

REAL ESTATE INVESTMENT TRUSTS

Nigeria



Real Estate Investment Trusts

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Quick reference guide enabling side-by-side comparison of local insights, including into the definition, advantages and disadvantages of REITS, and market climate; organisational and governance considerations; key regulatory requirements, including for publicly traded REITS; categories of REIT and relevant property sectors; eligible investors; and recent trends.

Generated 19 October 2022

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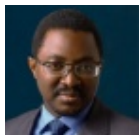
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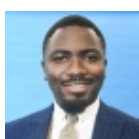
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PRELIMINARY CONSIDERATIONS

Definition

What constitutes a real estate investment trust (REIT) in your jurisdiction?

Generally, a REIT is a scheme through which an investor invests in an income-generating real estate property that affords investors an opportunity to earn returns from real estate without actually owning or managing real property. Section 193(2) of the Investment and Securities Act No. 29 of 2007 (as amended) (ISA) defines a REIT as a trust that may be constituted for the sole purpose of acquiring a property on a 'trust for sale' for the investors. Such a trust may be structured as an investment where the investors acquire units in the trust through which they will be entitled to receive a periodic distribution of income and participate in any capital appreciation of the relevant property; or the investors may be entitled to retain control over their investments by investing directly in a particular real property rather than in a portfolio of investments.

In Nigeria, REIT schemes may be structured as a company or trust, or any other structure approved by the Securities and Exchange Commission (SEC). By the SEC Rules, 2013 (as amended) (Rules or SEC Rules), a REIT is an entity that invests primarily in real estate and, subject to applicable laws, may qualify for special tax treatment, providing a channel for earnings to be taxed at the investor level as against the entity level. According to section 23(1)(s) of the Companies Income Tax Act (Laws of the Federation of Nigeria 2004, as amended), upon fulfilling certain conditions, the dividend or rental income of a REIT is exempt from tax, because it is received by the REIT on behalf of its shareholders or unitholders. Upon being distributed by the REIT, such income becomes taxable at the hand of respective shareholders or unitholders. REITs can own or finance income-generating real estate and provide investors with stable income streams, diversification and long-term capital appreciation.

Law stated - 25 February 2022

Pros and cons of REITs

Why were REITs created in your jurisdiction? What are the advantages and disadvantages of using REIT structures in your jurisdiction?

The real estate market in Nigeria is capital intensive, largely illiquid and requires a high degree of domain expertise to purchase, and more importantly manage developments, as well as attain rent optimisation. Accordingly, REITs have been created to address the challenges identified.

Key advantages conferred by REITs include access to finance for investment in real estate, professional management of real estate assets or projects and an opportunity for investors (who otherwise may not have had the opportunity due to the challenges indicated above) to participate in real estate financing without getting involved in the day-to-day management of real estate processes. Other advantages are tax advantage to entities that own and manage properties, easy way of investing in real estate and offering investors a path to participating in the ownership of real estate, without the hassle of managing those properties.

One key disadvantage of REITs is the absence of immediate payment of profits by reason of the distribution rules and requirements for publicly traded REITs, which makes it difficult to sustain growth in the scheme. Also, REITs do not allow investors who own stock directly the opportunity to monitor or manage the performance of the REIT, and to cut their losses, if need be, since an investor can only sell their shares when they are unsatisfied with the performance of the REIT.

Law stated - 25 February 2022

Market climate

How would you describe the state of the REIT market in your jurisdiction? How common are REITs in practice?

The REITs market in Nigeria is still at the nascent stage. So far, only three REITs have been successfully listed on Nigerian Exchange Limited (NGX), namely the Skye Shelter Hybrid (SFS) REIT (listed in February 2008), Union Homes REIT (listed in August 2008), and UPDC REIT (listed in 2013).

According to Bloomberg Index, the market capitalisation for the three REITs as of 23 December 2021, is about 21.45 billion naira compared to a market capitalisation of 42.5 billion naira previously reported as of 2015, marking a 50 per cent reduction in capitalisation for the REIT market.

Law stated - 25 February 2022

ORGANISATION

Choice of entity and organisational requirements

What forms of entity are used for REITs and what basic organisational requirements apply?

According to the Rules, REITs can either be structured as a limited liability company or as a trust. Where a REIT is constituted as a company, the documentation and organisational requirements will include:

- certificate of incorporation of the company, duly certified by the Corporate Affairs Commission (CAC), Nigeria's companies' registry;
- memorandum and articles of association, duly certified by the CAC, reflecting objects covering investment in real estate related business;
- certified status report issued by the CAC showing particulars of directors and shareholding, among others;
- draft prospectus (the contents to be included therein are outlined in the SEC Rules);
- evidence of increase in share capital (where applicable);
- evidence of appointment of a property manager registered with the SEC;
- a valuation report of the real estate property to be filed with the SEC by a real estate valuer registered with the SEC, in the subsequent quarter once an acquisition has occurred; and
- evidence of insurance taken out on the real property of the company establishing a REIT.

Where a REIT is to be constituted as a trust, an application for registration as a real estate investment trust will be filed with the SEC in the appropriate SEC forms. In addition, the Rules provide for the filing of a prospectus, including the form and the information required to be provided on such prospectus, to be filed with the SEC. The information provided by the REIT in its prospectus must be complete and not misleading.

Law stated - 25 February 2022

Partnerships as subsidiaries

Are REITs permitted to have partnerships as subsidiaries in your jurisdiction?

There is no law that expressly proscribes REITs from having partnerships as subsidiaries in Nigeria.

REITs as subsidiaries**Are partnerships permitted to have REITs as subsidiaries in your jurisdiction?**

Firstly, it is important to distinguish the types of partnerships that have been created by reason of Nigeria's new companies' law. By the effect of the said law, partnerships generally come in two different forms – limited liability partnership or limited partnership – with different legal implications.

Where a partnership is registered as a limited liability partnership, it is regarded by law as a body corporate and can operate in ways similar to a company, including doing any acts that bodies corporate can lawfully do, such as holding interest in other companies as subsidiaries.

However, where a partnership is registered as a limited partnership, it operates only as a business name (ie, lacks legal personality) and may not be able to hold a REIT as a subsidiary because such a limited partnership does not have its own separate corporate personality. While the distinction is clear under the broader companies' law, it is pertinent to note that the Rules have not taken the recent changes under our companies' law into context, but it can be assumed that limited liability partnerships have the same legal consequence as a company and therefore can have REITs as a subsidiary.

Furthermore, in its definition of REITs special purpose vehicles (SPV), the Rules provide that interest may be held by another REIT in a REIT SPV as a subsidiary. Having established that, the SEC Rules recognise holding structures for real estate investment schemes. The Rules define a REIT Holding Company as an entity set up either as a company or as a trust – that holds income-generating real estate assets directly or with a legal interest in a real estate investment scheme special purpose vehicle. This means that the Rules recognise an instance where a REIT is specially set up to hold interest in another REIT SPV. Therefore, it is possible to hold REITs as a subsidiary. However, for a partnership to hold such a REIT as a subsidiary, it would have to be registered as a limited liability partnership.

Law stated - 25 February 2022

Governance**What governance issues should the boards of REITs in your jurisdiction be aware of? How are these issues navigated in practice?**

There are several issues that are involved in the governance and administration of REITs, which a board should pay attention to in Nigeria.

One of the important reporting matters for REITs is on rating and valuation. By the provisions of the SEC Rules, particularly Rule 522 (further to the 2017 amendment), a rating report made by a registered rating agency is required to be filed with the SEC every two years. Also, for new applications, a valuation report would be considered valid for nine months from the date of valuation. After the initial period, an updated valuation report of the relevant property must be submitted to the SEC annually by a real estate valuer registered with the SEC in line with a recognised valuation standard. In practice, the registered estate valuer would undertake a professional valuation of the REIT's assets and submit the report to the fund manager, who will further advise the SEC and unit holders after receipt of the valuation report.

Another issue is the requirement for quarterly reports to be filed at the SEC. A REIT is required to file quarterly reports and such reports must contain the income statement, balance sheet, and cash flow statements, as well as information on rental yields, occupancy levels, and any notable changes in the portfolio composition of the REIT, as well as commentary on the quarterly financial performance measured against the previous year and projections, and the view

on the valuation of the assets of the REIT.

Furthermore, REITs are required to pay attention to insurance reporting. Rule 524 of the SEC Rules requires real estate assets of a REIT to have a comprehensive insurance, with the evidence of the insurance filed with the SEC within 90 days of commencement of the REIT scheme, and within 30 days of any subsequent acquisition of a real estate asset. It is also required that any renewal of expired insurance policy is filed with the SEC within 30 days of the due date.

In addition to the core governance issues, it is also important to note some prudential and market-ethics issues such as the several risk-aversion and consumer protection mechanisms put in place by market rules; like the gearing ratios and limitations imposed on fund managers and all other necessary stakeholders responsible for managing the funds and assets of the REIT.

Law stated - 25 February 2022

KEY REGULATORY REQUIREMENTS

Sources of income

What are the basic source-of-income requirements for a REIT?

The Rules (Rule 510, SEC Rules 2017, as amended) provide that a minimum of 90 per cent of a REITs' revenue (apart from capital gains), must be derived from rental income and dividend income.

Rental income is any income derived from the lease of properties owned by a REIT or a REIT SPV. On the other hand, dividend income is the income derived from owning interests in real estate assets or REIT SPV and distributed to unit holders as return on equity capital.

Law stated - 25 February 2022

Asset composition

What are the basic asset composition requirements for a REIT?

The SEC is responsible for determining and regulating the asset allocation levels of a REIT. In Nigeria, for a closed-ended REIT that is either equity-based or mortgage-based, a minimum of 75 per cent of the REIT's total assets have to be invested in real estate while the remaining 25 per cent may be invested in other real estate-related assets, provided that the REIT does not have more than 10 per cent of the remaining assets in liquid assets. Where a REIT is hybrid, it is required that at least 40 per cent of the REIT's assets be invested in real estate while at least 40 per cent is invested in mortgage assets and the remaining 20 per cent held in real estate-related assets, with the caveat that not more than 10 per cent of the remaining assets is invested in liquid assets.

On the other hand, where the REIT is open-ended, and the REIT is either equity-based or mortgage-based, a minimum of 70 per cent of the REIT's assets is required to be in real estate or real estate-related assets, a maximum of 10 per cent of the REIT's assets is required to be in liquid assets and 20 per cent may be invested in other assets. Where the open-ended REIT is hybrid, it is required that at least 40 per cent of the REIT's total assets be invested in real estate, at least 40 per cent invested in mortgage assets, while the remaining 20 per cent of the REIT's assets may be invested in real estate related assets, with a caveat that not more than 10 per cent of the remaining assets is to be invested in liquid assets.

Furthermore, it is provided that for both open-ended and closed-ended REITs, the extent of new development by a Fund Manager should not exceed 20 per cent of the REIT's gross asset value and the Fund Manager is required to hold onto any development for a minimum of two years before disposing of it.

Another consideration is that REITs, whether open-ended or closed-ended, are permitted to invest a maximum of 25 per

cent of their total assets outside Nigeria, but within Africa (Rule 539(3) of the SEC Rules 2017, as amended). The assets invested in out-of-Nigeria investment destinations, must bear similarities with the definition of real estate assets or real estate SPVs in Nigeria. It is also provided, that such out-of-Nigeria investments must be in a country with an investment grade credit rating assigned by an international rating agency.

In addition, the Rules provide that no single asset must constitute more than 20 per cent by value, of the gross asset value of a REIT. Rule 539 (4,5) of the SEC Rules 2017 (as amended) further determines that a REIT must own a minimum of 75 per cent legal interest in any real estate or real estate SPV within its portfolio and be able to exercise effective control over the assets.

Law stated - 25 February 2022

Distributions

What are the basic distribution requirements for a REIT?

It is compulsory for a real estate investment scheme to make a distribution at least annually. In the event that it does not, it may cease to be registered as a REIT by the SEC.

Under the Rules, an authorised REIT is required to annually distribute not less than 75 per cent of its rental or dividend income to unit holders.

Law stated - 25 February 2022

Consequences of non-compliance

What happens if a REIT fails to meet the basic regulatory requirements? Is relief available if a company fails to meet any of these requirements?

Generally, the conduct of REITs is subject to the approval and regulation of the SEC. The SEC regularly issues rules and regulations that guide the activities of operators and the registration of securities like REITs on the capital market.

Under the rules created by the SEC to regulate REITs, the most specific sanction provided indicates that non-compliance with the requirement for an annual distribution of not less than 75 per cent of the rental and dividend income of the REIT, may lead to deregistration by the SEC.

In addition to this, failure to meet the basic regulatory requirements may lead to the general sanctions and administrative procedure available under the SEC Rules (Rule 598 and 599). Some of the sanctions that can be administered by the SEC includes suspension of registration of securities, removal of officers of a capital market operator, fines for a capital market operator or its employees, among others (Rule 16, Schedule VIII of the SEC Rules 2013).

The SEC Rules also establish an Administrative Proceedings Committee, which operates as a tribunal to hear issues of violations of the rules and regulations issued by the SEC. The Rules recognise negotiated settlement processes, wherein any party against whom an action by the SEC has been instituted, can propose a negotiated settlement.

Law stated - 25 February 2022

Compliance best practices

What best practices should be considered to ensure compliance with the key regulatory requirements for REITs in your jurisdiction?

The Rules provide for the appointment of a compliance officer for every market operator. The compliance officer is an individual expected to be proficient in relevant capital market regulations, be responsible for monitoring and ensuring compliance with the relevant laws, rules and regulations, notifications, guidelines, etc, issued by the SEC and any other relevant agency. The compliance officer is expected to be registered, as a market operator with the SEC as a sponsored individual, in the prescribed filing forms.

The compliance officer has a wide range of compliance duties such as training and educating members of staff on compliance-related issues, and reporting cases of non-compliance to the SEC. The compliance officer must attend, on an annual basis, at least two training sessions organised by institutions recognised by the SEC.

It is best practice for the board in charge of the registered REIT to provide for the appointment of a compliance officer, who will supervise the REIT's compliance with the SEC Rules. Such a compliance officer may be a corporate body or an individual.

Law stated - 25 February 2022

Public REITs – regulatory treatment

Are the requirements for a publicly traded REIT raising capital different from those imposed on private REITs or public non-REIT companies?

The requirements for the registration of publicly traded REITs, for the purpose of raising capital are provided for under the SEC Rules. On the other hand, private REITs are not recognised under Nigerian law, as the ISA (Section 54) provides that all collective investment schemes (under which REITs are categorised), are required to be registered with, and regulated by, the SEC. Since private REITs are not registered with the SEC, it can be safely concluded that private REITs are currently unrecognised in Nigeria – although this is not to say that they do not exist.

The basic requirements for publicly traded REITs are not altogether different from the requirements for public non-REIT companies. Like publicly traded REITs, the securities of public companies must be registered with the SEC. REITs are also required to prepare a prospectus in the respective prescribed forms, as is required of public companies intending to list their securities on the capital market.

Essentially, the SEC Rules treat the units of a REIT and the shares or bonds being sold by a public company, as securities that must be registered with the SEC.

Law stated - 25 February 2022

Public REITs – ongoing requirements

What are the ongoing securities and disclosure requirements for publicly traded REITs?

According to the SEC Rules, a REIT must provide complete and accurate information in its prospectus.

Publicly traded REITs include the requirements for rating report by a registered rating agency, which must be filed with the SEC every two years and the valuation report, which must be filed with the SEC by a registered real estate valuer on an annual basis.

The fund manager of a REIT is also required to file a quarterly report on performance while a half-yearly report is required to be filed by a trustee to the REIT.

The quarterly reports and half-yearly reports to be filed will typically contain the following information:

- income statement, balance sheet and cash flow statements;
- rental yield, occupancy levels and property status;

- commentary on the analysis of financial performance over the quarter as against the previous quarter; and
- management's view on the valuation of the assets of the REIT.

Law stated - 25 February 2022

Public REITs – listing rules

Do the stock exchanges in your jurisdiction have any special rules that do not apply to unlisted or private REITs?

NGX has listing and delisting rules, as well as regulations and disclosure standards for the REIT market. The NGX Rulebook, 2015 (Rulebook) applies to investments structured as unit trusts, which cover REITs (in particular, Rule 5.1 (6) of the Rulebook). Some of the additional requirements highlighted under the Rules are:

- The trust deed must make provision for determining how the management company's prices for units on sale and purchase, and the yield from these units, are calculated.
- The trust deed must make provision for regulating the execution and issuance of unit certificate to the satisfaction of the trustee.
- The trust deed must make provision prohibiting the issue by the management company, of any circular or advertisement regarding the sale price of units or payments or benefits to be received by holders, unless there is a statement of the yield from the units.
- The trust deed must contain provisions on the audit of accounts relating to the trust.
- The trust deed must contain provisions to notify the Exchange of the Board recommendation to pay dividends within 21 days before the closure of books of transfer of payment for such dividend.
- The notification for the termination of a trust must be filed with the Exchange not less than six months before the intended termination.

Law stated - 25 February 2022

SCOPE OF ACTIVITIES AND INVESTMENTS

Categories of REIT and relevant property sectors

What kinds of REIT are available in your jurisdiction? In which real property sectors are REITs used?

The Nigerian Investment and Securities Act defines a real estate investment company as a body corporate incorporated for the sole purpose of acquiring intermediate or long term interest in real estate or property development and may raise funds from the capital market through the issuance of securities, which shall have the characteristics of an income certificate giving the investor a right to a share of the income of any property or property development; or an ordinary share in the body corporate giving the investor voting rights in the management of the body corporate.

Three types of REIT models are commonly used in Nigeria, namely:

- equity REITs;
- mortgage REITs; and
- hybrid REITs.

Equity REITs can purchase, hold or manage commercial and rental properties. Usually, equity REITs would finance

properties with a view to exiting with profits through rents and proceeds of sale of properties. Mortgage REITs do not own, possess or manage properties directly. Instead, they invest in mortgages on real estate properties. While the properties serve as a collateral for the loans a mortgage REIT invests in, the REIT has no ownership position in the property itself. Hybrid REITs combine the investment strategies of equity REITs and mortgage REITs, by investing in both properties and mortgages.

Furthermore, REITs may either be open-ended or closed-ended. This distinction is mainly premised on the ability of a REIT to issue additional units. Where a REIT is closed-ended, it can only issue units for sale to the public once and can only issue additional units when current unit holders approve it. On the other hand, an open-ended REIT can issue additional units from time to time, as may be deemed appropriate by the management of the REIT.

Law stated - 25 February 2022

Special rules

Are there any special rules for different types of REIT?

Under the Capital Market regulations, different rules apply to a REIT that is structured as a company (REICO) and a REIT that is structured as a trust (REIT).

For a REICO, it must be registered in line with the provisions of the Nigerian company law, the Companies and Allied Matters Act No. 3 of 2020 (as amended) (CAMA). A REICO must have a capital and reserve as indicated by the SEC and can be open-ended or closed-ended. Its borrowing powers are limited to not more than 40 per cent of its gross asset value. The SEC Rules provide for insurance, and the requirement for filing insurance on all the real estate assets of the REICO. For a REICO, no single asset within its portfolio must constitute more than 25 per cent by value, of its gross asset value.

On the other hand, a REIT can be constituted under a trust deed, between trustees and a fund manager and registered with the SEC. It may offer its units for sale to the public upon registration with the SEC. For a REIT, no single asset within its portfolio must constitute more than 20 per cent by value, of its gross asset value.

Law stated - 25 February 2022

Eligible investment property

What assets are treated as qualifying real property under the REIT rules in your jurisdiction? Can REITs located within your jurisdiction invest in real property outside your jurisdiction?

The Rules define real estate assets as developed, operational and income-generating properties owned directly by a REIT or through a REIT SPV. A real estate asset may also be the proprietary interest of a REIT in another real estate special purpose vehicle or in real estate related assets.

REITs within Nigeria are permitted to own real estate assets or related assets outside Nigeria, but within Africa, subject to the proviso that the collective portfolio of such assets outside Nigeria must not exceed 25 per cent of its total assets, and the investment asset must be in a country with an investment grade credit rating assigned by an international rating agency.

Law stated - 25 February 2022

Permitted activities

Are REITs in your jurisdiction allowed to engage in any ancillary non-investment activities, such as real property management and development?

The ISA, in defining REITs, provides that their sole purpose is for acquiring intermediate or long-term interests in real estate or property development. This suggests that a REIT cannot participate in all other activities that are not related to investment activities.

Generally, the practice in many cases is that REITs, whether structured as a company or as a trust, work together with property development and management companies who take on these ancillary activities.

Law stated - 25 February 2022

Eligible investors

Who may invest in REITs in your jurisdiction? What types of investor do they typically attract? Are there any restrictions on foreign investors?

Anyone may invest in listed REITs in Nigeria, and this includes individuals, banks and other financial institutions, fund managers, among others.

The main investor groups in REITs in Nigeria include pension funds, institutional investors, and retail investors. According to a recent market participation index, other institutional investors are leading participation in REITs by about 64 per cent while pension fund administrators take about 34 per cent and retail investors take about 2 per cent market share, respectively.

Foreign investors are permitted to invest in REITs floated in Nigeria, subject to compliance with the rules provided by the Central Bank of Nigeria (CBN) regarding Certificate of Capital Importation (CCI). The law requires a foreign investor bringing in investment capital into Nigeria, to do so through an authorised dealer licensed by the CBN. This authorised dealer must issue a CCI to the investor within 24 hours of capital importation and make returns to the CBN – as the banking and forex regulator – within 48 hours thereafter. The CCI entitles an investor to repatriate funds (both capital and earnings/interest) out of Nigeria.

Law stated - 25 February 2022

Transactions with non-REITs

Are there any special considerations when REITs negotiate purchases and sales or leases of investment real estate with non-REITs?

Generally, there are no regulations that determine how purchases, sales or leases between REITs and non-REITs are to be administered. However, in conducting the purchase, sale or lease of a property by a REIT, tax considerations and title perfection requirements under Nigerian law, together with the associated costs, must be considered. For instance, there is the requirement to obtain the Governor's consent to any alienation of interest in land, pursuant to the Land Use Act. Property transaction documents are also required to be stamped in accordance with the provisions of the Stamp Duties Act while the transaction documents are further required to be registered at the relevant Lands Registry, pursuant to the Land Instrument Registration Law of the state where the land is situated.

With regards to negotiations, there is a need for caution concerning the likelihood of a conflict of interest between the sponsors of a REIT, fund managers, valuers, and the interest of the unit holders. The fund managers, in their dealings, must bear in mind the investor protection rules under the SEC Rules.

Acquiring non-REIT corporations

Are there any special considerations when REITs acquire non-REIT corporations?

Generally, the SEC Rules provide that a REIT may conduct any investment activity for the purpose of acquiring interest in real estate-related assets, such as real estate SPVs. Where a REIT invests in an SPV within its portfolio, it must own at least 75 per cent legal interest in the company and be able to exercise full control over the assets of the company.

Some of the general considerations for acquiring a non-REIT corporation include the requirement by the Nigerian company law, of offering a first right of refusal to existing shareholders; where a shareholder or group of shareholders intends to sell more than 50 per cent of the shares of the company to a non-shareholder. This first right of refusal must be exercised before a REIT can acquire more than 50 per cent of the shares of a non-REIT company.

Law stated - 25 February 2022

UPDATE AND TRENDS

Recent developments

What have been the most noteworthy recent developments affecting REITs in your jurisdiction, including any significant legal or regulatory changes and commercial trends?

A notable regulatory change in the taxation of REITs and their activities within Nigeria was introduced. In 2021, the Federal Inland Revenue Service (FIRS), Nigeria's federal tax agency, issued a circular providing guidance on the taxation of real estate investment companies in line with the relevant tax laws. In its circular, the FIRS detailed how the Companies Income Tax Act, as amended, would apply to the distribution of dividends by a REIT. In summary, subject to the REIT fulfilling some conditions, the gross rental income and dividend received by a REIT will be treated as a non-taxable income, because the amount is received on behalf of shareholders or unitholders. The FIRS further clarified that a withholding tax rate of 10 per cent is to be charged on distribution or dividend made by a REIT to shareholders or unitholders, unless such a shareholder or unitholder is a REIT under a real estate investment scheme.

In addition, the Finance Act 2021, new legislation recently passed into law in Nigeria, amended the definition of 'Real Estate Investment Company' under the Companies Income Tax Act, to include a Real Estate Unit Trust duly approved by the SEC. Effectively, this has harmonised the definition of a real estate investment company and real estate investment trust.

Law stated - 25 February 2022

Jurisdictions

	India	AZB & Partners
	Japan	Mori Hamada & Matsumoto
	Luxembourg	Loyens & Loeff
	Nigeria	Banwo & Ighodalo
	USA	Sullivan & Worcester LLP