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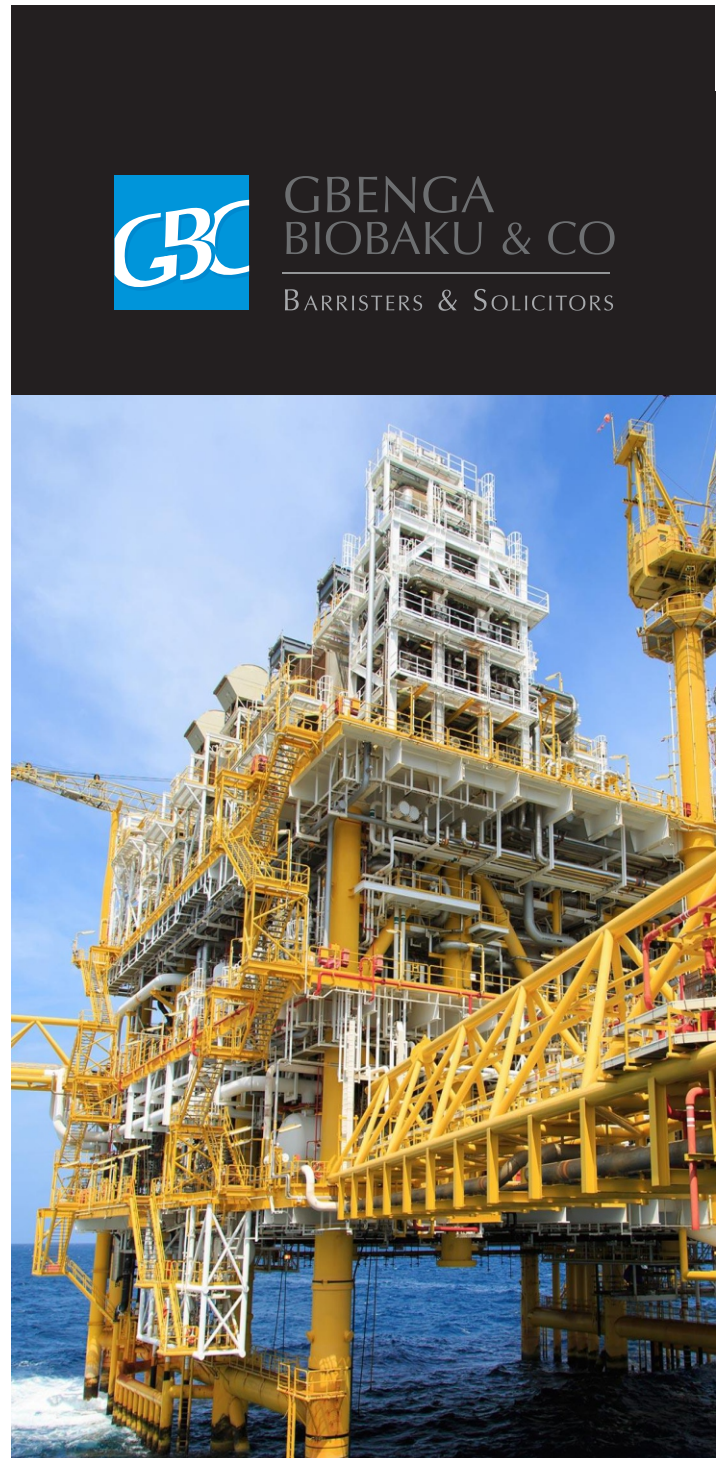
A Review of the new Companies and Allied Matters Bill recently passed by Nigeria's National Assembly

Will the new Bill prove to be a game changer in
Nigeria's Corporate climate?



Key Facts About Gbenga Biobaku & Co

- Top ranking law firm based in Lagos, Nigeria
- Principal areas of practice – Energy, Projects, Foreign Investments, Banking, Capital Markets and General Corporate/ Commercial Law
- Recipient of the Corporate International Global distinction award for 'Business Formation & Legal Advisory'
- Global Clients include
 - Statoil
 - Nexans Norway
 - Baker Hughes
 - ExxonMobil
 - Oceaneering
 - Standard Chartered Bank
 - Rockwell Automation
 - African Capital Alliance
 - Parker Drilling
 - Nigerian Bottling Company (a Nigerian affiliate of the Coca-Cola Hellenic Bottling Company Group)



The House of Representatives on Thursday, 17th January, 2019, passed the Bill for An Act to repeal the Companies and Allied Matters Act Cap C20, LFN 2004 ("CAMA") and enact the Companies and Allied Matters Act 2018 ("the Bill").

The Bill had earlier been reviewed extensively by the Senate Committee on Trade and Investment and passed by the Senate in May, 2018 and was sent to the House of Representatives for concurrence.

The Senate had listed 6 benefits of the Bill which include:

1. Making Nigeria's business environment as competitive as its counterparts around the world.
2. Empowering one person to open and run a company – unlike the current position that requires two or more people.
3. Promoting the use of technology in the registration of businesses.
4. Removing all the unnecessary regulatory provisions for small companies.
5. Creating a new category of legal identity for Nigerian businesses and;
6. Ensuring that Nigerians can now register their businesses from anywhere in the country through the e-registration system that the Senate's amendment gives legal backing.

The Bill, as passed, has 871 sections and 16 schedules as opposed to the 613 sections in the 2004 Act – a total sum of 247 additional sections.

We have outlined below, some of the major changes introduced by Bill, as passed.

1. E-registration

Electronic registration of companies will now be possible by virtue of the provisions of the Bill.

By virtue of Section 34(2) of the Bill, the Corporate Affairs Commission ("CAC") would be able to establish companies using any means of electronic communication to facilitate an automated reservation of names and registration.

This will definitely speed things up and result in a hassle-free process of registration of companies. It should be noted that independent of the Bill, the CAC has already commenced electronic registration of Business names and companies. Therefore, when passed into law, the effect of the provision of the Bill in this regard will be to codify an existing administrative practice.

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The bold reforms contained in the new Bill will bring Nigeria's Companies Regulation in tandem with global best practice.

Quoted from page 10

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2. Single Member Companies

The minimum number of people that can set-up a private company has been reduced to one (1) by the provisions of the Bill. This is consistent with several other jurisdictions such as England, India and Singapore, which provide that a company can be formed by one or more persons.

This may be contrasted with the provisions of the CAMA which requires a minimum of two (2) persons to form and incorporate a company. The reduction of the statutory minimum requirement by the Bill will be a welcome development for multinational companies and other holding companies who can now be the only shareholder in their Nigerian subsidiaries.

3. Limited Liability Partnerships

The Bill proposes a new form of legal entity known as a Limited Liability Partnership ("LLP").

By this provision, two or more persons desirous of carrying on a lawful business with a view to profit may form or incorporate a limited liability partnership under the Act as a legal entity separate from that of its partners having perpetual succession. For such limited liability partnerships, at least one of the partners must be resident in Nigeria.

Upon registration, a limited liability partnership becomes a body corporate that by its name is capable of suing and being sued, holding property and having a common seal (if it decides to have one) among others. It is worthy of note that Lagos State Partnership Law 2009 provides for Limited liability partnership (LLP) which allows investors that register their businesses under this law to enjoy reduced responsibility in the event the partnership breaks up or the venture fails.

4. Consent of the Attorney General of the Federation for memorandum of Companies Ltd by Guarantee.

Section 26(5) of CAMA 2004, which provides that the Memorandum of a company limited by Guarantee shall not be registered without the authority of the Attorney General of the Federation, has been deleted by the Bill.

The Bill replaces this with a duty on the Commission to cause the application to be advertised in Three (3) national newspapers. In removing the requirement for the authorization of the Attorney –General, the new law has dealt with a matter of considerable difficulty often encountered by promoters of non-profit organizations to wit - the bottlenecks associated with obtaining the AG's consent, who may in his absolute discretion withhold such consent.

5. Minimum Issued Share Capital

Section 27(2) of the Bill upwardly reviews the minimum issued share capital for both private and public companies. For private companies, it proposes an increase from N 10,000.00 to N100,000. 00 and for public companies, from N500, 000 to N 2,000,000.00. However, this amendment does not significantly change the statutory cost of registering a Company due to the fact that a minimum threshold amount is still required for the registration of private companies with a share capital of One million or less.

6. Registration of name

The Commission is empowered by Section 35(7) of the Bill to withdraw or cancel any approval given where it is discovered that the approval was fraudulently or improperly procured. This is an improvement over the current practice where an aggrieved Party will need to apply to the court for an order directing the CAC to withdraw or cancel the name which was improperly registered. We hope that in the exercise of these powers that the CAC will give parties concerned a fair hearing.

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The Corporate Affairs Commission (“CAC”) would be able to establish companies using any means of electronic communication to facilitate an automated reservation of names and registration.

Quoted from e-registration, on page 4

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7. Articles of Association

The Bill seeks to abolish the mandatory prescription of Model Articles by the Commission and instead gives the Commission powers to prescribe model articles which will only apply where a company is unable to provide its Articles of Association to the Commission. 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.

8. Certificate of Incorporation

Although the Act empowers a Company, with the approval of the Commission to direct another company to change its name where such name is registered under a name identical to that by which the first company in existence is previously registered, or so resembling it as to be likely to deceive, the Commission will be empowered by virtue of the Bill to withdraw, cancel or revoke such certificate of registration issued where it is discovered that the certificate was fraudulently, unlawfully or otherwise improperly procured

9. Protection of Director's Information.

Section 292(6) of the CAMA mandates that the Register of directors containing the necessary details should be made available for inspection by any member of the Company.

The Bill, in Section 322 introduces certain measures to protect the directors' information particularly as contained in the Register of directors.

The Bill classifies some of the information contained in the Register as "protected information". It goes further to provide that the information does not cease to be 'protected information' because the individual has ceased to be a director of the company.

The Bill forbids a company from disclosing protected information except for the purpose of communicating with the director concerned, in order to comply with any requirement of the Bill. Any other disclosure has to be with the consent of the director concerned.

The Court however would have the power to make an order directing either a company or the Commission to disclose said protected information if necessary.

10. Statement of Compliance

Another requirement of registration of Companies in Nigeria is the submission of a Statutory Declaration of Compliance with the Requirements of CAMA (Form CAC 4). It can only be filled by a legal practitioner according to the provisions of Section 35(3) of the CAMA.

Section 40 of the Bill has brought a new twist to things. The following part of Section 35(3) of the Act which requires a "Statutory declaration in the prescribed form by a legal practitioner..." has been removed and substituted with "A statement of compliance".

This change would have the following implications:

- a) The document proving compliance with the Act no longer has to be by way of a statutory declaration as a simple 'statement' to that effect will suffice.
- b) The strict condition that the declaration of compliance must be made by a legal practitioner has also been removed.

11. Electronic Signature

Where a document or proceeding is required to be authenticated by a company, the Bill provides that an electronic signature on such document or proceeding shall suffice. The Bill states: "A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company, and need not be signed as a deed unless otherwise so required in this Part of this Act, provided that an electronic signature shall be deemed to satisfy the requirement for signing under this section."

12. Common Seal of the Company

Based on the provisions of the Bill, the requirement to have a common seal will be made optional for companies, the use and design of which would be regulated by their Articles.

13. Disclosure of Persons with significant control/Beneficial Ownership

Under Section 95 of CAMA, a person who is a substantial shareholder (holding shares which entitle him to exercise at least 10% of the voting rights) in a public company is required to give notice in writing to the Company.

However, the requirement to notify the Company of significant shareholding in a Company will no longer be limited to public companies by virtue of Section 119 of the Bill.

Also, a 5% threshold for disclosure has been introduced under the Bill, as well as a requirement for such disclosures to be noted in the register of members and annual returns of the Company. This will definitely increase transparency and reduce asset shielding.

14. Ease of Reduction of Share Capital

Under the CAMA, the treatment for private and public companies with respect to the process by which they may reduce their share capital is the same. Current global best practice is to make a distinction between private and public companies.

In order to ease the process of doing business, amendments have been proposed to the process by which a Company can reduce its share capital, by enabling private companies to reduce their share capital if they pass a special resolution and file a copy of the minutes of the meeting of the Board of Directors showing the stipulated details of the reduction, without the added burden of applying to court for a confirmation.

15. Financial Assistance

The new Bill proposes amendments to the financial assistance provisions of CAMA by including a provision that allows a 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 Bill that enable shareholders and potential shareholders to access funds, within certain parameters, which in turn, would enable them to invest in such companies.

Whereas CAMA precludes a company from giving financial assistance to persons for the purpose of acquiring its shares subject to certain exemptions which include (a.) lending of money by the company to its member(s) in the ordinary course of its business, (b.) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; (c.) the granting by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully-paid shares in the company or its holding company, to be held themselves by way of beneficial ownership; (d.) any act or transaction otherwise authorized by law. The penalty for the contravention of this provision by every officer of the Company, who is in default, has been reviewed downward from N500 to N100 upon conviction.

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The Bill expands the scope of options available to a company in distress to include Administration. In contrast to the options provided by the CAMA, the Bill 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.

Quoted from Resolving Insolvency, on page 12

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16. Acquisition by a Company of its own shares

The prohibitions on share buy back in the CAMA are outdated and under the Bill, companies, both private and public, are permitted to buy back their shares subject to the satisfaction of certain conditions which are outlined under Section 185 of the Bill.

This is a significant improvement on the current position which limits the circumstances where a Company can acquire its own shares.

A Limited Liability 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 does not have to be any of those listed out in Section 160 (2) of the 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.

While the provision for a company's acquisition of its shares under the Act relates to companies generally, the Bill expressly provides that it relates to a Limited Liability Company alone.

17. Exemption from Audit

The Bill exempts a certain class of companies from the mandatory need to ensure their accounts are audited.

The Bill provides that companies that have not carried on any business since incorporation or whose turnover in a financial year is not more than N 10,000,000 and the balance sheet total does not exceed N 5,000,000 need not audit their accounts for that financial year. However, within the said financial year, the company must not at any time have carried on business as an insurance company, a bank or such other company as may be prescribed by the Commission.

18. Electronic Meetings

Section 241 of the Bill enables private companies to hold their general and board meetings electronically as long as the meetings are conducted in accordance with their Articles of Association. 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.

19. Annual General Meeting

The Bill, by Section 238 exempts all small companies as well as companies that have not more than one shareholder from the mandatory requirement of Annual General Meetings.

20. Company Secretary

Section 331 of the Bill seeks to further ease the regulatory burden of companies by limiting the requirement to appoint a company secretary to public companies, thereby making it optional for small companies and companies with one shareholder.

21. Private Companies need not keep Register of Secretaries

While Section 292 (1) of CAMA provides that "Every company shall keep at its registered office, a register of its directors and secretaries", the Bill proposes that "Every public company shall maintain a register of secretaries..." This appears to suggest that private companies will not be mandatorily required to keep a register of Secretaries.

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In certain Sections of the Bill, reference is made to electronic instruments of transfer in relation to transfer of shares. Clause 182 of the Bill also makes provision for a certificate of transfer issued in electronic form. The electronic transfer requirement is in line with the Securities Exchange Commission (SEC) Consolidated Rules which provides for the electronic offer and transfer of securities.

Quoted from Electronic Instruments, on page 13

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22. Companies to keep and display Accounting records

The Bill stipulates that Public companies are to display their audited accounts on their websites so that the public is kept informed of their activities.

This requirement is in line with the Securities and Exchange Commission Consolidated Rules 2013 which requires a public company to publish its accounting policies, notes and other relevant information on its website which address should be disclosed in a newspaper publication.

23. Resolving Insolvency

The Act enables a company in distress to explore options such as winding-up, merger, acquisition and compromise.

The Bill however introduces a company rescue and insolvency legal regime which is not focused on a Company's demise, but on rescuing companies from insolvency.

As such the Bill expands the scope of options available to a company in distress to include Administration. In contrast to the options provided by the CAMA, the Bill 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.

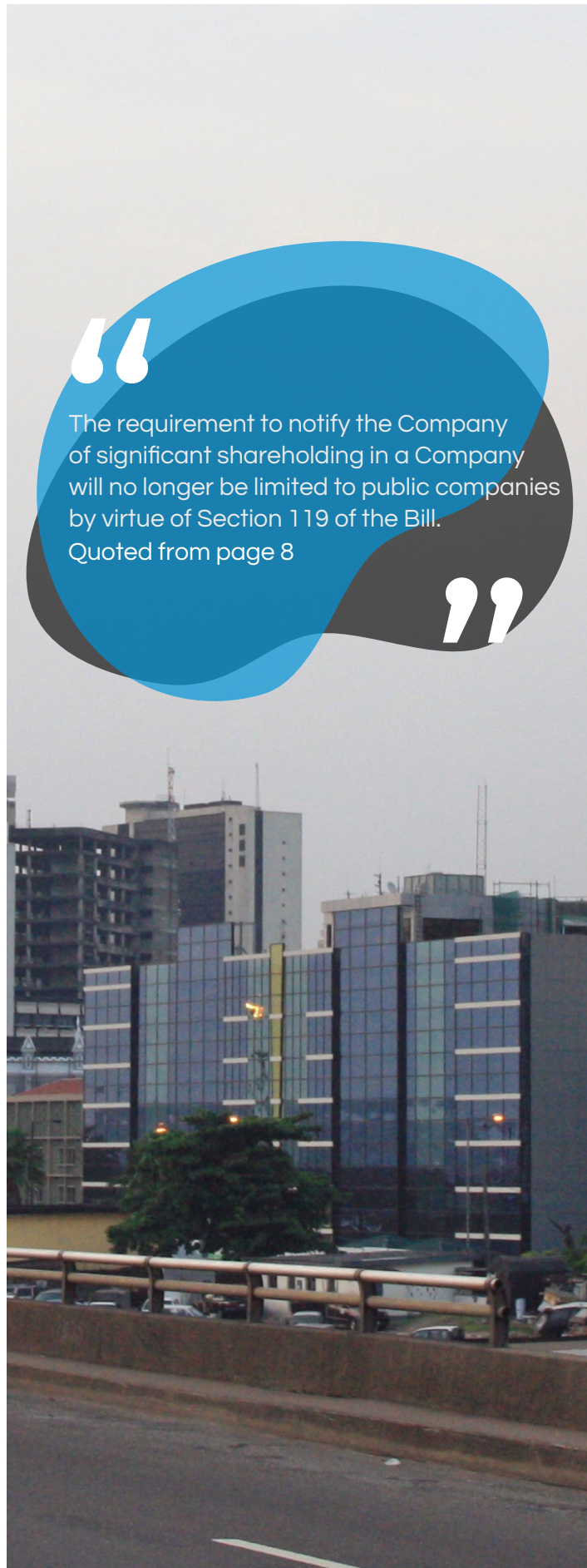
Once an administrator is appointed, any petition for the winding-up of the company will be dismissed except if the petition was presented under grounds of public interest or with the leave of the court or if the petition was presented under special banking provisions of the Banks and Other Financial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

One of the main advantages 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.

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The requirement to notify the Company of significant shareholding in a Company will no longer be limited to public companies by virtue of Section 119 of the Bill.
Quoted from page 8

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24. Electronic Notice

The Bill has included provisions that make the service of notices easier. In addition to the notice given personally or by post, notice may also be given by electronic mail to any member that has provided an electronic mail address.

25. Duty to Seek Comments of Government Department or Other Body

The Bill provides that in certain situations that the Commission deems fit, it may require that an applicant who has submitted an application for approval for an intended name, seek the view of a specified Government Department in writing to indicate whether (and if so why) such Government Department has any objections to the proposed name.

26. Penalty for False Statements or Information

The Bill makes it unlawful for any person or association of persons to carry on business in Nigeria as a company, limited liability partnership, or under a business name without being registered under the Bill. Any individual, corporation or every partner in the firm that defaults the above provision shall be found guilty of an offence and be held liable on conviction to a fine prescribed or determined in accordance the Commission's regulations.

27. Upward Review of Fines

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

28. Electronic Instrument

In certain Sections of the Bill, reference is made to electronic instruments of transfer in relation to transfer of shares. Clause 182 of the Bill also makes provision for a certificate of transfer issued in electronic form. The electronic transfer requirement is in line with the Securities Exchange Commission (SEC) Consolidated Rules which provides for the electronic offer and transfer of securities.

The Central Securities Clearing System Plc serves as an agent of SEC for central depository, clearing and settlement of transactions in securities in the Nigerian Capital Market, in this regard and also serves as a depository for share certificates of companies quoted on the Nigerian Stock Exchange.

29. Power to Consolidate Incorporated Trustees

Section 823 of the Bill empowers the Commission to direct that an association be treated as forming part of an already registered association, or that any two or more associations having the same trustees be treated as a single association. The main reason for this is the curbing of multiple incorporations of Incorporated Trustees by the same group of people under the guise of different incorporated names. Incorporated Trustees may, on their own, merge under such terms and conditions as may be prescribed by the Commission. This is a welcome development and will enable NGOs engaged in the same or similar area of activities to reduce their cost by consolidation.

30. Suspension of Trustees and Appointment of Interim Manager(s)

The Bill empowers the Commission to suspend trustees of an association and appoint interim managers to manage the affairs of the association where the Commission reasonably believes that there is a misconduct or mismanagement in the administration of the association; the affairs of the association are being run fraudulently, among others. The Commission shall enquire into the affairs of the association and if satisfied that the allegations are true, it has the power to remove the offending trustees and the Court may order that they be replaced.

The suspension shall be by an order of court upon the petition of the Commission or members consisting one-fifth of the association.

Upon the appointment of the interim manager, the court with the assistance of the Commission may make provisions with respect to the functions to be discharged by the interim manager(s) under the supervision of the Commission. This provision gives wide powers to the Commission to oversee the affairs of non-profit organizations which was hitherto non-existent. These provisions seem to be in line with the recent trend by the government to exercise greater control over the affairs of non-profit organizations.

31. Bi-Annual Statement of Affairs and Accounting Records of Incorporated Trustees

The Bill brings about a new requirement for the trustees of an association to submit a bi-annual statement of affairs of the association to the Commission of which a failure to comply will render every trustee liable to a penalty for every day during which the default continues.

The trustees of an association have an obligation to ensure that accounting records are kept properly and such accounting records shall be sufficient to show the transactions of the association. Such accounting records of an association shall be preserved by it for a period of six years from the date on which they were made.

32. Establishment of Administrative Proceedings Committee

Section 843 of the Bill proposes the establishment of a committee called "the Administrative Committee."

The main function of this Committee is to provide the opportunity of fair hearing for persons alleged to have contravened the provisions of the Bill; resolve disputes arising from the operations of this Act; and impose administrative penalties for the contravention of the provisions of this Act. The decisions of the Administrative Committee are subject to confirmation by the Board and parties dissatisfied with decisions of the Administrative Committee have a right to appeal to the Federal High Court.

Conclusion

Overall, the new Companies and Allied Matters Bill is an improvement on the current 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 Bill will bring Nigeria's Companies Regulation in tandem with global best practice.



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