

## Legal Alert April 2008 **Shares Private Placements As Public Offers**

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### Legal News

The Lagos State Government has published a notice reminding Applicants of the "New Procedure for obtaining Governor's consent" to real estate transactions in Lagos State. A cumulative rate of 15% is applicable to all subleases, assignments and power of attorney; this consist of:- (a) consent fee ? 8% of assessment; (b) capital gains tax ? 2% of assessment; (c) stamp duty ? 2% of assessment and (d) registration fee ? 3% of assessment.

Assignment of state land within ten years of the issuance of the right of occupancy attracts 16% as consent fee (as against 8% stated above). A deed of gift attracts 5% as consent fee. For further information, you can contact the Lands Bureau, Block 13, Room 54, Lagos State Government Secretariat, Alausa, Ikeja, Lagos.

The Nigerian Securities & Exchange Commission (SEC) has issued a public warning to the effect that the shares of private companies been offered by way of private placements to members of the public are not registered or regulated by SEC, neither are these shares listed on the floor of the Nigerian Stock Exchange. SEC's notice also reminds members of the public that where a company has more than 50 members/shareholders, it is by Law a public company required to comply with the reporting and regulatory requirements of a public company. Purchasers of shares in a private placement are therefore required to undertake all due diligence as the shares bought from private placements are bought at their own risk and peril.

Legal Alert for April 2008 ? Shares Private Placements as Public Offers ? Legality.

The increase in the number of persons, both corporate and individuals, who subscribe to the various investment vehicles especially the buying and the selling of the shares of publicly quoted companies in Nigeria, is commendable. Private companies desirous of raising fresh capital have also benefited from this new drive and enthusiasm sometime to the peril of the investing members of the public who may be under the impression that they are purchasing the shares of a public company quoted on the Nigerian Stock Exchange.

To protect members of the public, SEC has issued a public notice warning members of the public that while they can invest in private placements, such private placements are not regulated by SEC

neither are the shares listed on the floor of the Nigerian Stock Exchange.

This paper however seeks to briefly explore what distinguishes a private company from a public company? This paper would also explore whether the caveat emptor warning from SEC is sufficient in the discharge of its statutory duty of protecting members of the investing public.

#### Private and Public Companies compared

Section 22 (1) to (5) of the Companies and Allied Matters Act, 1990 describes a private company to be one which by its Memorandum of Association states that it is a private company, and by its Articles of Association restricts the transfer of its shares, limits the number of its members to not more than 50 persons (excluding bona fide employees and ex-employees of the company), and does not unless authorised by Nigerian Law to do so, invite members of the public to subscribe for its shares or debentures or to deposit money for fixed periods whether or not such money bears interest.

A public company in comparison has more than 50 members and is allowed by Law to invite members of the public to subscribe for its shares.

#### Meaning of Public Invitation

The Investment and Securities Act, 1999 describes an invitation to the public to include any publication, advertising or dissemination by newspaper, broadcasting, cinematography or by any other public means whatsoever, of the activities of a company.

#### Restriction to Public Invitation By Private Companies

Section 44 of the Investment and Securities Act, 1999 bars any company, which is not a duly registered public company, from inviting members of the public to subscribe or trade in the securities of such a company.

Section 23 of the Companies and Allied Matters Act, 1990 provides that a private company shall cease to be entitled to the privileges and exemptions from public regulations conferred on private companies in Nigeria and would be treated "... as if it were a public company" where it has the characteristics of a public company; e.g. more than 50 members and invitation to the public to subscribe for its shares.

#### Consequence of Default

A key privilege of a private company is that it is not bound by the reporting and regulatory rules that govern the affairs of a public company.

Section 44(2) of the Investment and Securities Act, 1999 provides that any individual or body corporate that is not a duly registered corporate body that invites members of the public to subscribe for its shares is liable on conviction to a fine of not less than One Hundred Thousand Naira (N100,000) and or to a term of imprisonment of not less than two years.

## Conclusion

The number of private companies that are publicly inviting members of the public to participate in their private placement offerings would continue to be on the increase without regulation by SEC. Allegations that some private companies that have benefited from private placements before going public and have refused to issue share certificates to the subscribers under their private placements need to be investigated by the regulators.

It is recommended that the Securities and Exchange Commission must apply the Laws of Nigeria by prosecuting in criminal courts the offending private companies. This is particularly so for private companies that have now gone public but refused to issue share certificates to subscribers who paid for shares offered during the private placement. This strategy would further bring some sanity to the securities market.

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