# GHANA


## Law and Practice

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**B&P Associates**

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**B&P Associates** is a law firm located in Accra, Ghana (Labone). It has a 19-member team that guides its clients to navigate the legal and regulatory landscape, and conducts training and consultancy for international organisations on the Ghanaian investment landscape. The team is made up of internationally trained lawyers qualified to practice in multiple jurisdictions. Its practice areas include investment law, mergers & acquisitions, corporate & commercial, project & project finance, restructuring & insolvency, employment & immigration, dispute resolution & debt recovery, technology, IP, and telecommunications. The firm's clients cut across diverse sectors and it has provided them with a myriad of services including conducting sector due diligence, rendering legal advice on company financing, and advising financial institutions on investment issues. It also provides business support services for the benefit of its clients.

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## 1. Specific Financial Asset Types

### 1.1 Common Financial Assets

Securitisation in Ghana still remains largely unexplored. However, in the few instances where it has been explored, the assets utilised included future receivables, tax receipts, and consumer loans. Currently, the Securities and Exchange Commission (SEC) has approved three primary securitisation transactions. In these transactions, the financial assets are categorised as follows.

- Cash flows – levies paid to the government, such as the GetFund and Energy Sector Levy.
- Consumer loans – loans issued to public sector employees, as seen in the Controller ABS PLC transaction.

### 1.2 Structures Relating to Financial Assets

The most common form of securitisation in Ghana is Future Flow Securitisation (FFS) – a traditional structure that is based on the government's future levies and tax revenues. Here, the originator, the government of Ghana, transfers its right to these cash flows to a Special Purpose Entity (SPE). This SPE, established as an independent public liability company, then issues bonds backed by these cash flows. Investors purchase the bonds, providing upfront capital to the originator, and the subsequent cash flows are used to service the bond payments.

### 1.3 Applicable Laws and Regulations

Ghana does not have a particular piece of legislation that specifically governs securitisation. However, the securities industry in Ghana is generally governed by the Securities Industry Act, 2016 (Act 929) and its regulations, with the Securities Exchange Commission (SEC) being the industry regulator that regulates and promotes the growth and development of the securities market. Additionally, the following laws and regulations are relevant to securitisation transactions in Ghana.

- 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.
- Securities Industry (Over-The-Counter Market) Guidelines, 2022.
- Corporate Governance Code of the Securities and Exchange Commission.

### 1.4 Special Purpose Entity (SPE) Jurisdiction

Although securitisation transactions are rare in Ghana, there are no specific legal restrictions preventing Special Purpose Entities (SPEs) incorporated in other jurisdictions from participating in the Ghanaian market. Therefore, the choice of jurisdiction for incorporating SPEs depends on the objectives of the originator.

Generally, SPEs are often established to capitalise on specific benefits offered by the host jurisdiction. One of the most desirable characteristics of an SPE in a securitisation transaction is its degree of bankruptcy remoteness. Countries with more favourable insolvency laws may be particularly attractive for establishing an SPE to facilitate securitisation transactions.

### 1.5 Material Forms of Credit Enhancement

As mentioned, securitisation transactions in Ghana are rare. However, in instances where such transactions do take place, over-collateralisation is the most frequently employed method of credit enhancement.

## 2. Roles and Responsibilities of the Parties

### 2.1 Issuers

The term "issuer" refers to an entity established, typically by a financial institution, for the specific purpose of acquiring assets and achieving off-balance-sheet treatment for both legal and accounting purposes. In securitisation, the issuer typically refers to the Special Purpose Entity (SPE) created for the securitisation process. The issuer's main role is to create securities and offer them to the public. When issuing securities to the public, the issuer is responsible for adhering to all applicable regulatory requirements.

### 2.2 Sponsors

The sponsor plays an essential role in a securitisation transaction. The sponsor, typically a major financial institution, is often the originator or an affiliate of the originator. More precisely, the sponsor is often the parent company or a related arranger of the loan-originating subsidiary that serves as the primary originator for the specific asset-backed securities (ABS) transaction being executed. In most securitisation transactions that have taken place in Ghana, this role has primarily been undertaken by the government of Ghana.

### 2.3 Originators/Sellers

The originator is the entity that initially pools the assets to be securitised, and transfers them to the Special Purpose Entity (SPE), or alternatively, acquires the exposures of other entities with the objective of securitising them. The originator is usually a financial institution, such as a bank, that provides credit. However, other types of originators can include large commercial enterprises, utility companies, or specialised entities created specifically for securitisation. The originator often engages an arranger – usually an affiliate – to structure the transaction. In the context of securitisation in Ghana, the originator is often the government.

### 2.4 Underwriters and Placement Agents

Underwriters are corporate entities that purchase securities directly from an issuer and then sell them to open-market investors (see Section 109 of Act 929). An underwriter may be an investment bank; when the underwriter is a bank, it is commonly referred to as an issuing house.

The underwriter is responsible for facilitating the sale of the issuer's securities to initial investors, acting as an intermediary between the issuer (SPE) and the investors. It assesses investor demand and, in collaboration with the Credit Rating Agency, provides strategic guidance on structuring the transaction in an efficient and cost-effective way.

To function as an underwriter, a company must be duly licensed by the Securities and Exchange Commission (SEC). Underwriters may operate as Licensed Dealing Members (LDM) who conduct transactions through Authorised Dealing Officers.

When issuing a bond on the Ghana Stock Exchange (GSE), the issuer must appoint an LDM to sponsor its listing application. The LDM is responsible for submitting all required applica-

tion documents to the GSE, in accordance with GSE Listing Rules 20.

### 2.5 Servicers

Servicers are typically appointed as the originator's representative to ensure that the Special Purpose Entity (SPE) remains in compliance. While this role has not been specifically defined within the structures explored in Ghana, it can be argued that aspects of the servicer's responsibilities are shared among the following parties working collaboratively.

- Lead managers/arrangers – these parties structure the transaction and ensure that all participants fulfil their respective roles.
- Debt-service bank – this bank provides banking services to the SPE and must adhere to the regulations set forth in the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). In the securitisation transactions that have occurred in Ghana, the debt-service bank has also been responsible for collecting and distributing cash flows appropriately, due to the nature of the underlying financial assets.
- Manager of the SPE – typically, a corporate entity, the manager is responsible for overseeing the day-to-day operations of the SPE. They ensure that all roles and obligations of the SPE in relation to both sides of the transaction are met.

### 2.6 Investors

Investors play a critical role in securitisation transactions. They purchase the securities issued, and when the security is a bond, they receive coupon payments as well as the bond's face value upon maturity. An investor generally does not have obligations beyond the payment for the security. However, investors may possess certain rights or obligations under the trust deed associated with the bonds being issued. Typical investors in securitisation transactions include financial institutions, insurance companies, pension funds, hedge funds, corporations, and high-net-worth individuals.

### 2.7 Bond/Note Trustees

The bond trustee serves as the representative of the investors in the transaction. The primary responsibility of the trustee is to safeguard the interests of the bondholders/investors. The specific duties of the trustee may vary and are largely determined by the terms of a separate trust agreement. It is important to note that, with the exception of government debt securities, all other debt securities must be issued in accordance with a trust deed that has been approved by the SEC, as stipulated in the GSE Listing Rules (Rule 7).

### 2.8 Security Trustees/Agents

A security trustee or agent is responsible for holding various security interests in trust on behalf of creditors, which may include banks or bondholders. This arrangement eliminates the need to provide individual security for each creditor, a process that would be both costly and unmanageable. Security interests held by a security trustee 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, as long as any security interests granted to the trustee are properly perfected.

## 3. Documentation

### 3.1 Bankruptcy-Remote Transfer of Financial Assets

The agreements relevant to a bankruptcy-remote transfer primarily depend on the type of underly-

ing asset; however, an Asset Purchase Agreement may be considered in this context. To avoid transfer pricing issues, the consideration for the asset must be adequate and reflect its true value in accordance with the arm's length principle. In other words, the transfer must reflect a true sale such that the prices of the assets should be similar to what that would have been agreed upon by unrelated parties under similar circumstances. For example, in a valid asset transfer, the originator must not retain control over the asset as if they were still the owner. In the absence of specific legislation, the SEC is open to accepting customised terms that effectively express the concept of securitisation.

### 3.2 Principal Warranties

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

- A warranty that the originator holds perfect title to the asset and has the legal capacity to transfer it.
- A warranty of full compliance with regulatory requirements and that the assets are not subject to any tax claims, penalties, or regulatory fines that could arise after the sale.
- A warranty that the originator is not insolvent or in danger of insolvency proceedings that could affect the validity of the asset transfer to the Special Purpose Entity (SPE).
- A warranty that the asset is free from any encumbrances.
- Any other specific warranties that the parties may wish to include.

To address the enforcement of these warranties, parties may incorporate a clause that allows the SPE to be indemnified in the event of a breach. Typically, the parties also include a dispute resolution clause, providing the aggrieved party with a mechanism to remedy any breach of the agreement's terms.

### 3.3 Principal Perfection Provisions

Perfection is dependent on the nature of the asset being transferred. Generally, key perfection provisions that may be included include the delivery of title documents to the transferee, as well as provisions for filing changes in title with the relevant regulatory authorities.

### 3.4 Principal Covenants

As mentioned, the nature of the agreement largely depends on the type of financial asset involved. However, with regard to covenants, the parties will include provisions outlining each party's obligations. These provisions typically address payment obligations, delivery mechanisms, required notices, reporting duties, collateral obligations (if applicable), and any other covenants permitted by the SEC.

In terms of enforcement, the dispute resolution clause will outline the agreed-upon process for making claims.

### 3.5 Principal Servicing Provisions

These provisions outline the servicer's obligations, including reporting requirements, notices, and the information to be provided. It may also specify timelines for the delivery of the required reports.

### 3.6 Principal Defaults

Defaults in securitisation documentation may manifest in the following forms.

- General defaults by parties – this occurs when there is a breach of the agreement or a violation of specific events of default, such as the insolvency of the SPE. This may trigger a

series of actions for seeking remedies from the defaulting party.
- Early amortisation – certain events may prompt investors to claim a payout, regardless of the bond's maturity date. Examples of such events include a decline in the underlying assets, such as cash flows, or an increase in defaults by debtors when the underlying asset consists of loans.

In the case of general defaults, the primary course of action would likely involve utilising the dispute resolution clause for enforcement. Regarding early amortisation, investors would have the right to make claims. However, due to the liquidity challenges this could present to the SPE and the potential for some investors to incur losses, SEC may need to be involved in the process.

### 3.7 Principal Indemnities

The parties may include indemnity clauses to address defaults resulting from the actions or negligence of any party. In the absence of specific laws and regulations, the parties have the flexibility to structure these clauses according to their preferences.

### 3.8 Bonds/Notes/Securities

The primary transaction documents in a securitisation include the following.

- securitisation agreement;
- offering memorandum;
- trust deed;
- paying agency agreement;
- subscription agreement;
- servicing agreement;
- asset purchase agreement;
- security agreement;
- investment or collateral management agreement;
- post-enforcement call option agreement;
- swap contracts;
- due diligence reports;
- tax opinions; and
- legal opinions.

### 3.9 Derivatives

Ghana's financial system has not yet developed to support the widespread use of derivatives. However, the SEC and the GSE are presently working on a comprehensive legal and regulatory framework to facilitate the development of a derivatives market in the near future, in order to diversify the markets on the GSE.

### 3.10 Offering Memoranda

An offering memorandum is primarily a legal and regulatory disclosure document. It is typically required when an issuer, particularly a new issuer or one with weaker creditworthiness, seeks to raise capital through debt securities in the capital markets. It may also be referred to as a prospectus, offering circular, information memorandum, or listing particulars. In Ghana, it is most commonly known as the prospectus.

Regarding specific regulations, there are no laws or regulations specifically tailored to securitisation disclosures. However, the SEC Regulations 2003 (LI 1728) (see Sections 50–62) provide general disclosure requirements for issuers. These regulations are further incorporated into the GSE Listing Rules.

## 4. Laws and Regulations Specifically Relating to Securitisation

### 4.1 Specific Disclosure Laws or Regulations

Currently, Ghana has no securitisation-specific disclosure laws or regulations.

### 4.2 General Disclosure Laws or Regulations

#### Disclosure by the SPE

The SEC Regulations 2003 (LI 1728) (Regulations 50–62), along with the GSE Listing Rules, specify disclosure obligations for issuers. As an issuer, the SPE is required to:

- maintain high disclosure standards of disclosure;
- fully disclose information essential for investors to make informed decisions;
- immediately release any material information likely to impact market activity or the price of its listed securities;
- ensure fair and orderly market conditions for its securities; and
- guarantee simultaneous and equal information access for all investors.

The SPE is not obligated to disclose internal earnings projections. However, should it choose to do so, the information must be accurate, realistic, and fully qualified, with updates on material changes and reasons for variances provided promptly.

Additionally, the SPE must announce specific events, including:

- missed payments on interest or capital for debt securities at maturity or due dates;
- major corporate actions, such as mergers, acquisitions, joint ventures, or takeovers;
- dividend declarations;
- adjustments to capital structure, such as rights or bonus issues;
- changes in company officers or control of the business;
- updates to the registered office address or records locations;
- securities redemption calls;
- penalties imposed on the SPE by a regulatory authority;
- significant events impacting business operations, revenue, or profits, including mitigation efforts;
- alterations of the rights or privileges of any unlisted securities issued by the SPE;
- additional public or private securities sales;
- new products, discoveries, or a tender offer for another entity's securities;
- a change in capital investment plans; and
- any notable labour or supplier disputes.

Each disclosure must be reported to the SEC in writing.

In certain cases, an SPE may defer disclosure if immediate release could undermine its business goals; however, in cases of uncertainty, disclosure is generally advised.

Before listing, the SPE must submit the Trust Deed associated with the securities for SEC approval. It must also register the securities with the SEC, which then issues a certificate of registration for any public issuance, excluding securities maturing within a year. The SPE is additionally required to notify the SEC within 21 days of any securities cancellation or redemption, (Section 145 of the Securities Industry Act, 2016 (Act 929).

### Disclosure by the Originator

An originator is required to submit its audited financial statements annually to the Registrar of Companies and must also report any updates to the company's registered details, as specified in the Companies Act, 2019 (Act 992). The audited financial statement must include proper accounting records of assets acquired whether for resale or for use by the company.

Beyond these, special disclosure obligations may be outlined within the securitisation transaction documents.

## 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

In Ghana, there are no specific laws or regulations regarding periodic reporting for securitisation transactions. However, general disclosure and reporting requirements are mandated under Act 929 and Act 992, enforced by the SEC and the Registrar of Companies respectively.

All companies are required under Sections 126 (6) and 298 (2)(a) of the Companies Act, 2019 to file their financial statement as part of their annual returns with the Registrar of Companies. Also, an SPE with public securities must submit an annual report with audited financial statements to the SEC, GSE, shareholders, and bondholders within three months of the close of each financial year. The financial statements must be prepared in accordance with the Ghana National Accounting Standards issued by the Institute of Chartered Accountants, Ghana (Regulation 54, LI 1728).

### Quarterly Reporting

The SPE is required to provide quarterly financial statements to the SEC, shareholders, bondholders, and the relevant stock exchange within one month of the completion of each quarter. However, if the issuer circulates its annual report within two months of the end of the financial year, it is exempt from distributing the fourth-quarter financial statements (Regulation 55, LI1728). An SPE who fails to comply shall be liable to pay a penalty of GHS200 for each day the default continues (Regulation 60, LI 1728).

## 4.5 Activities of Rating Agencies

Under Act 929, a credit rating agency (RA) is a company that assesses the financial strength of issuers of debt securities, particularly their ability to meet the interest and principal payments and assign ratings to them. In Ghana, RAs are regulated by the SEC and shall not carry on business without a valid licence issued by the SEC in accordance with the Act. The licence is valid for a period of one year, and renewable on an annual basis. The SEC maintains a register of the holders of current licences, which specifies the particulars of the RAs (Section 121, Act 929). RAs are also required to meet the minimum financial requirements determined by the SEC, before a licence is granted or renewed (Section 112(3), Act 929).

Where a RA carries on business without a licence, the SEC is empowered to reprimand or disqualify that RA. With regards to reprimands, the SEC may issue a private warning, issue a public censure, or simply disqualify the RA from holding a licence or a licence of a specified kind

for a specified period. Where the SEC is satisfied that a RA has obtained moneys 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 moneys 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.

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.

### 4.6 Treatment of Securitisation in Financial Entities

In Ghana, financial entities are highly regulated. 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.

These 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 is yet to evolve 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 have the right to be informed of the material facts, risks and costs associated with any investment recommended or sold by the market operator, a representative, or an investment adviser. The primary investor protection provisions are found in Act 929 and other relevant SEC regulations and directives. 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.

### 4.9 Banks Securitising Financial Assets

Ghana has no specific laws directly governing banks that securitise financial assets. However, the Bank of Ghana regulates banks under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). Banks participating in Ghana's securities sector are also regulated by the Securities Industry Act, 2016 (Act 929),

as amended, and the SEC Regulations, 2003 (LI 1728).

Depending on a bank's role in securitisation, specific licences or approvals may be required. For instance, acting as an originator requires SEC approval. Additionally, any bank seeking to engage in capital market activities beyond roles like trustee, custodian, primary dealer, nominee, registrar, issuing house, or underwriter must incorporate a subsidiary and obtain a licence from the SEC, as stipulated in Section 114 of Act 929.

### 4.10 SPEs or Other Entities

The form of SPEs or other entities used in securitisation in Ghana is flexible due to the absence of specific securitisation laws. However, for listing on the Ghana Stock Exchange (GSE), SPEs must be incorporated as Public Liability Companies (PLCs) under the Companies Act, 2019 (Act 992), as stipulated by the GSE Listing Rules 4(6)(a).

In securitisation transactions, SPEs are often set up as "orphan" entities, meaning they are structured independently of the corporate group involved in the transaction. To achieve this, ownership of the SPE is typically vested in 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 distinctness 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.

If the veil is pierced, the originator and SPE may be treated as a single unit, raising transfer pricing issues concerning the asset transfer, as per Section 31 of Act 896.

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

In Ghana, SPEs engaged in securitisation must be cautious with public offerings of securities, as such invitations bring them under the oversight of the SEC. It is challenging for these entities to avoid SEC regulation when they invite public investment, as the SEC has regulatory authority over public securities offerings.

The SEC is responsible for determining whether an SPE has complied with regulations governing public securities issuance. If an SPE issues securities publicly without securing necessary approvals, it faces significant penalties, including an administrative fine of GHS12,000, per Section 206(2)(b) of Act 929.

## 4.12 Participation of Government-Sponsored Entities

In Ghana, two known government-sponsored SPEs are known to be engaged in securitisation.

### Daakye Trust PLC

This SPE securitises cash flows from the Ghana Education Trust Fund (GETFund) levies, which are funds collected specifically for educational purposes. Daakye Trust benefits from legislative backing, as the GETFund levy law ensures that these levies are channelled into a dedicated collection account for debt servicing on Daakye's bonds. This legislative support guarantees a steady cash flow, making the bonds attractive to investors. Additional credit enhancement is provided through guarantees by the Ministry of Finance, and while general transaction approvals were secured, no rating was required due to the originator being the government of Ghana. Investors perceive this securitisation as having a low risk similar to government securities.

### ESLA PLC

The underlying asset in this transaction is the Energy Sector levies. This SPE was established to address energy sector debts owed to banks and trade creditors. The Energy Debt Recovery Levy, a tax imposed on petroleum products, provides a stable revenue stream, securing ESLA's bond issuances. Additionally, the Ministry of Finance offers a capped cash commitment of up to GHS600 million to cover any shortfall in the Debt Service Reserve Account. This backstop further bolsters investor confidence by securing debt repayment even in the event of significant underperformance.

## 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.

### Material Rules for Pension Scheme Investments

The National Pension Regulatory Authority (NPRA) Investment Guidelines for Pension schemes provide for limits that are designed to protect pension funds and ensure that portfolios remain well-diversified, thereby safeguarding the returns promised to pension beneficiaries. The rules are as follows.

- A 35% total allocation cap on investments in corporate debt securities within a pension scheme's portfolio.
- A 5% maximum per issuer and 5% per issue limitation to promote diversification and reduce concentration risk.

## 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 million 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

Synthetic securitisation has not been attempted or regularised in Ghana. Accordingly, there is no express indication of whether or not it would be permitted. However, the position of the SEC is flexible, led by the dictates of the sector participants and the market.

## 6. Structurally Embedded Laws of General Application

### 6.1 Insolvency Laws

The Corporate Insolvency and Restructuring Act (CIRA), 2020 (Act 1015), regulates insolvency in Ghana. Generally, the CIRA does not apply to companies carrying on the business of banking, insurance or any other business which is subject to special legislation, except where the special legislation does not provide for a rescue provision. Although the securities industry is subject to Act 929, there are no specific provisions for insolvency. Accordingly, by necessary implication, the general insolvency laws contained in the CIRA would apply to insolvent companies in the securities industry – and by extension companies engaged in securitisation.

Under the CIRA, when insolvency occurs, the company shall be placed under administration and restructuring, before liquidation. During the business rescue stage, the property and affairs of the distressed company would be managed and restructured by an appointed administrator, in a manner that provides an opportunity for the company to as much as possible continue in existence as a going concern. It is only when administration and restructuring fail that the company is placed in official liquidation and wound up in order to pay its creditors. This statutory structure affords financially distressed companies an opportunity to recover and continue their operations into the foreseeable future.

#### Stay of Proceedings

During 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 cannot 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 most desirable feature of an SPE is its bankruptcy-remoteness. Other desirable 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.
- 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.
- The minimum number of directors is two with at least one being ordinarily resident in Ghana.
- There should be independent external auditors.
- There should be no restriction on the transferability of shares or the number of shareholders and debenture holders.

Since securitisation involves the issuance of securities, SPEs are subject to various laws including 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. Therefore, the structure and legal form of an SPE must comply with the provisions set forth in these laws. SPEs in securitisation transactions that have occurred in Ghana may be listed on the Ghana Stock Exchange (GSE).

To safeguard investors from the risk of consolidation during insolvency proceedings that could jeopardise the bankruptcy remoteness of the SPE, the SEC carefully examines the proposed structure and transaction documents presented by the parties involved in the securitisation before granting approval. The SEC ensures, among other things, that the transaction is structured to clearly distinguish the originator from the SPE. Additionally, it verifies that the transaction documents include non-petition and limited recourse provisions, as well as clauses that restrict the powers of the board to initiate voluntary liquidation. Furthermore, the SEC ensures that the transfer of financial assets from the originator to the SPE is conducted at arm's length to prevent the originator from retaining control.

### 6.3 Transfer of Financial Assets

Depending on the nature of 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 commonly utilised methods for transferring rights 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

Beyond the construction of true sale transactions to isolate the originator's insolvency risks from the SPE, the SEC remains optimistic that additional strategies for creating bankruptcy-remote transactions will be explored as securitisation establishes a foothold in Ghana. This may include the use of derivatives to hedge against associated with the originator's financial stability, providing investors with an extra layer of protection.

Due to the emerging nature of securitisation in Ghana, insolvency opinions on bankruptcy-remote transactions are not commonly sought, though obtaining such opinions would be desirable to ensure compliance in structuring these transactions.

### 6.5 Bankruptcy-Remote SPE

SEC allows flexibility in the form and structure of securitisation documents, provided they align with existing laws and best practices. To protect the SPE from bankruptcy, securitisation documents must be structured to ensure that the SPE operates independently of the originator, preventing it from being included in the originator's estate if the originator goes bankrupt.

Accordingly, 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

In a transfer of financial assets, the primary tax that may apply is capital gains tax, which is charged on the gain made from selling or disposing of the asset. In Ghana, a person who realises an asset must submit a return to the Commissioner-General of the Ghana Revenue Authority within 30 days of the transaction.

Therefore, the tax liability falls on the originator, not the SPE, as it is the originator who realises the asset and incurs the gain. However, the SPE may be required to withhold tax on the gross amount of the payment at the rate specified by the laws (Section 116A of the Income Tax Act, Act 896 as amended by the Income Tax (Amendment) Act, 2023 (Act 1094)).

### 7.2 Taxes on Profit

Incorporated companies are required to pay corporate income tax on the chargeable income earned from their financial assets at a rate of 25%. Additionally, for the 2023, 2024 and 2025 assessment years, SPEs would be liable to pay a Growth and Sustainability Levy on the profit before tax earned from their financial assets, at a rate of 5%.

These taxes can be mitigated by the SPE claiming capital allowances on its depreciable assets and ensuring that all other allowable expenses are deducted from its gross income, thereby reducing its taxable income.

### 7.3 Withholding Taxes

All income generated from sources in Ghana is subject to taxation in Ghana. Additionally, the foreign-sourced income of a resident person is also subject to taxation in Ghana. An SPE is considered resident in Ghana for an assessment year if it is incorporated in Ghana or if its management and control are exercised in Ghana at any time during that assessment year. Therefore, any cross-border payment received by the SPE with a source in Ghana is subject to income tax, regardless of the place of payment. Additionally, if the cross-border payment received by the SPE is from a foreign source, it remains taxable in Ghana if the SPE qualifies as a tax resident.

A resident SPE is required to withhold tax on any interest paid to investors, as well as on any consideration paid to the originator regarding the realisation of an asset, provided the payment has a source in Ghana.

A common approach that practitioners often employ to deal with taxes include structuring the transaction to take advantage of Double Taxation Treaties (DTTs), which may reduce withholding tax rates or lower the tax liability on these transactions. Additionally, practitioners may select jurisdictions with favourable tax treatments to incorporate the SPE in as a means of minimising the impact of these taxes.

### 7.4 Other Taxes

Other key taxes that may apply are payroll taxes such as:

- the Pay As You Earn (PAYE);
- Stamp Duty;
- Communication Service Tax;
- Electronic Transfer Levy (E-Levy);
- National Health Insurance Levy (NHIL);
- Ghana Education Trust Fund Levy (GETFL);
- COVID-19 Health Recovery Levy (CHRL);
- rent tax; and
- Value-Added Tax (VAT) for incidental services rendered by or to the company.

### 7.5 Obtaining Legal Opinions

Given the novelty of securitisation transactions in Ghana, tax opinions on same are uncommon. However, it is prudent to obtain tax opinions on such transactions to ensure clarity on tax implications and compliance.

## 8. Accounting Rules and Issues

### 8.1 Legal Issues With Securitisation Accounting Rules

As securitisation is a relatively new area in Ghana, legal issues concerning the applicable accounting rules have not yet emerged.

### 8.2 Dealing With Legal Issues

Although obtaining legal opinions in these matters is not required, it is prudent for stakeholders to seek professional opinions from their lawyers since securitisation transactions can be quite complex.

# Trends and Developments

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**B&P Associates**

**B&P Associates** is a law firm located in Accra, Ghana (Labone). It has a 19-member team that guides its clients to navigate the legal and regulatory landscape, and conducts training and consultancy for international organisations on the Ghanaian investment landscape. The team is made up of internationally trained lawyers qualified to practice in multiple jurisdictions. Its practice areas include investment law, mergers & acquisitions, corporate & commercial, project & project finance, restructuring & insolvency, employment & immigration, dispute resolution & debt recovery, technology, IP, and telecommunications. The firm's clients cut across diverse sectors and it has provided them with a myriad of services including conducting sector due diligence, rendering legal advice on company financing, and advising financial institutions on investment issues. It also provides business support services for the benefit of its clients.

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## Green Bonds: A New Era in Ghana's Securities Landscape

### *Introduction*

In the face of increasing concern over the impact of climate change, governments and organisations worldwide are making significant strides toward sustainable finance. With climate risks becoming more prevalent across all sectors of the economy and investors showing greater interest in socially and environmentally friendly projects, the push for sustainable development and investment is gaining strong momentum – and it is no exception in Ghana. Public budgets and investment vehicles are now increasingly considering climate risk in their financial decisions. As such, regulatory bodies are issuing new regulations to incorporate sustainability and sustainability-related disclosures in business activities.

In response to the increasing popularity of green bonds, Ghana's Securities and Exchange Commission (SEC) issued the Securities Industry (Green Bond) Guidelines 2024 SEC/GUI/003/03/2024 ("the Guidelines"). The Guidelines mark a significant step in formalising the domestic green securities market and demonstrating the country's commitment to sustainability, by encouraging investment in projects that protect and enhance the environment.

This article provides a brief overview of the Securities Industry (Green Bond) Guidelines 2024, highlighting certain key provisions that issuers of green bonds must bear in mind.

### *A framework for a domestic green bond market*

Green bonds are debt securities designed to raise capital specifically for environmentally beneficial projects. Over the past decade, they have grown in popularity worldwide, with global sales reaching USD575 billion in 2023, according to Bloomberg.

The Guidelines were published in accordance with the Green Bond Principles (the GBPr) created by the International Capital Market Association (the ICMA). The Guidelines aim to provide a structured framework for issuing and regulating green bonds in Ghana, facilitating the development of a domestic green securities market and maintaining the credibility of green securities through transparency, disclosure, integrity and quality. They also seek to prevent "greenwashing" – the issuance of, and investment in, misleadingly labelled green bonds.

By encouraging green bond issuance in Ghana, the Guidelines seek to enable businesses to invest in sustainable projects across various sectors, such as renewable energy, sustainable agriculture, clean transportation, and pollution prevention.

### *Scope and application*

The SEC Guidelines set out clear regulations for green bond issuers which include public companies, external companies, supranational institutions, local government authorities, and statutory corporations. Issuers must comply with Ghana's legal framework, including the Companies Act, 2019 (Act 992), the SEC Regulations, 2003 (L.I. 1728), and other relevant legislation. The Guidelines also apply to entities with existing note programmes, allowing them to issue green bonds under these programmes, subject to submitting a supplementary prospectus or complying with any requirements the SEC may impose.

In instances of ambiguity in interpreting the Guidelines or any other SEC-issued Directives, the SEC's interpretation will be final. Additionally,

the SEC can grant exemptions or waivers from complying with the Guidelines.

By establishing a structured regulatory framework, the SEC seeks to attract both domestic and international investors to Ghana's capital market.

### *Issuance of green bonds*

Issuers are required to undergo an independent review to confirm the "green" status of eligible projects associated with green bonds before the bonds are issued and their compliance to the obligations the bond issuance is subject to. This review includes an initial external review conducted by a qualified, independent expert which aligns with the ICMA's GBPr. This review is then submitted to the SEC with the Green Bond Framework upon issuance. Issuers are to obtain further assurance through certification, scoring, or rating of the green bond's environmental credentials. Issuers may also opt for additional verifications such as external third-party monitoring of specific issuance criteria. The independent expert must have the requisite expertise to assess the green characteristics of the bonds issued and prepare a due diligence report that assesses the projects' expected environmental impact; recommends and verifies terms to promote alignment with green bond compliance requirements; and assesses the material environmental risks associated with eligible projects and how the issuer manages these risks.

### *Approval process of the green bonds issuance*

The Guidelines outline the process for obtaining SEC approval for green bond issuance. This process involves three key stages: pre-issuance, project identification, and mandatory declarations.

The pre-issuance phase involves issuers looking to engage in public bond issuance following the stringent regulatory framework which governs the issuance of bonds to the public. This includes filing a draft information memorandum or prospectus with the Securities Exchange Commission, or an applicable pricing supplement where a shelf programme has been previously approved. Issuers must also comply with relevant regulations such as the Companies Act, 2019 (Act 992), and L.I. 1728 in addition to the Guidelines. They must also have the issuance approved by the relevant bodies and structure the issuance with the assistance of a skilled adviser. All documentation and internal processes of the issuer must align with best practices described in the Guidelines and the ICMA's GBPr.

When identifying projects for a Green Bond Framework, clarity is paramount. The issuer must accurately describe the project types, the methodology of selection in place by the issuer as well as the methodology for evaluating and financing the project. The framework must indicate which projects or project portfolios are impacted by refinancing efforts where the proceeds of the issuance is to be used for refinancing.

Issuers are to comply with the mandatory declarations in L.I. 1728 including a declaration by the directors accepting responsibility for the accuracy of the information provided in the prospectus and a statement by the person managing the issue stating that all material facts about the issue and the issuer have been fully disclosed.

### *Use of proceeds*

To safeguard the credibility of Ghana's green bond market, the Guidelines mandate strict requirements for the use of bond proceeds.

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Issuers must ensure that funds raised through green bonds are used to finance projects with a positive environmental impact, thus preventing the misuse of funds for non-green purposes. In circumstances in which proceeds are used for refinancing, the Issuer is required to provide an estimate of the share of financing and re-financing, identify the investments or project portfolios eligible for refinancing, and specify a look-back period for eligible green projects to be refinanced. The SEC Guidelines outline a variety of eligible projects for green bond financing including:

- renewable energy projects, such as the production and transmission of wind, solar, and geothermal energy;
- energy efficiency initiatives such as energy storage and smart grids;
- pollution prevention and control measures including reducing air emissions, controlling greenhouse gases and waste recycling;
- environmentally sustainable management of living natural resources and sustainable land use; and
- green buildings that meet environmentally sustainable standards.

These projects reflect the broad spectrum of sectors that can benefit from green financing and align with Ghana's overarching goals of environmental protection and sustainable economic growth. However, the Guidelines also impose strict prohibitions on the use of green bond proceeds for certain types of projects. Funds cannot be allocated to projects involving weapons and ammunition; alcoholic beverages (excluding beer and wine); or forced or harmful child labour, amongst others. These prohibitions align the green bond issuance with ethical standards and reinforce investor trust and confidence.

Issuers must ensure that the evaluation and selection process for eligible projects is clear, precise, and transparent. This process should address:

- the objectives of the projects and their environmental impact;
- the eligibility criteria for projects; and
- the process for identifying and managing environmental risks potentially associated with the projects.

### *Management of green bond proceeds*

The net proceeds of the green bond, or an equivalent amount, should be credited to an account dedicated to the project. If there are sub-projects, the proceeds should be allocated accordingly. Alternatively, the issuer can track the proceeds through a formal internal process linked to the issuer's operations for eligible green projects.

While the green bond remains outstanding, the balance of the tracked net funds will be adjusted periodically to situate allocations with eligible green projects during that period. Issuers must disclose in the offer document the intended types of temporary placement for the balance of unallocated net proceeds and the estimated timeframe for full allocation of all the green bond proceeds to eligible projects. The issuer's external auditor will report on how the issuer internally tracks and allocates funds from the green bond proceeds to the selected projects.

### *Performance measurement and monitoring*

Issuers are to measure and monitor the performance of eligible projects by using quantitative and/or qualitative performance indicators to track outcomes achieved for eligible projects and specify the methodologies and assumptions used for the quantitative measurement. They

are also to define the indicators that quantify the expected impacts of green bond-financed projects and disclose any changes to impact measurement indicators to bondholders and the public, explaining the reasons, and providing a 12-month transition period where previous indicators are still reported. Additionally, environmental impact information may be independently reviewed and confirmed by an expert.

### *Communication and reporting*

At the time of issuance and throughout the lifespan of the green bonds, issuers must provide information on the procedures for evaluating, selecting and monitoring projects; allocation of the funds raised; and external evaluation report about these procedures to the public on their website and upon request. They are also to publish an updated list of projects financed or refinanced annually or upon any significant developments. This list must indicate the project descriptions, amounts allocated, expected environmental impacts, and any unused balance of each project. Issuers are to disclose in their annual report to the Commission, bondholders, and the securities exchange on which they are listed, the environmental impact achieved by project, by category, and on an overall basis. The Guidelines also require consistency in that all information published remains comparable over time by maintaining the same indicators in each report.

### *Penalty*

In the event an individual does not adhere to the Guidelines, the SEC may refuse to renew their licence; revoke or suspend their licence; or impose sanctions such as reprimands, disqualification, or administrative penalties. The SEC may take any other necessary action to protect investors and uphold the integrity of the securities market. Criminal proceedings may also be initiated against issuers if they fail to make payment within 14 days of a demand being made.

### *Unlocking opportunities for stakeholders*

The adoption of the SEC Green Bond Guidelines holds significant promise for Ghana's economy. As climate finance becomes an integral part of global investment strategies, Ghana's ability to issue green bonds positions it as an attractive destination for environmentally conscious investors. The issuance of green bonds in line with the Guidelines can lead to improved reputation and credibility for businesses, as consumers and investors are increasingly favouring companies with strong environmental, social and governance (ESG) practices.

### *Conclusion*

The SEC's Green Bond Guidelines represent a defining moment in Ghana's securities industry, introducing a sustainable financing option that aligns with both local and global environmental goals. By embracing green bonds, Ghana is paving the way for a future where economic growth and environmental consciousness go hand-in-hand. The Guidelines do not only encourage investment in green projects and promote sustainable finance, but they also promise substantial benefits to Ghana's economy, positioning the country as a leader in the region for responsible, sustainable investment.

Green bonds and other sustainability-linked bonds are poised to transform Ghana's investment sector, offering new pathways to prosperity for businesses and investors.