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# Securitisation 2024

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**Ghana: Law & Practice and Trends & Developments**

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B&P Associates

# GHANA


## Law and Practice

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**B&P Associates** is a reputable law firm located at Labone, Accra, with 20 core team members including the managing partner and five non-lawyers. The firm keenly promotes the ease of doing business in Ghana, and provides top-notch, user-friendly legal advice to domestic and international investors. It provides clients with all forms of assistance to navigate the legal and regulatory landscape, as well as providing training and consultancy for international organisations on the Ghanaian investment scheme. The team is experienced in assisting companies set up and run successfully in Ghana with respect to business formation and financing, operational matters, as well as myriad corporate transactions, contracts, securities, joint ventures and shareholding agreements, corporate governance, and company secretarial services. The firm would like to acknowledge Audrey Nana Oye Addy for her contribution to the preparation of this publication.

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# 1. Specific Financial Asset Types

## 1.1 Common Financial Assets

Securitisation in Ghana has not undergone extensive exploration; nevertheless, the few instances in which securitisation has been employed involved assets including: future receivables, tax receipts and consumer loans. Currently, there have been three main securitisation transactions approved by SEC. In those transactions, the financial assets used are categorised as follows:

- cashflows – levies paid to the government [GetFund and Energy Sector Levy]; and
- consumer loans issued to public sector employees [Controller ABS PLC].

## 1.2 Structures Relating to Financial Assets

The most commonly used form of securitisation in Ghana is Future Flow Securitisation (FFS). The structure applied in cases involving taxes and future receivables is the traditional structure. Here, the originator leverages on its levies and taxes to be received in the future. The originator transfers its right to cash flows to an SPE. The SPE (incorporated as an independent public liability company) issues bonds backed by the cash flows. Investors invest in the bonds providing immediate proceeds paid upfront to the originator and the cash flows are used to pay off the bonds.

## 1.3 Applicable Laws and Regulations

While Ghana lacks dedicated securitisation legislation, securitisation transactions are nonetheless regulated by the following laws and documents:

- Companies Act 2019 (Act 992);
- Securities Industry Act 2016 (Act 929), as amended;
- SEC Regulations 2003 (LI 1728);
- Securities and Exchange Commission (Amendment) Regulations 2019 LI 2387;
- Energy Sector Levy Act 2015 (Act 899);
- Ghana Education Trust Fund (GetFund) Act 2000 (Act 581), as amended;
- Listing Rules of the Ghana Stock Exchange; and
- The Corporate Governance Code of the Securities and Exchange Commission.

## 1.4 Special-Purpose Entity (SPE) Jurisdiction

Although, securitisation transactions in Ghana are uncommon, there are no specific laws in

Ghana that prevent SPEs incorporated in other jurisdictions from participating in the Ghanaian economy. Accordingly, the choice of jurisdiction of incorporation of SPEs is subject to the aims of the originator.

Generally, Special Purpose Entities (SPEs) are often created with the aim of obtaining specific advantages provided by the host jurisdiction. The most desirable feature of an SPE in a securitisation transaction is arguably the extent of its bankruptcy remoteness. A country with more accommodating insolvency laws could be potentially more attractive for the purposes of incorporating an SPE for securitisation.

### 1.5 Material Forms of Credit Enhancement

Securitisation transactions in Ghana are relatively limited. However, when these transactions do occur, over-collateralisation is the most commonly used credit enhancement method.

## 2. Roles and Responsibilities of the Parties

### 2.1 Issuers

The term "issuer" pertains to an individual or any other entity that issues, has previously issued, or plans to issue securities. In the context of securitisation, an issuer would be the SPE securitisation vehicle.

Its primary role is to create securities and sell them in the market. Where an issuer issues securities to the public, it is tasked with complying with regulatory requirements.

### 2.2 Sponsors

A sponsor purchases the pool of assets with the ultimate intention of securitising them. In some transactions, the sponsor is also the originator. This role has been predominantly played by the Government of Ghana in the majority of the securitisation transactions that have occurred in Ghana.

### 2.3 Originators/Sellers

The originator refers to the company that originally pools the assets and assigns them to the SPE or purchases the exposures of other parties with the aim of securitising them.

Originators tend to be financial institutions (such as banks), large companies and commercial enterprises, and specialist entities set up for securitisation. In the Ghanaian context of securitisation, however, the originator tends to be the government.

### 2.4 Underwriters and Placement Agents

Underwriters are corporate bodies that buy securities outright from an issuer and sell them to open-market investors (Section 109, Act 929). An underwriter may be an investment bank, however, where it is a bank, it is referred to as an issuing house.

The underwriter is the entity responsible for arranging the sale of the issuer's securities to the initial investors. It serves as an intermediary between the issuer (SPE) and investors in an offering. The underwriter analyses investor demand and – in collaboration with the Credit Rating Agency – provides guidance on structuring the transaction in an efficient and cost-effective manner.

In order to act as an underwriter, the company must be duly licensed by the SEC. Underwriters may take the form of Licensed Dealing Members (LDM) who operate through Authorised Dealing Officers.

In order to issue a bond on the Ghana Stock Exchange (GSE), the issuer is required to appoint an LDM to sponsor its application to list. The LDM would be required to file all the application documentation with the GSE (GSE Listing Rules 20).

### 2.5 Servicers

Servicers are generally tasked as the originator's representative to ensure compliance by the SPE. This role has not been designated within the structures explored in Ghana, however, it may be said that the role of a servicer is in some parts played by the following parties working together.

- Lead managers/arrangers – structure the transaction and ensure that parties participate and play their respective roles.
- Debt-service Bank – provides banking services to the SPE. The debt service bank must comply with the regulations of the Banks and Specialised Deposit Taking Institutions Act 2016 (Act 930). In the transactions that have occurred in Ghana so far, due to the nature of the financial assets, the debt-service bank has also been tasked with the collection and proper distribution of cash flows.
- Manager of the SPE – which is usually a corporate body, based on the transactions that have occurred. They handle the day-to-day activities of the SPE and ensure that all roles and obligations of the SPE on both ends of the transaction are satisfied.

### 2.6 Investors

Investors are key parties to the securitisation transaction. They purchase the securities issued and where the security is a bond, they would receive coupons and the face value of the bond at maturity. Regarding investors, the main responsibility of the SEC as a regulator is to ensure investor protection. The investor may therefore not have responsibilities beyond the payment for the security.

Additionally, the investor may have rights that exist under the trust deed based on which the bonds are issued.

The typical investors in securitisation are financial institutions, insurance companies, pension funds, hedge funds, corporations and high net worth individuals.

### 2.7 Bond/Note Trustees

The bond trustee acts as a representative of investors in the transaction. The primary role of the trustee is to ensure that the interests of bondholders/investors are protected. The responsibilities of the trustee vary and are largely dependent on a separate trust agreement. It is important to note that apart from a government debt security, any other debt security must be issued subject to a trust deed approved by the SEC (GSE Listing Rules 7).

### 2.8 Security Trustees/Agents

A security trustee or agent acts as the entity responsible for holding the different security interests established in trust for these various creditors, which may include banks or bondholders. This setup eliminates the need to provide security individually to each creditor, which would be both expensive and unmanageable. Security interests held by security trustees are enforceable in Ghana. A security trustee may be appointed to hold security in trust for, or on behalf of multiple lenders or other secured parties, provided that any security interests granted in favour of that trustee are properly perfected.

## 3. Documentation

### 3.1 Bankruptcy-Remote Transfer of Financial Assets

The agreements that are relevant to a bankruptcy remote transfer largely depend on the type of underlying asset, however, an Asset Purchase Agreement may be explored in this instance. In order to avoid transfer pricing issues, there must be adequate consideration commensurate with the value of the asset in line with the arm's length theory.

Additionally, there must be a reflection of a true sale in its entirety. For instance, in an effective transfer of the asset, the originator must not continue to exercise control over the asset in the capacity of an owner. In the absence of specific legislation, the SEC is open to tailor-made terms that express the concept of securitisation.

### 3.2 Principal Warranties

The principal warranties that may be included in securitisation documentation are as follows:

- an assurance that the asset is free from encumbrance;
- an assurance that the originator has perfect title to the asset and has the capacity to transfer it;
- an assurance of complete regulatory compliance and due authorisations; and
- any other peculiar warranties that the parties may wish to include.

Regarding enforcement of the warranties given, parties may include a clause by which the SPE may be indemnified upon breach of the warranties provided. Usually, parties provide for a dispute resolution clause which gives the disgruntled party an avenue to remedy a breach of the terms of an agreement.

### 3.3 Principal Perfection Provisions

Perfection is contingent on the nature of the asset being transferred.

Generally, some principal perfection provisions that may be included are delivery of the title documents to the transferee; and provisions on filing the changes in title with the regulatory authorities.

### 3.4 Principal Covenants

As described above, the nature of the agreement largely depends on the type of financial asset. However, regarding covenants, parties will include terms relating to the obligations of each party. This covers payment obligations, delivery mechanism, notice required, reporting obligations, collateral obligations, if any, and any other covenants as permitted by the SEC.

In relation to enforcement, the dispute resolution clause would provide for the agreed process to make claims.

### 3.5 Principal Servicing Provisions

This will reflect the obligations of the servicer, reporting obligations, notices and information to be given. There may be timelines provided for the delivery of required reports.

### 3.6 Principal Defaults

Defaults in securitisation documentation may take the following forms.

- General defaults by parties – in this case there may be a general breach of the agreement or a breach of specified events of default such as the insolvency of the SPE, which may instigate a sequence of events for the claiming of remedies from the defaulting party.

- Early amortisation – certain events may trigger the claim of investors for a payout, irrespective of when the maturity date of the bond issued may be. Some instances that may pre-empt such occurrences include the decline in underlying assets, which may be cash flows, and an increased rate in default by debtors where the underlying asset may be loans.

In the case of general events of default, the most likely avenue would be the exploration of the dispute resolution clause for enforcement. In relation to early amortisation, investors will be at liberty to make their claims. However, due to the liquidity issues that this may pose for the SPE and the likelihood that some investors may encounter a loss on their investments, the SEC may have to be involved in the process.

### 3.7 Principal Indemnities

The parties may include indemnity clauses for defaults owing to the acts or negligence of a party. Due to the absence of direct laws and regulations, the parties are at liberty to structure such clauses to meet their preferences, subject to the approval of the relevant regulators.

### 3.8 Bonds/Notes/Securities

The principal transaction documents in a securitisation include the following:

- offering memorandum;
- trust deed;
- paying agency agreement;
- subscription agreement;
- servicing agreement;
- sale agreement;
- security agreement;
- investment or collateral management agreement;
- post enforcement call option agreement;
- swap contracts; and
- legal opinions.

### 3.9 Derivatives

Ghana's financial system has not evolved to incorporate the extensive use of derivatives. The SEC and the GSE are presently working on a comprehensive legal and regulatory framework that would make the development of a derivatives market possible.

### 3.10 Offering Memoranda

An offering memorandum is principally a legal and regulatory disclosure document. An offering memorandum is typically required in situations where an issuer, especially a new one, or an issuer with weaker creditworthiness, is looking to raise capital through debt securities in the capital markets. It may sometimes be referred to as the prospectus, offering circular, offering memorandum, information memorandum or listing particulars. In Ghana, however, it is commonly referred to as the prospectus.

Regarding specific regulations, there are no securitisation-specific disclosure laws and regulations. However, the SEC Regulations 2003 (LI 1728) (see Sections 50–62) generally provide regulations for disclosure by issuers. This has been further incorporated in the GSE Listing Rules.

## 4. Laws and Regulations Specifically Relating to Securitisation

### 4.1 Specific Disclosure Laws or Regulations

There are no securitisation-specific disclosure laws or regulations.

### 4.2 General Disclosure Laws or Regulations

The SEC Regulations 2003 (LI 1728) (see Sections 50–62) set out the regulations for disclosure by issuers. These regulations have also been incorporated in the GSE Listing Rules. The Regulations provide that the SPE, as an issuer, has a duty to:

- maintain high standards of disclosure;
- fully disclose information needed to make informed investment decisions to the public;
- ensure the immediate release of information, reasonably expected to have a material effect on the market activity and price of its listed securities;
- ensure the maintenance of a fair and orderly market in its securities; and
- help to ensure that investors have simultaneous and equal access to the same information.

The SPE is not required to disclose its internal estimates or to disclose the projections of its earnings. If it chooses to disclose this information, then it has a duty to ensure that the information prepared is thorough, factual and realistic with appropriate qualifications, and subsequent developments that vary should be promptly reported with the reasons for the variance adequately explained.

The SPE is required to promptly announce the following in writing to the SEC:

- non-payment of interest on the "due date" on account of debt securities;
- non-payment of capital on the redemption date on account of debt securities;
- a joint venture, merger, acquisition, or takeover;
- a decision on whether or not to declare a dividend;
- any decision to change the capital structure of the SPE including a rights issue or a bonus issue;
- a change in company officers or control of the business;
- change of address of the registered office of the SPE or of any offices at which the register of the securities of the SPE is kept;
- a call of securities for redemption;
- penalties imposed on the SPE by a regulatory authority;
- an event or occurrence which has the potential of materially affecting the business or revenue or profits of the company and efforts to minimise its effect;
- alteration or amendment of the rights and privileges of any unlisted securities issued by the SPE;
- a tender offer for another entity's securities;
- a new product or discovery;
- the public or private sale of additional securities;
- a change in capital investment plans; and
- a labour dispute or dispute with subcontractors or suppliers.

The above information must be communicated to the SEC in writing.

In some cases, the SPE may withhold information, for instance: where immediate disclosure would prejudice the ability of the SPE to pursue its corporate objectives. However, where there is any question of whether or not to disclose, the SPE should disclose.

Additionally, before the SPE lists its securities, it is required to submit the Trust Deed pursuant to which the securities are being listed for the approval of the SEC.

The SPE would be required to register its securities with the SEC. The SEC would then issue a certificate of registration in respect of securities registered. This applies to all public issuance of securities except securities with a maturity of one year. The SPE must also inform the SEC of a cancellation or redemption of the securities within 21 days of the event (Section 145, Act 929).

### Disclosure by the Originator

An originator, on the other hand, has a duty to file its audited financial statements with the registrar of companies annually. It also has a duty to file any changes in the company's particulars contained in the Companies Register (Companies Act, 2019 (Act 992)).

Beyond this, the transaction documents may provide for peculiar disclosure requirements.

## 4.3 Credit Risk Retention

There are currently no credit-risk retention specific laws in Ghana.

However, in order to tackle credit risk, the SPE may mark to market to assess the current financial situation of the SPE. This is especially important where the SPE explores innovative measures such as the use of derivatives in its dealings with the originator to promote bankruptcy remoteness.

## 4.4 Periodic Reporting

### Annual Reporting

For compliance, all companies are expected to file their annual report as well as their audited financial statements with the Registrar of Companies for every financial year (Section 127, Act 992). The SPE is also required to circulate these documents to its shareholders, bondholders, the SEC and the GSE within three months of the close of each financial year. The financial statements must adhere to Ghana National Accounting Standards issued by the Institute of Chartered Accountants (Ghana) (Regulation 54, LI1728). The failure of the SPE to fulfil this obligation shall attract a penalty of GHS200 for each day the default subsists (Regulation 62, LI1728).

### Quarterly Reporting

The SPE is obligated to submit quarterly financial statements on its corporate securities listed to the SEC, GSE, bondholders and its shareholders within a month of the completion of each quarter. However, if the SPE circulates its annual report within two months of the end of a financial year then it will be exempt from the obligation of circulating the fourth quarter financial statements (Regulation 55, LI1728). The failure of the SPE to fulfil this obligation shall attract a penalty of GHS200 for each day the default subsists (Regulation 62, LI1728).

## 4.5 Activities of Rating Agencies

Rating Agencies (RAs) cannot operate in Ghana unless they are registered, licensed or authorised by the SEC.

The SEC maintains a register with a list of RAs that hold valid licences and their particulars. Where an RA carries on business without a licence, the SEC is empowered to reprimand or disqualify it. The SEC may also impose an administrative penalty of GHS6,000 (Section 209, Act 929) on any RA that operates without a licence or acts in violation of the restrictions in the licence.

Where the SEC is satisfied that an RA has obtained money without a licence or contrary to the terms of the licence of the person, the SEC has the power to instruct that RA to repay all the money obtained and the profits accruing to that

person; return assets acquired as a result of the illegally obtained moneys or deposits; or pay any interest or other amounts which may be owed by that person in respect of those moneys, to the respective persons from whom the moneys were obtained (Section 123 and Section 216, Act 929).

### 4.6 Treatment of Securitisation in Financial Entities

Financial Entities are highly regulated in Ghana. Apart from the generally applicable security industry laws, institutions in the financial sector of Ghana may be subject to Banks, the Bank of Ghana in accordance with the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), Non-Bank Financial Institutions Act, 2008 (Act 774), Payment Systems and Services Act, 2019 (Act 987), the Borrowers and Lenders Act 2020 (Act 773), Foreign Exchange Act, 2006 (Act 723), the Development Finance Institutions Act, 2020 (Act 1032), Insurance Act, 2021 (Act 1061) and/or the National Pensions Act, 2008 (Act 766) as amended.

The various laws provide for respective capital and liquidity requirements. In the absence of any direct law on securitisations, the general rules apply and there is no special treatment or concession for securitisation transactions on the backdrop of the peculiar sector rules.

### 4.7 Use of Derivatives

Ghana's financial system has not evolved to incorporate the extensive use of derivatives.

The SEC and the GSE are currently working on a comprehensive legal and regulatory framework that would make the development of a derivatives market possible.

### 4.8 Investor Protection

The general laws that protect investors within the context of issued securities are the Companies Act, 2019, (Act 992), Securities Industry Act, 2016 (Act 929) as amended, SEC Regulations 2003 (LI 1728) and the GSE Listing Rules.

In Ghana, investors are entitled to information on the material facts, risks and costs associated with any investment recommended or sold by the market operator, a representative or an investment adviser.

The penalties for non-compliance generally include the imposition of restrictions, imposition of administrative penalty units, or the suspension or revocation of a market operator's licence by the SEC. Additionally, transactions that violate Act 929 may be declared by the courts to be void or voidable and may give rise to both private and public enforcement, guaranteed unconditional transfer of dividends and profits (Section 39(2)(d), CIRA).

### 4.9 Banks Securitising Financial Assets

There are no direct laws for banks that securitise a bank's financial assets. The Bank of Ghana has regulatory oversight over banks pursuant to the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930).

Beyond this, a bank that participates in the securities sector of Ghana would also be subject to the regulation of the SEC under the Securities Industry Act, 2016 (Act 929) as amended, SEC Regulations 2003 (LI 1728).

Depending on the role played by the bank in a securitisation, the bank may require a licence or approvals. In acting as an originator, SEC approvals are required. However, a bank that intends to do business in the capital market

other than the business of trustee, custodian, primary dealer, nominee, registrar, issuing house and underwriter, is required to incorporate a subsidiary company and apply for the relevant licence from SEC (see Section 114, Act 929).

### 4.10 SPEs or Other Entities

Due to the non-existence of direct laws on securitisation in Ghana, there is room for flexibility regarding the form of the SPE. For the purposes of listing on the GSE however, it is important to note that the SPE would have to be incorporated as a PLC (GSE Listing Rules 4(6)(a)).

Generally, in securitisation transactions, an SPE is usually (but not always) established as an orphan entity which is not part of the same corporate group as any other transaction party. To achieve this orphan status, the equity in the SPE is often settled on a charitable trust.

In settling on the ideal form of the SPE, it is important to consider the fact that the corporate veil may be pierced pursuant to the provisions of legislation or under equitable grounds as decided by the Supreme Court in Morkor v Kuma [1999-2000] 1 GLR 72. Therefore, the court may disregard the separate legal personality principle where the separateness of the SPE and its holding company has not been sufficiently established or where their affairs are so entangled that upholding the separate personality principle would cause injustice to all creditors. Being a discretionary remedy, some factors that guide the court in applying this remedy include, inter alia, the following:

- the parent company and the SPE have common directors or officers;
- the parent corporation finances the SPE;
- the directors or executives of the SPE are subject to the control of the parent corporation;
- the formal legal requirements of the subsidiary as a separate and independent corporation are not observed; and
- there is a commingling of assets and business functions.

Where the veil is pierced, the originator and the SPE may be construed as a unit and transfer pricing concerns may arise in relation to the transfer of the financial asset (see Section 31, Act 896).

### 4.11 Activities Avoided by SPEs or Other Securitisation Entities

Where the SPE seeks to make invitations to the public to purchase securities, the SEC has oversight in respect of securitisation transactions. It is therefore difficult for companies of this nature to avoid the regulation of the SEC.

If the SPE fails to seek the necessary approvals to issue to the public, a penalty is imposed and it is liable to pay the SEC an administrative penalty of GHS12,000.00 (see Section 206(2)(b), Act 929).

### 4.12 Participation of Government-Sponsored Entities

Currently, the only known government-sponsored SPEs engaged in securitisation are:

- Daakye Trust PLC – the underlying assets used in this securitisation are the levies paid in respect of the Ghana Education Trust Fund (GetFund); and
- ESLA PLC – this transaction aimed to resolve energy sector debts due to banks and trade creditors. The underlying asset in this transaction is the Energy Sector levies.

In the case of Daakye Trust, the SPE secured the general approvals for the transaction. However, the arrangers of the transaction saw no apparent need to secure a rating. This is attributable to the fact that the underlying assets were government cash flows, the originator was the government of Ghana, and the Ministry of Finance issued a guarantee. The investor reaction to the transaction was synonymous with government securities issued, with a perceived minimum risk attached.

### 4.13 Entities Investing in Securitisation

Generally, institutions involved in the financial sector invest in securitisations: pensions, banking, insurance and the securities sector. Specifically, banks, insurance companies, pension companies, mutual funds, unit trusts and the like are the kinds of entities that undertake such investments. Beyond these entities, there may be some high net worth individuals that explore investment in securitisation.

#### Rules for Investment by Pension Scheme

The National Pension Regulatory Authority (NPRA) Investment Guidelines for Pension Schemes provide that in investing in corporate debt securities, a pension scheme may not exceed a total allocation of 35%, a maximum of 5% per issuer and a maximum of 5% per issue. This has been put in place to protect the pensions paid to the pension schemes and to ensure a diverse portfolio.

### 4.14 Other Principal Laws and Regulations

#### Listing Rules of the Ghana Stock Exchange

The GSE may consider the admission of debt securities of the SPE if the security concerned has a total issue amount of not less than GHS1,000,000 face value and the SPE has at least 50 holders of such securities. Government securities are exempt from these requirements.

The debt security the SPE seeks to admit must have been created and issued under a Trust Deed duly approved by the SEC.

#### The Corporate Governance Code of the Securities and Exchange Commission

Every SPE that has its securities admitted to trading on the GSE must comply with the Corporate Governance Code for Listed Companies 2020.

The SEC may waive some or all of the provisions of this Code if it is satisfied that the SPE has its securities listed on a stock exchange outside Ghana; is incorporated outside Ghana; and is subject to corporate governance requirements in the country where its securities are traded or where it is incorporated.

## 5. Synthetic Securitisation

### 5.1 Synthetic Securitisation Regulation and Structure

Due to the fact that synthetic securitisation has not been attempted or regularised within Ghana, there is no express indication of whether or not it would be permitted. However, the position of the SEC has been a flexible one led by the dictates of the sector participants and the market.

## 6. Structurally Embedded Laws of General Application

### 6.1 Insolvency Laws

In Ghana, Insolvency is governed by the Corporate Insolvency and Restructuring Act (CIRA), 2020 (Act 1015). Under the CIRA, when insol-

vency occurs, the company may explore the option of administration, restructuring or liquidation.

The objective of the CIRA is to give a distressed company the chance to recover from insolvency and survive as a going concern. The CIRA does not apply to companies carrying on the business of banking, insurance, or any other business which is subject to sector-specific legislation, except where the legislation does not provide for a rescue provision (CIRA S1(3)).

There are no specific provisions for securitisation as it relates to insolvency in Ghana. Accordingly, the general insolvency laws contained in the CIRA may apply alongside the sector-specific legislation applicable to the company in question.

### Stay of Proceedings

If a company undergoes administration, a creditor is not permitted to start or continue legal proceedings or an enforcement process against the company and its property. This may extend the timeframe within which a creditor may retrieve, claim or access any property or collateral.

In restructuring, the restructuring agreement may provide a moratorium period during which creditors will not sue the company.

If liquidation is explored, there is a stay of legal proceedings (see CIRA Section 32, Section 33 and Section 87).

The stay of proceedings may protect an originator in a securitisation transaction or an insolvent SPE from overwhelming creditor claims or enforcements.

### Restoration Rule

A creditor who received money or property regarding a debt that the company owes them may be required to pay it back to the liquidator. The creditor in this case must have received the money or property within 21 days before the winding-up petition was filed.

This restoration rule does not include payments:

- made by the company if the payment is later made by the bank to meet cheques drawn by the company;
- regarding a debt incurred during the 21-day period;
- regarding a secured debt; or
- regarding the enforcement (against a third party) of a guarantee, indemnity, mortgage, charge or lien on the third party's property.

A liquidator is also at liberty to reverse a transaction entered into:

- in the ten years preceding the winding up order (while the company was insolvent); or
- in the two years preceding the winding up order (while the company was solvent or insolvent) (CIRA Section 122 and Section 123).

## 6.2 SPEs

The primary feature of an SPE in securitisation is the bankruptcy remoteness attached.

SPEs in securitisation transactions that have occurred in Ghana may be listed on the GSE. The SPEs are therefore subject to the Companies Act, 2019 (Act 992), Securities Industry Act, 2016 (Act 929) as amended, Securities and Exchange Commission (SEC) Regulations 2003 (LI 1728), Securities and Exchange Commission (Amendment) Regulations, 2019 LI 2387, the

GSE listing rules and the SEC Corporate Governance Code.

Some features of SPEs of this nature are highlighted as follows.

- The SPE would ordinarily be incorporated as a Public Company limited by shares under the Companies Act (see GSE Listing Rules 4(6)(a)).
- Ideally, there should be between five and 13 board members. Where this is not the case the board should explain why the number is appropriate in an annual report. Notwithstanding, the minimum number of directors is two with at least one being ordinarily resident in Ghana.
- The board shall have a majority of non-executive directors who are mostly independent. At the very least, two directors (25%) should be independent, one of whom may be the board chair (GSE Listing Rules 11).
- There should be independent external auditors.
- There should be no restriction on the transferability of shares or the number of shareholders and debenture holders.

Where an SPE seeks to issue securities to the public, SEC approval(s) is always required. The parties to the securitisation transaction present their proposed structure and transaction documents for review by the SEC to obtain the necessary approval(s).

To protect investors, the SEC reviews the transaction to ensure there are measures in place such that the insolvency of the originator is unlikely to affect the SPE. By extension, these measures minimise the risk of the SPE and the originator being consolidated in insolvency proceedings.

Some of these measures include:

- structuring the transaction to prevent the corporate veil from being lifted to construe the originator and issuer as one;
- restricting the powers of the board to commence voluntary liquidation;
- incorporating clauses in agreements with third parties that restrict liquidation petitions; and
- the effective transfer of financial assets considering the arm's length principle.

### 6.3 Transfer of Financial Assets

Depending on the financial asset being transferred, steps must be taken to file the transfer with the relevant regulatory authority. For example, regarding share certificates, the registrar of companies may have to be notified. Where the financial asset is cash, however, possession may suffice as an indication of a valid transfer of ownership.

The records of the collateral registry must also be updated, where applicable, to reflect the change in ownership of the asset.

Some options available to effect the transfer include:

- novation – the transferee assumes the rights and obligations of the transferor regarding the financial asset;
- legal assignment – the transferor assigns its rights to the transferee; and
- declaration of trust – the transferor acts as a settlor and establishes the trust with the transferee as the beneficiary.

In Ghana, novation and legal assignment appear to be the most explored option of transfer in securitisation transactions.

Where the property sold is overvalued and the company becomes insolvent within the next 12 months, the liquidator would have the power to reverse the transaction (CIRA Section 124).

The transferor must deal with the transferee at arm's length, charging market price (Income Tax Act, 2016 (Act 896) Section 31).

It must be noted that the transaction documents would have to be duly stamped or they may be inadmissible as evidence in court or for any purpose except in criminal proceedings (see Stamp Duty Act 2005 (Act 689) Section 32(6)).

Ultimately, the agreement and the terms stipulated may be used to determine whether a true sale is being effected. Where this is not the case, the SEC is unlikely to grant approvals to proceed with the securitisation in the interest of investors.

### 6.4 Construction of Bankruptcy-Remote Transactions

Securitisation in Ghana has not yet been extensively explored. Currently, the SEC is open and hopeful that more diverse modes of constructing bankruptcy-remote transactions will be explored, such as the use of derivatives. This may insulate the SPE against exposure that may exist in an actual transfer of the underlying asset.

### 6.5 Bankruptcy-Remote SPE

Limited recourse and non-petition provisions can be incorporated in the securitisation documents as safeguards for the SPE's financial stability.

Bankruptcy remoteness means the SPE is not liable to be put into insolvency proceedings, which would fundamentally upset the structure of the securitisation. The transaction documents can be drafted permitting only the trustee to institute insolvency proceedings against the SPE. To achieve this, the transaction parties must be unable to proceed directly against the SPE and only able to proceed against the securitised assets. It is also important that the SPE is, so far as legally possible, prevented from commencing insolvency proceedings itself.

The steps that can be taken to achieve bankruptcy remoteness may include:

- ensuring the SPE is operated on a solvent basis;
- ensuring the SPE is operated separately from the originator;
- appointing one or more directors (independent of the originator) whose vote(s) is/are required to pass a board resolution to place the SPE into insolvency proceedings;
- placing restrictions on the SPE that prevent it from incurring any liabilities outside those contemplated by the securitisation;
- including non-petition clauses in agreements between the SPE and third parties that prohibit the third parties from commencing insolvency procedures against the SPE; and
- including limited recourse wording in all significant transaction documents to restrict the recourse of a counterparty who takes enforcement action in respect of the SPE's assets, to the assets that the SPE holds and over which the counterparty has security.

## 7. Tax Laws and Issues

### 7.1 Transfer Taxes

#### Withholding Tax

In paying consideration for the realisation of the asset to the originator, the SPE may be required by law to withhold tax on the gross amount of the payment at the rate specified by the laws. (Section 116A the Income Tax Act, Act 896 as

amended by Income Tax (Amendment) Act 2023 (Act 1094)).

### 7.2 Taxes on Profit

Incorporated companies will be required to pay corporate income tax on the chargeable income of the business (Section 5, Act 896).

### 7.3 Withholding Taxes

Where the SPE is incorporated within Ghana, its chargeable income is subject to applicable taxes notwithstanding the location or residence of the originator or investor. Incomes that trace their source to Ghana are taxable unless the law grants an express exemption.

The following payments are recognised as having a source in the country:

- dividends paid by a resident company; and
- interest paid:
  (a) where the debt obligation giving rise to the interest is secured by real property located in Ghana; and
  (b) by a resident person (Section 105, Act 896).

A company is resident for tax purposes if it is incorporated in Ghana (see Section 101(4), Act 896). There may, however, be some peculiar tax arrangements applicable if the country of residence of the transfer recipient has a Double Taxation Agreement with provisions that apply to the taxes payable within the specified context.

### 7.4 Other Taxes

Other related taxes that may apply are the Pay As You Earn (PAYE), rent tax and value added tax for incidental services rendered by or to the company.

### 7.5 Obtaining Legal Opinions

It is advisable to obtain tax opinions in securitisation transactions. However, in recent years, the taxation regime of Ghana has undergone a number of changes that require stakeholders to constantly stay abreast of such events to make strategic business decisions.

## 8. Accounting Rules and Issues

### 8.1 Legal Issues with Securitisation Accounting Rules

Due to the novelty of securitisation as an area in Ghana, legal issues have not yet been raised relating to applicable accounting rules.

### 8.2 Dealing with Legal Issues

Legal opinions on such areas are not required, but it is ideal to procure legal opinions where any such circumstance arises.

# Trends and Developments

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**B&P Associates**

**B&P Associates** is a reputable law firm located at Labone, Accra, with 20 core team members including the managing partner and five non-lawyers. The firm keenly promotes the ease of doing business in Ghana, and provides top-notch, user-friendly legal advice to domestic and international investors. It provides clients with all forms of assistance to navigate the legal and regulatory landscape, as well as providing training and consultancy for international organisations on the Ghanaian investment scheme. The team is experienced in assisting companies set up and run successfully in Ghana with respect to business formation and financing, operational matters, as well as myriad corporate transactions, contracts, securities, joint ventures and shareholding agreements, corporate governance, and company secretarial services. The firm would like to acknowledge Audrey Nana Oye Addy for her contribution to the preparation of this publication.

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## The Use of the "Ghana Card" as the Exclusive Identity Document for Transactions in the Securities Market

In a quest to increase the efficiency and security of the Ghanaian securities market, the Securities and Exchange Commission (SEC) issued a directive mandating the use of the National Identification Card (the "Ghana Card") as the sole identity document for all transactions within the securities market.

This landmark directive is a pivotal development which has implications for investors, market operators and the entire securities ecosystem.

This write-up discusses the directive, the role of identity verification, the rationale behind the directive, and its potential impact on investors, market operators, and the broader financial ecosystem.

### *Identity verification and its role in the securities market*

Identity verification is very critical in securities trading. Market participants need a robust system for establishing the identity of individuals engaging in various transactions. The existence of such a system for confirming the identity of individuals participating in various transactions is the bedrock upon which market trust and integrity are built.

In the past, this has involved multiple identity documents and verification methods, which can be cumbersome, and also present certain security challenges.

Accurate identity verification serves as the foundation for trust and security within the financial market. Before individuals or companies buy securities, ensuring that the prospective vendors are who they claim to be can help to prevent fraud and unauthorised activities. For instance, when an investor attempts to trade in securities using another person's identity, an accurate identification verification system will expose them, halt the perpetuation of such fraudulent transactions and maintain the integrity of the securities market.

Additionally, accurate identity verification is a part of regulatory compliance. Financial institutions must adhere to strict laws that mandate confirming the identities of their clients. The Anti-Money Laundering Act, 2020 (Act 1044), for example, imposes a statutory obligation on accountable institutions to apply customer due diligence measures.

"Accountable institutions" has been defined to include "an entity or a person that conducts as a business... for or on behalf of a customer: accepting deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, bank draft, orders or by any other means; financing, whether in whole or in part or by way of short, medium or long-term loans or advances of trade, industry, commerce or agriculture; providing services in respect of financial guarantees and commitments; trading in foreign exchange, currency market instruments, transferable securities, or commodity futures..."

This helps prevent money laundering, terrorist financing, and other illicit financial activities. Accurate identity verification not only protects individual investors but also contributes to the overall stability and integrity of the financial system.

### *The introduction of the Ghana Card*

Prior to the implementation and use of the Ghana Card, Ghana had numerous separate data-

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bases dispersed across various government and public entities. This resulted in the multiplicity of disparate identification systems, leading to inefficiencies and delays. Government agencies, businesses, and financial institutions faced challenges in authenticating citizens and their data due to this disjointed system.

Additionally, the absence of a unified identification structure contributed to the elevated costs associated with electronic business operations in Ghana and further hindered the government's capacity to deliver targeted services and generate revenue.

Recognising these challenges, the government acknowledged the necessity for a national ID solution and initiated the Ghana Card programme through the National Identification Authority (NIA).

The NIA was set up pursuant to the National Identification Authority Act, 2006 (Act 707) as a body corporate to issue national ID cards to both citizens and foreign nationals permanently resident in the country.

### *About the Ghana Card*

Unlike other traditional identification cards, the Ghana Card is a versatile document that consolidates various identification systems into a unified platform and streamlines verification procedures in Ghana.

It contains basic identification information such as the name, date of birth, height, and personal identification number of the cardholder. It also has an expiry date.

Both citizens and non-citizens have the same card except for the distinguishing feature of the country codes in the Personal Identification Number (PIN). The PIN for Ghanaians starts with "GHA" whilst that for Nigerians, for example, will start with "NRG". The card of foreigners also has NON-CITIZEN in bold red on the front of the card.

The integration of biometric data enhances the accuracy and security of identification processes, reducing the risk of identity fraud and unauthorised access. Additionally, the card is designed to be interoperable with other databases and systems, promoting seamless integration across different sectors such as healthcare, finance and governance.

### *The government's initiatives to promote the use of the Ghana Card for various transactions*

The Ghana Card is the primary ID card that Ghanaians use to access all services in the country – it serves as a valid ID to open a bank account, apply for a passport, mobile number, driver's licence and many other services.

- The Bank of Ghana (BoG), the entity mandated to regulate, supervise, and direct the banking and credit systems to ensure the smooth operation of a safe and sound banking system directed all banks, specialised deposit-taking institutions (SDIs), non-deposit-taking financial institutions, payment service providers, dedicated electronic money issuers, forex bureaux as well as the credit reference bureaux, to accept only the Ghana Card as the form of identification for transaction purposes.
- The Social Security and National Insurance Trust (SSNIT) also rolled out a programme to ensure that all contributors replace their unique scheme identification numbers with the Ghana Card identification numbers.

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- The Ghana Revenue Authority (GRA) and the Registrar-General's Department (RGD) also collaborated with the NIA to replace the Taxpayer Identification Number (TIN) of individuals with the Ghana Card PIN. This was in furtherance of the government's policy to use a unique identifier for all transactions where the identification of an individual is required.

### *The SEC Directive to all investors and market operators on the use of the Ghana Card as the only identity card for all transactions in the securities market (the "Directive")*

The SEC, which was established by the Securities Industry Act, 2016 (Act 929) as amended, is the main capital markets regulator in Ghana. Its object is to regulate and promote the growth and development of an efficient, fair and transparent securities market in which investors and the integrity of the market are protected. In furtherance of its object, the SEC can exercise its discretionary powers within the ambit of Article 296 of Ghana's Constitution to issue directives that it deems necessary.

Sometime in 2022, the SEC issued one such directive stipulating the Ghana Card as the solitary identity document for securities transactions in the securities market.

### *Rationale for the Directive*

The Directive is underpinned by many compelling motives. As succinctly stated in the Directive, its core objectives are to achieve uniformity in the identification of investors; align the securities market's operations to that of the entire financial sector; enhance market surveillance; and ensure the integrity and security of information.

- Achieve uniformity in the identification of investors – the implementation of the Ghana Card as a singular identity card ensures a uniform approach to how investors are identified. Every investor is required to use the same standardised identification, thus streamlining processes and offering a consistent method for investor identification in the securities market. This aligns with global best practices recommended by financial regulatory bodies such as the International Organization of Securities Commissions (IOSCO), of which Ghana is a member, and which stresses that the principles of securities regulation should be based on the following three objectives, namely: protecting investors; ensuring that markets are fair, efficient and transparent; and reducing systemic risk.
- Align the securities market's operations with the entire financial sector – embracing a common identity solution aligns the securities market's operations with broader financial sector practices, thereby promoting cohesion and allowing for seamless interactions between the securities market and other financial institutions. This approach resonates with government initiatives to create an integrated financial ecosystem, fostering collaboration across different sectors.
- Enhance market surveillance – the adoption and use of a single identity document strengthens the capacity of regulatory authorities to conduct effective market surveillance. It enables authorities to monitor transactions more efficiently, detect irregularities, and take timely corrective measures. The SEC always emphasises the importance of robust market surveillance to uphold the integrity of the securities market and protect investor interests.
- Ensure the integrity and security of information – a singular identity document contributes significantly to the integrity and security of investor information. It reduces the risk

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of data breaches and unauthorised access, thereby safeguarding sensitive information.

### *Impact of the Directive on investors and market operators*

For investors who were admitted into Ghana's securities market before the Directive was issued, the Ghana Card was to become the sole identity card for all their transactions with market operators, effective 1 January 2023. Given that they were admitted into the securities market with identity cards other than the Ghana Card, they are mandated by the Directive to present their Ghana Cards for an update of their KYC records with their respective market operators.

The Directive, however, took immediate effect for all new investors who sought to undertake any transaction in the securities market after the Directive was issued.

Under the Directive, all market operators must take the requisite steps, including the use of digital channels to update the records of investors with the Ghana Card.

In light of this, investors must ensure that they possess a valid Ghana Card to participate in securities transactions, and market operators, such as brokerage firms and clearinghouses, must review their protocols to accommodate the use of the Ghana Card for identity verification.

### *Effect of non-compliance*

The Directive is binding on investors and market operators in Ghana's securities market. Where a player breaches a provision of the Directive, the SEC may take any action(s) specified under the Securities Industry Act, 2016 (Act 929) as amended, and/or any other relevant law or any provision applicable under the Securities Industry Act, 2016 (Act 929) as amended. Such actions may include imposing an administrative penalty of five hundred penalty units (GHS6,000) on the defaulter.

Notwithstanding the above, the SEC has the power to grant a full or partial exemption or a waiver from compliance with the Directive. This must, however, be for good cause and may have accompanying conditions which must be fulfilled.

### *Benefits of the Directive*

Adopting the Ghana Card as the exclusive identity document for transactions in the securities market in Ghana has several advantages.

- It reduces the likelihood of errors associated with managing multiple forms of identification, promoting consistency and accuracy in record-keeping and making the securities market more reliable and transparent.
- It positions Ghana's securities market within global best practices, fostering trust and collaboration with international partners.
- It simplifies and streamlines transaction processes. There is thus no need for multiple forms of identification, making transactions more efficient for both investors and market operators.
- It provides a standardised and secure means of verifying the identity of individuals involved in securities transactions. The risk of identity theft, fraud, and other illicit activities is significantly reduced, making the securities market more secure.
- It facilitates more effective oversight as regulators, such as the SEC, are able to monitor and audit transactions easily, ensuring compliance with established rules and regulations in the securities market.
- Market participants can adapt quickly to a standardised set of procedures, reducing

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complexity and hastening the pace of transactions.
- It minimises the administrative burden associated with managing various forms of identification, ultimately contributing to a more cost-effective and efficient securities market.
- It facilitates easier integration with technological advancements, such as digital platforms and biometric verification systems.

In sum, the use of only the Ghana card as the exclusive identity document for transactions in the securities market in Ghana promotes efficiency and security. It simplifies processes, reduces risks, and contributes to the overall robustness of the financial ecosystem.

### *Potential disadvantages – security and privacy concerns*

The potential disadvantages of the use of the Ghana Card as the singular identity document hinge on issues of data security and privacy. Given that the Ghana Card will be key to many financial transactions, many people have raised security and privacy concerns and have questioned the adequacy of safeguards in place to protect personal data.

Processing a Ghana Card for persons involves the collection and storage of sensitive biometric data and as such, ensuring robust data protection measures must be a priority.

To this end, although Ghana has a data protection regime comprising the Data Protection Act, 2012 (Act 843), more robust data protection mechanisms and privacy policies must be put in place to address these concerns. Cybersecurity measures must also be undertaken to address any potential cybersecurity risks associated with the increased use of digital identity in securities transactions.

The directive by the SEC to make the Ghana Card the exclusive identity document for transactions in the securities market is a bold stride towards bolstering the security and efficiency of Ghana's securities market. Its successful implementation has the potential to reshape prevailing identity verification practices in the financial sector.

While it may present some security and privacy challenges, it is anticipated to yield long-term benefits, making securities transactions more secure and streamlined. The Ghana Card initiative reflects a crucial advancement within the broader narrative of identity management and underscores the government's commitment to modernising and enhancing the financial infrastructure in Ghana.

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