



A REVIEW OF THE SECURITIES AND EXCHANGE COMMISSION'S PROPOSED RULES ON THE ISSUANCE AND ALLOTMENT OF DEBT SECURITIES BY PRIVATE COMPANIES

Key Contacts



Uwemedimo Atakpo Jnr.

Senior Associate

uwemedimo.atakpo@ao2law.com



Oghenekaro Isiorho

Associate

oghenekaro.isiorho@ao2law.com



Oluseun Olayiwola

Associate

oluseun.olayiwola@ao2law.com

Introduction

Previously under Nigerian law (Companies and Allied Matters Act 2004 and 2020), only public companies, certain statutory bodies, and banks were permitted to publicly offer or trade securities.¹ Private companies were generally restricted from doing so,² and were therefore constrained to explore other options³ in their bid to publicly offer securities. However, with the passage of the Business Facilitation (Miscellaneous Provisions) Act 2022 (BFA) in 2023, section 67(1) of the Investments and Securities Act 2007 (ISA) which prohibited offer of securities by private companies was amended, consequently vesting powers in the Securities and Exchange Commission (the **Commission**) to issue regulations to guide the public issue and allotment of securities by private companies. Pursuant to these powers bestowed on it by the BFA, the Commission recently issued the Exposure Draft of the New Rules on the Issuance and Allotment of Private Companies' Securities (the **Proposed Rules**).⁴ The Proposed Rules will upon issuance, apply to debt securities issued by private companies either by way of public offer, private placement, or other methods as may be approved by the Commission.

In this article, we briefly highlight some salient introductions the Proposed Rules may usher into the regulatory framework for issuance and general use of debt securities by private companies.

¹ Section 67(1) ISA 2007

² Section 22(5) of the Companies and Allied Matters Act 2020 (as amended)

³ These options include reregistration/conversion to a public company, scheme or share swap, reverse mergers, and the establish of a Special Purpose Acquisition Company.

⁴ May 7, 2024

A. Eligibility Criteria for Private Companies to issue Securities under the Proposed Rules

According to the Proposed Rules, private companies seeking to issue securities, including bonds, debentures and alternative asset classes such as Sukuk, must be incorporated under the Companies and Allied Matters Act (CAMA 2020) or other enabling laws and must have been in operation for at least three (3) years.

Furthermore, private companies must duly register with the Commission and fulfil the registration requirements stipulated under the Proposed Rules which include filing certified true copies of their incorporation documents, audited financial statements, prospectus/offer documentation, details of their assets where applicable, etc.⁵ Prior to such issuance, a private company requiring approval from a sector regulator is required to obtain all necessary approvals from any relevant regulatory authority and file same with the Commission, alongside the applicable documents for registration with the Commission. This will serve to ensure that sector-based regulators are aware of and involved in debt-based fund-raising options by private companies as envisaged under the Proposed Rules. While the typical delays in approvals by regulators may be a cause for concern for sector-regulated private entities, it is envisaged that the provisions of the Executive Order on the Promotion of Transparency and Efficiency in the Business Environment which provides for deemed approvals by agencies will apply to curb such delays.⁶

Significantly, the Proposed Rules is with retrospective effect, particularly in relation to private companies with already existing debt securities. The Proposed Rules require private companies with existing debt securities held by qualified investors to apply for the registration of such securities with the Commission through the securities exchanges, no later than three (3) months from the date of the issuance of the Proposed Rules. This is essentially to ensure that securities that may have been issued by a private company prior to the passage of the Proposed Rules are also registered with the Commission and subject to the regulatory requirement of the Proposed Rules. Failure to comply with this directive will attract a penalty of not less than ₦2,000,000 (Two Million Naira) and a further sum of ₦100,000 (One Hundred Thousand Naira) for every day the violation continues.

The Proposed Rules also makes it mandatory for issuers and their bonds to be rated by a credit rating agency, and such ratings must not fall below the investment grade. Furthermore, issuers (private companies issuing such debt instruments under the Proposed Rules) will be barred from offering bonds if they are in default on payment of interest or repayment of principal in respect of previous debt issuance(s) for a period over six(6) months. It is expected that this will serve to protect investor interest, bolster investor confidence, and encourage investor participation in private debt financing as issues of risk and default by an issuer will have been adequately addressed.

⁵ Rule 9 of the Proposed Rules

⁶ [Executive Order - Efficiency and Transparency in Business Environment .pdf \(osgf.gov.ng\)](#)



B. Conditions for the Issuance and Allotment of Securities

The Commission prescribes certain conditions under which a private company may issue its securities.⁷ These conditions are:

- i. **Non-complex Securities:** Private companies must only issue plain vanilla bonds/debentures and other debt instruments including Sukuk. The Proposed Rules define plain vanilla bonds as non-complex debt instruments with fixed rates and defined maturities, with the investor receiving periodic interest payments and amortized or bullet principal repayments at maturity.

Sukuk, an Arabic term, refers to investment certificates or notes that evidence the holder's proportionate interest in ownership of tangible assets, usufructs, and services, or investment in the assets of projects or special investment activity that adhere to the principles of Shariah law.⁸ For Sukuk issuances, issuers must adhere to the Securities and Exchange Commission Rules and Regulations 2013 (**SEC Rules**).⁹

- ii. **Qualified Investors:** Securities must be offered or sold to qualified investors only. Qualified investors referred to under the Proposed Rules are institutional investors or high-net-worth individuals as defined in the SEC Rules.¹⁰

⁷ Rule 8 of the Proposed Rules

⁸ Sukuk (Islamic Bond) at a glance. <https://sec.gov.ng/investor-education/sukuk-islamic-bond-at-a-glance/>

⁹ See Rules 569 – 588 of the SEC Rules

¹⁰ See the definition section of the Proposed Rules

- iii. **Annual Threshold of Debt:** The Proposed Rules puts the maximum amount a private company can raise within a 1 (one) year period at ₦15 Billion (Fifteen Billion Naira). Private companies looking to raise can only undertake such debt security issuances three (3) times a year. Where a private company expends its allowed number of issuances and intends to undertake any further debt securities issuance, it shall be required to re-register as a public company.

For the allotment of securities offered under the Proposed Rules, the issuer and the issuing house will be responsible for ensuring such allotment is in accordance with the Proposed Rules.¹¹ For instance, a fresh offer of securities shall not be made unless the allotment with respect to any previous offer has been concluded or the offer aborted. Furthermore, an issuing house must make a publication of allotment on the issuer's website within five (5) working days of allotment. Under the Proposed Rules, a private company may list its securities on a registered securities exchange. A private company's securities can be listed on a registered securities exchange not later than thirty (30) days after completion of allotment.¹²

C. Restrictions on Issuance of Securities

While the Proposed Rules will grant a private company the right to issue and allot debt securities to the public, it does not permit it to offer its equity securities (shares) to the public under any circumstance.¹³ Furthermore, only a registered capital market operator is permitted to be a party to the issued debt securities. The private company must carry out a prior clearance of the securities exchange and register such securities with the Commission before any offer, sale, or allotment of the securities is made to the public. Also, any securities purchased in a public offer must be traded on a registered securities exchange only. It is essential to note that the use of proceeds for purposes other than those stated in an offer document without the prior approval of the Commission is prohibited.¹⁴ Accordingly, offer documents must capture in detail, the intended use of the proceeds to be raised by the private company issuing such securities. To ensure adequate reporting, an issuer is required to file detailed information on the utilization of proceeds with the Commission not later than ninety (90) days after the conclusion of an issue.

D. Penalties for Violations

Any person who issues or allots securities without the prior approval of the Commission, or violates any provisions of the Proposed Rules shall be liable to one or more of the following sanctions: (i) a penalty of not less than ₦10 million in the first instance and an additional ₦100,000 for every day the violation continues; (ii) suspension or withdrawal of the registration of the capital market operator(s) involved; (iii) disgorgement of proceeds or income from the transaction; (iv) the Commission may ratify or rescind a

¹¹ Rule 12 of the Proposed Rules

¹² Rule 13 of the Proposed Rules

¹³ Rule 7 of the Proposed Rules

¹⁴ Rule 15 of the Proposed Rules

transaction if it is in the public interest; and (iv) any other sanction the Commission deems appropriate under the circumstances.

Conclusion

The Proposed Rules represent a significant shift in the regulatory landscape for private companies in Nigeria, especially regarding financing options available to them. By allowing private companies to issue debt securities to the public without converting to public companies or exploring either of the earlier referenced options, the Proposed Rules offer new avenues for private companies to raise capital while allowing them to maintain their private status. The stringent eligibility criteria, mandatory registration, and required compliance with SEC Rules ensure that only financially sound and well-structured private entities can participate in this “new market”.

Additionally, the strict conditions and limitations, such as the necessity for credit ratings, the prohibition of equity offerings to the public, the requirement to issue only plain vanilla bonds or Sukuk, etc. will serve as a bulwark to protect investors and maintain market integrity. The penalties for non-compliance are severe, reflecting the Commission’s commitment to enforcing these regulations and deterring misconduct.

Overall, the Proposed Rules are poised to enhance the flexibility and depth of Nigeria's capital markets and offer private companies a viable option for raising funds while ensuring robust investor protection and regulatory oversight. As the Proposed Rules come into effect, stakeholders must adapt to the new regulatory requirements to fully leverage the opportunities presented by this significant development in the Nigerian financial sector.