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Analysis of the New Rules & Regulations of the Securities and Exchange Commission on Mergers, Takeovers, and Acquisitions: A New Dispensation for Public Companies I

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Background

The Securities and Exchange Commission (“**SEC**” or the “**Commission**”) on 30 August 2021 introduced new rules to the provisions on mergers, takeovers, and acquisitions (the “**New Rules**”), amending the provisions of the SEC Rules and Regulations 2013 (as amended) (the “**SEC Rules**”). The New Rules contain provisions pertaining to certain forms of business divestitures such as carve-outs, spin-offs, and split-offs. In this issue, we highlight certain impactful provisions of the New Rules in relation to **mergers and acquisitions.** A subsequent issue will address the relevant provisions that affect takeovers and corporate restructuring.

Highlights of the New Rules

Approval and other requirements

The New Rules apply to public companies. It covers mergers, acquisitions, business combinations, or other affected transactions between companies, involving acquisitions of shares, assets, businesses, or subsidiaries of a public company.

The approval of the Commission is required prior to any transaction relating to:

A. Conversion of a public company or the reconstruction of its shares;

B. Carve-out, spin-off, split-off or other form of corporate restructuring;

C. Material change arising from an acquisition, divestment or disposal of the assets, business, subsidiaries, shares or other significant property of a public company; or

D. Amalgamation, merger or other business combination.

The prior approval of the SEC will not be required for divestments by a public company of assets constituting less than 15% of the total assets of the company or of assets not constituting a business line of the company. Where a divestment requires the prior approval of the SEC, an information memorandum, in addition to relevant corporate authorisations, approvals, and certain specified documents are to be submitted to the Commission.

Notably, while sections 711 – 713 of the *Companies and Allied Matters Act 2020* outlines general provisions on the requirements to be met by companies for the purpose of finalising a merger transaction, the New Rules prescribe additional requirements with respect to public companies. For instance, companies that have obtained the Commission’s approval-in-principle are required to issue a notice of the court-ordered meeting to members and publish same in two (2) national newspapers. Also, there is now a requirement for companies to officially invite the Commission to their court-ordered meetings. Following shareholders' approval of a proposed merger and the court’s sanctioning of the merger, a copy of the order is required to be delivered to the SEC for registration within seven (7) days.

Filing and notification processes

In filing a notice of a proposed merger, the New Rules specify additional requirements which were, hitherto, not contained in the SEC Rules. These include:

- Solicitors may now make a merger filing on behalf of a company at the SEC;

- Where applicable, the approval letter issued by the Federal Competition and Consumer Protection Commission is to be submitted to the Commission;

- Evidence of reconciliation of the issued shares of the company with the company's registrars, central securities depository, or securities exchange, as may be applicable, is to be submitted to the Commission; and

- Payment of a notification fee of ₦100,000.00 (*One Hundred Thousand Naira*) per merging entity to the SEC.

Companies are also required to pay a prescribed processing fee for the registration of the securities based on the value of shares of the entity that will emerge from such amalgamation. The applicable fee payable is calculated based on the table below:

Nominal Value of Emerging Company's Shares	Percentage Fee
1st ₦500million	0.3%
Next ₦500million	0.225%
Any sum thereafter	0.15%

Upon finalising the merger after the court sanction has been obtained, the New Rules specify certain post approval requirements, one of which is that a merging entity is obliged to file summary reports of the scheme within three (3) months of the court sanction.

Commentary

The introduction of the New Rules is notable, following the enactment of the *Federal Competition and Consumer Protection Act 2018*, which repealed the provisions of Sections 118 – 128 of the *Investments and Securities Act 2007* relating to mergers.

Crucially, the New Rules appear to apply to every merger and acquisition or related transaction involving the acquisition or sale of shares of subsidiaries of a public company. This could raise some concerns as the supervisory powers of the SEC may appear to have been extended to private companies. Flowing from this, a knotty point is whether or not this means that the prescribed processing fees payable for mergers under the New Rules will be applicable to mergers involving the subsidiaries of public companies (which, often times, would be private companies). Perhaps, a simple merger notification to the Commission in this specific scenario may have been a suitable approach in monitoring the interests of public companies in other ventures or businesses.

Overall, we expect that the introduction of the New Rules will further enhance clarity and deepen engagements between the regulator and relevant stakeholders particularly around the registration processes and procedures of mergers involving public companies.

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