crowdfunding

The Rules make a laudable attempt to regulate the activities of stakeholders in a Crowdfunding scheme. The Rule sets out the criteria and eligibility for MSME’s seeking to raise funds through registered Crowdfunding Portals and then insightfully lays down the requirements for dealings on the Crowdfunding Portal.

A Crowdfunding portal, as defined by the Rules, is any platform which facilitates interaction between fundraisers and the investing public for the purpose of any investment-based crowdfunding and as such must be registered with the SEC. A very relevant provision of the Rules, perpectively recognizes the possible presence of foreign Crowdfunding Portals, which must also operate in line with the Rules. Furthermore, the Rules extensively provide for the mandatory requirement of the Crowdfunding Portal to conduct due diligence on a prospective issuer/fund raiser, which in essence positions it as a watchdog for both the SEC and the investor.
The Rules mandate an issuer/fundraiser to offer its securities or investments through a Crowdfunding Portal of which, such funding project shall remain live on the portal for not more than 60 (sixty) days. However, where the minimum threshold is not reached at the end of such offer, the Crowdfunding Portal must make refunds to all investors within 48 (Forty-Eight) hours. This reiterates the overall ethos of the proposed Rules to ensure transparency and the protection of investors’ funds are upheld within the scheme. The Rules also gives right to an investor to withdraw any offer or agreement to purchase securities or investments instruments within 48 (Forty-Eight) hours after the closing of the offer.

Benefits of the Proposed Rules

The benefits of the proposed Rules cannot be overstated owing to the mitigating qualification of the provisions of the Rule which solely seeks to reduce investors’ risks. The requirement of the appointment of a Custodian by the Crowdfunding Portal for the establishment and maintenance of a separate trust account with a financial institution is welcome and will certainly lead to an increased participation of investors in Crowdfunding, as the Rules proposes.

Criticisms against the Proposed Rules

Arguably, the inability of most start-ups looking to operate as Crowdfunding Portals, to satisfy the N100,000,000.00 (One Hundred Million Naira) minimum share capital requirement for Portal registration under Part 2 (5) of the Rules, may impede the growth of Crowdfunding activities. Also, the eligibility requirement of start-ups with a minimum track record of 2 (two years) tends to limit viable businesses from utilizing this scheme.

Furthermore, in view of the unqualified prohibition on the issuance and disposition of securities by private companies to the public under Section 67 (1) and (2) of ISA, it is doubtful whether the proposed Rules are in tandem with the provisions of the ISA. It is trite to state that subsidiary legislations derive their validity from and must be in conformity with the principal law; and if any provision of the subsidiary legislation is inconsistent with the provisions of the principal law such provision shall to the extent of inconsistency be declared void.

Conclusion

In the light of the forgoing advantages of the Proposed Rules which amongst other things represents a much-needed statutory intervention to an otherwise unregulated part of the Nigerian Economy, it is recommended that the necessary amendments be made to the ISA to erase the uncertainty of the legality of the Rules.

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1Section 67 (1) and (2) of the Investments and Securities Act (ISA), 2007 prohibits and penalises the invitation of the public to acquire or the disposition of any securities of a corporate body or the of deposit money with a corporate body for a fixed period or payable at call (whether or not such is intended to bear interest), unless the corporate body is a public company (whether quoted or unquoted) or a statutory body or bank established and empowered by an Act of the National Assembly to accept deposits and savings from the public or issue its own securities, promissory notes, bills of exchange and other instruments.

2Now Section 22 (5) of CAMA 2020. The said Section prohibits Private companies from inviting the public to subscribe to the shares of the company or deposit money for fixed periods or payable at call (whether or not such is intended to bear interest) unless authorised by law.


4Ibid at Part 2 (4) (b)

5Ibid at Part 3 (10)
Introduction

The Securities and Exchange Commission ("SEC"), has released the exposure draft for its proposed Crowdfunding Rules (the "Rules").

By virtue of the Rules, a micro, small or medium enterprise ("Issuer") would, subject to certain restrictions, be permitted to raise funds by selling its shares or issuing plain bonds through an electronic platform ("Crowdfunding Portal") operated by SEC licensed operators including dealers/brokers ("Crowdfunding Intermediary") to members of the Public ("Investors").

Summary

A summary of the Rules is provided in the table below:

<table>
<thead>
<tr>
<th>Participants</th>
<th>Role</th>
<th>Criteria</th>
<th>Limitations/ Restrictions</th>
<th>Obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Micro, Small and Medium Enterprises</td>
<td>Issuer – who, in furtherance of its fund-raising objectives, would be permitted to issue shares or bonds to the public through a Crowdfunding Portal.</td>
<td>- must be incorporated in Nigeria as a private company</td>
<td>- Can only raise funds from the public through a Crowdfunding Portal</td>
<td>- Prepare offering documents</td>
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<td></td>
<td></td>
<td>- must be accredited/ accepted by a crowdfunding portal</td>
<td>- Maximum aggregate amount of funds that can be raised (including by its associated company/ subsidiary) within a period of 12 (twelve) months is between N50m - N100m (this limitation does not apply to Digital Commodities Investment Platforms).</td>
<td>- Submit relevant documents to Crowdfunding Intermediary</td>
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<td></td>
<td>- must have a minimum of 2 (two) years track record</td>
<td>- Cannot raise funds concurrently on multiple Crowdfunding Portals</td>
<td>- Comply with continuous disclosure obligations</td>
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<td></td>
<td></td>
<td></td>
<td>- Ensure directors, controlling shareholders and officers are fit and proper persons</td>
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<td></td>
<td>- Ensure business proposition is verifiable</td>
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<td></td>
<td></td>
<td>- Maintain accurate list of investors</td>
</tr>
</tbody>
</table>

1Exposure of Proposed New Rules to the Rules and Regulations of the Commission
<table>
<thead>
<tr>
<th>Exchange, Dealer, Broker, Broker/Dealer or Alternative Trading Facility</th>
<th>Intermediary - registered by SEC to operate, provide and maintain a Crowdfunding Portal through which funds can be raised by SMEs</th>
<th>up capital of N100,000,000</th>
<th>for the purpose of crowdfunding can only carry out activities under the crowdfunding rules</th>
<th>obligations and data protection and privacy obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Must be registered with SEC</td>
<td>Must register the Crowdfunding Portal with SEC</td>
<td>Must not allow an issuer access to the Portal whereby any of its officers, directors, significant shareholders or associated persons beneficially own or control more than 5% of the securities of that issuer</td>
<td>carry out due diligence on prospective issuers</td>
<td></td>
</tr>
<tr>
<td>Custodian Establishes and maintains trust accounts; and releases funds to issuer after specified conditions are met</td>
<td>Must be a financial institution registered by SEC as a Custodian</td>
<td>As per applicable rules relating to custodial functions</td>
<td>monitor conduct of issuers and take actions against misconduct</td>
<td></td>
</tr>
<tr>
<td>Investor/ General Public Invests in / purchases securities or investment instruments of Issuer</td>
<td>Investors can be: - Retail investors - HNIs, Sophisticated and Institutional Investors</td>
<td>retail investors cannot invest more than 10% of their annual income</td>
<td>ensure fund limits of issuers are not breached</td>
<td></td>
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<td></td>
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<td>cannot transfer investment instrument for a period of 1 (one) year, except in limited circumstances.</td>
<td>ensure investment limits of retail investors are not breached</td>
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<td>Required to show proof of annual income</td>
<td>carry out investor education programmes;</td>
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<td></td>
<td></td>
<td>Participate in investor education programmes</td>
<td>verify disclosure documents lodged by issuers</td>
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<td></td>
<td></td>
<td>Seek independent financial advice before investing</td>
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</tbody>
</table>

**Conclusion**

Whilst the Rules are still at its exposure stage, we are of the view that parties who intend to take advantage of the opportunities upon its commencement, must now take deliberate steps to position themselves rightly as follows:
For SMEs:

- The registration of their businesses by taking steps to incorporate a private limited liability company; or for existing business names, the conversion of the business to a private company.
- The review of subsisting articles of association to permit tag along rights in favour of proposed investors.
- On-boarding of competent financial and legal advisors to audit the company and advise on matters including business plan/objectives, capitalization requirements, organizational set up, shareholding structure, compliance measures etc.
- Putting in place adequate measures to strengthen its processes and minimize compliance risk.

For Intermediaries:

- Forging of strategic partnerships with technology infrastructure and support service providers in order to meet the registration requirements of the Crowdfunding Portal.
- Realizing the minimum paid up capital (either by merging with similar entities or fund raising).
- Constituting a competent management and general human resources team with the requisite skill and expertise to carry out their respective roles as stipulated in the Crowdfunding Rules.
- Putting in place adequate security and risk management measures to secure the integrity of the systems, processes and data in readiness for its crowdfunding operations.
- On-boarding competent financial and legal advisors to assist in the achievement of the objectives.

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Termination of Tax-Exempt Status of Bond Instruments: Proactive Steps Needed from the Government

Funmilola Mesaiyete and Elo Adhekpkoli

Over the last decade, the sovereign bond segment of the Nigerian capital market has witnessed exponential growth. Most, if not all bond issuance programmes, by both the Federal Government, various State Governments and corporate entities, have been fully subscribed and largely successful. Bond instruments are very safe investment instruments for private and institutional investors with long-term investable funds. One of the attractive features for investors is that income derived from investment in bond instruments are tax-free.

On 02 January 2012, the Federal Government enacted the following Exemption Orders to exempt income from bond instruments from income tax and value added tax for a ten (10) year period:


The tax-exempt period for bonds will therefore expire on 2nd January 2022.

As at September 2020, there are thirteen (13) sub-national bond issue listed on the Nigerian Stock Exchange (NSE) that will mature after the termination date of the Exemption Orders. Specifically, bond issue from the following nine (9) States will be affected - Gombe (February, 2022), Oyo (February 2022), Benue (February 2022), Kogi (March, 2022), Plateau (March 2022), Zamfara (April, 2022), Cross River (May, 2022), Lagos (December 2023, August 2024, August 2027, August 2024, August 2027) and Ondo (January 2027). There are also fifty-one (51) Federal Government of Nigeria bond issues listed on the NSE, which will mature after the termination date of the Exemption Orders.

The Exemption Orders are also applicable to corporate bonds instruments issued by companies. As at September 2020, there are twenty-five (25) corporate bonds listed on the NSE that will mature after the termination date of the Exemption Orders.

Any income derived from the sale of interest in the listed bond holdings and bond yields on maturity of both sovereign and corporate bond instruments after 2nd January 2022, could be subject to income tax and value added tax, if the Exemption Orders are not extended.

The provisions of the Finance Act 2019, in respect of applicable tax rates for companies income tax and value added tax could become applicable to income derived from bonds.

A major concern, if this development occurs, is that bond instruments could become unattractive to investors because taxes could affect yields and profitability. The coupon rates for bonds at maturity usually hover around 10% - 20%. The current highest rate for bond instruments is 17.25% on bonds issued by Lagos State Government due in August 2027.

If investors begin to shy away from bond offers because the tax exemption is not extended, Governments and companies may see a decline in the availability of long-term funds for infrastructural development, which can be sourced from issuing bonds instruments. The global economy is in crisis, and the Nigerian economy, in particularly, is suffering from global shocks arising from the fall in revenue derived from crude oil and the Covid-19 pandemic.

In the circumstances, extending the tax exemption on bonds instruments is a more proactive measure, which the Government can take to ensure that the market for bonds in Nigeria is sustained and continues to grow.

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Structuring A REIT In Nigeria: Key Legal And Tax Considerations

By Chidi Odoemenem

Real Estate Investment Trusts (“REITs”) play a critical role in providing capital to bridge the real estate deficit while also providing investors with the opportunity of benefiting from large and diversified holdings of real estate. Notwithstanding the opportunities available in the sector, the Nigerian REIT market remains underutilised and underdeveloped. This assertion gains credence from the low number of listed REITs in Nigeria i.e. 3 namely, Skye Shelter Fund (nowSFS REIT), Union Homes REIT and UPDC REIT, low level of market capitalisation (N24,960,325,637 as at October 2019) and low level of liquidity (REITs account for less than 0.5% of the entire Nigerian stock market). The poor growth of the Nigerian REIT market has been attributed to several factors including a shallow investment pipeline lacking investment-grade assets, low level of investor familiarity with the REIT market and sensitivity to interest rates.

As institutional investors look to diversify their investment portfolios due to the impacts of the COVID-19 pandemic on several investment products, investors may consider investing their funds in alternative investment products, including REITs. Market participants in the REIT ecosystem, including Fund Managers/promoters and investors must pay attention to the fine details of the REIT structure to ensure that the investment product fits into their business and investment plans. This article focuses on the key legal and tax considerations for proposed participants in the REIT ecosystem.

Fund Corporate Structure

Under Nigerian securities law, real estate funds or schemes can be structured as a unit trust (REIT) or a real estate investment company (REICO) (interchangeably referred to as the “Fund”, “REIT” or “REIS” in this article). The rules and regulations of the Securities and Exchange Commission (“SEC Rules”) define a real estate investment scheme (“REIS”) as a “company, a trust or other such corporate structures that may be approved and regulated by the Commission, which is primarily engaged in, and invests in income-generating real estate assets or real estate related assets.”

While the REIT unit trust structure is a popular option amongst participants in the Nigerian REIT market and has been utilised in structuring the 3 listed REITs, the REICO structure is also an available structure for managers and promoters. In the REICO structure, investors are allotted shares in the REICO (a body incorporated under the CAMA?) which entitles the investors to voting rights in the REICO. Unlike the REICO, the REIT is constituted under a trust deed between the Fund Manager and the Trustees, and registered with the SEC.

The beneficial interests in the Net Asset Value (NAV) and net income of the Fund are divided into transferable units or shares in the Fund, which may be listed and traded on securities exchanges.
such as The Nigerian Stock Exchange and/or the FMDQ.

Fund Governance Structure

The Investment Committee

The Fund is required to constitute an Investment Committee comprising a minimum of 3 persons knowledgeable in investment and financial matters, one of whom must be independent of the Fund Manager, Trustee and Custodian. Where the Fund is structured as a REICO, the Investment Committee may be constituted as a committee of the board of directors of the REICO. The Investment Committee performs secondary oversight functions over the Fund’s investment activities by (i) setting appropriate policies, reviewing and assessing processes and controls, which would guide investment decisions by the Fund Manager; (ii) reviewing the investment policy and strategies of the Fund Manager; (iii) deciding on the purchase, selection, sale or alteration of investments for the Fund.

The Advisory Board
The Fund is also required to constitute an Advisory Board comprised of representatives of the Trustee and the investors. The Advisory Board is authorised to (i) review and approve all related party transactions to be entered into by the Fund; (ii) approve, review or waive the investment objectives, investment policy and investment outlets of the Fund; (iii) approve the Fund’s annual budget; and (iv) approve candidates for replacement of the Fund Manager’s key persons, amongst others.

The Fund Manager
The Fund Manager plays a pivotal role in the operations of the Fund by selecting and managing the portfolio of the Fund’s assets, establishing compliance and risk management policies for the Fund, keeping periodic accounting records of the Fund and representing the Fund’s interest in both the local and global market.

The Trustee
Where the Fund is structured as a REIT, the Fund Trustee would be vested with control over the affairs of the Fund which the Trustee will exercise on behalf of the unitholders of the Fund.

“Control” in this instance excludes the selection of investments of the Fund and other duties to be performed by other stakeholders in the Fund ecosystem. The ownership of the Fund assets would also be vested in the Trustee on behalf of the unitholders.

The Custodian
The Custodian of the Fund holds the assets (e.g. title documents, share certificates) of the Fund. The net proceeds of the offer of the Fund when received is also paid into a subscription account maintained with the Custodian. The Custodian is responsible for the payment, out of the Fund, of all expenses incurred in connection with the management or trusteeship of the Fund.

The Property Manager
The Property Manager is a SEC-registered company appointed by the Fund Manager to provide general property maintenance functions, and financial, accounting and secretarial services in relation to the Fund’s properties. Typically, the Property Manager would maintain tenancy records, ensure lease terms are complied with, collect rent and operating expenses, liaise with the tenants on a day-to-day basis and render annual service charges on the properties.

Revenue and Distribution Restrictions
At least 90% of the revenue of the Fund (excluding capital gains) is required to be derived from rental income (in the case of a direct investment in real estate assets) or dividend income (in the case of investment through an investment vehicle). The Fund is mandated to distribute at least 75% of its rental income or dividend to its investors on an annual basis.

2Companies and Allied Matters Act, 2020
Investment and Operation Restrictions

Allocation of Fund Assets

The Fund is required to invest at least 90% of its total assets in real estate assets and a maximum of 10% of its total assets in real estate-related assets. Where the Fund intends to invest its assets in a new development activity, such investment is required to be capped at 20% of the Fund’s Gross Asset Value (GAV). The Fund may invest up to 30% of its GAV in new development activity where the Fund is solely targeted at qualified investors. The Fund may also invest up to 25% of its total assets in real estate assets outside Nigeria; however, such investments must be restricted to countries (with an investment-grade credit rating) within Africa.

The Fund is also required to ensure that (i) no single asset constitutes more than 25% (in the case of a REICO) or 20% (in the case of a REIT), by the value of its GAV; (ii) it owns at least 75% legal interest in any real estate or investment vehicle within its portfolio.

shareholder loan is required to be on a pro-rata basis with the ownership of the ordinary equity of the Fund for all the investors of the Fund.

Operating Fees and Expenses

The Fund expenses, including the annual management fee of the Fund, is required to be capped at 5% of the Fund’s NAV. The Fund Manager is entitled to receive an incentive fee not exceeding 30% of the total returns above 10% of the Fund’s NAV.

Investment Process

The investment process of the Fund typically comprises of 4 stages: (i) deal sourcing; (ii) initial investment review; (iii) conditional Investment Committee approval; and (iv) final Investment Committee approval.

Deal sourcing is the primary responsibility of the Fund Manager and the investment team, basically to identify and source potential investment opportunities from their industry network.

Borrowing by the Fund

In relation to Funds structured as REICOs, the Fund is required to ensure that in exercising its borrowing powers, borrowing from third-parties does not exceed 40% of its GAV. This borrowing restriction cannot be overridden by the provisions of the Fund’s constitutional documents.

Where a portion of the Fund’s capital is sourced from shareholder loans, the ownership of the

When a potential investment opportunity is sourced and has undergone initial investment review, such an opportunity will be referred to the Investment Committee for its conditional approval. The Investment Committee will issue a conditional approval after an evaluation process which will assess, amongst others, the background of the counterparty, valuation and transaction dynamics. The conditional Investment Committee approval will allow the investment team to develop a term sheet for the deal and arrive at an approval-in-principle with the counterparty.
The final Investment Committee approval will be issued upon review by the Investment Committee of the due diligence report and finalised investment memorandum submitted by the investment team. Upon consideration of the investment memorandum, the Investment Committee will approve the transaction which will allow the investment team and Trustee to finalise and sign the transaction documents.

**Tax Treatment of the Fund**

Where the Fund is structured as a unit trust REIT, the dividends distributed by the REIT would be exempt from tax in the hands of the unitholders. However, where the Fund is structured as a REICO, the dividends or rental income received by shareholders of the REICO would not be exempt from tax.

The dividend and rental income received by the Fund from its investments would be tax-exempt provided that the Fund distributes at least 75% of the earned dividends and rental income to investors within 12 months of the end of the financial year in which such income was earned. However, this tax exemption does not extend to the management fee, profits or other income earned for the Fund's account.

Distributions made by the Fund to investors will not be subject to excess dividend tax to the extent that the distributions meet the exemption criteria stipulated in the Finance Act, i.e. distribution of at least 75% of the rental or dividend income within 12 months after the relevant accounting period. However, it is not clear if the Fund will be exempt from Tertiary Education Tax (TET) as the Finance Act and accompanying circular issued by the Federal Inland Revenue Service is silent on this point.

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CMSA 2019 End of Year Party
The Securities and Exchange Commission (SEC), by virtue of its power under the Investment and Securities Act to regulate investments and securities business in Nigeria, issued a statement on the regulation of virtual crypto assets. The objective of the regulation is to create standards that encourage ethical practices that ultimately make for a fair and efficient market. The SEC will also regulate all Digital Assets Token Offering (DATOs), Initial Coin Offerings (ICOs), Security Token ICOs and other Blockchain-based offers within Nigeria or by Nigerian issuers or sponsors or foreign issuers targeting Nigerian investors.

According to the statement, the SEC will treat virtual crypto assets as securities and will require issuers or sponsors to register the digital assets. However, issuers or sponsors may argue that the crypto assets proposed to be offered are not securities and therefore not under the jurisdiction of the SEC.

The initial assessment filing is made by the issuers or sponsors to satisfy the burden of proving that the assets offered do not constitute securities. Where this burden is not satisfied, i.e., where the SEC finds that the assets are indeed securities, then the issuer or sponsor will have to register the digital assets.

The regulation will cover every individual or corporate body, whose activities involve any aspect of Blockchain-related and virtual digital asset services, and such persons will be required to register and comply with the regulatory guidelines of the SEC. Such services without limitation include, reception, transmission and execution of orders on behalf of other persons, dealers on own account, portfolio management, investment advice, custodian or nominee services.

Thus, the statement provides that the registration process for virtual assets will involve a two-prong approach, an initial assessment filing and the filing for registration proper.
Issuers or sponsors of virtual digital assets, whether start-ups or existing corporations, shall thereby be guided by the SEC’s regulation. Whilst, foreign issuers or sponsors will be recognized by the SEC where a reciprocal agreement exists between Nigeria and the country of the foreign issuer or sponsor or where the country of the foreign issuer or sponsor is a member of the International Organization of Securities Commissions (IOSCO).

However, the Commission may require Foreign or non-residential issuers or sponsors to establish a branch office within Nigeria.

Existing digital assets offering prior to the implementation of the Regulatory Guidelines will have three (3) months to comply with the registration requirements.
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