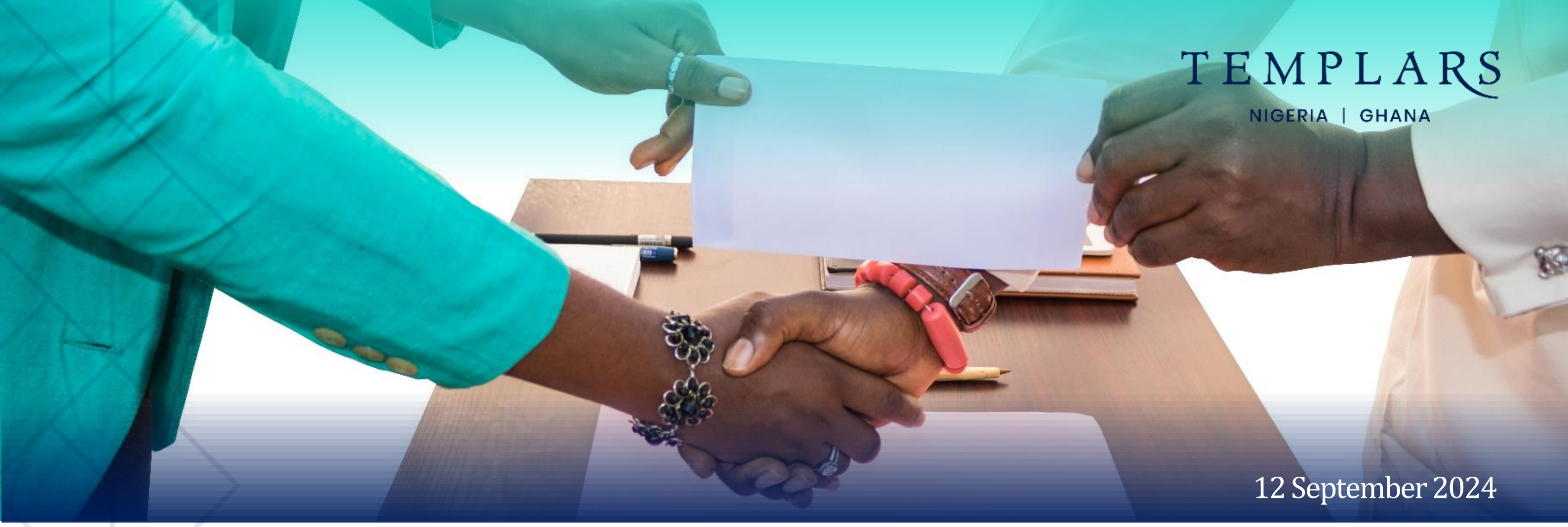

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Client Alert

Regulating Corporate Philanthropy Through the Corporate Social Responsibility Bill, 2023

Introduction

In November 2023, the Corporate Social Responsibility Bill, 2023 (the "**Bill**") passed its second reading at the House of Representatives (the "**House**") and was referred to the House Committee on Corporate Social Responsibility ("**CSR**"). The Bill seeks to mandate and regulate CSR in Nigeria and integrate long-term economic, environmental and social elements in business strategies[1], among other things. The Bill also establishes a CSR Monitoring Unit to be presided by an officer called the "Commissioner"[2].

The Bill has successfully passed the first few stages of lawmaking (i.e., the initial review, first reading and second reading) and is now at the committee stage. Under Nigerian legislative process, it will be read a third time after the committee's review, and thereafter sent to the Senate for concurrence. Once the Senate equally passes the Bill, it will be enrolled for the President of the Federal Republic of Nigeria ("**President**")'s assent (signature). It will only become law after the President assents to it.[3] It is difficult to estimate when this Bill will eventually become an Act of the National Assembly taking into account the fluidity of the National Assembly's timelines in making new legislation, however, considering the objectives of the Bill, we expect that the National Assembly will expedite its passing.

Highlights of the proposed legislation

The proposed legislation will apply to 2 (two) categories of companies when passed and stipulates the financial thresholds these companies should meet for the law to be applicable to them. The categories are ccompanies in the non-extractive industry that have a net worth of at least N500,000,000 (Five Hundred Million Naira), *or* a turnover of at least N500,000,000 (Five Hundred Million Naira), *or* a net profit of N100,000,000 (One Hundred Million Naira) in any financial year [4]; and ccompanies in the extractive industry that have a net worth of at least N200,000,000 (Two Hundred Million Naira), *or* a turnover of at least N200,000,000 (Two Hundred Million Naira), *or* a net profit of N50,000,000 (Fifty Million Naira) in any financial year[5].

[1] Section 1 of the Bill
[2] Section 3 of the Bill
[3] Section 58(5) of the Constitution
[4] Section 5(1)(a) of the Bill
[5] Section 6(1)(a) of the Bill

Although the Bill provides no basis for the stipulated minimum financial requirements, we can infer that the intention intends to exclude small companies or companies who are not as financially buoyant as the categories of companies listed above, from mandatorily engaging in CSR activities, leaving it at their discretion. It is also noteworthy that the minimum financial requirements for companies in the extractive industry is much lower than that of the non-extractive industry. We believe this is an intentional move to ensure that majority of companies in the extractive industries whose extractive activities have a more negative effect on the environment, are captured under, and will be compliant with the Bill.

Why this Bill matters

Although the Bill is still at the committee stage, when it is eventually passed into law after successfully going through the legislative process, it will impose certain obligations on companies who meet the financial thresholds prescribed. Where these obligations are not met by the companies, they will be liable to certain sanctions. The sanction for non-compliance with the Bill is a fine of at least three times the amount the company ought to spend on the CSR.

It is important to note that whilst the Bill does not create an obligation for individuals in their personal capacity and does not specify how an individual can be held responsible for violation of its provisions, it imposes a 2-year imprisonment term for individuals who are in violation of its provisions. It is not clear how individuals can be held responsible for violation of its provisions in the absence of any clear obligations under the law. There is a possibility that the intention of the lawmakers is to also sanction directors of defaulting companies in breach of its provisions. It however remains to be seen how the liability of a company for non-compliance can be transferred to an individual, without any clear obligation for such an individual created in the law. It is expected that the lawmakers will finetune these provisions before the Bill becomes law.

Compliance obligations of companies when the Bill is passed into law

Once this Bill becomes a law, companies who meet the financial threshold above will be statutorily required to comply with the following obligations to stay on the right side of the law:

- Constitute a CSR committee whose responsibilities includes, formulating a CSR policy[6], recommending the company's CSR activities and drawing up a CSR budget[7];
- Notify the Corporate Affairs Commission ("**CAC**")'s board of the CSR committee[8] constituted in line with the statute;
- Allocate a minimum of 2% (in the case of a non-extractive company[9]) and 5% (in the case of an extractive company[10]) of the company's average net profits made during the 3 years immediately preceding the company's current financial year, for CSR purposes.

One grey area with these obligations is in the uncertainty as to how it will apply to one-man companies (i.e., a company with just one director who is also the shareholder) that meets the financial thresholds above. It is unclear if these one-man company will be mandated to collaborate with non-board members, in order to meet the requirement to form a CSR committee consisting of at least 3 members of the board. One way this can be resolved is by making the membership of the CSR committee open to other member of the management and not only the board members. This way, a one-man company can remain compliant with this obligation.

Also, there is the risk of having overlapped statutorily imposed CSR obligations. For instance, the Petroleum Industry Act, 2021 ("**PIA**") provides for the establishment of Host Communities Development Trust[11] ("**HCDT**") in areas/communities where companies who hold an interest in a petroleum prospecting licence ("**Prospecting Companies**") carry out their operations. Furthermore, 3% of the annual operating expenditure of these Prospecting Companies are to be contributed to the HCDT fund[12]. The main purpose of the HCDT under the PIA is to promote the carrying out of CSR activities in these communities known as "Host Communities" where Prospecting Companies operate. The Bill seems to add an extra layer of compliance on Prospecting Companies in mandating a contribution of 2% of a company's 3-year average net profit to CSR activities. It then begs the questions - will concerned companies who have already contributed 3% to CSR activities under the PIA be exempted from the additional levy 2%, so that the CSR activities carried out by these companies under the PIA ticks the box for them when the CSR Bill is passed.

In our view, the lawmakers should consider making certain exceptions for companies who already have statutory imposed CSR obligations. This is to ensure companies are not overburdened with CSR responsibilities.

Conclusion

Bearing in mind these impending obligations, companies are advised to take note of the CSR obligations that would be statutorily imposed on them when this Bill becomes law, especially the CSR activities and policies, to avoid being sanctioned. To this end, companies should review their CSR policies and begin to consider legally mandated CSR activities they would engage in for compliance with the law, since the Bill permits each company to decide on its own, what CSR activity to undertake.

[6] Section 5(2)(a) of the Bill
[7] Section 5(1)(d) of the Bill
[8] Section 5(1)(a) & (c) of the Bill
[9] Section 5(3)(a) of the Bill
[10] Section 6(3)(a) of the Bill
[11] Section 235 of the PIA
[12] Section 240(2) of the PIA