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SEC/AIHN roundtable on Mergers & Acquisitions

Making the Merger & Acquisition Application and Approval Process more Effective: An Issuing House Perspective

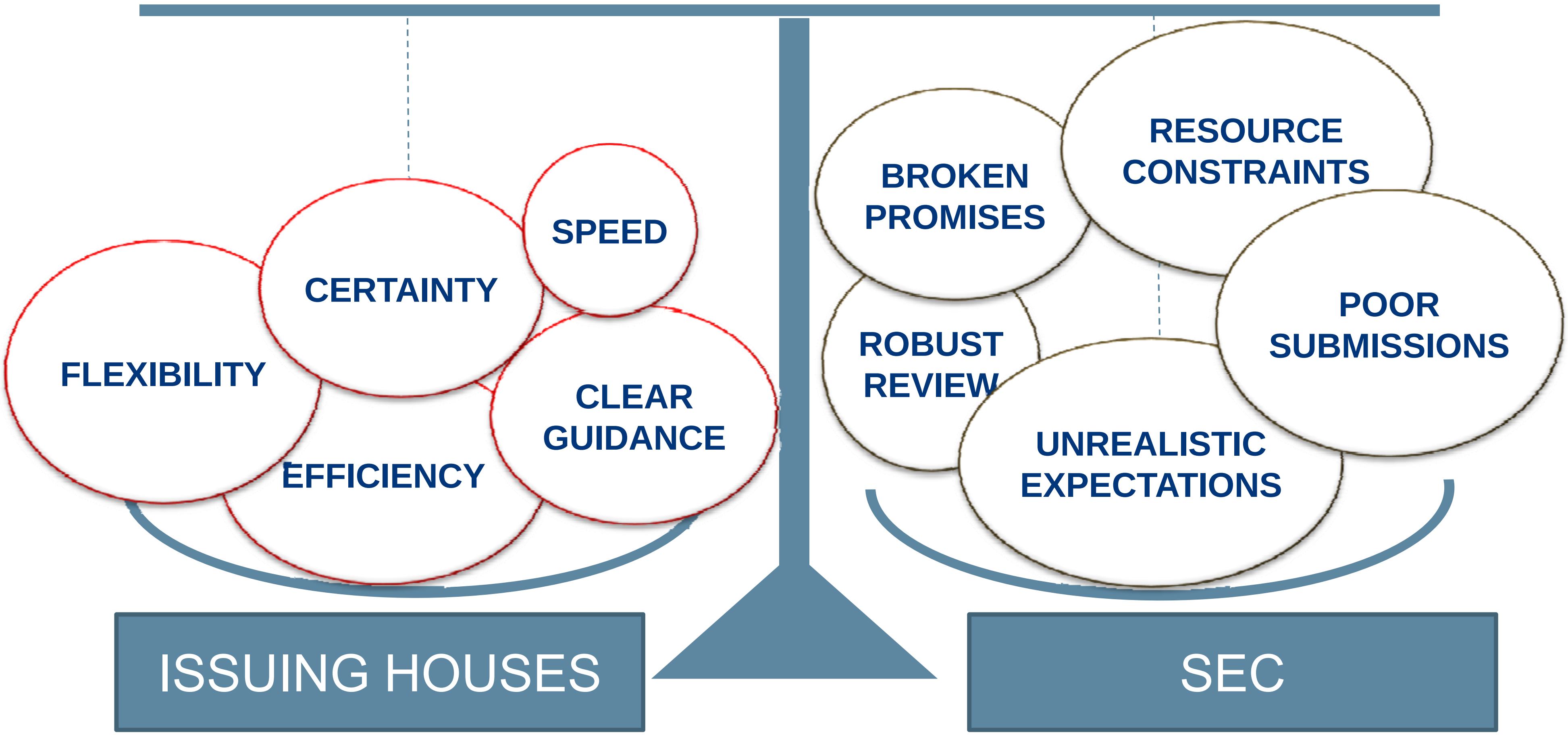
10 October 2012

Introduction

- The Association of Issuing Houses of Nigeria welcomes the opportunity to engage with the Securities & Exchange Commission on ideas for improving the process for approving Mergers & Acquisitions in Nigeria
- There has been a significant increase in M&A activity in Nigeria driven by a number of factors
  - Regulatory changes, largely in the financial services sector
  - Strong economic growth and increasing attractiveness of Nigeria as an investment destination
  - Deepening capital markets
  - Increased activity of financial sponsors
- Cooperation between The SEC and issuing houses has resulted in significant progress in the regulatory process
- This discussion documents aims to outline a few challenges with the M&A approval process in Nigeria and outline possible improvements

A robust and efficient regulatory approval framework must balance several needs and requirements

- Improvements to the approval process must balance issuing houses' expectations with the SEC's requirements



Overview of current regulatory process

APPROVAL IN PRINCIPLE → CLEARANCE OF SCHEME DOCUMENT → FORMAL APPROVAL → REGISTRATION OF NEW SHARES

Time				
	?	?	?	?

Further time spent on court processes plus 28 clear days for shareholders meetings

The M&A approval process in Nigeria typically lasts several months

- The key challenge faced by issuing houses is the lack of defined time limits within which the SEC responds at each approval phase
- Each approval phase also requires significant supporting documentation, regardless of how many times the corporates involved have engaged in SEC regulated activity

There is joint responsibility for the lengthy approval process

Quality of filings	■ Incomplete supporting documentation ■ Changes to applications post submission ■ Poor quality drafting of documentation
Unclear communication channels	■ No agreement up front as to transaction lead at issuing house and primary desk officers at the SEC ■ Results in multiple calls to various contacts at the SEC on the same transaction
No pre-agreed timelines	■ The SEC does not commit upfront to reviewing documentation within certain defined time periods ■ Leads to unrealistic expectations from issuing houses for speedy review and frustration when reviews take too long
Supporting documentation	■ Each stage of the approval process requires significant supporting documentation ■ Documentation often needs to be notarized or originally certified ■ Collating supporting documentation extends the transaction timeframes

Lengthy M&A approval processes cause significant challenges

Transaction risk

- Many transactions are very sensitive to the market valuations of the merging entities
- The longer the approval process, the greater the risk of significant price swings that may jeopardize transaction success

Management distraction

- Mergers and acquisitions typically entail significant time commitments from the boards and management teams of the parties entailed
- Lengthy processes result in extended periods of management distraction which impact companies' operating and financial performance

Value erosion

- In certain instances, members of management may be opposed to M&A activity
- Lengthy transaction processes result in companies being run by individuals who may not necessarily act to maximize value for the would be acquirer

Investor aversion

- Investors exploring acquisitions in Nigeria require clarity around the length of time required to complete M&A transactions
- This is particularly important where consideration in placed in escrow
- Certain potential investors delay or avoid transactions on account of the significant risk of loss of value that a lengthy process may cause e.g. exchange rate movements

In discussing the timing for M&A approvals, it is important to understand the dual role of the SEC

- Unlike in certain other jurisdictions, the SEC plays a dual role in Nigeria
- This must be taken into consideration in evaluating approval time frames
- In many other jurisdictions, mergers and acquisitions are governed by take over regulatory panels with a separate competition commission assessing the impact of mergers on operating environments

SEC

Take over regulatory panel

- Issue and administer takeover and merger codes
- Codes are primarily to ensure
  - Shareholders in offeree companies are treated fairly and given an opportunity to vote on the merits of transactions
  - Shareholders of the same class are treated equally

Competition Commission

- Control and evaluation of restrictive business practices and abuse of dominant positions
- Control and evaluation of mergers and acquisitions to achieve equity and efficiency

Take over regulatory panels in other jurisdictions have much quicker timelines than in Nigeria

Ongoing engagement between TRP and issuing house results in speed

- Take over regulatory panels are concerned with the application of take over codes and limit their reviews to the application of codes
- There is ongoing and regular dialogue between TRPs and issuing houses on specific transactions
- The TRP typically fits in with the timelines of the relevant exchange and the broader transaction timeline

Approaches to a Merger review (1/2)

Transactions can by split according to size

small & intermediate	Commission has an initial review period of 20 business days Commission may extend this by a further 40 business days **The Commission has a maximum review period of 60 business days**
Large	Commission must provide a written recommendation with reasons on filings to the Tribunal, Minister of Trade and Industry and parties to the merger within 40 business days The Commission may apply to the Tribunal to seek an extension of no more than 15 business days The Tribunal must schedule a hearing date or pre-hearing conference within 10 business days. The Chairman of the Tribunal may extend this by a further 10 days The Tribunal must reach a decision on the merger within 10 business days of completing the hearing **The maximum review period is 85 business days**

Approaches to a Merger review (2/2)

Transactions can by split according to complexity

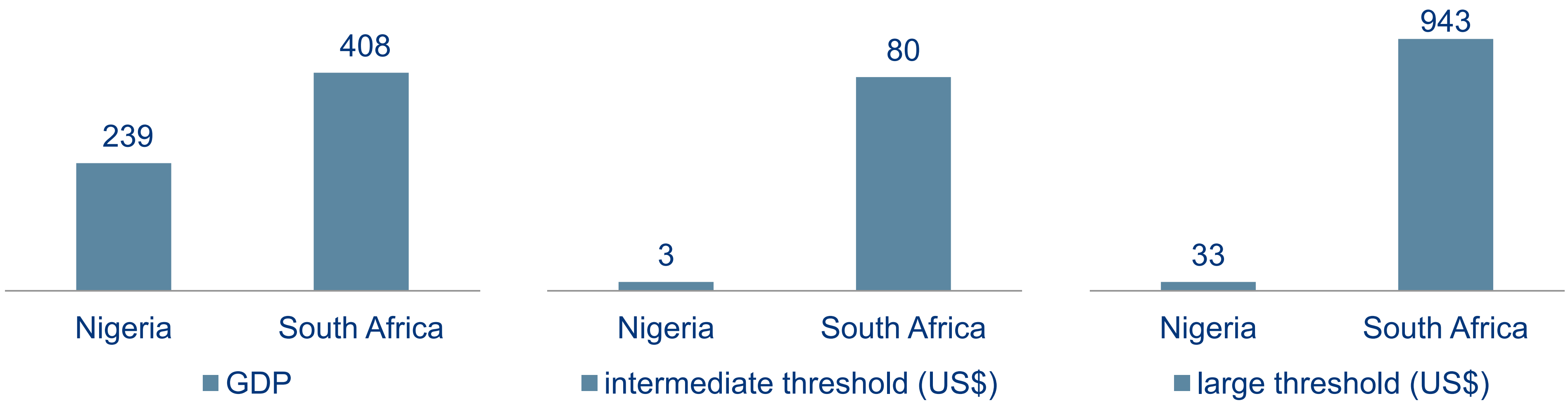
Non complex	▪ No competition issues ▪ Involve a merger where one or more of the following criteria apply - No overlap between the activities of the parties - In event of overlap, combined market share is less than 15% - No complex control structures associated with merger - No public interest issues associated with merger ▪ **20 business days is required to review application**
Complex	▪ Involve transactions between direct or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) ▪ Each party has a market share in excess of 15% in respective markets ▪ Transactions typically involve challenges around the following - Defining relevant markets - Multiple product or geographic markets - Markets which are subject to deregulation - Public interest issues around the transaction ▪ **45 business days is required to review application**

Approaches to a Merger review (2/2, continued)

Transactions can by split according to complexity

Very complex	
	▪ Likely to create or result in a substantial prevention or lessening of competition ▪ Mergers between leading market participants in any one of the markets in which parties compete falls within this category ▪ Very complex transactions will necessitate a thorough investigation - Require specific documentation and information from the merger parties and third party industry participants - Documentation not limited to the complete filing documents ▪ **The Commission often takes longer than 60 business days to review application**

Increasing the threshold of transactions that require competition approval will be a useful step



Significant scope to increase the thresholds for competition approval

- The longest phase of the regulatory approval process for mergers and acquisitions in most jurisdictions is competition commission approval
- The SEC in Nigeria plays the role of the competition commission
- Increasing the threshold for transactions requiring competition commission will significantly reduce the length of time required to approve small transactions
- Thresholds in South Africa are c. 25x the thresholds in Nigeria

Suggested quick wins

Certainty of timelines

- Clarifying process timelines and stipulating the expected duration for each stage of the review process will help manage expectations and force efficiency
- The review timeline should commence only after complete documentation has been provided

Thresholds for competition

- Clear parameters for determining the acceptable impact on competition of each transaction should be provided to ensure only compliant deals are presented to the SEC
- SEC should consider reviewing competition thresholds ensure focus on real threats to the competitive landscape of each industry

Communication channels

- Contact persons should be appointed at SEC (with at least one alternate) for each institution approaching the Institution (and vice versa)
- This helps ensure there is regular communication on transaction progress and identified issues are dealt with expediently

Submission checklist

- A clear submission checklist should be developed and signed off by before submissions are accepted for review
- This will force proper submissions by institutions approaching SEC and speed up the review process

Streamline requirements

- Streamlining the documentation requirements will help improve compliance and focuses the SEC review process