

FEBRUARY 2021

REGULATORY UPDATE REPORT

IMPACT OF THE NEW COMPANIES
AND ALLIED MATTERS ACT (CAMA)
2020 ON OPERATIONS OF FOREIGN
PRIVATE LIMITED LIABILITY
COMPANIES IN NIGERIA

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1 . INTRODUCTION

The new CAMA 2020 is not an amendment of the old CAMA, it is an Act to repeal the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004 and enact the Companies and Allied Matters Act, 2020.

President Muhammadu Buhari on Friday, 7th of August 2020 assented to the Companies and Allied Matters Bill, 2020 recently passed by the National Assembly. Hence, the Act is deemed passed on the same day.

2. NOTABLE INFORMATION AND REFORMS UNDER THE ACT

2.1 COMPANY FORMATION AND REGISTRATION

The Corporate Affairs Commission (CAC) now has the power to arrange or conduct an investigation into the affairs of any company, incorporated trustees or business names where the interest of shareholders, members, partners or public so demands –Section 8(1) CAMA.

Provision for single-member/shareholder for private companies under Section 18(2) CAMA - The minimum number of people that can set-up a private company has been reduced to one (1) by the provisions of the Act as opposed to the former minimum requirement of two (2) people. However, public companies must have at least two members – Section 118 CAMA.

Replacement of 'Authorized Share Capital' with reviewed "Minimum Issued Share Capital" under Section 27(2)(a)CAMA 2020 – This subsection provides that if a company has a share capital- the memorandum of association shall also state the amount of minimum issued share capital which shall not be less than N100,000.00 in the case of a private company and N2,000,000.00, in the case of a public company, with which the company proposes to be registered, and the division thereof into shares of a fixed amount.

The CAC has the power to withdraw, cancel or revoke a certificate of incorporation issued under this Act where it is discovered that the certificate was fraudulently, unlawfully or improperly procured under Section 41(7) CAMA.

2.2 FOREIGN COMPANIES INTENDING TO CARRY ON BUSINESS IN NIGERIA

The new CAMA under section 80 now provides that a foreign company may apply to the Minister of industry, trade and investment for exemption from registration as opposed to the provision in the old CAMA which states that applications be made to the President. Additionally, section 80(7) now provides that exempted companies must deliver to CAC upon payment of a prescribed fee notice of its exemption within 30 days of such grant of exemption while section 80 (8) provides for a penalty of non-compliance.

2.3 GENERAL REFORMS FOR DIRECTORS

Under Section 283(c) where a director is removed before the expiration of his tenure, such director is disqualified from becoming the director of any other company. It is a very critical provision as directors must tread with caution in view of this provision.

Under Section 312 (3)(b) Directors are now liable directly and derivatively to members of the company for loss or damage suffered by them as a result of arrangements or transactions involving the acquisition of property by the company from such directors or controlling members of the company.

Section 313 also prohibits Directors from making secret benefits. A contravention of this provision amounts to a breach of duty and the company shall recover the actual gift from the Director and sue him and the other person involved for damages sustained without any deduction in respect of what the Director has returned.

Sections 323-329 provides for Directors' information, particularly information on residential addresses are offered special protection and may only be used for the purpose of communicating with the directors or in compliance with the provisions of the Act.

2.4 ELECTRONIC INNOVATION

Service of notice of a meeting by electronic email is recognised in addition to personal service or by post- Section 244 (3) CAMA.

Companies may, in addition to hard copies, keep electronic copies or register of any document or record it is required to maintain under the Act- Section 375 (3). Authentication of a document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorized officer of the company can be signed electronically- Section 101 CAMA, 2020.

Shares can now also be transferred electronically under Section 175(1) CAMA 2020.

Private companies can hold meetings virtually meetings so long as it is conducted in accordance with the Articles of Association of the company- Section 240(2) CAMA 2020.

It is also pertinent to note that in April 2020, the Nigerian Stock Exchange (NSE) published a circular: 'Guidance on Companies' Virtual Board, Committee, and Management Meetings' which sought to provide some guidance to the market and other stakeholders on carrying out successful, productive, and rewarding virtual meetings.

2.5 COMPANY MEETINGS AND GENERAL OPERATIONS

The ordinary business of an AGM has now been amended to include the disclosure of the remuneration of managers of the company.

Therefore, besides the following ordinary business of a company; consideration of financial statements, declaration of dividends, appointment and removal of directors, appointment and remuneration of auditors and the election of a member of the audit committee are now optional for small companies, Disclosure of remuneration of managers of the company has been included – Section 257 CAMA.

Section 183(4) of the new Act allows for the non-prohibition of a private company from giving financial assistance in the acquisition of shares its shares or, if it is a subsidiary of another private company, in that other company subject to some provisions as stated in the Act.

The use of Common Seal is no longer mandatory for companies by virtue of Section 98 CAMA 2020.



Previously the appointment of a company secretary was mandatory for all companies. This position has now been amended under section 330(1) to exclude small companies from the statutory obligation to appoint a company secretary. Against this backdrop, the CAMA, 2020 only makes it optional for small companies in trying to reduce the cost for small businesses. It is important to state that the role of the company secretary cannot be downplayed as it ensures the effective administrative running of the company and compliance with corporate Governance.

Disclosure of capacity as a shareholder is no longer restricted to Public companies. By virtue of Section 119 CAMA 2020, any person with significant control over a company shall, within seven days of becoming such a person, indicate to the company in writing the particulars of such control. The Corporate Affairs Commission is also mandated to maintain a register of persons with significant control upon notification by the Company.

2.5.1 AUDIT COMMITTEE

To further ensure shareholders involvement and protection, the composition of the statutory audit committee has been reduced from 6 members comprising of an equal number of shareholders members and directors to 5 members comprising of 3 shareholder members and 2 non-executive directors under Section 404(3) of the Act.

2.5.2 UNCLAIMED DIVIDEND

Publication of unclaimed dividend: company shall publish the list of unclaimed dividends in two national newspapers and attach the list as published to the notice of the next annual general meeting to the members. Dividends that are unclaimed after 12 years could be included in the profits that should be distributed to the other shareholders of the company. Section 429 and Section 432 (2).

2.5.3 DELEGATION OF POWER TO ALLOT SHARES TO THE DIRECTORS OF A COMPANY

The Act under section 149(1) now makes express provisions on the delegation of the power to allot shares to the directors in private companies. This power is, however, limited to any restriction in the Articles of Association of the company and the company in general meeting delegating such powers to the directors. The delegation of power to allot shares must be done during the general meeting of such company and may be given subject to conditions as prescribed by the company in a general meeting

2.6 FINANCIAL STATEMENTS AND AUDITS

Under Section 401 and 402, a company is exempt from preparing audited financial statements if it has not carried on business since incorporation, or if it is a small company. However, insurance companies; banks or any company as may be prescribed by the Commission are not entitled to this exemption. Failure of a company to file annual returns for a consecutive period of 10 years is a ground for striking off the name of company from the companies' register.

2.7 INSOLVENCY AND WINDING UP

The new act introduced provisions for rescuing a company in distress to prevent it from being insolvent to keep it alive such as Voluntary arrangements, Administration and Netting. Qualification of an insolvency practitioner is provided in section 705(1).

Companies can only apply for administration as against winding up. A company can now be wound up by the court where the condition which necessitated its existence or operation has ceased to exist- Section 571(e).



3. REGISTRATION WITH THE NIGERIAN INVESTMENT PROMOTION COMMISSION (NIPC)

There are no changes regarding registration with the NIPC as a result of the new CAMA 2020. A foreign company may operate business as a secondary establishment, branch, or subsidiary in Nigeria. However, such a company must undertake certain legal requirements necessary to obtain local incorporation of the Nigerian branch or subsidiary as a separate legal entity.

Generally, the Nigerian Investment Promotion Commission (NIPC) Act No. 16 of 1995 regulates the participation of foreign investment in Nigeria. By the provisions of Section 24 of the NIPC Act, a foreign investor registered with NIPC is guaranteed unconditional transfer of dividends or profits attributed to the investment, payments in respect of loan servicing where a foreign loan was obtained and remittance of proceeds and other obligations in the event of a sale or liquidation of the investors' business or any interest attributable to the investment.

The required documents to accompany the NIPC registration application include;

- a. Duly completed NIPC form
- b. Certified True Copies of CAC form 1.1 and Memorandum and Articles of Association (obtained from the CAC upon incorporation)

4. APPLICATION FOR BUSINESS PERMIT AND EXPATRIATE QUOTA

There are no changes to the application for Business Permit and Expatriate Quota as a result of the CAMA 2020. A registered company with foreign participation is required to obtain the consent of the Ministry of Internal Affairs. This consent takes the form of a Business Permit. The Business Permit allows the company to carry on business in Nigeria permanently with imported funds. A business permit is an operational and permanent permit for the local operation of a business with expatriate investment either as a branch or subsidiary of a foreign company or otherwise.

All companies that intend to employ foreigners must have an expatriate quota. Expatriate quota refers to the allowable number of foreigners to be employed by business organizations operating or wishing to operate in Nigeria. This approval granted to this business organization is what is known as Expatriate Quota. The quota is issued to the company and not the expatriate, as such when the expatriate leaves the company, the position reverts to the company and the company may place another expatriate on the same position for as long as the quota position remains valid.

The application for Business Permit and Expatriate Quota is made by an application to the Permanent Secretary, Ministry of Interior accompanied with Certified True Copies of the Memorandum and Articles of Association and Forms CAC 1.1 and the following documents;

- a. A Copy of training programme or personnel policy of the company, incorporating management succession schedule for qualified Nigerians;
- b. Certificate of machinery/capital importation;
- c. Job title designations, salary structure and the academic and working experience required for the occupants of such positions.
- d. Evidence of acquisition of premises – Tenancy Agreement/lease.
- e. Tax clearance certificate
- f. Business plan/feasibility report
- g. Joint Venture Agreement where applicable
- h. Evidence of machinery acquisition
- i. Bank reference

CONCLUSION

An effective legal framework for company law is a key building block of a modern and business-friendly economy. A genuinely modern and effective legal framework can promote enterprise, enhance competitiveness and stimulate investment. Conversely, an ineffective or outdated framework can inhibit productivity and growth and undermine investor confidence. The CAMA 2020 Act is a welcomed innovation by Nigeria's corporate and commercial sectors after 30 years of abiding by the repealed CAMA. The Act enhances productivity, flexibility, Corporate Governance and promotes the ease of doing business. The Act also factors in the new normal following the COVID 19 pandemic by embracing technology in how companies can engage with the CAC as a regulator and generally carry out their business.

PUNUKA is available to deal with any inquiries regarding how the CAMA 2020 Act affects your business.

See contact details below.

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