

# LEGISLATIVE ALERT

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## THE PRESIDENTIAL (TRANSITION) (AMENDMENT) BILL: A MOVE FROM DIAGNOSIS TO PRESCRIPTION

by

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### SUMMARY

*The post-2012 election period presented the first test for implementing major aspects of the Presidential (Transition) Act. Following the transition, the Institute of Economic Affairs (IEA) initiated research to critically evaluate the process. The findings provided encouraging evidence of the Act being put into practice. However, challenges were highlighted and recommendations were outlined. The IEA's proposed reforms were presented to Government - in the form of a draft Bill to fine-tune the Transition Act. This is what forms the crux of the Presidential (Transition) (Amendment) Bill, 2016 currently before Parliament.*

*The objective of this paper is to discuss the key amendments in the Bill in order to provide further clarity on the thinking behind the proposed changes. For this analysis, the amendments are categorised under three themes – (i) resolving legal technicalities (ii) value for money and (iii) enforcement. This Legislative Alert also outlines additional recommendations aimed at improving the management of official assets. Overall, the paper argues that the reforms outlined in the Bill will accrue efficiency savings, promote accountability in the use of official assets and strengthen Ghana's system of governance. In this regard, the Presidential (Transition) (Amendment) Bill is a step in the right direction. We urge Parliament to consider the proposals set out in this paper and approve the Bill. Taking this stand will not only unlock the full potential of the Transition Act - but will also be in the national interest.*

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## INTRODUCTION

Ghana's political environment is often characterised by interparty hostility and intense polarisation. However, on 16 March 2012 Parliament bucked the trend by unanimously passing the Presidential (Transition) Bill. In doing so, our political leaders demonstrated their capability to rise above partisan lines and work towards sound democratic governance in our country. Indeed, the passage of this piece of legislation bears the hallmarks of cross-party efforts aimed at institutional reform. What is notable is that the legislation originated as a response to the 2001 transition, which deepened political polarisation and suspicion in Ghana.

In 2007, the Institute of Economic Affairs (IEA) in collaboration with the Ghana Political Parties Programme (GPPP) initiated work on a multi-partisan framework of ground rules and regulations to govern future transitions. In fact, there was cross-party consensus that reforming the transition process in Ghana - for it to be credible and effective - required that it should have statutory underpinning. The end product of this initiative was the Presidential (Transition) Bill, which the IEA/GPPP drafted and was subsequently signed into law on 31 May 2012 as the Presidential (Transition) Act, 2012 (Act 845).

The primary objective of the Presidential (Transition) Act is to provide a framework for managing the political transfer of power from an out-going democratically elected President to an incoming President. The legislation draws on practical lessons from Ghana's 2001 and

2009 transitions. Yet the benefits of the Act transcend regime change; this is evident in its key attributes of accountability, institutional clarity and a structured time frame for managing the transition process. The Act, for example, stipulates timelines for vacating official accommodation; a mechanism to safeguard government assets through an inventory system; the submission of handing-over notes covering a broad range of public offices in order to engender good recording-keeping; and appointees whose tenure ends with that of an outgoing President, among others.

The post-2012 election period presented the first test for implementing major aspects of the Transition Act. It is important to emphasise that executive level transition occurs even with the re-election of an incumbent; section 1 (3) of Act 845 makes provision for this scenario. The IEA closely monitored the transition process and, after the President was sworn-in on 7 January 2013, the Institute initiated research to critically evaluate the process. The objective was to assess what worked well, review what did not and propose reforms to address the challenges. The research findings provided encouraging evidence of the Act being put into practice. However, challenges were highlighted and areas for reform were outlined. After broad consultation, the IEA published its findings as a concise monograph.<sup>1</sup>

The feedback on the published review and proposals for amendment was very positive. The IEA's next step was to prepare a draft Presidential (Transition) (Amendment) Bill to fine-tune Act 845. In

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<sup>1</sup>Implementing the Presidential (Transition) Act: Lessons, challenges and the way forward. IEA Monograph No. 33. Accra: Institute of Economic Affairs.

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this regard, in July 2013, the Institute organised a two-day working session primarily for key members from Parliament's Committee on Constitutional, Legal and Parliamentary Affairs, as well as the Committee on Subsidiary Legislation. The core recommendations outlined in the IEA's monograph served as the working document during the two-day session. The parliamentary political parties were all represented. The working session drew on the recommendations in the IEA monograph which required legal backing and, at the end of the second day, a draft Presidential (Transition) (Amendment Bill) was produced. The Institute subjected the draft Bill to extensive consultation and external review. After this, the draft Bill was sent to the Attorney-General and Minister for Justice with a request for it to be sent to Cabinet and, subsequently, Parliament. It has taken a few years for the Bill to progress from the office of the Attorney-General and Minister for Justice to Cabinet - and then to Parliament. On 8 March 2016, the Presidential (Transition) (Amendment) Bill, 2016 was read for the first time in Parliament and referred to the Committee on Constitutional, Legal and Parliamentary Affairs.

The amendments proposed by the IEA (and subsequently introduced in the Bill) can be grouped under three key themes – (i) value for money (ii) resolving legal technicalities and (iii) providing enforcement powers to unlock the full potential of Act 845.

Against this backdrop, the objective of this briefing paper is to discuss the key

amendments in the Bill in order to provide further clarity on the thinking behind the proposed changes. While the paper draws primarily on the IEA's earlier work, which served as the basis for the Bill, it also outlines further recommendations aimed at improving the management of official asset. Overall, the paper argues that the reforms outlined in the Bill will accrue efficiency savings, promote accountability in the use of official assets and strengthen the country's system of governance. It is hoped that Parliament will consider the additional proposals outlined in this paper and, altogether, approve the Amendment Bill in Ghana's interest.

## LEGAL TECHNICALITIES

In the implementation of the Presidential (Transition) Act, some legal technicalities emerged. The Amendment Bill attempts to address these issues. Three of these are worth noting. First, section 1 (3) of Act 845 has a potential legal technicality, which was not apparent when the Transition Act was drafted. The section states that: “*where an incumbent President is re-elected for a second term, the President shall designate members of the Transition Team.*” The case of President Mahama, who assumed office as President in July 2012 upon the death of President John Atta Mills is evidence of a scenario whereby “an incumbent” who wins a general election may not necessarily have been elected for a “second term”. To avoid any potential issues such as legal challenges relating to strict adherence of this section, it is important to reflect the 'Mahama scenario' in the law. The Bill clarifies section 1(3) to simply state “*where the incumbent President is elected...*” with the

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<sup>2</sup>The legality of swearing-in Parliament two days before dissolution was carefully examined during the consideration stage of the Presidential (Transition) Bill by Parliament. It is, then, surprising that the same Parliament, which debated and passed Act 845, deemed a section it approved as unconstitutional.

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reference to “second term” deleted and thereby removing any potential legal technicalities.

The second legal issue the Amendment Bill addresses relates to the swearing-in of Parliament. In the 2013 transition, there were disagreements with implementing section 11 of the Presidential (Transition) Act, which covers the election of the Speaker and swearing-in of a new Parliament. The argument, which was put forward by MPs and legal practitioners, was that the Transition Act was inconsistent with the Constitution. Article 113 (1) of the 1992 Constitution provides that “...Parliament shall continue for four years from the date of its first sitting and shall then stand dissolved.” Applying this provision to the 2013 transition, this implied that Parliament stood dissolved only after midnight on 7 January 2013. The Transition Act, however, states that a new Parliament must be sworn in two days before dissolution - but assume office on 7 January. The issue here was that if the swearing-in went ahead (as per the Transition Act) then two Parliaments would have been in existence - a scenario that was considered unconstitutional.<sup>2</sup> In view of these disagreements, Parliament was sworn in at the earliest opportunity - shortly after midnight on 7 January 2013.

The early swearing-in undoubtedly contributed to the smooth presidential inauguration, which took place before Parliament that same day. Yet, the midnight sitting of the House posed its own logistical and practical difficulties. Clause 7 of the Amendment Bill make changes to section 11 (1) of Act 845 by replacing “two days” with “within twelve

hours” (before the dissolution of Parliament). This plausible alternative, while providing for an early swearing-in, should bring about a settled view on the above matter.

Third, section 8 (5) of Act 845 grants to the Presidential Estates Unit, the responsibility for “*the procurement of any assets or properties of Government which are assets and properties not vested in the Lands Commission.*” There are laws on the statute book such as the Public Procurement Act, which assigns Ministries, Department and Agencies (MDAs) responsibility for procurement. In order to remove potential conflicts, the Amendment Bill fittingly deletes section 8 (5). On the other hand, this author will argue that, it is not necessary to delete section 8(6), as indicated in clause 5 of the Bill. In fact, section 8(6) simply states that “*The Administrator-General shall in procuring assets, comply with the provisions of the Public Procurement Act, 2003 (Act 663).*” Indeed, this sub-section should be retained for good governance, as the Administrator-General will still engage in procurement of assets outside the control of MDAs.

## **ENFORCEMENT POWERS**

Although the Transition Act confers a range of duties on the Administrator-General's office, it does not empower the office to deal with possible breaches. For the Transition Act to be effective, powers that can strengthen the hand of the Administrator-General in carrying out the statutory duties conferred on that office remain crucial. Clause 6 of the Amendment Bill addresses this gap; it empowers the Administrator-General to

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<sup>2</sup>The legality of swearing-in Parliament two days before dissolution was carefully examined during the consideration stage of the Presidential (Transition) Bill by Parliament. It is, then, surprising that the same Parliament, which debated and passed Act 845, deemed a section it approved as unconstitutional.

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evict persons (no longer holding public office after the Presidential inauguration) who fail to vacate their official residence beyond the maximum three months. Indeed, while the enforcement powers are welcome, the Administrator-General needs to be further empowered to surcharge public officials for missing or damaged state assets.

## VALUE FOR MONEY

The Amendment Bill draws on lessons from the previous transitions to provide measures that will accrue efficiency savings on transition costs. The evidence from the 2009 transition suggests that honoraria for members of a Transition Team and its sub-committees accounted for more than half of transition expenses.<sup>3</sup> Out of a total GH¢361,924.41 spent on that year's transition, GH¢208,800 was paid as honoraria (Parliamentary Debates, 17 June 2009). The honoraria amount represents 57 percent of that transition's expenditure. In this respect, there is a need for a cap on the number of individuals appointed to a Transition Team owing to the cost of honoraria on the public purse.

In the scenario where an incumbent is re-elected, Act 845 states that the President shall designate members of the Transition Team. However, the 22-member team the President appointed could be considered as sizeable, as this was not a transition from one democratically elected President to another. Clause 1 of the Bill amends section 1 (3) of Act 845 and essentially limits the Transition Team to 13 individuals in the case when an incumbent is re-elected. This could help limit the cost relating to Transition Team appointees.

The Bill also provides for additional savings by putting a limit on the tenure of office for members of a Transition Team. In the past, some Transition Teams have operated well over three months after the Presidential inauguration. Clause 3A of the Amendment Bill now provides for a six-week tenure for the Transition Team after which it shall cease to exist.<sup>4</sup>

However, on the issue of cost, the Bill does not provide for capping allowances or honoraria paid to members of a Transition Team. This remains important in order to tackle transition cost. Perhaps, providing for a set budget prepared by the Administrator-General to cover honoraria (based on what was previously paid to Transition Team members with an inflation adjustment factored into it) could be one approach to take. Overall, given that Ghana faces economic challenges, which have resulted in national belt tightening in key sectors, it will be prudent to show austerity in this area of public spending.

## RECOMMENDATIONS

There are three key issues that require further consideration for the overall effectiveness of the Transition law. First, it is in the public interest to impose a statutory requirement for the Administrator-General to submit periodic (narrative and financial) reports to Parliament. The proposed requirement, which can be on an annual basis, could be set within a time frame such as 'not later than six months after the end of each financial year'. The annual report should provide an update on the national register of executive asset (including size and

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<sup>3</sup> The figures indicate that for the 2009 transition there were 151 individuals on the Transition Team and its 10 subcommittees.

<sup>4</sup> As per clause 3A of the Amendment Bill, the six weeks begin from the declaration of the Presidential election result.

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location); timelines of inventories taken; cost of maintaining the assets portfolio; assets procured; actions taken by the Presidential Estates Unit (PEU) during transitions (where applicable) and the operations and performance of the Unit, among others. Indeed, given that the cost of government is a pressing public policy issue, the Transition Act can be tightened to ensure value for money. The effective management and maintenance of the large portfolio of official assets, which the Administrator-General and PEU will oversee, could accrue huge savings to the nation. Parliament, as the watchdog over the public purse, must scrutinise the proposed reports to ensure Ghanaians get value for money. Overall, this approach will further promote accountability and transparency in the management of official assets.

Second, subsidiary legislation that outlines the finer details relating to the Administrator-General's role and the PEU's mandate, among others, requires urgent consideration. Clause 12A of the Bill makes provisions for the Minister for Justice to introduce a legislative instrument for the effective implementation of the Presidential (Transition) Act. It is essential for work to begin swiftly on regulations that empower the Administrator-General to surcharge public officials for damaged or missing state assets, among others. This will help to ensure accountability in the use of state assets.

Third, previous transitions have shown that vacating official accommodation is a contentious issue. In this regard, section 10 (2) of the Presidential (Transition) Act

provides rules to govern this process stating that “...[a] person who ceases to hold office on the assumption of office of the person elected as President and is in occupation of an official residence shall vacate the residence within three months after that assumption of office”. The provision is clear about the time limit. However, the Bill amends the section 10 (2) by introducing what may be interpreted as a minimum time frame that requires public officers ceasing to hold office to “...vacate the residence within one month and not later than three months after [the] assumption of office [of the President]”. Given that the maximum period of three months is still retained, the introduction of “one month” in the Amendment may be considered unnecessary. Thus, Parliament is urged to consider retaining the current format of section 10 (2) Act 845 to maintain clarity in this controversial area of transitions.

## CONCLUSION

The Presidential (Transition) Act was implemented for the first time during the 2013 transition. Following the transition, the IEA initiated research to critically evaluate the process. The objective was to assess what worked well, review what did not and propose reforms to address the challenges encountered. After broad consultation on the research 'diagnosis', the Institute provided a 'prescription' to address the challenges identified. The treatment plan was presented to Government in the form of a draft Bill, which now forms the crux of the Presidential (Transition) (Amendment) Bill, 2016 currently before Parliament. This briefing paper has given an account of

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the thinking behind the Bill with the aim of providing further clarity on the major areas of reform. The paper has also proposed that Parliament reconsiders specific issues (outlined in the recommendation section above) for the effective implementation of the Act 845.

The Transition Act remains integral to good governance in Ghana; the Amendment Bill is a step in the right direction as it seeks to fine-tune the Act to improve its effectiveness. Indeed, taken together, the assessment provided in this paper indicates that the reforms outlined in the Bill, which can be categorised under three themes - resolving legal technicalities; value for money and enforcement - will accrue efficiency savings, promote accountability in the use of official assets and strengthen our system of governance. In passing Act 845 policymakers demonstrated what cross party efforts can achieve. The consideration stage of the Bill provides another window of opportunity for our Members of Parliament (MPs) to demonstrate, again, the same spirit of working together for the good of mother Ghana. Parliament is hereby urged to consider the proposals set out in this paper and approve the Bill. Taking this stand will not only unlock the full potential of the Transition Act - but will also be in the national interest.

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