

Nigeria – Regulating Corporate Entities under the New Companies and Allied Matters Act 2020:

What you should know.

On August 7th, 2020 President Muhammadu Buhari signed into law the Companies and Allied Matters Act (CAMA 2020, the "Act" or the "New Act"). For our earlier article on the new law titled "A review of the New Companies and Allied Matters Bill initially passed by Nigeria's National Assembly; Will the new Act prove to be a game changer in Nigeria's Corporate Clime?", kindly go to: <http://www.gbc-law.com/assets/publications/A-REVIEW-OF-THE-NEW-CAMA-BILL.pdf>.

Section 869 of the New Act repeals the erstwhile CAMA 1990 and all related amendments, legislations and regulations made thereunder ("Repealed CAMA"), whilst Section 869(2) preserves the validity of any order, rule, regulation, appointment, conveyance, mortgage, deed, agreement, resolution, direction, proceeding, instrument or thing in force immediately before the commencement of the New Act

We highlight the key innovations introduced under the Companies and Allied Matters Act 2020 ("CAMA 2020) below:



1. E-registration

Electronic registration of companies will now be possible by virtue of Section 31(1) of the New Act. The Corporate Affairs Commission ("Commission" or "CAC") would be able to establish companies using any means of electronic communication to facilitate an automated reservation of names and registration. This provision codifies what has already become practice at the CAC and will definitely speed things up and result in a hassle-free process of registration of companies.

2. Single Member Companies

Section 18(2) of CAMA 2020 provides that one person can constitute the minimum membership of a private company. Also, companies with a single shareholder are not required to record the minutes of the proceedings of meetings in the minutes' book of the company (Section 266(1)).

3. Transfer of Share by private companies

By Section 22(a) of CAMA 2020, in addition to restricting the transfer of shares, the Articles of a private company may also provide that the company shall not without the consent of its members, sell the assets of the company with a value of more than 50% of the total value of the company's assets. Also, members of private companies are not permitted to sell their shares to non- members without first offering it to members. (Section 22(2)(b)).



4. Incorporation of Companies Ltd by Guarantee



New provisions have been added to CAMA with respect to registration of companies limited by guarantee. These provisions are expressed in Section 26 of CAMA 2020. The New Act expressly gives the Attorney General of the Federation (AGF) authority to proceed with a company registration, within Thirty (30) days where he has no objections. If the AGF requires more information from the promoters of the company, the 30-day period will not begin until the information has been given to him. Where the AGF gives no objection after the 30-day period, the company can call for objections from the public. The notice of objection must state the grounds for such objection and must be forwarded to the CAC within 28 days after publication in the newspaper of the call for objections. Where the AGF makes no decision after the 28 day window, the Commission can assent to the application and register the company without the AGF's consent. The new law has dealt with a matter of considerable difficulty often encountered by promoters of non-profit organizations who wait endlessly for the consent of the AGF.

Additionally, by Section 38 of CAMA 2020, a statement of guarantee is expected to be delivered to the CAC in respect of the registration of companies limited by guarantee.

5. Minimum Issued Share Capital

By Section 27(2) (a) of CAMA 2020, "Authorised share capital" has been replaced with "Minimum Share Capital". Such minimum share capital of a private company shall not be less than N100, 000 while the minimum share capital for a public company shall not be less than N2, 000,000.

6. Articles of Association

The Act seeks to abolish the mandatory prescription of Model Articles by the Commission and instead gives the Minister of Trade the powers, (under Section 33 of the Act, to prescribe model articles of association for companies. The Minister is permitted to prescribe different models for different companies and companies are allowed to adopt any of the models prescribed. This is a welcome development as it will give companies the flexibility to create their own Articles as against the current practice of the Commission insisting on the adoption of the model Articles in CAMA.

7. Certificate of Incorporation



Previously a Company, with the approval of the Commission, could direct another company to change its name where such a Company is registered under a name identical to that by which the first company in existence is previously registered, or so closely resembling it as to be likely to deceive. New powers have been given to the CAC in respect of registration of companies. By Section 31 (3) of CAMA 2020, the Corporate Affairs Commission now has the power to withdraw, cancel or revoke a reserved name if it discovers that such name is identical with the name of a company already in existence and or if it resembles it so much as to cause deceit.

By Section 41(7) of CAMA 2020, the Commission also has the powers to withdraw, revoke or cancel a Certificate of Incorporation where it discovers that the Certificate was fraudulently, unlawfully or improperly procured. The Commission will thereafter publicize names that have been withdrawn, revoked or cancelled periodically in the Federal Gazette.

8. Statement of Compliance

Previously, one of the requirements for registration of Companies in Nigeria is the submission of a Statutory Declaration of Compliance (Form CAC 4) and this can only be filled by a legal practitioner according to the provisions of Section 35(3) of the CAMA.

By Section 40(1) of CAMA 2020, applicants and their agents can now sign a statement of compliance confirming that the requirements of the law in respect to registration of companies have been complied with. This has therefore expunged the need for a statutory Declaration for Compliance by a Notary Public or a Legal Practitioner. However, the Commission will also accept a Declaration of Compliance which is signed by a Legal Practitioner and attested before a Notary Public

9. Foreign participation

By Section 79 of CAMA 2020, where a foreign company fails to adhere strictly to the provisions of registration for foreign companies in Nigeria, such company and its agent will be liable to prosecution prescribed by the CAC as opposed to a fine of not less than N2500 under Section 55 of the Repealed CAMA.

10. Electronic Signature

Under Section 101 of CAMA 2020, where a document or proceeding is required to be authenticated by a company, the New Act provides that an electronic signature on such document or proceeding shall suffice for the purpose of authenticating the document.

11. Common Seal of the Company

By Section 98 of CAMA 2020, based on the provisions of the Act, the requirement to have a Common Seal has been made optional for companies, the use and design of which would be regulated by their Articles.

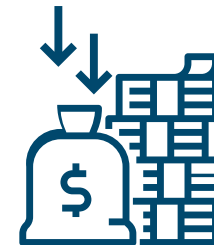


12. Disclosure of Persons with significant control/ Beneficial Ownership

By Section 119 and 120 of CAMA 2020, every person having significant control over a company shall within Seven (7) days of gaining such control make full disclosure in writing to the Company the particulars of such control. There must be full disclosure by a substantial shareholder in a public company (Section 120).

13. Reduction of Share Capital

Under CAMA 2020, by Section 136, the penalty for: the wilful concealment of the name of a creditor entitled to object to the reduction of capital; the wilful misrepresentation of the nature or amount of the debt or claim of any creditor; or the aiding and abetting of any such concealment or misrepresentation shall attract a penalty as may be determined by the Commission. In addition, anyone who is privy to such concealment or misrepresentation shall also incur a penalty to be determined by the Commission.



14. Financial assistance

The New Act amends the financial assistance provisions of the repealed Act by including a provision that allows a private company to provide financial assistance to its members for the purpose of acquiring its shares with the approval of its shareholders.

This is in line with the provisions under the English Companies Act 2006 which reflects a market friendly advancement from the current position. It also improves companies' chances of attracting much-needed investment since there are now provisions in the Act that enable shareholders and potential shareholders to access funds, within certain parameters, which in turn, would enable them invest in such companies.


Private companies are no longer prohibited from granting financial assistance for the acquisition of shares if the company has net assets which are not reduced and if the assistance is provided out of distributable profits. To give such financial assistance, there must also be a special resolution approving the assistance and the directors company or the holding company must also make a statutory declaration in the prescribed form (Section 183(4)).

15. Acquisition by a Company of its own shares

Previously, any Company may purchase its own shares if it is permitted by its Articles and also approved by the shareholders by way of a special resolution. It should be noted that the purpose of the acquisition must fall within those listed out in Section 160 (2) of the Repealed Act. However, if there would no longer be any issued shares of the company other than redeemable shares or shares held as treasury shares, the company is prohibited from acquiring its shares.

The current position under CAMA 2020 states the circumstances where a Company can acquire its own shares including redeemable shares. By Section 184 (1)(a) and (b), a limited liability company can purchase its own shares including redeemable shares if its Articles permit it or where its shareholders approve through a special resolution. While the provision for a company's acquisition of its shares under the Repealed Act relates to companies generally, CAMA 2020 expressly provides that it relates to a Limited Liability Company alone.





By Section 22(a) of CAMA 2020, in addition to restricting the transfer of shares, the Articles of a private company may also provide that the company shall not without the consent of all its members, sell assets of the company with a value of more than 50% of the total value of the company's assets. Also, members of private companies are not permitted to sell their shares to non-members without first offering it to members. (Section 22(2)(b)).

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16. Registration of Charges

Under Section 222 of the New Act, the registration of the particulars of a charge together with the instrument creating that charge, shall upon such registration with the Commission give rise to a constructive notice of the matters stated in the charge. The New Act also provides for the sum total of the fees payable to the Commission in connection with the filing, registration or release of a charge with the Commission which shall not exceed 0.35% of the value of the charge or such other amount as the Minister may specify in the Federal Government Gazette. (Section 222(12).



18. Exemption from Audit

The Act exempts a certain class of companies from the mandatory need to ensure their accounts are audited. By Section 402 CAMA 2020, a company is exempted from audit requirements where the company has not carried out business since incorporation or the company is a small company with the exception of banks, insurance companies and any other Company as may be prescribed by the Commission.

It should be noted that CAMA 2020 defines a Small Company under Section 394 (3) as "a private company with a turnover of not more than N120,000, 000. 00 and a net asset value of not more than N60,000,000.00 and one in which none of its members is an alien, a Government or a Government Corporation or agency or its nominee and one in which the directors hold at least 51% of the company's equity share capital.

17. Directors

Public companies are now required to have at least Three (3) independent Directors under Section 275 of the New Act. Also, the Chairman of a public company is prohibited from acting as the Chief Executive Officer of such company. This is in line with the Code of Corporate Governance Regulation 2018 issued by the Minister for Industry, Trade and Investment. Additionally, a person cannot be a director in more than Five (5) public companies under Section 307. The New Act also mandates that the compensation of managers of a company shall be disclosed to members of the company at the annual general meeting under Section 257.



19. Electronic meetings

By Section 243(1)(e) of CAMA 2020 private companies can now conduct virtual meetings provided it is in line with the articles of association of the company. This will give legal effect to a practice that has already been adopted by many companies and bring the administration of Board and General Meetings in line with technological advancement and social realities.

20. Exemption from AGM:

By section 240 of CAMA 2020, small companies and private companies with just one shareholder are exempted from conducting Annual General Meetings.



21. Company Secretary

By Section 330(1) of CAMA 2020, small companies are no longer required to appoint secretaries but instead the directors can authorize an assistant, deputy secretary or officer of the company. The most significant change under this subject is the fact that in the old regime, every company had to have a secretary; however that is not the case under the New Act which eases the regulatory burden on small companies by giving them the option of operating without a secretary while also giving public companies Six (6) months to appoint a secretary if they do not have one at the time of the Commencement of the Act. Also, the New Act now provides that every public company shall maintain a register of secretaries and sets out the guideline for this. This appears to suggest that private companies will not be mandatorily required to keep a register of Secretaries as required under the Repealed Act. Public companies and their directors are now liable to a fine to be determined by the Commission where they fail to appoint a company secretary (Section 330(4)).



22. Modified Financial Statement for Small companies

Under Section 396, the directors of a company may deliver individual financial statements modified as for a small company pursuant to the 6th Schedule of the New Act where they qualify under circumstances stated under subsections 2 & 3



23. Annual Returns

Companies may apply to the Commission for extension of time within which to file Annual Returns for a calendar year. Companies can also now deliver annexures to their Annual Returns through electronics means. Failure to file Annual Returns for a consecutive period of Ten (10) years is a ground for the Commission to strike off the name of a Company from the Companies Register.

24. Company Voluntary Arrangements and Administration of Companies (Sections 434 - 549)

The Repealed Act enables a company in distress to explore options such as winding-up, merger, acquisition and compromise. The New Act however introduces a company rescue and insolvency legal regime which is not focused on a Company's demise, but on rescuing companies from insolvency. The New Act in a bid to salvage insolvent companies introduced the provisions of Sections 434 -549 on voluntary arrangements and administration of companies and sets out detailed procedures to be followed for the execution of both. This is an unprecedented development in the history of corporate legislation in Nigeria. The provisions form a framework for rescuing a company in distress and to keep it alive as opposed to resorting to insolvency.

Section 434(1) provides that the directors of a company may make a proposal for a nominee to act in respect of a voluntary arrangement to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. Such nominee must be qualified to act as an insolvency practitioner in relation to the company and may be appointed either as trustee or otherwise for the purpose of supervising the implementation of the voluntary arrangement. A proposal for a voluntary arrangement may be made by the administrator where an administration order is in force in relation to the company and by the liquidator where the company is being wound up. Such voluntary arrangement shall not impact on the priority of a secured creditor, except with the secured creditor's consent, neither will it prejudice the priority of preferential creditors.

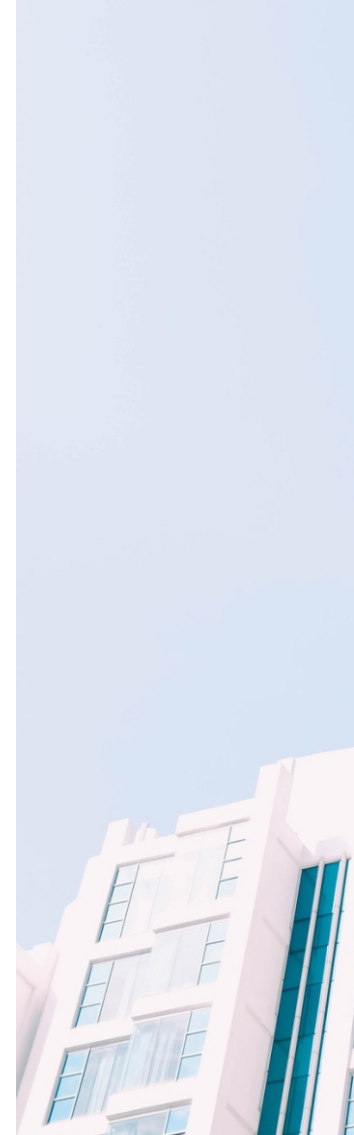
CAMA 2020 also restricts insolvency practice to a person who is authorized to so practice by the Commission. Such a person must have obtained a Law Degree, an Accountancy Degree or relevant qualification from a university or polytechnic. Such person must have a minimum of Five (5) years post qualification experience in matters of insolvency. The New Act has recognized the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) as the body responsible for certifying insolvency practitioners. As such, a person that must practice insolvency in Nigeria must be authorized to so act by virtue of a certificate

issued by BRIPAN or such other professional body recognized by the Commission.

The New Act also expands the scope of options available to a company in distress to include Administration. In contrast to the options provided by the Repealed Act, the New Act focuses instead on resuscitating the company. Administration serves as a rescue mechanism for insolvent entities and allows such entities to carry on running their businesses. An administrator may be appointed by an order of court, the holder of a floating charge or the company or its directors. It is important to note that administration can be discharged or terminated by a court order made pursuant to an application by an administrator or creditor of the Company.

Once an administrator is appointed, any petition for the winding-up of the company will be dismissed except if the petition was presented under grounds of public interest or with the leave of the court or if the petition was presented under special banking provisions of the Banks and Other Financial Institutions Act, the Nigerian Deposit Insurance Act or any other law and rule by a financial services and markets regulator.

While the rescue of the company is the primary objective of the administrator, the administrator is required to do all such things as may be necessary for the management of the affairs, business and property of the company for rescuing the company, the whole or any part of its undertaking, as a going concern; achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, or realizing property in order to make a distribution to one or more secured or preferential creditors. This new provision gives an ailing company the opportunity to work through its difficulties without the pressure of being wound up. Another main advantage of this model is that the administrator is appointed to act in the interest of the Company and not, as the case of receivership, in the interest of the person that appointed him.





25. Dealings in Derivatives and Netting

The Act validates dealings in derivatives and classifies derivative contracts recognized by the Act as "qualified financial Contracts". The Act empowers financial regulatory authorities like the Central Bank of Nigeria and the Securities and Exchange Commission to designate other forms of contracts not captured by the Act as "qualified financial contracts" in the sector that they regulate.

Netting means the termination, liquidation or acceleration of any payment or delivery obligation or entitlement under one or more qualified financial contract; it is the closing out of an obligation by substituting or converting the calculated or estimated or market value of an obligation. The netting provisions of the Act now validates netting obligations arising from qualified financial contract like futures, forward, options, swaps, spots etc.

These provisions are relevant so as to give validity to these financial obligations with respect to enforcing them against a company that has become insolvent. Section 721 of CAMA 2020 states that the terms of netting arrangement will be enforced even against an insolvent party, and that this enforcement cannot be limited by a liquidator, bankruptcy law or insolvency law.

26. Electronic Notice & Instruments

The New Act has included provisions that make the service of notices easier. The issuance of a notice via electronic mail is now recognized under the New Act as one of the ways by which notice of a meeting may be given to members of a company, where those members provide the company with an electronic mail address. An electronic address is also recognized as a registered address. (Section 244).

Likewise, electronic instruments of share transfer and electronic register of transfer are permissible under Section 175 of the New Act. Such shares can be transferred by an electronic instrument of transfer while the certificates of transfer can now be issued in electronic forms. Also by Section 860, any document required to be filed with the Commission for registration may be filed electronically and a copy of or extract from any document electronically filed with the Commission or issued by the Commission and certified to be a true copy or extract shall in any proceedings be admissible in evidence as of equal validity with the original documents.



27. Upward Review of Fines

Throughout the New Act, provisions relating to fines have either been upwardly reviewed or left open-ended. This will, where necessary, empower the Commission to periodically review the applicable fines to ensure that the fines are in compliance with the current value of money. It is hoped that the Commission will not abuse this power.

28. Limited Liability Partnerships & Limited Partnership (Part C-D)

The Companies and Allied Matters Act 2020 has introduced a new form of legal entity known as the Limited Liability Partnerships ("LLP") under Part C of the Act. This novel concept aims to merge the organizational concept of a partnership and the limited liability of the members of a company. The Act provides that when incorporated, the LLP is a legal entity separate from the partners and also went further to state that the LLP shall have perpetual succession. The implication of this is that the LLP in itself is recognized separately by the Act to the extent that any death, bankruptcy, insanity, change in membership or ultimately, any change in partners does not affect the existence, rights or liabilities of the LLP. The Act goes on to provide that an individual or body corporate may be a partner in an LLP and it also sets the minimum number of partners at two of which for individuals, at least one of the partners must be resident in Nigeria. The mutual rights and duties of the partners of an LLP and the mutual rights and duties of an LLP and its partners shall be governed by a limited partnership agreement ("LLPA") between the partners or between the LLP and the partners which must be filed with the Commission. Where a Partnership is not registered, it will be deemed to be a general partnership and every partner would be deemed to be a general

partner.

The New Act also introduces extensive provisions and guidance for the formation of Limited Partnerships (LPs) and its registration with the Commission. Under this arrangement, a limited partnership ("LP") can be formed by at least two persons, one of which will be called a general partner who will be liable for all debts and obligation of the firm and the other a limited partner whose liability will be limited to the amount contributed or agreed to be contributed. Like the LLP, an individual or a body corporate may be a partner in an LP provided they don't fall in the category of persons exempted.

A partnership carrying on business as an LP must be registered and the name must end with the words "limited partnership" or with the abbreviation "LP". A partnership not registered as an LP shall be deemed to be a general partnership and in terms of liability, every limited partner will be deemed to be a general partner. This LP is largely similar to the LLP concept and the provisions relating to LLPs shall apply to LPs except where they are in conflict with the express provision of the New Act.

29. Incorporated Trustees (Part F)

Under Section 824 of the New Act, the Commission will now classify Incorporated Trustees based on their aims and objectives. The Commission, by Section 849 may also direct that an association be merged with another association or any two or more associations having the same trustees be treated as a single association. The New Act now also makes it possible for two or more associations with similar objectives to be merged.

The Commission is now empowered through an order of court to suspend the Trustees of an association and appoint interim managers to manage the affairs of the association where the Commission believes that there has been

a misconduct, or mismanagement of the association; or it becomes necessary to protect or secure the application of the property of the association, or for public interest. (Section 839).

An Association shall now submit a bi-annual statement of affairs to the Commission. The trustees of the association that fails to make this return will be liable to a daily penalty to be fixed by the Commission. The Trustees of an association are also required to keep accounting records which should sufficiently show transactions of the association and disclose at any time, with accuracy, the financial position of the association.

30. Minority Protection against illegal or oppressive conduct

Under the provisions of the Repealed Act, the general rule was that "where an irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy the wrong and only the company can ratify the irregular conduct". The New Act retains the general rule that was contained in the 2004 Act.

However, under the New Act, where members of the Company who are in the minority are the ones complaining of oppressive acts being done by the members who are in the majority or the directors, there are certain protections put in place to protect the minority members one of which is the concept of "Major Asset Transaction" under Section 324(1) of CAMA 2020". A Major Asset Transaction is defined as series of transactions which include (a) the purchase or other acquisition outside the usual course of the Company's business; and (b) any sale or other transfer outside the usual course of the Company's business of the Company's property or other rights the value of which on the day the of the Company's

decision to complete the transaction is 50% or more of the book value of the Company's assets based on the Company's most recently compiled balance sheet.

Section 342(2) requires that for such a transaction to be undertaken by the Company, the Board must recommend it and notice of the said transaction given to all members entitled to such notice to attend the meeting or to vote on the transaction. A Major Asset Transaction must be approved by a Special Resolution unless the Company's Memorandum of Association provides otherwise.

Section 343 (1) (g) of CAMA 2020 also provides that a member of the Company may approach the Court for an injunction or declaration restraining the Company or its officers from doing any act or making any omission where the interest of justice so demands. This is in addition to other grounds that had previously existed under the 2004 Act and was carried over to CAMA 2020.

The addition of this omnibus ground will be particularly useful where a member is unable to situate his grievance under any of the other grounds, he may now be able to do so under the omnibus ground.

Section 344(1) provides that where a member institutes a personal or representative action on behalf of himself and other affected members, the member would be entitled to damages for any loss incurred on account of the breach of that right or to a declaration or injunction restraining the Company or directors from doing any particular act- Under the Repealed Act, the only remedy or relief the aggrieved minority member could obtain in Court was an injunction or a declaration. Furthermore, by Section 344(2) where a director is found personally liable, such a director will be personally liable in damages to the aggrieved member.

Conclusion

Overall, the Companies and Allied Matters Act 2020 is an improvement on the previous legislation and will significantly enhance the ease of doing business in Nigeria which is likely to reflect in an improved rating in the World Bank Doing Business (WBDB) Ranking Index. The bold reforms contained in the New Act will bring Nigeria's Companies Regulation in tandem with global best practice.



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