

Private equity in Nigeria: market and regulatory overview

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A Q&A guide to private equity law in Nigeria.

The Q&A gives a high level overview of the key practical issues including the level of activity and recent trends in the market; investment incentives for institutional and private investors; the mechanics involved in establishing a private equity fund; equity and debt finance issues in a private equity transaction; issues surrounding buyouts and the relationship between the portfolio company's managers and the private equity funds; management incentives; and exit routes from investments. Details on national private equity and venture capital associations are also included. To compare answers across multiple jurisdictions visit the [Private Equity Country Q&A Tool](#). This Q&A is part of the global guide to private equity. For a full list of jurisdictional Q&As visit www.practicallaw.com/privateequity-guide.

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Market overview

1. How do private equity funds typically obtain their funding?

Typical sources of private equity funding include contributions from institutional and retail investors, including high net worth individuals, pension funds, insurance funds, and banks (see [Question 2](#)).

2. What are the current major trends in the private equity market?

The Nigerian private equity market remains relatively resilient, despite challenges such as global oil and commodity pricing and currency volatility. There is particular interest in the financial services and industrial sectors (which together attracted 50% of all deals and 66% of all capital deployed in Nigeria in 2015) and consumer goods (*EMPEA 2015 Annual Fundraising and Investment Review Private Capital in Emerging markets*).

There is also increasing interest in the real estate, agriculture and health sectors. Twenty private equity deals were reported in Nigeria in 2015, with private equity capital investments totalling US\$159 million.

There have been a number of regulatory developments. These include the Securities and Exchange Commission (SEC)'s (<http://sec.gov.ng/>) introduction of discrete regulations for infrastructure fund investments in 2014, following the National Pension Commission (PENCOM)'s approval of infrastructure funds and private equity funds as asset classes for

pension fund investments in 2010. However, the PenCom Regulations restrict such pension fund investment to infrastructure funds and private equity funds that are SEC-registered and run by SEC-licensed fund managers.

The SEC has also published regulations increasing the minimum share capital required for fund managers seeking registration with the SEC to NGN150 million. In April 2015, the SEC also issued rules establishing the Investor Protection Fund (IPF), which is incorporated as a legal entity. It has been set up to mitigate pecuniary losses suffered by investors due to the insolvency, bankruptcy, negligence, or misappropriation of funds by capital market operators, in relation to securities or any property entrusted to, received, or deemed to be received by such operators in the course of business. Subject to meeting certain eligibility criteria, investors are entitled to receive from the IPF a maximum of NGN200,000, or its equivalent in shares or other securities.

In July 2013, the National Association of Securities Dealers (NASD) (www.nasdaq.com) launched NASD PLC's over-the-counter trading platform for unlisted public company securities. The platform is SEC-registered. NASD and private equity practitioners have welcomed the development and the SEC's 2015 regulations on unlisted public company securities to promote best practice for operators, price discovery and transparency in the Nigeria over-the-counter market for unlisted securities (see <http://sec.gov.ng/regulation/rules-codes>).

3. What has been the level of private equity activity in recent years?

Fundraising

Nigeria (together with South Africa) remains at the forefront of sub-Saharan fundraising and investment for private equity. Between 2007 to 2015, 311 private equity deals were reported in West Africa, with a total of US\$6.1 billion capital invested. Notably, Nigeria accounted for 67% of deal value (US\$4,087,000,000) and for 140 deals in this period (www.avca-africa.org/media/1310/avca-spotlight-on-west-africa-private-equity-public-version.pdf).

Investment

Unlike other parts of the continent (*EMPEA 2015 Annual Fundraising and Investment Review Private Capital in Emerging markets*), the private equity investor appetite for Nigerian investments continues to grow, particularly across the services, industrial, consumer goods and real estate sectors. There is also an emerging trend of secondary investments, particularly in the financial services sector.

In the last decade, the private equity sector in Nigeria has grown from about three main players with about US\$75 million under management, to ten or more indigenous players with about US\$2 billion under management, 15 international funds and about 30 new funds under formation.

Transactions

Private equity transactions in Nigeria are generally in the form of management buyouts and restructuring. Compared with 2014, in 2015 there were fewer deals above US\$250 million, which resulted in a decline in the overall deal value from US\$8.1 billion to US\$2.5 billion. However, deals below a value of US\$250 million have increased slightly (www.avca-africa.org/newsroom/avca-news/2016/avca-research-release-private-equity-in-africa-shows-continued-growth-in-2015).

Exits

Exit activity in Africa has increased, from 29 in the period 2007 to 2010, to 46 between 2011 and the first half of 2015 (www.avca-africa.org/newsroom/avca-news/2015/avca-research-release-west-africa-private-equity-investments-continue-to-rise) (see [Question 33](#)).

Reform

4. What recent reforms or proposals for reform affect private equity in your jurisdiction?

In 2013 the Federal Minister of Industry Trade and Investment set up a committee, to generate recommendations for developing an optimal environment for private equity from a regulatory, economic and fiscal perspective. This signaled the government's increasing recognition of private equity's potential as a catalyst for development.

The issue of infrastructure and private equity specific regulations by the Securities and Exchange Commission (SEC) shows an increasingly sophisticated approach to the regulation of asset management and investments in Nigeria.

Developments such as the new SEC regulations on the trading of unlisted securities on an over-the-counter platform also suggest that sector regulators may continue to review their rules, to accommodate the increasingly dynamic changes that affect private equity activity. The development of a distinct private equity legal and regulatory framework, with related reforms to the pensions and tax regime in particular, would support and boost private equity investment in Nigeria.

Tax incentive schemes

5. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

Incentive schemes

Companies classified as pioneer industries or engaged in the production of pioneer products are entitled to apply for pioneer status. If this is granted, they enjoy corporate tax relief/holidays, for an initial term of three years, starting from the date the pioneer company commences business. This can be extended for a further period of one year, and a further one year term, subject to factors such as the relative importance at the time of the industry to national development. In particular:

- A company granted pioneer status does not pay companies' income tax, education tax or withhold tax on any dividends during the pioneer period.
- Net qualifying expenditure for capital items during the pioneer period are accumulated, and qualify for both initial and annual allowances in the new business.
- Losses incurred by the pioneer company during the pioneer period and certified by the Federal Inland Revenue Service may be relieved afterwards, since such losses are deemed to have been incurred on the first day of the new business.

Applicants must, among other things:

- Be registered as companies in Nigeria.
- Have incurred qualifying capital expenditure of at least NGN10 million in the pioneer industry concerned.
- Submit the application within one year of commencing commercial production.

The tax benefits accrue to pioneer companies and their shareholders.

Tax savings on dividend payments

Where the recipient of dividends from Nigeria is resident in a country with which Nigeria has entered into a double taxation agreement (DTA), the withholding tax rate is reduced to 7.5% from 10%.

Tax exemption on interest on foreign loans

Interest payments on foreign loans to Nigerian companies are tax exempt, where such loans are granted in foreign currency and satisfy the moratorium and tenor requirements relating to both interest and principal, as follows:

- Repayment period including moratorium above seven years, with a grace period of at least two years: 100% exemption.
- Repayment period including moratorium of five to seven years, with a grace period of at least 18 months: 70% exemption.
- Repayment period including moratorium of two to four years, with a grace period of at least 12 months: 40% exemption.
- Repayment period including moratorium below two years, with no grace period: no exemption.

Deduction of expenses and capital allowance

Nigerian law allows companies to deduct from their income all outgoings and expenses, or any part of them, wholly, exclusively, necessarily and reasonably incurred in the production of the income. There are also various deductions allowed for deduction for employment and infrastructure and investment allowances. Companies are also allowed to deduct, as expenses, the amount of capital spent on an asset. Such amounts, in the form of capital allowances, can be set off over time by Nigerian companies against their assessable profits.

Capital allowances are available to a company if it incurs qualifying capital expenditure in carrying out its business. Qualifying expenditure includes expenditure wholly, exclusively, necessarily and reasonably incurred on buildings, mining, plant and machinery, motor vehicles, plantation equipment, housing estates, ranching and plantations and research and development, for the purpose of the trade or business carried on by a company. The rates for these allowances vary depending on the nature of the assets and the business of the company. There are also sectoral incentives that apply to companies operating in various sectors. These are incentives for the company.

Gas utilisation incentives

There are specific incentives for companies that engage in gas utilisation, including:

- Initial three-year tax holiday, commencing from the production start date certified by the Minister of Petroleum Resources, which is renewable for an additional two years subject to satisfactory performance. As an alternative, an additional investment allowance of 35% is available, which must not reduce the value of the assets.
- Accelerated capital allowances after the tax free period.
- Tax free dividends during the tax free period, where either:
 - the investment was made in foreign currency; or
 - the imported plant and machinery during the (tax free) period was at least 30% of the company's share capital.

Exemption from capital gains tax

Under the Capital Gains Tax Act, the following are all exempt from capital gains tax:

- Gains made on a disposal of shares, and government securities such as treasury bills, bonds and savings certificates.
- Gains arising from acquisitions, mergers, or takeovers (where no cash payment is made in respect of acquired shares).

- Gains made on any asset used for the purposes of a trade or business, provided that the gain is used for replacing the old asset sold.

Taxation of government securities and corporate bonds

Securities issued by the Federal Government of Nigeria are tax exempt for an unlimited tenure, while bonds issued by corporate bodies and state governments are exempt for ten years from 2 January 2012. All income earned from personal investments in government securities and corporate bonds is also tax exempt. No limitation period applies with respect to the exemption from income tax granted to individuals. These incentives are available to investors in securities issued in Nigeria or by Nigerian institutions.

Incentives for venture capital companies

The fiscal incentives as outlined under the Capital Gains Tax Act, the Industrial Development (Income Tax Relief) Act and the Companies Income Tax Act as amended improve on those earlier prescribed by the Venture Capital (Incentives) Act (Chapter V2) Laws of the Federation of Nigeria 2004 (VCA), which targets venture companies and venture projects.

A venture project is defined as a company incorporated in Nigeria for the realisation of one or more of the following objectives:

- Acceleration of industrialisation by nurturing innovative ideas, projects and techniques to fruition.
- Commercialisation of research findings with high potential for far-reaching forward or backward linkages.
- Promotion of self-reliance through the establishment of resource-based and strategic industries, through the provision of risk guarantee and insurance.
- Encouragement of indigenous process and technologies.
- Promotion of the growth of small and medium scale enterprises, with emphasis on local raw materials development and use.

Venture companies that invest in such venture projects must be accredited by the Federal Inland Revenue Service (FIRS) as venture companies or venture projects, and must invest at least 25% of the total capital required for the venture project to be eligible for the following:

- Accelerated capital allowance for equity investment by a venture company in a venture project, with the following deductions:
 - first year: 30%;
 - second year: 30%;
 - third year: 20%;
 - fourth year: 10%; and
 - fifth year: 10%.
- Reduction of withholding of tax on dividends declared by venture projects to venture companies for the first five years, from 10% to 5%.
- Export incentives such as export expansion grants, if the venture project exports its products.
- Gains realised by venture companies from a disposal of an equity interest in the venture project are not liable to capital gains tax.
- Exemption from company income tax for three years, which can be extended for an additional final period of two years.

Fund structuring

6. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

The legal structures most commonly used as a vehicle for private equity funds are:

- Limited companies under the Companies and Allied Matters Act chapter C20 Laws of the Federation of Nigeria 2004.
- General or limited partnerships, or the newer limited liability partnerships under the Partnership Law of Lagos State 2009 (as amended).

7. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

Partnerships

Where a company is engaged in a trade or business in partnership with any other person in Nigeria, that trade or business is deemed to be a separate source of profits, and the assessable profits of the company are determined under the Personal Income Tax Act (Chapter P8) Laws of the Federation of Nigeria 2004 as amended (*section 29(8), Companies Income Tax Act*).

In relation to dividends received by a private equity fund that is a partnership (that is, a partnership consisting of companies):

- Such dividends are subject to a 10% withholding tax by the investee company.
- Once paid to the fund, are part of the fund's income and assessed under the Personal Income Tax Act, to determine the assessable profit of each partner.

Capital gains made by the partnership are taxed at 10% under the Capital Gains Tax Act. If the gains are made on the disposal of shares in investee companies, the gains are tax exempt. Where partnership profits are distributed among the partners, and the partner is a limited company:

- The company is liable to tax under the Companies Income Tax Act, at 30% on profits made from such distributions.
- Such profits are subject to a further 2% tax under the Tertiary Education Trust Fund Act, 2011.
- The limited liability partner must withhold tax (at 10%) when re-distributing the profits it has received from the partnership to its own shareholders as a dividend. The concept of franked investment income (*see below, [Limited companies](#)*) does not apply to income distributed by partnerships.

Limited companies

Dividends received by private equity funds that are limited companies have already been subject to a 10% withholding tax by the investee company. Dividends received after tax deduction is franked investment income of the recipient, so that (*section 80(3), Companies Income Tax Act*):

- The fund will not be liable to pay corporate income tax on the dividends.
- Where the dividend income is to be re-distributed to the fund's shareholders as dividends, the fund can set off the tax earlier withheld against any tax it must withhold from the dividends before paying them to its shareholders.

The fund has no obligation to withhold tax before paying dividends to its own shareholders.

As with partnership funds, capital gains by corporate funds are taxed at 10% under the Capital Gains Act, but gains on equity disposals are exempt from capital gains tax.

8. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?

The case for establishing a private equity fund as a limited company would seem to be compelling from the point of view of tax efficiency, although much depends on factors specific to

each fund, its investors and its investments. What may complicate this is that the Federal Inland Revenue Service (FIRS) enforces section 19 of the Companies Income Tax Act. This currently prescribes an excess dividend tax, so that where a dividend is paid as profit on which no tax is payable (due to no total profits, or profits less than the dividend paid) the dividend is charged to tax at 30%, as if the dividend is the total profit of the company for the year of assessment. The FIRS has taken the view that where the income a company receives has been exempted from tax due to the franked investment income provisions, such companies effectively have no total profit, so the franked investment income is taxable at 30%.

Various engagements are taking place with the FIRS and if the outcome is positive, the FIRS will stop enforcing the excess dividend tax provisions. This would make private equity funds structured as limited companies significantly more tax effective than private equity funds as partnerships.

Fund duration and investment objectives

9. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?

The average life of a fund is five to ten years. Private equity funds investing in Nigeria typically hold investments for about three to seven years before exit. Exit strategies include initial public offerings, offers for sale, secondary-buyouts, trade sales, acquisition by initial sponsors or majority shareholders.

Fund regulation and licensing

10. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

Under the SEC Rules (*see Question 11*), any private equity funds established in Nigeria with a minimum commitment of NGN 1 billion in investor funds must be registered with the SEC.

Similarly, the fund manager must be registered with the SEC, with a minimum share capital of NGN150 million. The promoters and principals of a private equity fund do not require authorisations.

11. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

Regulation

The Rule and Regulations issued by the Securities and Exchange Commission (SEC Rules) provide that investments in private equity funds cannot be solicited from the general public. The Investments and Securities Act 2007 defines an invitation to the public as an offer that is any of the following:

- Published, advertised or disseminated by newspaper, broadcasting, cinematography, or any other means.
- Made to, or circulated among, any persons, whether selected as members or as debenture holders of the company concerned, or as clients of the persons making or circulating the invitation, or in any other manner.
- Made to any one or more persons, on the terms that the person or persons to whom it is made can renounce or assign the benefit of the offer or invitation or any of the securities in favour of any other person or persons.

- Made to any one or more persons to acquire any securities dealt in by a securities exchange or capital trade point, or in respect of which the invitation states that an application has been or will be made for permission to deal in those securities on a securities or capital trade point.

Offshore registered funds can only solicit investments from investors in Nigeria with SEC approval.

The SEC Rules also provide that investments in private equity funds must only be sourced from qualified institutional investors, that is, purchasers of securities that are financially sophisticated and legally recognised by the SEC, including:

- Fund managers.
- Registered and/or verifiable private equity funds.
- Registered and/or verifiable hedge funds.
- Other operators determined by the SEC from time to time.

Offshore registered funds can only solicit investments from investors in Nigeria with SEC approval.

The National Pension Commission's regulations prohibit pension fund administrators from investing pension fund assets in private equity funds that are not SEC-registered or managed by SEC licensed fund managers.

The SEC extensively regulates promotional materials used by registered private equity funds. Comprehensive information memoranda must be distributed to investors. The content of offer instruments is also strictly prescribed.

Exemptions

Private equity funds with a commitment of less than NGN1 billion are not required to be SEC-registered.

12. Are there any restrictions on investors in private equity funds?

Investments in private equity funds can only be sought from what the SEC has defined as qualified institutional investors (*see [Question 11](#)*).

13. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

The SEC Rules restrict the investment amount to no more than 30% of the private equity fund's assets in a single investment.

Investor protection

14. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

Typically, the partnership agreement or constitutional documents (depending on the structure) of the private equity fund usually sets out the relationship between the investors and the fund, including their duties, rights, obligations and dispute resolution mechanisms.

In the authors' experience, investors seek protections around adequacy of returns, drag and tag along rights, divestment and disposal of assets, and exits. It is not uncommon for the documents to seek to incorporate best practice policies and requirements from development finance institutions and international agencies.

Interests in portfolio companies

15. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

Most common forms

The nature of private equity fund investment in a portfolio company can be equity, debt, convertible debt, or a combination of two or more of these. The most common is the acquisition of shares (equity investment). Under the Companies and Allied Matters Act, a private company limited by shares must restrict the transfer of its shares. Under Nigerian tax laws, while withholding tax at 10% is applied to payment of a dividend on shares, there is no capital gains tax levied on the transfer of shares.

Restrictions

Under the Companies and Allied Matters Act, a private company is required to restrict the transfer of its shares in its articles of association. Typically such a restriction is the board having the right to refuse to approve a transfer of shares, although the exact form of it is not prescribed by the Companies and Allied Matters Act. Shareholders of a private company also have pre-emptive rights in relation to the issue of new shares by the company.

Taxes

Subject to [Question 5](#) in relation to various tax incentives, there is a requirement to withhold tax on interest payments on debt instruments and dividends paid to equity holders at the rate of 10%. Where the recipient of such a payment is a resident of a country that Nigeria has a double tax agreement with, the withholding tax rate is reduced to 7.5%.

Gains realised from a disposal of shares are exempted from capital gains tax.

There is no capital gains tax payable on the disposal of Nigerian government debt securities but there may be capital gains tax on the disposal in Nigeria of corporate bonds or other debt instruments not issued by the Federal Government of Nigeria.

Buyouts

16. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

Auctions are increasingly common, particularly for public companies and large corporate targets. There is no formal legislation that governs the auction process. It will usually be prescribed, for example under a request for proposal by the relevant target or sellers, and where possible negotiated by prospective bidders.

17. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

Investments in listed companies are not uncommon. The following will generally apply:

- Companies and Allied Matters Act Chapter C20 Laws of the federation of Nigeria 2004.
- Investments and Securities Act 2007.
- Rules and regulations of the Nigerian Stock Exchange.
- Statutes and regulations specific to the relevant sector.

Principal documentation

18. What are the principal documents produced in a buyout?

Transaction documentation typically includes, among others:

- Non-disclosure agreements and term sheets.
- Offer documentation.
- Due diligence reports (legal, financial, tax, and technical).
- Share purchase or subscription agreements.
- Shareholders agreements.
- Disclosure letters.

Buyer protection

19. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

Such contractual protections typically include:

- Based on due diligence, covenants, warranties and indemnities to address due diligence gaps and liabilities and for good order (including regulatory compliance, financials, title to equity, corporate information, capacity, encumbrances, tax, employee and operational issues).
- Specification of internal rates of return and performance targets.
- Supermajority/veto rights for specified reserved matters.
- Down round protections (subject to financial assistance rules, where applicable).
- Share retention restrictions for larger shareholders.
- Ratchet anti-dilution provisions (on a negotiated basis).
- Prescribed exit rights (including form and timing of exit, drag and tag along clauses, and forced sale provisions).

20. What non-contractual duties do the portfolio company managers owe and to whom?

This is subject to contract and will include:

- Confidentiality and non-compete provisions.
- Where such managers are also directors, fiduciary and statutory duties owed to the company under the Companies and Allied Matters Act.
- Where applicable, the ISA, SEC Rules and rules and regulations of the Nigerian Stock Exchange (for example, in relation to insider trading and disclosure obligations).

21. What terms of employment are typically imposed on management by the private equity investor in an MBO?

The following terms of employment are typically imposed on management:

- Confidentiality (for example, disclosure of financial information or trade secrets to potential funders).
- Prescribed list of duties requiring devotion of energies to target business.
- Performance and profitability targets and key performance indicators that minimise the risk exposure of investors.
- Typical executive terms of employment.

22. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

The following are commonly used to give a private equity fund a level of management control over the activities of the portfolio company:

- Board representation.
- Voting agreements.
- Appointment of key officers (for example, CFO and CEO, and a chairman that has a casting vote on an equality of votes).

Protections are contained in a shareholders' agreement or, subject to negotiation, in the company's articles of association to ensure that provisions are enforceable against the company and its other shareholders who may not be privy to the shareholders' agreement, subject to the Companies and Allied Matters Act.

Debt financing

23. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

This depends on due diligence and the investment objectives, as well as cost concerns. Convertible debt, term loans, working capital facilities and debt/equity hybrids are not uncommon. Ultimately, the choice of debt as financing capital depends on the relative cost of using debt versus equity, as assessed by the investors.

Lender protection

24. What forms of protection do debt providers typically use to protect their investments?

Security

Security, in the form of charges over shares or other assets of significant shareholders, and charges over the target's assets and undertakings, are not uncommon. Where relevant, related companies may also provide security in the form of corporate guarantees and charges over their assets.

Contractual and structural mechanisms

Security documents typically include:

- Undertakings to ensure that the target's business is maintained and operated within agreed parameters.
- Financial covenants to maintain and monitor the financial strength of the portfolio (to enable lenders to accelerate repayment).
- Defined events of default and enforcement.

Financial assistance

25. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

Rules

Section 159 of the Companies and Allied Matters Act generally prohibits a target company and its subsidiaries from giving direct or indirect financial assistance for the purchase of the target's shares (including gifts, guarantees, security or indemnities, loans, any form of credit, and any financial assistance so that the net assets of the company are thereby reduced to a material extent/or which has no net assets).

In addition, where a person has acquired shares in a company and liability has been incurred, for the purposes of the acquisition, it is not lawful for the company or any subsidiaries to give

financial assistance directly or indirectly for the purposes of reducing or discharging the liability incurred.

Exemptions

The following are exempt:

- Lending money in the ordinary course of business.
- Employee share schemes.
- Loans to employees other than directors to enable purchases or subscriptions for fully paid shares in the company or its holding company.
- Acts and transactions otherwise authorised by law.

Insolvent liquidation

26. What is the order of priority on insolvent liquidation?

In insolvency liquidations, the following statutory order of priority applies:

- Holders of a fixed charge.
- Amounts due and unpaid to employees' compensation funds under the Employee Compensation Act 2010.
- Costs and expenses of winding up.
- Preferential payments (including local rates and charges, pay as you earn tax deductions, assessed tax, land tax, property and income tax).
- Deductions under the National Social Insurance Trust Fund Act 2004.
- All wages or salary of any clerk, workman, labourer or servant in respect of services rendered to the company.
- All accrued holiday remuneration becoming payable to any clerk, servant workman, or labourer on the termination of his employment before or by the effect of the winding up order or resolution).
- Holders of floating charges which have crystallised.
- Unsecured creditors.

Equity appreciation

27. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

A debt holder can achieve equity appreciation through conversion features such as options, but warrants are not recognised by the Companies and Allied Matters Act.

Portfolio company management

28. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

The most common incentives granted to management to encourage portfolio company management to produce healthy income returns are:

- Share option plans, vested on the occurrence of certain events or after a certain period of time.
- Performance-related bonuses dependent on the achievement of established goals or objectives.

Such management incentives also include:

- Periodic or annual cash incentives and bonus plans.
- Performance related bonuses.
- Shares, share option plans, and profit rights, typically vested subject to the occurrence of certain events.
- Attainment of certain targets or after a certain period of time.

- Employment/severance protections, restrictive covenants (including non-compete) and so on.

29. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

There are no specific reliefs or incentives available to portfolio company managers investing in their companies.

30. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

The Companies and Allied Matters Act regulates the payment of dividends. Dividends can only be paid subject to the company being able to pay its debts as they fall due out of distributable profits, such as:

- Profits arising from the use of the company's property, although it is a wasting asset.
- Revenue reserves.
- Realised profits on fixed assets sold, but where more than one asset is sold, the net realised profit on the assets sold.

Dividends cannot be declared or paid if there are reasonable grounds for believing that the company would not, after the payment, be able to pay its liabilities as and when they become due.

31. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

Typical anti-corruption/ anti-bribery protection provisions in investment documents include:

- Representations and warranties of compliance with anti-corruption/anti-bribery laws and indemnities, if such representations and warranties are breached.
- Undertakings by portfolio company management, in relation to certain policies and procedures that will be adapted to ensure compliance with such laws.
- Undertakings to comply with (or confirm compliance with) laws applicable in Nigeria and in jurisdictions in which the relevant fund or investors are resident, domiciled or active, such as the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act 1977.

In Nigeria, under the Corrupt Practices and Other Related Offences Act 2004, which applies to private companies and individuals, fund executives can be liable where the portfolio company or its agents are found guilty of bribery and/or corruption offences. For instance, where a director (or his agent) corruptly asks for, receives or obtains any property or benefit of any kind for himself or for any other person, on account of anything done or to be done, or for any favour or disfavour in the discharge of the director's official duties, the director (or agent) commits a bribery offence.

Penalties for offences under this act include imprisonment for terms ranging from six months to seven years and, in some cases, with hard labour, forfeiture of property or proceeds of the crime, or fines ranging from NGN10,000 to NGN1 million, or both a fine and imprisonment.

The Corrupt Practices and Other Related Offences Act extends to acts outside Nigeria involving Nigerian citizens and persons granted permanent residence in Nigeria, where such acts would violate Nigerian law and the law of the jurisdiction where the acts take place.

Fund executives can also be liable under the Economic and Financial Crimes Commission (Establishment) Act, (Chapter E1), Laws of the Federation of Nigeria 2004 (Economic and Financial Crimes Commission Act). This establishes the Economic and Financial Crimes

Commission (EFCC) and vests it with responsibility to investigate offences relating to economic and financial crimes, that is, any non-violent criminal and illicit activity committed to earn wealth illegally, either individually or in a group or organised manner. This includes fraud, money laundering, embezzlement, bribery, looting and corrupt malpractice, tax evasion, foreign exchange malpractice and open market abuse.

In relation to such crimes, the Economic and Financial Crimes Commission Act prohibits anyone from concealing, removing from Nigeria or transferring to nominees, the proceeds of any economic and financial crime on behalf of another, with the knowledge that such proceeds are as a result of criminal conduct by the principal. If this offence is committed, the person is liable on conviction to a term of imprisonment of three years or more, or a fine equivalent to the value of the proceeds of the crime, or both.

Other sanctions under the Economic and Financial Crimes Commission Act include the forfeiture of assets (both within and outside Nigeria) and the freezing of bank accounts maintained by a person accused of the commission of a financial crime. The Act also gives the Economic and Financial Crimes Commission power to compound an offence, by accepting money exceeding the maximum amount for which a person is liable if convicted for the offence. If a person is convicted of an offence under the Act, his passport will be forfeited to the Federal Government, and will not be returned to him until he has served any sentence passed on him or the President grants him a pardon (*section 23, Economic and Financial Crimes Commission Act*).

Exit strategies

32. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

Forms of exit

Trade sales to strategic buyers and secondary buyouts are most common in practice, but transaction agreements also permit exit by an initial public offering (IPO) and recapitalisation.

In 2015, trade sales accounted for 50% of exits in Nigeria

(http://mail.nasdnq.com/media/publications/downloads/pe_materials/Challenges%20of%20PE%20Exits_Feb_2015_v6%20by%20Synergy%20Capital%20Managers.pdf) and are sometimes

preferred as they return the cash investment to the fund almost immediately. They are also less dependent on capital market conditions and can provide a more predictable sale price.

While secondary buyouts have historically been less common in Nigeria than trade sales, they are considered when a fund has come to the end of its life and wishes to wind up. In 2012, they made up 23% of exits in Nigeria

(http://mail.nasdnq.com/media/publications/downloads/downloads/downloads/publications/Challenges%20of%20PE%20Exits_Feb_2015_v6%20by%20Synergy%20Capital%20Managers.pdf).

NASD plc (www.nasdnq.com) now offers an over-the-counter platform for trading in unlisted public securities.

The manner of exit is also subject to whether the target is a public listed company, which may require the fund to sell its shares on the floor of the Nigerian Stock Exchange (NSE), even to an identified block buyer.

33. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

Where an investment is unsuccessful and a private equity fund wishes to exit, this is typically done by a private treaty fire sale, that is, at a discount or loss.

Private equity/venture capital associations

Emerging Markets Private Equity Association

W www.empea.org

African Venture Capital Association

W www.avca.com

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