FEBRUARY 2005 LEGAL ALERT: **PENSION OPERATORS LICENSING REQUIREMENTS**.

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REACTIONS TO LAST LEGAL ALERT.

Reactions to our last Legal Alert were understandably many as the strict enforcement and success of the Pension Reform Act 2004 would have many strong beneficial impacts on the Nigerian economy and citizenry. Legal brief Africa, an affiliate of the International Bar Association, published this Legal Alert and you can find it on this web link:
http://www.legalbrief.co.za/article.php?story=20050130142243136

Our Ehijeagbon Oserogho will be serving as a Facilitator on the Pension Reforms Act 2004 (Pension Reform Law) in the coming months. We will be inviting you to these Seminars and Workshops. Where you are unable to attend, we will communicate to you, through our Monthly Legal Alerts, recent developments worthy of bringing to your attention.

WHAT IS NEW?

We have a new telephone number which also serves as our facsimile number (in addition to our other numbers) where you can easily reach us. It is + 234 1 444 7022.

The Federal Government in the last week of February 2005 announced its presentation of many Bills to the National Assembly seeking to amend many tax Laws in Nigeria. An example is the proposed increase from 5% to 10% as VAT for primarily luxury items.

In politics, there is the National Dialogue which has just started; the business community is monitoring its outcome very closely as everybody will be affected by its outcome.

LEGAL ALERT: PENSION OPERATORS LICENSING GUIDELINES.

The Nigerian Pension Commission in the last week or two released the long awaited guidelines for licensing the key Operators, who would implement the provisions of the Pension Reform Law. The primary Operators, as a remainder, are (1) The Pension Fund Administrators (PFAs); (2) The Pension Fund Custodians (PFCs).

We have attempted in this Legal Alert to provide you with an Executive Summary of the Licensing requirements for PFAs and PFCs. Also included are key implementation guidelines that may affect you and your enterprise. For a detailed exposition of the licensing requirements, Pension guidelines, the Pension Reform Law itself, etc you can visit the web site of the Nigeria Pension Commission: http://www.pencom.gov.ng or our web site www.oseroghoassociates.com where there are detailed analysis.

GUIDELINES FOR APPOINTMENT OF BOARD AND TOP MANAGEMENT OF PFAS & PFCS.

The Nigerian Pension Commission (The Pension Commission) arguably set a milestone, in financial circles, by the carefully crafted requirements that members of the Boards of Directors and top management staff of every licensed PFA and PFC must meet before they can be appointed to any of these positions.

For the position of the Managing Director of a PFA or a PFC, the minimum requirement that they must have before they can be appointed to such a position include a first degree in any numerate or semi numerate discipline like actuarial Sciences, Statistics, Mathematics, Accounting, Economic, etc. The appointee must also have a minimum work experience of at least 15 years post qualification experience; of this period, at least 12 years must have been in the financial services sector of the economy and 8 years of the same period must be in top managerial positions.

For other Executive Directors and Heads of Departments, the same minimum educational qualification is required but minor minimum lower years of work experience is demanded.

The licensing guidelines require all the Directors and top management staff of a PFA or a PFC to complete a Personal Profile Form. Embodied in this Form is a "fit and proper persons" test which requires the proposed appointee to submit two very good references as to his/her suitability for appointment. The two referees must be individuals of proven integrity who have occupied top management positions in successful financial service institutions. Lastly, this Form authorises the Pension Commission to investigate and obtain information from the Appointee's schools, businesses, criminal justice agencies, tax authorities, etc.

Another innovation in financial circles is the fact that all the Directors of PFAs and PFCs are required to enter into a bond which makes them to be jointly and severally liable to indemnify the PFA or PFC against any loss arising from a failure of the PFA or PFC to comply with the provisions of the Pension Reform Law, guidelines issued by the Pension Commission, internal rules, etc. This requirement will definitely reduce insider dealings and abuses by the Directors of a PFA or a PFC as compared with what is allegedly happening in the other financial sectors of the Nigerian economy.

LICENSING REQUIREMENTS FOR A PFA: -

In summary, the licensing requirements for a PFA include: -

(a). The PFA must be a registered limited liability company in Nigeria having as its sole business,

the management of pension funds.
(b). Provide evidence that it has not compounded its debts or failed to honour its obligations.
(c). Provide evidence that it has the professional and technical capacity to manage pension fund and administer retirement benefits.
(d). Provide evidence that possesses the appropriate information and technology to cater for on line real-time transactions in addition to keeping proper accounts of the transactions.
The application fee is a non refundable sum of N500,000 (Five Hundred Thousand Naira). Where the application is granted at the interim stage, an approval-in-principle licence is given to the PFA upon it showing that it has deposited into an escrow account with the Central Bank of Nigeria (CBN) a minimum paid up share capital of N150Million. The licence fee, on the final approval of the application, is a non refundable sum of N5Million payable to the Pension Commission.
LICENSING REQUIREMENTS FOR A PFC: -
The primary services that a PFC is required to provide include (i) basic custodian services which includes acting as a clearing agent for the PFA, buying and selling securities on the instructions of the PFA, etc. The PFC is also required to provide investment accounting and performance measurement services to the PFA.
The licensing requirements of a PFC are similar to those of a PFA. Key arrears where they differ (in terms of additional requirements) include: -
(i). The PFC must show that it is wholly or jointly owed by a licensed financial institution with or a combined minimum networth of N5Billion unimpaired by losses.
(ii). The PFC has or its parent company or technical partner have/has a combined total balance sheet of at least N125Billion.
(iii). Evidence of adequate insurance for the pension assets in its custody against loss by fire, theft, natural catastrophe, etc as well as a Fidelity Guarantee Cover.
An applicant PFC is required to make an initial minimum deposit of N2Billion into an escrow account with the CBN before an approval-in-principle is granted by the Pension Commission. In the event that the application fails, this sum with the accrued interest will be returned to the Applicant. Where the application succeeds, a non refundable license fee of N10Million will be demanded.
OUR FINAL COMMENTS OF THE LICENSING GUIDELINES: -
The inability of the Pension Commission to license PFAs and PFCs, on time, is creating transitional problems for the stakeholders to pension matters particularly employers of labour in the private sector. As a result, constitutional and equitable implementation challenges to the enforcement of the pension Act has continued to increase in great bounds. A Labour group is

threatening to institute a Court action in the first week of March 2005 against the Federal Government for making the Pension Act.

Examples of the constitutional challenges include:

1. The application of the Pension Act to the exclusion of employees in the public sector of the States and Local Governments in Nigeria is a contravention of the Second Schedule, Part 1, Item 44 of the Exclusive Legislative List which empowers the Federal Government to legislate on "Pensions, gratuities and other like benefits payable out of the Consolidated Revenue Fund or other public funds of the Federation". Another discriminatory provision is the provision of military personnel paying only 2.5%; this benefit is not extended to other security services like the Police, etc.

2. Sections 3, 4, 92 and 93 of the Pension Act (which are on the non withdrawal from a Retirement Savings Account of contributions until the attainment of age 50 years and referral of disputes to the Pension Commission and Arbitration) contravene Sections 6 (6), 44, 210, 173 of the 1999 Constitution (which are constitutional provisions on judicial powers, non compulsory acquisition of property without payment of compensation, and non withholding or alteration of pension benefits to a public servant to his disadvantage).

We are of the view that these constitutional and other challenges are genuine and should be addressed by the Pensions Commission forwarding a proposed Pension Reform Act (Amendment) Bill to the National Assembly. Pending the passing into Law of such an Amendment, a full troth implementation of the Pension Act must commence in the light of the unfortunate past experiences on this subject.

Motivational Quote for February, 2005:

Our quote for this month is: the greatest opportunities are usually disguised as problems and challenges.