



# **A Critique of the Guidelines for the Issuance of the HAGF's Authority for the Registration of Companies Limited by Guarantee**

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## Introduction

With the release of the Guidelines for the Issuance of the Honourable Attorney-General of the Federation's (the "HAGF") Authority for the Registration of Companies Limited by Guarantee ("CLBG") (the "Guidelines"), this article analyses the provisions of the Guidelines and highlights some of the issues posed by some of its provisions.

The Guidelines apply to entities seeking to register CLBGs at the Corporate Affairs Commission (the "CAC") and were passed pursuant to Section 26(4) of the Companies and Allied Matters Act, 2020 (the "CAMA"). CLBGs are organisations that exist to promote specific purposes and are required to use their income and assets solely for those purposes. These purposes include but are not limited to commerce, art, science, religion, charity, and so forth.

## Procedure for the Grant of the HAGF's Authority for the Registration of CLBGs

A CLBG may be incorporated by submitting the following at the CAC: (i) an application for the HAGF's authority, (ii) the memorandum and articles of association, and (iii) any other documents that may be required by the CAC.<sup>1</sup>

The CAC is charged with the responsibility of forwarding the application to the office of the HAGF for the HAGF's authority.<sup>2</sup> The application must be accompanied with the documents prescribed in the Guidelines. Upon receipt of the application from the CAC, the HAGF shall examine the application and its accompanying documents and is obligated to issue an instrument authorizing the registration of the memorandum where it is satisfied that (a) the objects contained in the company's application, complies with the provisions of CAMA, any other relevant legislation, and these Guidelines,<sup>3</sup> and (b) the promoters of the company have paid the applicable processing fees.<sup>4</sup>

Where the HAGF is not satisfied with the application or documents forwarded by the CAC or believes that there are justifiable grounds for withholding his authority, the HAGF is obliged to communicate this fact to the promoters of the company through the CAC, requiring the promoters to rectify the defect.<sup>5</sup> The promoters, upon complying with the queries raised by the HAGF, will resubmit the amended copies of the memorandum to the HAGF through the CAC.<sup>6</sup>

Where in the view of the HAGF, the queries are satisfactorily rectified, the HAGF is obligated to grant his authority. He may however decline the application if he has reasonable grounds to believe that the promoters have not complied with the provisions of CAMA, the Guidelines, or any other relevant legislation, or failed to pay the applicable fees.<sup>7</sup>

By Paragraph 10(8) of the Guidelines, the decision of the HAGF declining the application for the incorporation of a CLBG is final.

## Possible Challenges in the Implementation of the Guidelines

Whilst the Guidelines were issued to address challenges associated with processing applications for the HAGF's authority for the registration of CLBGs and to ensure uniformity in the procedures for processing the HAGF's authority;<sup>8</sup> there are some provisions that pose challenges to its implementation.

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<sup>1</sup> The Guidelines, para 2.

<sup>2</sup> The Guidelines, para. 10.

<sup>3</sup> The memorandum of a CLBG must not contain (a) inconsistent objects, (b) functions or powers of established government ministries, departments, and agencies, or (c) purport to regulate other bodies. Also, the memorandum of a CLBG must not contain objects which authorize the company to (w) participate in political campaigns, (x) contribute or donate to campaign funds, (y) sponsor candidates to election, and (z) liaise or arrange with any political party to carry on any activity listed in (w) – (y) above. (The Guidelines, Para 4(2) and (3)) The memorandum of such a company must also not contain any object that targets national security, instigates crisis, or promotes disunity or hatred or any object that purports to professionalize a trade, or issue proficiency certificates, in respect of any formal trade (The Guidelines, Para 6(3) and (4)). These are some of the provisions required to be complied with by the Guidelines.

<sup>4</sup> The Guidelines, para. 10(4).

<sup>5</sup> The Guidelines, para. 10(5).

<sup>6</sup> The Guidelines, para. 10(6).

<sup>7</sup> The Guidelines, para. 10(7).

<sup>8</sup> The Guidelines, paras. 1 and 2.

## 1. Registration of Foreign CLBGs

The Guidelines impose additional requirements on foreign CLBGs seeking to do business. The Guidelines require that a foreign CLBG intending to operate in Nigeria must include in its application for the HAGF's authority, evidence of its registration with the National Planning Commission of Nigeria ("**NPCN**"). This requirement has no basis as the NPCN is not charged with the regulation and supervision of companies in Nigeria.<sup>9</sup> The NPCN derives its powers and functions from the National Planning Commission Act<sup>10</sup> ("**NPCA**"). It is also a legal principle that where the exercise of power is statutory, it can only be exercised within the confines of the statute.<sup>11</sup> Thus, the functions and powers of the NPCN are restricted to those set out in the NPCA. The Guidelines seem to be going outside its jurisdiction by requiring applicants to provide proof of registration with the NPCN or its successor.<sup>12</sup> The Guidelines are pursuant to a statute and are intended to clarify the statutory provision and not extend it.<sup>13</sup> Section 26(4) of CAMA does not require applicants to provide evidence of such registration nor does it give the HAGF blanket authority to impose such conditions as it deems fit.<sup>14</sup>

By Nigerian law, all foreign companies intending to operate in Nigeria are expected to be registered in compliance with applicable laws, that is, CAMA, Nigerian Investment Promotion Commission Act,<sup>15</sup> and National Office for Technology Acquisition and Promotion Act (where applicable), and so forth.<sup>16</sup> CAMA provides that every foreign company intending to carry on business in Nigeria shall take *all steps* necessary to obtain incorporation as a separate entity in Nigeria for that purpose (emphasis ours).<sup>17</sup>

In comparison, there are no such requirements in other jurisdictions such as the United Kingdom. In the United Kingdom, CLBGs are incorporated by lodging a form **that** includes information about the company's intended principal business activities, a statement of capital and initial members, and the memorandum and articles of association.<sup>18</sup>

## 2. Statutory Time Limit for the Grant of the HAGF's Authority

According to the Guidelines, the decision of the HAGF declining the application for the incorporation of a CLBG is stated to be final.<sup>19</sup> The Guidelines are however silent on the timeframe within which the HAGF's authority is expected to be granted. By section 26(5) of CAMA, the authority of the HAGF is to be granted within 30 days of the submission of the application for the HAGF's authority. CAMA provides an alternative to the grant of the authority where the HAGF does not communicate his decision within 30 days.<sup>20</sup> A conflict may arise where the HAGF withholds his authority outside the 30-day period, but the company has however been registered in line with the alternative procedure in CAMA. Where this occurs, the incorporation of the CLBG in line with the alternative procedure of CAMA on alternative means of registering a CBLG without the HAGF's authority will supersede the HAGF's withholding his authority outside the 30-day period. The implication is that the HAGF's authority will not be regarded as final as the provisions of CAMA supersede

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<sup>9</sup> The National Planning Commission Act, CAP N66, LFN 2004, provides for the functions and powers of the NPCN none of which include regulation or supervision of companies in Nigeria (see National Planning Commission Act CAP N66, LFN 2004, ss. 4 and 5).

<sup>10</sup> National Planning Commission Act, CAP N66, LFN 2004.

<sup>11</sup> *Sanusi v Ayoola & Ors* [1992] LPELR – 3009 (SC); *ADC & Ors v INEC* [2022] LPELR – 24040 S.C.

<sup>12</sup> The Guidelines, para. 3(5).

<sup>13</sup> A subsidiary legislation derives its authority and validity from a substantive law, and it does not have the capacity to extend such authority - *Gov., Oyo State v. Folayan* [1995] 8 NWLR (Pt. 413) 292 (S.C.).

<sup>14</sup> It is the law that subsidiary legislations must conform with the principal law which provided the source of their existence - *FAMFA Oil Ltd v. AG Federation & Anor* [2007] LPELR-9023 (CA); a subsidiary legislation derives its validity from the enabling law. Its provisions therefore must be in conformity with the terms of its enabling law - *Odeneye v. Efunuga* [1990] 7 NWLR (Pt. 164) 618 (S.C.).

<sup>15</sup> Nigerian Investment Promotion Commission Act, CAP N117, LFN 2004.

<sup>16</sup> By s. 20 of the NIPC Act, an enterprise in which foreign participation is permitted, is required to apply to the Nigerian Investment Promotion Commission for registration.

<sup>17</sup> CAMA, s. 78(1).

<sup>18</sup> Thomas Schmuhl, Bill Northcote, Sven Hoffman, Kerri Dewe, Van Campen Liem, 'Global Business Entities Guide' (*Multilaw*, 2021) [https://www.multilaw.com/Multilaw/Global\\_Business\\_Entities\\_Guide/Global\\_Business\\_Entities\\_Guide.aspx](https://www.multilaw.com/Multilaw/Global_Business_Entities_Guide/Global_Business_Entities_Guide.aspx) accessed 30 October 2023.

<sup>19</sup> The Guidelines, para. 10(8).

<sup>20</sup> CAMA, s. 26(7) - where the HAGF does not decide within the 30-day period, the company promoters must advertise in three national dailies for objections. The CAC then considers the objections (where any) and may uphold or reject same.

the Guidelines. This is because subsidiary legislations,<sup>21</sup> like the Guidelines, are by their nature secondary to the principal legislations they are enacted thereto and must conform with the principal legislations.<sup>22</sup> This is a drawback to the Guidelines as the Guidelines were made to ensure uniformity in the procedure for processing the HAGF's Authority.<sup>23</sup>

### Conclusion

In conclusion, the Guidelines is a step in the right direction as it provides crucial insights into the requirements and process for obtaining the HAGF's authority for registering CLBGs. However, the Guidelines are supplementary to the CAMA, and as such, the requirement of obtaining proof of registration with the NPCN for foreign CLBGs seeking to operate in Nigeria lacks legal basis. Further, a decision of the HAGF declining the application for the incorporation of a CLBG will not be final where the CLBG has been incorporated in line with the alternative procedure provided by CAMA.

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<sup>21</sup> A subsidiary legislation or enactment is one that was subsequently made or enacted under and pursuant to the power conferred by the principal legislation or enactment. It derives its force or efficacy from the principal legislation to which it is therefore secondary and complimentary - *Omatseye v. FRN* [2017] LPELR-42719(CA).

<sup>22</sup> *FAMFA Oil Ltd v. AG Federation & Anor* [2007] LPELR-9023(CA); a subsidiary legislation derives life or force of law from the principal law. Therefore, a subsidiary legislation cannot contradict or override the principal legislation - *Kennedy v. I.N.E.C.* [2009] 1 NWLR (Pt. 1123) 614 (C.A); *Omatseye v. FRN* [2017] LPELR-42719 (CA).

<sup>23</sup> The Guidelines, para. 1 (b).

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