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NEWSLETTER

**AN OVERVIEW OF THE BANKS AND OTHER
FINANCIAL INSTITUTIONS ACT, 2020**



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AN OVERVIEW OF THE BANKS AND OTHER FINANCIAL INSTITUTIONS ACT 2020

The amendment and replacement of the Banks and Other Financial Institutions Act (BOFIA) 2004, has long been touted to be the next major milestone in the country's ambitious drive towards creating an enabling business environment in the country and improving the Nigerian investment climate.

The now repealed Act had been in operation for about 16 years without amendment, despite progressive innovations in the banking and finance sector globally and the increasing complexities as a result of disruptive technologies and their associated risks.¹ Also, lax corporate governance under the old Act had given room for insider abuse and corruption, culminating in the humongous increase in non-performing loans (NPLs) in the country's banking system. Additionally, the erosion of faith in the Nigerian banking system as a result of the 2004 and 2008 financial crises which can be traced to the excessive risk taking, reckless credit facilities, and other unethical practices in the system had resulted in the long and growing clamour by stakeholders for the review of the regulatory framework for banking and finance in Nigeria.

The enactment of the Banks and Other Financial Institutions Act (BOFIA) 2020 is, therefore, intended to update the existing Act to tackle some of these debilitating challenges in the Nigerian banking and financial services industry occasioned by an Act which has proved to be grossly inadequate in the present ecosystem and to bring it in line with global best practices.

The Act seeks to regulate banking and businesses of other financial institutions by prohibiting the carrying on of such businesses in Nigeria except under license and by a company incorporated in Nigeria; update

laws governing Banks, Financial Institutions and Financial Services Companies; enhance efficiency in the process of obtaining/granting banking licenses; accurately delineate the regulatory functions of the Central Bank of Nigeria ("the Bank" / "CBN") in the financial services industry; update and incorporate the laws for enacting, licensing and regulating microfinance banks; regulate the activities of financial technology companies (Fin-Techs); and update commensurate penalties for regulatory breaches in the financial services sector.

The key provisions of the new Act are highlighted as follows:

BANKING BUSINESS

Operating without License

- The Act makes it an offense for any person/body to transact banking business without a valid license issued by the CBN.² The Act goes further to provide a stiff penalty of 5 years imprisonment or a fine of not less than N50 million or two times the cumulative deposits or other amount collected or both imprisonment and fine for anyone who violates this provision.³ This, we expect, will serve as a deterrent to operators of Ponzi schemes who swindle naïve investors through fraudulent means.



Extension of Central Bank's Regulatory Oversight

- The Act extends the scope of the Central Bank of Nigeria (CBN)'s regulatory oversight and licensing over and beyond just the collection and solicitation of deposits from the general public.⁴ It provides that a person shall be deemed to be receiving money as deposits and therefore carrying on banking business: (a) if the person accepts deposits from the general public as a feature of its business or if the person solicits for deposits orally, electronically or through any form of advertisement or otherwise by any other means; or (b) if the person receives monies as deposits which are limited to fixed amounts or for



which certificates or other instruments are issued in respect of any such amounts providing for the repayment to the holder thereof either conditionally or unconditionally of the amount of deposits at specified or unspecified dates, or for the payment of interest, dividend, profit, or fees on the amount deposited at specified intervals or otherwise, or that such certificate is transferrable: Provided that the receiving of money against any issue of shares, debentures, interest-bearing instruments offered to the public in accordance with any enactment in force within the Federation shall not be deemed to constitute receiving monies as deposit for the purposes of the Act.⁵

- **Refund of Monies Deposited with Unlicensed Banks**

The Act also provides that monies deposited by account holders with an unlicensed bank must be refunded in which case the CBN may direct that such monies be deposited with a duly licensed bank appointed for that purpose who will undertake the refund and report to the Bank (the CBN).⁶

- **Regulation of Fintech, Specialized Banking, etc.**

- The Act requires those who intend to carry on or are already carrying on specialized banking or business of other financial institution to acquire a license to do so from the Central Bank regardless of whether such businesses are conducted digitally, virtually or electronically only.⁷ This effectively codifies the licensing and regulation regime for financial technology service providers (fintech) and will serve to sanitize their operations, support their innovative initiatives, and drive investments in that space. Of particular interest with this section, however, is the inclusion of debt administration and investment management; a situation which would seem to amount to duplicity of regulations and which

could stifle the ease of doing business in Nigeria rather than improve it as may be contemplated by the lawmakers. This is because "investment management" is already expressly under the regulation of the Securities and Exchange Commission (SEC) by virtue of Section 38(1) of the Investment and Securities Act 2007. Furthermore, "debt administration" is an expansive area of bankruptcy and insolvency law and may include receivership, liquidation, administration, etc. which is already separately regulated under the Companies and Allied Matters Act, 2020. It is expected that an attempt by the CBN to exercise regulatory control under this anomalous provision may lead to face-offs and inter-agency conflicts with other regulators such as the Securities and Exchange Commission and the Corporate Affairs Commission.

BANKING LICENSE

Application for License

In applying for a banking license, the new Act makes a couple of changes to the list of things required to accompany the application. For example, it now requires a feasibility report for the proposed bank License including financial projection of up to five (5) years compared to the requirement for feasibility report without more under the old Act.⁸



It also provides that where the application for license is in respect of non-interest banking, it must also be accompanied by a list of experts on non-interest banking or finance that will serve as its advisory committee of experts.⁹

Restriction of Relationships with Certain Foreign Entities

The Act provides that any foreign bank or other entity which does not have a physical presence in its country of incorporation, or which is not licensed in its country of incorporation and which is not affiliated to any financial services group that is subject to effective consolidated supervision, shall not be



permitted to operate in Nigeria, and no Nigerian bank shall establish or continue any relationship with such bank or other entity.¹⁰ It adds further that any bank that breaches this provision and establishes a relationship with such bank or other entity is liable to a penalty of not less than N20,000,000 and to an additional penalty of N500,000 for each day the infraction continues.¹¹ It has been said that the intention behind this section may be to prevent Nigerian banks from entering into banking or other financial relationships with briefcase banks or other risky entities - a situation which may adversely impact the financial stability of the bank and pose systemic risk to the nation.

Operations of Foreign Banks in Nigeria and Offshore Banking

Improving on section 8 of the old Act, the new BOFIA provides that the CBN may, subject to such conditions as it may impose from time to time, grant to any bank registered in Nigeria or a foreign bank a license to undertake domestic or off-shore banking business "within a designated free trade or special economic zone in Nigeria" and "without prejudice to the provisions of Nigeria Processing Zones Authority Act or any other related enactment or law."¹² These qualifications were not contained under the old Act. Also, unlike the old Act, BOFIA 2020 specifically defines the term "offshore banking" to mean "the provision from within Nigeria of cross-border intermediation of funds and or the provision of banking and financial services to non-residents of Nigeria, other than non-residents that are Nigerian citizens."¹³

• It must be pointed out that this provision is quite counter-intuitive and downright confusing as the same Act provides that a license to carry on banking business in Nigeria may only be granted to a company duly incorporated in Nigeria¹⁴ which leads to the conclusion that any foreign bank that seeks to obtain a banking license in any part of Nigeria -

including a free trade zone area - ought to incorporate a Nigerian subsidiary for that purpose.

Investment and Release of Prescribed Minimum Share Capital

• BOFIA 2020 provides that where a license is granted to an applicant bank, the Central Bank shall repay the sum deposited with it as required by the Act¹⁵ together with the investment income and the investment income shall be treated as income of the (now) licensed institution. This paragraph was not contained in the old Act which only provides that where a license is not granted, the CBN shall refund the sum deposited to the applicant, together with the investment income after deducting administrative expenses and tax on the income.

Compliance with Conditions of License

• BOFIA 2020 provides that any bank which fails to comply with any of the conditions of its license shall be liable to a penalty of not less than N20,000,000, and to an additional penalty of N500,000 for each day during which the condition is not complied with.¹⁶ Under the old Act, the penalty on conviction for non-compliance in such circumstances is a fine not exceeding N50,000 for each day during which the conditions are not complied with.



• The Act also provides that any bank which fails to comply with any fresh or additional condition imposed in relation to its license, shall be liable to a penalty of not less than N5,000,000 and an additional fine of N100,000 for each day during which the fresh or additional condition is not complied with.¹⁶ Under the old Act, the penalty for non-compliance upon conviction is a fine of N500,000 and where the offence continues, to an additional fine of N5,000 for each day during which the offence continues.

• This section also introduces a new requirement with regards to compliance with conditions of license. It provides that any person who, being a director, manager or officer of a bank, fails to take



reasonable steps to secure compliance with any of the conditions of the license of the bank is guilty of an offence and liable, upon conviction to imprisonment for a term not less than 3 years or a fine of not less than N2,000,000 or for both imprisonment and fine.¹⁷

Revocation of Banking License

• Remarkably, the provision of Section 12 dealing with "Revocation of Banking License" has been enlarged under the new Act to cover more grounds. Unlike the old Act which contains only one subsection, the section under the new Act now includes six (6) subsections.

• First, the Act increases the media through which notice of revocation of banking license can be given to include (apart from the Gazette) print and electronic media.¹⁸ It also raises the number of grounds for revocation to include where the affected bank: (a) conducts its business in an unsound manner or its directors engage in unsafe practices; (b) is involved in a situation, circumstance, action or inaction which constitutes a threat to financial stability; (c) is in the opinion of the Bank critically undercapitalized with a capital adequacy ratio below the prudential minimum or such other ratio as the Bank may prescribe from time to time; (d) fails to commence banking operation within a period of twelve months following the grant of a license; or (e) fails to comply with the minimum paid-up share capital or minimum capital ratio under sections 9 and 13 of the Act.¹⁹

• The Act provides further that where the license of a bank has been revoked pursuant to the Act, and the Governor is satisfied that it is in the public interest to do so, the Governor may, subject to the approval of the Board of the CBN and without waiting for any period prescribed for doing anything under the Act or any law to lapse, appoint the Nigeria Deposit Insurance Corporation ("NDIC" / "the Corporation") as a liquidator of the affected bank and the Corporation shall have the powers conferred

on a liquidator by or under the Companies and Allied Matters Act and shall be deemed to have been appointed a liquidator by the Federal High Court for the purpose of the Act.²¹ This is an interesting provision in view of the Nigeria Deposit Insurance Corporation (NDIC) Act 2006 which provides that whenever the license of an institution insured under it is revoked by the CBN, the corporation shall act as a liquidator of such institution, exercise powers conferred on a liquidator under CAMA, and shall be deemed to have been duly appointed a provisional liquidator by the Federal High Court.²² Given this provision, it can be said that the NDIC does not need to be first appointed by the CBN before it can start acting as a liquidator of a bank whose license has been revoked and can immediately swing into action once the license has been definitively revoked. We hope that this provision of BOFIA 2020 will not lead to further face-offs between both regulators. • The Act also provides that notwithstanding its provisions or that of CAMA or any other law, where the Central Bank has revoked any license under the Act, and has appointed the NDIC as a liquidator, the NDIC shall immediately proceed with the liquidation of the bank whose license has been revoked and the payment of assured deposit liabilities pursuant to the Nigeria Deposit Insurance Corporation Act.²³



• Also, any action to challenge the revocation of the license of a bank, specialized bank or other financial institution on any ground whatsoever must be instituted within thirty (30) days from the date of the revocation²⁴ at the Federal High Court and such action and any appeal arising therefrom shall be heard and determined on an expedited and accelerated basis.²⁵

• Another interesting provision under this section is that of subsection (6) which provides that notwithstanding the provisions of the Act or any other enactment, no restorative or like order howsoever described, shall be granted against the



Bank or the Governor in any action, suit or proceedings in relation to the revocation of a license by the Bank under the Act, and the remedy of any claimant or applicant against the Bank or the Governor in any such action, suit or proceedings is limited to monetary compensation not exceeding the equivalent of the value of the paid-up capital of the bank at the time of the revocation of its license. The National Economic Summit Group (NESG) had warned that this particular provision would send a wrong signal to the international investment community about Nigeria as this provision would imply that any bank can lose its license on the slightest excuse without a chance of regaining it. It has been stated that such a scenario will rob Nigeria of the Savannah Bank experience whereby the bank was in court for seven years before its license, which was found to have been revoked in error, was restored to it.

GENERAL BANKING OPERATIONS

Opening or Closing of Bank Branches

- In addition to the provision in the new Act that no bank may open or close any branch office, cash centre or representative office anywhere within or outside Nigeria except with the prior written consent of the Bank²⁶ and prescribing a fine for non-compliance,²⁷ the Act provides further that any bank intending to close any of its branches or subsidiaries outside Nigeria shall give notice in writing to the Governor, of its intention, at least six months before the date of the intended closure, or within a shorter period as the Governor may, in any particular case, allow.²⁸
- The Act further provides that the Bank may direct any bank to divest from any of its subsidiaries where the Bank determines that any such continued investment of a bank imperils the financial health of the bank, or where the Bank determines that the oversight by the bank or

supervision by the host regulator over such subsidiary is not adequate relative to the risks the subsidiary presents, or if the Bank cannot gain access to the information required to assess the risk posed to a bank by such subsidiary on a continuous basis.²⁹

- The Act also provides that irrespective of the fines imposed, the CBN Governor may order - (a) the closure of any branch office, cash centre or representative office or any other banking outlet opened without the prior written consent of the Governor in contravention of the section; or (b) the re-opening of any branch office, cash centre or representative office or any other banking outlet closed without the prior written consent of the Governor in contravention of the section.

Restructuring, reorganization, merger and disposal, etc. of Banks.

- The Act provides that no bank shall enter into an agreement or arrangement which results in the transfer of a significant shareholding in a bank except with the prior written consent of the CBN Governor. This adds to the list of corporate actions involving the restructuring, reorganisation, merger, etc. of banks in Nigeria requiring the consent of the CBN Governor.³⁰



- The Act also raised the penalty for failing to duly obtain the consent of the CBN Governor to any restructuring, reorganisation, merger, etc. of banks from a fine not exceeding N1,000,000 and in the case of a continuing offence to an additional fine of N10,000 for each day during which the offence continues to a fine of not less than N20,000,000 and in the case of a continuing breach, to an additional penalty of N500,000 for each day during which the breach continues.³¹
- The Act further provides that any restructuring, reorganisation, merger, etc carried out without the consent of the Governor shall be void and any transfer of interest thereunder shall be ineffectual



except where such transaction is subsequently ratified in writing by the Bank.³²

- Also, in an interesting turn of events, the Act provides that where any bank proposes to enter into any agreement or arrangement for restructuring, reorganisation or merger, the Bank may, on the application of any of the banks to be affected, order separate meetings of the banks to be summoned in such manner as the Bank may direct. This particular provision has been called out by stakeholders as constituting unnecessary duplication of regulatory oversight which could bring the CBN at loggerheads with the Federal High Court which is presently carrying out such roles.³³

And this has regulatory implications in the merger of banks, the reason being that these meetings are placed under the jurisdiction of the Court because decisions reached at such meetings affect shareholders' proprietary rights. As such, supervision of the process by the Court is to ensure that the meetings are properly, effectively and fairly held and the sanctioning of the decisions makes them binding upon the parties. In our opinion, the Legislature should have limited the role of the CBN as the sector regulator to its extant right to consent or object to such a merger, reconstruction or arrangement as the case may be and leave the sanctioning procedure as is under CAMA 2020.

- It would also appear that there is a duplication of regulatory functions as the Act further provides that the Bank may approve an agreement or an arrangement covered by subsection (1) of this section if and only if the Bank is satisfied that — (a) such agreement or arrangement is not likely to cause a restraint of competition, or tend to create a monopoly in the banking industry;³⁴ (b) the significant shareholders or directors of the bank that results from the agreement or arrangement are not disqualified under the Act; (c) the agreement or arrangement is consistent with public interest, and (d) the bank that results from the

agreement or arrangement meets the capital requirements as prescribed under the Act.³⁵ The Federal Competition and Consumer Protection Commission (FCCPC) is already saddled with this role. In any event, the Federal Competition and Consumer Protection Act 2018 (FCCPA) already provides that in all matters affecting competition and consumer protection, the Act shall override the provisions of any other law (including the new BOFIA in this case) and between the FCCPC and any other relevant agency having similar jurisdiction under any other law, the FCCPC will have concurrent jurisdiction with and also take precedence over such other agency in matters affecting competition and consumer protection.³⁶

- Furthermore, upon the grant of a new banking licence by the Bank to a bank which results from the agreement or arrangement, all assets and liabilities of banks that are parties to the agreement or arrangement shall, by virtue of the grant of the new banking licence, be transferred to and become the assets and liabilities of the new bank.³⁷



Minimum Capital Ratio

- While the Act maintains the provision of the old Act that a bank shall maintain a minimum capital ratio (capital funds unimpaired by losses) as may be specified by the Bank,³⁸ it adds that the Central Bank may, notwithstanding, prescribe a higher or lower capital adequacy ratio with respect to any category of banks³⁹ or require a bank to maintain additional capital as the Bank considers appropriate in respect of specific risks.⁴⁰
- The Central Bank may also require a bank that has a holding company, a subsidiary, or both a holding company and a subsidiary, to calculate and maintain minimum capital adequacy ratio on a consolidated basis.⁴¹
- Adding to the list under the old Act, the new Act provides that the Central Bank may prohibit any bank which fails to observe any such specified



ratios from paying a bonus to its directors, other than the approved emoluments and/or benefits or engaging in any other activities as the Bank may specify from time to time. Under the old Act, they may only be prohibited from (a) advertising for or accepting new deposits; (b) granting credit or finance and making investments; or (c) paying cash dividends to their shareholders.⁴² Even moreso, the CBN is empowered to impose such additional holding actions, prohibitions and conditions as it may deem fit for failure to comply with the specified capital adequacy ratio.⁴³

Minimum holding of cash reserves, specified liquid assets, special deposits and stabilisation securities

- The penalty for not complying with the provisions on Minimum holding of cash reserves, specified liquid assets, special deposits and stabilisation securities has been increased to not less than N5,000,000 and an additional penalty of N100,000 for each day during which the contravention continues.⁴⁴
- Furthermore, the new Act has deleted the provision under the old Act which provides that the Central Bank may also, during the period when the bank fails to comply with any of these requirements, withdraw any privileges or facilities that are normally accorded to the bank.

Maintenance of Reserve Fund

- The penalty for non – compliance with the provision of the Act or regulation of the CBN on the maintenance of reserve fund has been increased from a fine of N500,000 to a fine of not less than N2,000,000.⁴⁵

Restriction on Payment of Dividends

- Under the new Act, a bank must satisfy all corporate governance and prudential requirements that may be stipulated by the Central Bank from time to time to be eligible to pay dividends.⁴⁶

- Penalty for non – compliance has been varied from a fine of 5 per cent of the dividend paid or imprisonment for a term not exceeding 3 years or both to a term of imprisonment of not less than 3 years or to a fine of not less than N2,000,000 or to both.⁴⁷
- The Act further alters the penalty for any director, manager or officer who fails to comply with the requirements of this section.

Insider Lending/Disclosure of interest by Directors, Managers and Officers in Credit Facilities

- The Act raises the penalty for a director, manager or other officer of a bank who fails to disclose his interest in a credit facility granted by the bank from a fine of N100,000 or imprisonment for a term of 3 years to a term of not less than 3 years or fine of not less than N5,000,000 or both fine and imprisonment.⁴⁸ In addition, any gains or benefits accruing to any person so convicted shall be forfeited to and vested in the bank (granting the credit) rather than the Federal Government as was the case under the old Act.⁴⁹



- The Act also provides that in a case where the director becomes interested in any advance, loan or credit facility after it is granted, the declaration shall be made to the board of directors immediately rather than at the first meeting of the board of directors of the bank held after he becomes so interested under the old Act.⁵⁰
- The Act further provides that a director of a bank who is in any way, whether directly or indirectly interested in the grant of an advance, loan or credit facility with a bank other than the bank in which such person is a director shall declare the nature of such interest in writing to the Central Bank prior to the grant of the advance, loan or credit facility by that other bank and in a case where the director becomes so interested in any advance, loan or credit facility after it is granted, the declaration



shall be made to the Bank immediately.⁵¹ This provision was not contained in the old Act.

- The new Act amends the third arm of the provision that a general notice/declaration of interest to the board of directors of a bank by a director shall be deemed to be sufficient declaration of interest in relation to any advance, loan or credit facility if the notice is given prior to the meeting of the board of directors of the bank rather than what obtained under the extant Act whereby the notice is deemed sufficient if it is given at the meeting of the board of directors of the bank or the director takes reasonable steps to ensure that it is brought up and read at the next meeting of the board of directors of the bank after it is given.⁵²
- Finally, the Act raises the penalty for a director not complying with the provisions of this section from a fine of N100,000 or imprisonment for a term of 3 years or both to a fine of not less than N5,000,000 or imprisonment for a term of 3 years or both fine and imprisonment.⁵³

Directorship

- The Act amends the criteria for the directorship of banks by providing that no bank shall, except with the approval of the Central Bank, have as a director, any person who is a director of any other bank or of any company or entity which has a significant influence on the bank.⁵⁴ The Act defines "significant influence" to mean direct or indirect ownership of five (5) per cent or more of the voting rights in the bank or controlling influence in the decision-making process of the bank.⁵⁵ This is unlike the regime under the old Act which provides that no bank shall, except with the approval of the Central Bank, have as a director any person who is a director of any other bank or of companies which among themselves are entitled to exercise voting rights above ten per cent of the total voting right of all shareholders of the bank.

- The Act also amends the provision under section 19(3)(b) of the old Act which provides that no bank shall be managed by a person who is engaged in any other business or vocation to reflect that no bank shall be managed by a person who is engaged in any other business or vocation whether remunerated or not except such personal or charitable causes as may be determined by the Bank and which do not conflict with or detract from their full-time duties.⁵⁶

Venture Capital / Acquisition of shares in small and medium scale industries etc.

- The Act retains its provision that banks may acquire or hold part of the share capital of any agricultural, industrial, private equity or venture capital company subject to the approval of the Bank⁵⁷ but alters one of the conditions for doing so to include:
 - 1) the shareholding of the bank in any medium scale industry, agricultural enterprise or venture capital company or any other business approved by the Bank shall not be more than 10 per cent of the bank's shareholders' funds unimpaired by losses and shall not exceed 20 percent of the paid-up share capital of the company or such other percentage as the Bank may prescribe from time to time as against 40 percent of the paid-up share capital of the company as provided under the old Act;⁵⁸



- 2) in the case of a non-interest bank, the activities of the agricultural, industrial, private equity or venture capital company shall be such as are permissible under non-interest banking principles.⁵⁹
- The Act also improves on the proviso to the relevant subsection of the old Act by providing that a bank may, subject to the prior written approval of the Central Bank, hold shares acquired in the course of the satisfaction of any debt owed to it, provided the shares acquired are not those of the bank's subsidiary, holding company, associate or



such other related party as the Bank may by regulation prescribe from time to time.⁶⁰ The proviso to the old Act only provides that a bank may hold shares acquired in the course of the satisfaction of any debt owed to it.

- The Act further amends the penalty for non-compliance with this section to a penalty of not less than N5,000,000 and an additional penalty of N100,000 for each day during which the infraction continues.⁶¹

Display of Information at Bank offices

- The Act sets out a list of items every bank must display at its offices and on its website. Apart from its lending and deposit interest rates as required under the old Act, every bank must display at its offices and on its website: (a) its obligation to report transactions above limits stipulated in the Anti-Money Laundering/Combating Financing of Terrorism guidelines/regulations and suspicious transactions to the Nigeria Financial Intelligence Unit; (b) foreign exchange rates; (c) certified true copy of its certificate of incorporation; (e) abridged version of its last approved audited accounts; and (c) such other information as the Bank may require from time to time.⁶² The Act also amends the penalty for failure to comply with this section.⁶³

Returns by Banks

- BOFIA 2020 makes an addition to the list of returns to be filed by banks by providing that where a bank is affiliated to any other person, the Bank may require such a bank to prepare and furnish any return required to be made under this Act or the Central Bank of Nigeria Act on a consolidated basis.⁶⁴ In such a case, the word "affiliated" as used in the section includes a subsidiary or holding company or such other relationship as may be determined from time to time by the Central Bank.⁶⁵

- The Act also adds that the statements and information submitted by a bank under this section shall be regarded as confidential although the Central Bank may furnish any such statement or information to any agency of Government as required by law.⁶⁶

Publication of Financial Statements

- The Act makes noteworthy changes to the regime for publication of financial statements by banks. Banks and other financial institutions are now required to, not later than three months after the end of their financial year, apply to the Bank for approval to publish their financial statements which shall be prepared in accordance with the relevant accounting standards as may be prescribed by the relevant authorities.⁶⁷ In the case of non-interest banks, they must further furnish the CBN with an independent report of their advisory committee of experts on the compliance status of the bank's activities with non-interest banking principles.⁶⁸
- Upon approval for publication by the CBN, the concerned bank or other financial institution must, not later than 7 days after approval: (a) cause to be published in not less than 2 national daily newspapers printed and circulating in Nigeria; (b) exhibit in a conspicuous position in each of its offices, branches and website; and (c) forward to the Bank, copies of the bank's published Statement of Financial Position and Statement of Profit and Loss and Other Comprehensive Income duly signed with full names of the directors of the bank who signed the financial statements, and in the case on a non-interest bank, a copy of the report of its advisory committee of experts.⁶⁹



- The Act also provides that the Statement of Financial Position and Statement of Profit or Loss and Other Comprehensive Income of a bank shall bear on their face the report of an approved auditor and shall contain statements on such



matters as may be specified by the Bank, from time to time.⁷⁰

Appointment, power and report of the approved auditor

- The Act amends the regime for the appointment of auditors by banks to give the Central Bank the power to direct in appropriate cases: (a) the appointment of more than one firm of Auditors for any bank which shall act jointly with the auditors appointed by the bank in auditing the bank's Statement of Financial Position and Statement of Profit or Loss and Other Comprehensive Income and all expenses and fees of the Auditors shall be borne by such bank; and (b) the removal of an auditor of a bank, who in the opinion of the Bank, is not discharging its functions effectively.⁷¹
- The Act also adds that where an auditor ceases to act for any bank, it shall within seven (7) days of the cessation inform the Central Bank of the fact of and reason for the cessation⁷² and the affected bank shall within fourteen (14) days of the cessation, appoint another auditor and obtain the approval of the Bank for the appointment.⁷³
- The Act also adds that an approved auditor shall be appointed for not more than ten (10) years and shall not be eligible for reappointment until a period of ten (10) years has elapsed after each appointment but the Central Bank has the power to determine and prescribe the tenure of approved auditors from time to time.⁷⁴
- The Act also improves on the old Act by providing that if any bank fails to appoint an approved auditor or at any time, fails to fill a vacancy for such person, the Central Bank shall appoint a suitable person for that purpose and shall fix the remuneration to be paid by the bank to such auditor.⁷⁵
- It also provides that every approved auditor of a bank shall have at all times a right of access to the books, accounts, vouchers and all records of the bank, and shall be entitled to require from

directors, managers and officers of the bank, such information and explanation as he thinks necessary for the performance of his duties under the Act.⁷⁶

- The Act further amends the penalty for an approved auditor who acts in contravention of or fails deliberately or negligently to comply with any of the provisions of this section to reflect a fine of not less than N2,000,000, and where the approved auditor is a firm, the individual partner or partners shall, in addition, be liable on conviction to imprisonment for a term of not less than 3 years or a fine of not less than N2,000,000 or both.⁷⁷

CBN's Powers with regard to Failing Banks and Rescue Tools

The Act also extends the power of the CBN with regards to failing banks and the rescue tools that may be employed by the CBN. The Act extends the power of the CBN Governor to (a) suspend any payment or delivery obligations pursuant to any contract to which the bank is a party; (b) require third-party service providers to the bank, to continue to provide services to the bank for such period as may be set out in the order; (c) transfer the bank or the whole or part only of the banking business of the bank to third-party private purchasers; and (d) employ any other intervention tools as the Bank may deem fit upon being notified of the status of a failing bank.⁷⁸ Other rescue tools employable in the case of a failing bank are contained in Sections 37-42 of the Act.



The Act also provides that without prejudice to the powers given to the CBN under this section, and notwithstanding the provisions of section 34 of the Central Bank of Nigeria Act or anything in any written law or contract or any limitations contained in the memorandum and articles of association of any bank, the CBN has power to, at any time, acquire shares of any failing bank up to a level that guarantees it gains control over it but it must dispose of such equity investment in such bank at the earliest suitable time.⁷⁹



Furthermore, if after taking any or all of the steps or exercising any of the powers stipulated in the section or such other measures as in the opinion of the Bank may be appropriate in the circumstance including but not limited to the measures and steps under sections 37– 42 of the Act, the state of affairs of the bank concerned does not improve, the Bank may invoke its power under the Act and revoke the licence of the concerned bank.⁸⁰

Application to the Federal High Court for winding up. Where the license of a bank has been revoked pursuant to section 39 of the Act, the Nigeria Deposit Insurance Corporation (NDIC) shall apply to the Federal High Court for a winding-up order of the affairs of the bank.⁸¹

OTHER RELEVANT PROVISIONS

Cooperation, etc. of agencies with the Central Bank during Banking Crisis

The Act provides that notwithstanding the provisions of any other enactment, relevant agencies shall cooperate with, render such assistance, grant such waivers or forbearances, as may be required by the Governor, which in the opinion of the Governor are necessary or expedient to resolve a banking crisis occasioned whenever two or more conditions as stipulated under the Act or any such other conditions as may be prescribed by the Governor occur.⁸² This novel provision was not contained under the old Act and is aimed at improving the regime for the resolution of potential banking crises in the country. The Act goes further to define relevant agencies to include the Federal Ministry of Finance, Budget and National Planning; the Nigeria Deposit Insurance Corporation; the Corporate Affairs Commission; the Federal Inland Revenue Service; and any other ministry, department or agency as may be determined by the Governor.⁸³

Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT)

The Act provides that all banks, specialised banks, and other financial institutions shall adopt policies stating their commitments to comply with Anti-Money Laundering (AML) and Combating Financing of Terrorism (CFT) obligations under subsisting laws, regulations and regulatory directives and to implement internal control measures to prevent any transaction that facilitates criminal activities, money laundering or terrorism.⁸⁴ The Central Bank Governor is, however, also given the power to issue regulations, guidelines and policies from time to time to fight money laundering and combat the financing of terrorism for banks and other financial institutions, in line with international best practices and standards.⁸⁵ The Governor is also empowered to liaise with relevant bodies in other countries with similar objectives to share information and relevant data that would aid the fight against money laundering and combat the financing of terrorism.⁸⁶

The CBN has also been granted powers to freeze accounts deemed to be involved in the commission of any criminal offence (fraudulent, terrorist-related, etc.) with a valid court order obtained from the Federal High Court by the CBN Governor.⁸⁷



Cybersecurity Regulation by the Bank.

In line with global best practices, the Act also introduces cyber-security regulations to address cyber-security-related issues in the delivery of services by banks, especially with the shift from traditional (physical presence) banking practices to online platforms and the dependence of banks on computerized systems for record-keeping.

It provides that the Central Bank may issue regulations and guidelines to banks, specialised banks or other financial institutions to address cybersecurity issues in the delivery of financial or banking services⁸⁸ and all concerned banks, specialised banks or other financial institutions shall



comply strictly with such cyber-security regulations and guidelines issued by the Bank.⁸⁹

It further adds that any officer of a bank, specialised bank or other financial institution who, through action or omission, fails to comply with the regulations and guidelines shall be liable to a penalty of not less than N2,000,000 and an additional penalty of N50,000 for each day during which such failure occurs.⁹⁰

Establishment of the Banking Sector Resolution Fund

The Act also introduces the (Banking Sector) Resolution Fund, which will be funded annually by the CBN and the banks and managed by the CBN.⁹¹ This is aimed at eradicating or, at least, minimizing recourse to public funds for resolution of crises in the banking sector and of failing or failed banks. By this, the Act opts for the “bail-in” option as against the usual (but undesirable and problematic) “bail-out” option.

Establishment of a Special Tribunal for the Enforcement and Recovery of Eligible Loans

Seeing as lengthy and seemingly unending loan dispute resolution issues have also been found to be a major cause of bank failures, the Act also creates a Credit Tribunal for the expeditious hearing and resolution of loan-related matters.⁹² This is a laudable development and it is expected that the provision would impact positively on the financial health of the economy as a whole.

The Act also provides that the case fee payable by banks, specialised banks or other institutions shall be 0.5 percent of the amount of their claim or such other percentage as set out in the Rules of Procedure of the Tribunal.⁹³

Oversight by CBN Examiners

The Act grants the CBN examiners power to attend, as observers, management and board meetings of

banks and other financial institutions or specialized banks.⁹⁴

Immunity from suit

The Act also grants immunity from judicial intervention to the Federal Government, the CBN, or any officer of the Federal Government or the CBN in respect of any action, claim or liability to any person in respect of anything done in the exercise of their duties under the Act.⁹⁵ Relying on existing legal protocols and judicial authorities, we believe that this particular provision can be challenged in court– and presumes it will be so challenged – because it represents an ouster of the jurisdiction of the court and so is unconstitutional. This is because the Constitution of the Federal Republic of Nigeria which is the ‘grundnorm’ and *‘fons et origo’* of all laws in the country provides that the National Assembly or a House of Assembly of a State shall not enact a law that ousts or purports to oust the jurisdiction of the court or a tribunal established by law.⁹⁶ The Constitution is supreme and if any law is inconsistent with its provisions, the constitution prevails and that other law shall to the extent of the inconsistencies be void.⁹⁷



CONCLUSION

Owing to the critical role of the banking and finance sector to the health of globally-competitive modern economies, the enactment of the new BOFIA is a truly welcome development. The current government’s aggressive industrialization and investment agenda to improve the Nigerian business climate have seen the country climb quickly in the World Bank Doing Business Index and the enactment of BOFIA 2020 hot on the heels of CAMA 2020 is further evidence of that. Whilst the old BOFIA 2004 provided an appropriate foundation for the growth and development witnessed in Nigerian banking and financial services sector over the last decade, significant contemporary financial, socio-economic and technological transformations across the world made the modernization of the legal framework for



banking and financial services in the country a necessity.

The Act, for example, addresses the clarification and accurate delineation of the regulatory functions of the Central Bank of Nigeria (CBN), as well as provides for new and developing areas of banking and finance such as microfinance banks and financial technology (fintech), which were not in their contemporary status when the old Act was conceived and enacted. It creates a sanctions regime which, if effectively implemented, will help check sharp practices in the banking sector and prevent future systemic distress. It also variously contain provisions dealing with insider lending; regulation of fintech; anti-money laundering (AML); operations of foreign banks and offshore banking; cybersecurity; the creation of a credit tribunal and a banking sector resolution fund; the appointment of the Nigeria Deposit Insurance Corporation (NDIC) as a liquidator of banks whose licence have been revoked, the immediate payment by the CBN of private deposit liabilities of banks before the commencement or completion of the liquidation of the bank by the NDIC, the exclusive jurisdiction of the Federal High Court to entertain action to challenge the revocation of the licence of a bank, the time frame within which to hear and determine an action to challenge a revocation and an appeal against the decision of the Federal High Court in respect of same, time within which to commence an action in respect of revocation of the licence of a bank; the maintenance at all times of capital funds unimpaired by losses as may be specified by the CBN failing which such bank may be prohibited from paying cash dividends to shareholders; etc.

Overall, the banking and financial services sector is crucial to the facilitation of trade and investment as well as the sustenance of economic activities and so a strengthened legal framework is a very critical and strategic tool to maintaining productivity and improving confidence in the sector. The new BOFIA is, therefore, expected to strengthen financial

stability and regulation and aid sustainable growth and development of the Nigerian economy.

REFERENCES

1. The Central Bank of Nigeria (CBN) itself has previously iterated that widespread innovation in channels for delivering financial services, emergence of new types of regulated institutions, advancements in supervisory techniques and methodologies are some of the contemporary developments that necessitate the need to upscale the legal framework for banking regulation and supervision in Nigeria.
2. Section 2(1)
3. Section 2(2)
4. Section 2(5)(a) and (b)
5. *Ibid*
6. Section 2(3)
7. Section 57(1) and (2)
8. Section 3(1)(a)
9. Section 3(1)(d)
10. Section 3(5)
11. Section 3(6)
12. Section 8(2)
13. Section 8(4)
14. Section 2(1)
15. Section 4(2) requires an applicant bank to deposit with the CBN a sum equal to the minimum paid-up share capital prescribed by the CBN which sum section 4(1) the CBN is required to be invest in a treasury bills or such other securities or non-interest bearing securities or similar non-interest banking compliant product or investment in the case of an application for a noninterest bank, until such a time as the CBN Governor shall decide whether or not to grant a license.
16. Section 5(3)
17. Section 5(5)
18. Section 5(6)
19. Section 12(1)
20. Section 12(1)
21. Section 12(2)
22. Section 40(1) of the Nigeria Deposit Insurance Corporation Act 2006
23. Section 12(3)
24. Section 12(5)
25. Section 12(4)
26. Section 6(1)
27. Section 6(4). The new Act actually increases the penalty from a fine of x500,000 and an additional fine of x5,000 for each day during which the non-compliance continues to N5,000,000 and an additional penalty of N100,000 for each day during which the contravention continues.
28. Section 6(2)
29. Section 6(3)
30. Section 7(1)
31. Section 7(7)
32. Section 7(3)
33. Section 711 of the Companies and Allied Matters Act 2020.
34. The Act even provides that its provisions shall apply notwithstanding the provisions of the Federal



Competition and Consumer Protection Act. See section 7(6)

35. Section 7(4)
36. Sections 104 and 105 of the Federal Competition and Consumer Protection Act 2018
37. Section 7(5)
38. Section 13(1)
39. Section 13(2)
40. Section 13(3)
41. Section 13(4)
42. Section 13(5)
43. Section 13(6)
44. Section 14(5)
45. Section 15(2)
46. Section 16(1)(d)
47. Section 16(2)
48. Section 17(2)
49. Ibid
50. Section 17(4)
51. Section 17(6)
52. Section 17(8)
53. Section 17(12)
54. Section 18(2)
55. Section 18(3). It also adds a proviso to the effect that in the case of a financial holding company, the aggregate number of directors from the subsidiaries and associates shall not exceed 30 per cent of the members of the board of directors of the financial holding company and the number of directors of the financial holding company in the board of a subsidiary or associate shall not exceed 30 per cent of the members of the board of such subsidiary or associate
56. Section 18(4)(b)
57. Section 20(1)
58. Section 20(1)(d)
59. Section 20(1)(e)
60. Section 20(2)
61. Section 20(5)
62. Section 22(1)
63. Section 22(2)
64. Section 24(3)
65. Section 24(4)
66. Section 24(5)
67. Section 26(1)
68. ibid
69. Section 26(2)
70. Section 26(4)
71. Section 28(1)
72. Section 28(3)

73. Section 28(2)
74. Section 28(6)
75. Section 28(7)
76. Section 28(8)
77. Section 28(12)
78. Section 34(2)
79. Section 34(3)
80. Section 34(4)
81. Section 35. This is similar to the provision of Section 40 of the Nigeria Deposit Insurance (NDIC) Act 2006
82. Section 36(1)
83. Section 36(2)
84. Section 66(1)
85. Section 66(2)
86. Section 66(3)
87. Section 97
88. Section 68(1)
89. Section 68(2)
90. Section 68(3)
91. Sections 74 – 101
92. Sections 102 – 129
93. Section 118
94. Section 29(4)(d)
95. Section 51
96. Section 4(8) of the Constitution of the Federal Republic of Nigeria
97. Section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria

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