

Banks And Other Financial Institutions Act (BOFIA) 2020: Reforming Provisions That Impact The Banking System, and Other Financial Institutions In Nigeria.

Introduction

In the past decade, industry stakeholders have consistently argued that the Banks and Other Financial Institutions Act (BOFIA) 1991 was obsolete and needed to be updated to reflect the true position of the industry. They had long canvassed for the review of the banking and financial sector framework especially following the 2004 and 2008 financial crises that almost eroded confidence in the banking system because of revelation that banks' assets quality had significantly deteriorated as a result of excessive risk taking, reckless credit facilities, and other unethical practices. Bank officials had taken advantage of some limitations in the repealed BOFIA including absence of stringent financial sanctions to deter infractions, lack of specialised courts to prosecute financial crimes, as well as absence of a clause that prevents bank officials from giving indiscriminate credit facilities.

In response to the significant challenges in the repealed BOFIA, and owing to development in the financial sector, President Muhammed Buhari on the 12th of November 2020 signed the Banks and Other Financial Institutions Act 2020

(BOFIA") into Law. This Act repeals and replaces Banks and other Financial Institutions Act 1991 with some of the innovative provisions geared toward enhancing and regulating the financial sector in Nigeria, enhancing the soundness and resilience of the financial system for sustainable growth and development of the Nigerian economy, strengthening CBN regulatory framework for the financial industry, inclusion of Financial Technology (Fintech) companies and microfinance banks in the regulatory framework, creation of a Credit Tribunal to strengthen credit recovery processes, enforcement of collateral right, amongst others.

Key Provisions

1. **Regulation of Financial Technology Companies:** With the rapid proliferation of technologies in the provision of banking services, section 69 of the Act now regulates the activities of Financial Technology Companies (FinTechs) by stipulating the conditions FinTechs must meet before being granted a licence to operate.

2. **Issuance of Licence:** Under Section 3(3) of the new Act, the Central Bank of Nigeria (CBN) may, upon payment of the prescribed sum by a proposed bank (applicant), issue a licence or refuse to issue a licence, and CBN is required to give reasons for the refusal within 60 days. This is an improvement on the old Act, which gave the CBN Governor wide discretionary power to issue a licence, with or without conditions or refuse to issue a licence without giving any reasons for such refusal.

   Section 3(4)(ii) of the Act further provides that where CBN grants an application for licence, it shall in addition to giving written notice to the applicant; indicate the scope of the banking business in which the applicant can engage in and the geographical area within which the applicant bank shall operate.

3. **Banks with no Physical Presence:** Section 3(6) provides that any bank or its subsidiaries which has no physical presence in the country of incorporation where it is licensed and is not affiliated with any financial services group that is subject to effective consolidated supervision shall not be allowed to operate in

Nigeria. The Act also provides that no Nigerian bank or its subsidiaries shall establish or continue any relationship with such bank or subsidiary.

4. **Introduction of stiffer penalties:** Another laudable provision of the new Act is Section 5(6), which makes any director, manager, or officer of a bank who fails to take reasonable steps to secure compliance with any conditions of licence, guilty upon conviction of the offence. The Act also provides that such a person is liable to imprisonment to a term not exceeding five years or a fine of N50,000,000.00 (Fifty Million Naira) or for both the imprisonment and fine.

5. **Revocation of Licence**: Remarkably, the provision of Section 12 dealing with "Revocation of Banking Licence" 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 has been enlarged to include 9 subsections. The subsections in Section 12 of the Act contain provisions dealing with the appointment of the Nigerian Deposit Insurance Corporation (NDIC) as a liquidator of the affected bank whose licence was revoked, the immediate payment by the CBN of private deposit liabilities of the bank before the commencement or completion of the liquidation of the bank by the Corporation, 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, and so on. All of these are novel provisions, which are not contained in the 1991 Act.

6. **Specialized Banks or Business of other Financial Institutions in Nigeria:** Under the new Act, Section 58(1) & (2) provides that no person shall carry on specialised banking or business of other financial institutions in Nigeria, other than insurance, pension fund management, collective investment schemes, and capital market, except it is a company duly incorporated in Nigeria and holds a valid licence granted under the provisions of the Act. Examples of "business of other financial institutions" under the Act include business of a discount house, bureau de change, finance company, money brokerage, etc.

7. **Approval to close a Bank**: Section 6(1) provides that no bank or its subsidiaries may open or close any branch office, cash centre or representative office anywhere within or outside Nigeria except with the prior consent in writing of CBN. The Act further provides 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 such shorter period as the Governor may, in any particular case allow.

   The Section further provides that the punishment for contravention of this section include payment of fine exceeding N2, 000,000.00

8. **Agreement to transfer Shareholding**: Section 7(1) of the Act provides no bank shall enter into an agreement or arrangement which results in the transfer of a significant shareholding in the bank without the prior consent of the CBN Governor. Section 7(7) of the Act further provides that the punishment for breach of Section 7(1) include payment of fine in the sum of N10,000,000.00

9. **Minimum Capital Ratio**: The provisions of Section 13 dealing with "Minimum Capital Ratio" has been enlarged to include the power of CBN to prescribe a higher or lower capital adequacy ratio, or a bank that has a holding company or subsidiary or both to calculate and maintain minimum capital adequacy ratio on a consolidated basis.

10. **Loan Facility in excess of Three Million Naira (3,000,000,00):** Section 20(1) (c) provides that a bank shall not, without the approval of the CBN, grant any advance, loan, or credit facility in excess of N3,000,000.00 or such amount as may be prescribed by the CBN, without any security or collateral.

11. **Equity Participation:** Section 21(1) (d) of the Act provides that the aggregate value of the equity participation of a bank in all enterprises both domestic and foreign shall not at any time exceed 40 percent of its shareholders' fund unimpaired by losses or such other percentage as the CBN may prescribe from time to time. Under the old Act, it was pegged at 20 percent.

12. **A non-profit bank:** Under the new Act, section 23(1) provides that a non-interest or profit and loss sharing bank shall indicate conspicuously in all their offices that they charge no interest. In the same vein, (unlike the old Act which permits 28 days after the last day of each month), every bank shall submit to the CBN not later than 10 days after the last day of each month or such other interval as the CBN may specify, a statement showing its assets and liabilities and an analysis of advances and other assets. See Section 25(1) of the Act. The CBN may require any bank, which is affiliated to any other person to prepare and furnish any return required to be made on a consolidated basis. See Section 25(3) and (4).

13. **Publication of Bank's financial statement:** Section 28(1) of BOFIA provides that a bank shall not later than three months (unlike 4 months under the old Act) after the end of its financial year, forward to the CBN for approval to publish (no requirement for approval to publish under the old Act) its financial statement which shall be prepared in accordance with the relevant accounting standard. Sub section 2 further provides that every bank shall, not later than 14 days after approval by the CBN, cause to be published in not less than 2 national daily newspapers (unlike 1 daily newspaper under the old Act), exhibit in a conspicuous position in each of its offices and branches, and forward to the CBN copies of the bank's balance sheet and profit and loss account duly signed.

14. **General Sanctions:** Section 64(1) provides that the sanctions, which the CBN Governor may impose on any bank, specialised bank, or other financial institution for failure to comply with any of the provisions of the Act, the Central Bank of Nigeria Act, or any other law or any rules, regulations, guidelines or directives made thereunder, have been enlarged beyond penalty or suspension of licence to now include suspension of the authorised foreign exchange dealership licence, prohibition from participation in any medium for transaction in foreign exchange, suspension from participation in bank clearing systems, forfeiture to the CBN of any pecuniary benefit obtained as a result of the violation or breach, imposition of a penalty not exceeding N5,000,000,00 etc.

15. **Appointment of a Bank's Auditor:** By the proviso to Section 29(1) of the new Act, the CBN may direct, in appropriate cases, the appointment of more than one firm of Auditors for any bank, which shall act jointly in auditing the bank's balance sheet and profit and loss accounts, and all expenses and fees of the Auditors shall be borne by the bank. Section 29(2) further provides that, every bank must on an annual basis, appoint an auditor and obtain the approval of the CBN to such appointment, and where, for any reason, the auditor ceases to act for the bank, appoint another auditor as soon as practicable. Further to this, Section 29(3) provides that an auditor shall not be approved by the CBN as auditor for the bank unless the auditor is able to comply with such conditions in relation to the discharge of his duties as may be determined by the CBN.

    Section 29(6) further provides that a person shall not be eligible for appointment as an external auditor of a bank or retain his appointment, if already appointed, unless that person declares to the CBN the interest that he may have in the bank or maintain with any of its directors or significant shareholders. Under the Act, Section 29(7) provides that an approved auditor shall only be appointed for a period of not more than 5 years and shall not be eligible for reappointment until after a period of 10 years has elapsed after each appointment.

16. **Notice:** Section 18(5) provides that the notice required to be given by a director who is directly or indirectly interested in any advance, loan, or credit facility must be in writing.

17. **Management of a Bank**: Under the new Act, Section 19(2) (b) provides that no bank shall be managed by a person who is the Chairman of the board of Directors of the bank. The provision under Section 19(1)(b) of the old Act, to the effect that: "no bank shall be managed by a management agent except as may be approved by the Bank" has been deleted in the new Act.

    The new Act in Section 19(2) allows the manager of a bank to engage in "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". See Section 19(2)(d).

Under the new Act, provision is made for the constitution of a Crisis Management Committee which function shall be to manage systemic distress by coordinating the actions of regulatory and supervisory agencies of any sub-sector of the financial services industry. See Section 38 of BOFIA.

18. **The Act bars Banks from hiring dismissed Government workers:** Section 48(2) (b) provides that a person who is dismissed from the service of the Federal, State or Local Government or any of the agencies of such government shall not be employed or continue the employment as a director, secretary or an officer of a bank.

19. **Supremacy of the Act**: The provisions of the Act apply without prejudice to the provisions of the Companies and Allied Matters Act (CAMA), the Nigeria Deposit Insurance Corporation Act (NDIC Act), Federal Mortgage Bank of Nigeria Act, Primary Mortgage Institutions Act, Nigerian Agricultural Cooperative and Rural Development Bank Act, and the Urban Development Bank Act, in so far as they relate to banks, other financial institutions and specialised banks and to winding up of such institutions. See Section 55(1). Where any of the provisions of the various Acts mentioned above is inconsistent with any provisions of the Act, the provisions of the Act shall prevail. See Section 55(2).

20. **Credit Tribunal**: The Act introduces credit tribunal to handle loan recovery matters. The Act Also Empowers credit tribunal to address the incidence of high non-performing loans within the financial system, which has been a key deterrent to lending by financial institutions.

DISCLAIMER: This article is only intended to provide general information on the subject matter and does not by itself create a client/attorney relationship between readers and our Law Firm or serve as legal advice. We are available to provide specialist legal advice on the readers' specific circumstances when they arise.