SECURITIES AND EXCHANGE COMMISSION, NIGERIA

RECURRING ISSUES IN THE NIGERIAN MERGERS AND ACQUISITION SPACE – THE REGULATORY PERSPECTIVE

MARY UDUK, FCIB
Ag. Director General

KEYNOTE ADDRESS DELIVERED AT THE 1ST ANNUAL SEMINAR OF THE COMMITTEE ON MERGERS, ACQUISITIONS, AND REORGANIZATIONS OF THE NIGERIAN BAR ASSOCIATION – SECTION ON BUSINESS LAW ("NBA-SBL")

FOUR POINTS, VICTORIA ISLAND, LAGOS

Thursday, May 3, 2018

PROTOCOL

The Chairman NBA-Section on Business Law,

The Chairman, Mergers, Acquisitions and Reorganizations Committee,

Distinguished Ladies and Gentlemen.

Thank you for inviting me to deliver the keynote address for the maiden seminar of the Committee on Mergers, Acquisitions, and Reorganizations, of the NBA-SBL.

I salute the tenacious efforts, resourcefulness, and courage of this outstanding association, which is stopping at nothing towards ensuring not only the regulation of the legal profession but fostering an all-inclusive growth in developing our economy. Perhaps, no other profession has the potential to directly impact national transformation as the legal profession.

The Nigerian Bar Association (NBA) keeps making us proud and we are indeed happy to be associated with you as the true custodians of our laws and catalyst for advancing sustainable economic development in Nigeria.

I congratulate the Committee on this auspicious occasion of its maiden annual seminar which is indeed timely as it provides us the rare opportunity to review the milestones attained, identify what remains undone and specify challenges that must be surmounted, in order to fully ensure an ideally competitive business environment.

Indeed, there is no better time or platform to engage all stakeholders in a discussion on a topic that is very dear to my heart, but more importantly essential for a well-functioning, vibrant and strong business ecosystem.

To a room of full of lawyers, it is trite that the Securities and Exchange Commission ("SEC" or the "Commission") is mandated by law to review, approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and affected transactions of all companies in Nigeria, whether private or public. This broad power combines the functions of the SEC as a securities regulator with the temporary role of merger control until a substantive Competition Commission is established.

The introduction of merger control provisions into the ISA in 1999 was in itself a challenge for regulation. It was absurd to have merger control provisions enshrined in a securities law to be administered by a capital market regulator. At the time, Section 99 of the 1999 ISA had merely vested the SEC with the power to approve mergers transactions only where it was not likely to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise. This was a challenge even for the Commission, and for a long time, the Commission was accused of assessing merger transactions by merely considering the fairness of a transaction on the shareholders of the merging companies. While this in itself was consistent with the functions of the SEC as a securities regulator, it was inconsistent with the expectations of stakeholders who craved some sort of merger control for the sake of competition. Fortunately, this was corrected by the expansion of the merger provisions in the 2007 ISA.

Over the last three years, the Commission has approved approximately 120 merger-related transactions, translating to an average of 40 merger-related transactions every year. As can be expected with business dealings, the nature and structure of these transactions vary in line with the objectives of the transacting entities and operational sectors. We have had mergers by amalgamation, acquisition of assets only, acquisition of economic rights, MBOs, carve-outs, spin-offs, and split-offs amongst others and most of you have been actively involved in a number of these transactions.

You might wonder how the Commission is expected to review and approve all mergers, acquisitions and related transactions occurring in Nigeria in addition to its primary function of securities regulation. Thankfully, the ISA categorizes these transactions into small, intermediate and large mergers and gives the Commission the latitude to review the specified thresholds which the Commission has done to ensure that review and regulation are targeted at transactions with significant economic impact.

From a regulator's perspective, I would like to think that the primary challenge with respect to merger-related transactions is the determination of what

transaction is notifiable. When headed the Securities and Investments Services Department and till date, inquiries regarding whether a contemplated action by a client would constitute a transaction which needs to be notified, constitute the highest number of inquiries received and handled by the department. For some, the transaction appears straightforward and should not require the approval of the Commission, while some others do not understand the antitrust role of the Commission in relation to these transactions.

We have had some law firms question the Commission's authority to review a merger involving private companies while some others have proceeded to consummate a transaction without first obtaining the approval of the Commission. From the regulator's perspective, a lack of understanding of the essence of regulation is our primary challenge.

Our regulation is two-fold, first as a securities regulator, we have a duty to ensure that every shareholder is fairly, equitably and similarly treated and given sufficient information regarding the transaction. We apply this when reviewing transactions involving public companies. Secondly, we have a duty to determine whether the proposed transaction is likely to substantially prevent or lessen competition by considering the factors set out in Section 121 of the ISA. This duty applies to both private and public companies.

The duty to make a determination on the competitive effects of a transaction is equally fraught with its own challenges for us as regulators. Our engagement with competition regulators of other jurisdictions reveals the need to be able to conduct an assessment of relevant markets and have access to real time data of economic sectors. This is hard to come by and as a result the Commission is compelled to rely on the information provided by Financial Advisers which is naturally skewed to present a favorable report on the market share of their clients.

The next major challenge is the law itself. There was a lot of incomplete copying and a combination of old provisions with new ones which created a disconnection between the intent and spirit of the law with the literal interpretation. For instance, the definition of "merger" in the ISA was copied

from CAMA with continuing parts copied from the South African Competition Law. This has resulted into having explanatory subsections for a missing definition section which has been very challenging. Section 131 of the ISA is yet another, and perhaps a more popular example of this sort of incomplete adoption of provisions. The debate as to when a bid should be made given the way the law is currently drafted and considering the global practice on takeovers, has been an ongoing one. While some argue that applying the law as drafted defeats the essence of making a bid, others favor applying the law as currently drafted. We expect the challenges with the law to be a thing of the past in no distant future, either with the passing of the proposed amendments to the ISA or the President's assent to the Competition Bill; whichever comes first.

May I stress at this point that once the President gives his assent to the Federal Competition and Consumer Protection Bill, the Commission will no longer review all kinds of mergers and will only consider merger related transactions by public companies solely for the purpose of determining whether all shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger, in other words, in furtherance of our investor protection mandate.

Having set out our primary challenges, permit me to highlight a few other significant challenges that we encounter in the course of our regulation.

Notifiable transactions, adequate review of the relevant market and the level of disclosure - oftentimes, rather than provide information and leave the determination to the Commission, entities skew information in a bid to demonstrate that the proposed transaction will not significantly affect competition in the relevant market.

Transaction structures – Advisers have been known to structure transactions in accordance with what is permissible in other jurisdictions and then try to arm-twist the regulator into approving by citing examples from all over the world. We all know how outdated some of our law are especially the Companies and Allied Matters Act which governs some of these transactions. Unfortunately, we remain guided by our substantive laws and the peculiarity of the Nigerian market.

A few transaction structures are not permitted by law and where the Commission is compelled to question the transaction structure, the perception of the Commission becomes one of an antagonistic regulator which is out to frustrate businesses.

Still, on transaction structures, there have been instances where parties describe their transaction in a certain way, while the Commission's review reveals a completely different transaction. We have had transactions described as a merger by amalgamation which on review turned out to be the mere utilization of a process to achieve the winding up of an inoperative entity. No assets or liabilities were transferred; neither was there a share exchange or a cash consideration. This can be time wasting particularly where there are a number of other genuine transactions awaiting approval.

Acquisition of Assets – In recent times, the Commission has witnessed the emergence of a trend in acquisitions with a number of transactions structured as an acquisition of assets only. At the onset of this trend, we had advisers challenging our jurisdiction to review transactions structured as an acquisition of assets given that there were no shares or business combination involved. We are mindful that there are a number of inconsistencies and stereotypes in our law and the Rules. Notwithstanding, the ISA provides clear provisions on the extent of our regulation and as lawyers I'm sure you agree that the intent of the law cannot be swept aside.

Schemes of Arrangement - I have no doubt that you are all waiting for me to broach the subject of schemes of arrangement and the disposition of the Commission towards schemes. Perhaps we should save the discussion on schemes for the panel session; I do not think a keynote address will do justice to the subject. Let me just say that the Commission is not against the use of schemes, what we scrutinize closely and sometimes question are takeover type schemes. I am confident that the panel session will adequately tackle the issue of schemes.

In addressing the challenges encountered in the course of regulation, the Commission has constantly reviewed its rules and regulations on the subject in consultation with stakeholders and in a bid to align with global best practices. We are now introducing a regulatory guide series which is largely modeled on the Australian regulatory guide series. Under this project, we have developed a guide who clearly explains the factors considered in determining the fairness of a transaction as required by law as well as a regulatory guide on schemes. We hope to produce a different guide for each key consideration to ensure advisers and the Commission are on the same page with respect to our requirements and the fulfillment of our mandate.

You would recall that I had mentioned the challenge of transactions being structured based on the laws of other jurisdictions. More often than not, we have advisers pointing us in the direction of one jurisdiction or the other on applicable practices. I have been told that lawyers can argue any way depending on who is picking the invoice. In addressing this challenge, the Commission makes its own independent verification taking into consideration the peculiarity of the Nigerian commercial sphere and investor base. We are aware that the Mergers and Acquisitions space is a global one with a majority of the transactions being cross-border transactions. Therefore, as a securities regulator with a mandate to protect investors, our approach to benchmarking is to adopt practices which serve the best interest of the shareholders.

Finally, we note that challenges are best resolved through stakeholder engagements and in the past, there have been significant stakeholder engagements such as M&A Roundtables, meetings with Trade Groups and consultations through fora such as this which have been very effective in modifying our approach to M&A transactions.

On behalf of the Securities and Exchange Commission may I appeal to lawyers to view us as an indispensable partner and stakeholder in the securities market to enforce vital business legislation made for the good of the investing public.

We assure you that we are willing to work together for public good which includes your clients.

I wish you all fruitful and impactful deliberations.

Thank you.

Mary Uduk, FCIB
Ag. Director General
Securities and Exchange Commission, Nigeria