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Detail Commercial Solicitors

KEY HIGHLIGHTS OF THE COMPANIES AND ALLIED MATTERS ACT 2020 – PART 1

BACKGROUND

The President of the Federal Republic of Nigeria, Muhammadu Buhari, signed into law the Companies and Allied Matters Act, 2020 (the "Act" or "New CAMA") on the 7th of August, 2020. The Act repeals the Companies and Allied Matters Act, 1990, which had been in force for the last 30 years. It is now the principal law with respect to the incorporation of companies, limited partnerships, registration of business names and the incorporation of trustees of certain committees, bodies and associations. The effective date of the Act is yet to be confirmed as the Act will only become effective after it has been gazetted.

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The Act is set to revolutionise Nigeria's business and corporate landscape, as it is based on principles of transparency, corporate governance and innovation. The provisions of the Act are vast in their application to businesses. This article sets out a summary of the key highlights of the Act for businesses and individuals to take into consideration.

KEY HIGHLIGHTS OF THE NEW CAMA

The key highlights of the Order include as follows:

1. **Single Member Companies**

Private companies can now be incorporated with only one member. This means that the minimum number of members required to form a private company is no longer two;

2. **Restriction on Transfer of Shares and Assets of a Private Company**

The New CAMA introduces provisions in the articles of a private company that restrict the transfers of shares and assets. These restrictions include:

(a) restriction on the disposal of company assets without the consent of all members, where the value of the assets on sale is more than 50% of the value of the company's total assets;

(b) a statutory right of first refusal in favour of existing members of a company, in the event that a member intends to sell its shares to a non-member; and

(c) introduction of a mandatory requirement for non-members acquiring 50% of the shares in a company to offer to buy the interest of all existing members.

These restrictions may impact on the rights of a shareholder under existing business arrangements, such as reserved matters with respect to asset sale and tag-along rights. It is necessary for parties to review their existing agreements to align the provisions with the requirements of the Act. Also, private companies will need to amend their articles to specifically exclude these restrictions where necessary.

3. **Amendments to Approval Procedure for Registration of Companies Limited by Guarantee**

The registration of a company limited by guarantee (LTD/GE) continues to be subject to the approval of the Attorney-General of the Federation (AGF).

However, the New CAMA introduces a 30-day timeline for issuance of a grant of authority by the AGF for LTD/GE registrations. The inclusion of a statutory timeline will eliminate the challenges relating to the approval timeline being experienced by parties interested in registering LTD/GEs. The New CAMA also introduces provisions that allow the Corporate Affairs Commission ("CAC" or the "Commission") to approve an LTD/GE registration application, in the event that no decision has been given by the AGF within the statutory timeline.

4. Replacement of Authorized Share Capital with Minimum Share Capital

The requirement for "authorised share capital" has been replaced with the concept "minimum share capital." The minimum share capital is the minimum number of shares a company can be registered with and can issue to its subscribers. This allows companies to keep their start-up capital costs low by only creating shares that are needed at the time of incorporation. The minimum share capital for a private company is now N100,000.00, and for a public company is now N2,000,000.00. This would, however, not affect regulatory requirements for minimum share capital for different sectors' laws or regulations.

5. Introduction of Statement of Compliance

The New CAMA introduces the requirement for Statement of Compliance, as an alternative to the Declaration of Compliance previously used in the process of incorporating a company. A Statement of Compliance can be signed by an applicant or his/her agent, unlike a Declaration of Compliance, which must be signed by a lawyer and attested to before a commissioner of oaths or notary public. This implies that small and medium-sized businesses looking to save cost in setting up their companies can now undertake the entire company registration process without engaging a lawyer.

6. Delivery of Notice of Exemption by Foreign Companies Exempted from Registration

Under the repealed law, foreign companies intending to carry on business in Nigeria may be exempted from the requirement to register a company for such purpose, subject to meeting certain specific criteria. The New CAMA introduces a new requirement for such entities to deliver to the Commission upon payment of the relevant fees, a notice of exemption to the Commission within 30 days of the grant of such exemption, failing which such exempted company shall be liable to penalties prescribed by the Commission for every day during which the default continues. In view of this, currently exempted companies may be required to notify the Commission accordingly.

7. Mode of Execution of Documents

A company seal is no longer a mandatory requirement under the Act. Where a company chooses to have a common seal or continues to use its existing company seal, the design and use of the seal shall be regulated by the company's articles, and the name of the company shall be engraved in the seal. This means that a company may validly execute a document as a deed, without affixing a common seal, if the document is executed by (i) a director and the company secretary, or (ii) at least two directors of the company, or (iii) by a director of the company in the presence of at least one witness who shall attest the signature.

For documents or proceedings (other than deeds) that require authentication by a company, such documents may be signed by a director, secretary, or other authorised officer of the company. The Act also recognises the use of electronic signatures as due authentication of documents or proceedings by a company.

8. Disclosure of Persons with Significant Control

For private companies and limited liability partnerships, persons with significant control have an obligation to disclose details of such control to the company within seven days of assuming control. A person has significant control if he/she directly or indirectly holds at least 5% of the voting rights, or the right to appoint or remove majority of the directors, or the right to exercise, or actually exercises significant influence or control, in a company or limited liability partnership.

For public companies, a substantial shareholder has an obligation to disclose its substantial shareholding to the company within 14 days of becoming aware of such substantial shareholding. A person is a substantial shareholder if he/she is entitled to exercise at least 5% unrestricted voting rights at any general meeting of the company. This is a reduction from the previous disclosure threshold of 10% of the unrestricted voting rights.

Companies are required to notify the Commission upon receipt of such information, and a register of persons with significant control shall be maintained by the Commission. In addition, public companies are now required to keep a Register of Interest in Shares.

9. New Procedure for Increase in Share Capital

The New CAMA introduces changes to the process of increasing the issued share capital of a company, especially as it relates to the requirement for third party approvals. Where a company is required to obtain regulatory approvals under any other law (other than the New CAMA) in connection with the increase of its share capital, the company is required to notify the Commission of such requirement within 15 days of passing the resolution to increase its share capital. Where the company has not obtained the approval within 48 days of notifying the Commission, the company shall file another notice and affidavit to that effect with the Commission and shall continue to do so for every successive period of 48 days. Provided that where such approval is not obtained within nine months from the date on which the Commission was first notified, the resolution authorising such increase shall be deemed null and void. This means that such increase in the issued share capital shall be deemed not to have taken effect.

10. Share Buy Back

Limited liability companies are now permitted to buy back their own shares, including redeemable shares, provided such share buy back is carried out in accordance with the requirements provided in the New CAMA. Notwithstanding, a company shall not hold more than 15% of the nominal value of the issued share capital of any class of its shares as treasury shares.

11. Qualifications of a Small Company

The New CAMA provides for new innovations and exemptions that are applicable to a 'Small Company'. To qualify as a small company, a company must meet the following qualifying conditions for the relevant financial year:

(a) be a private company;

(b) have a turnover of not more than N120,000,000 or such amount as may be fixed by the Commission from time to time;

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(c) have a net assets value of not more than N60,000,000 or such amount as may be fixed by the Commission from time to time;

(d) none of its members is an alien;

(e) none of its members is a government, government corporation or agency or its nominee; and

(f) in the case of a company having share capital, the directors between themselves hold at least 51% of its equity share capital.

It is noteworthy that the qualifications for a small company under the New CAMA is not to be confused with the definition of a small company under the Finance Act 2019. A small company under the Finance Act means a company whose gross turnover is N25,000,000 or less, and such a company is exempted from paying Companies Income Tax (CIT). From the qualifying condition on turnover as set out above, a small company under the New CAMA appears to be a Large Company under the Finance Act to the extent that its gross turnover is above N25,000,000, and such a company is liable to pay CIT at the rate of 30%.

12. No Requirement for Annual General Meeting for Small Companies and Single Member Companies

It is no longer mandatory for small companies and single member companies to hold annual general meetings. In addition, small companies and single member companies may hold such meetings outside of Nigeria. **(**Further requirements of a small company as stated in the New CAMA are provided in items 17, 19 and 20 below.)

13. Virtual Annual General Meetings

Private companies may hold virtual general meetings provided that such meetings are held in accordance with the companies' articles of association.

14. Issuance of Notice of Annual General Meeting to the Commission

All public companies are now required to notify the Commission of their general meetings.

15. Electronic Service of Notices

Notice of general meeting may be given by e-mail to any member who has provided his/her e-mail address to the company.

16. Independent Directors for Public Companies

Public companies are mandatorily required to have at least three independent directors. Persons entitled to nominate board members forming majority of the board shall also nominate at least three independent directors. Such independent directors so appointed must satisfy the requirements for independent directors under the New CAMA.

17. Single Director for Small Companies

Small companies may have a single director. This means that the previous requirement for a minimum of two directors will no longer apply to a small company.

18. Restriction on Multiple Directorship in Public Companies

The New CAMA prohibits a person from being a director in more than five public companies at a time. Additionally, any person who is to be appointed as a director in a public company has an obligation to disclose any other directorship positions such a person holds in any other public company.

19. Exemption from Appointing Secretaries and Auditors by Small Companies

Small companies are no longer mandatorily required to appoint a company secretary. The appointment of a company secretary, however, remains mandatory for public companies.

20. Exemption from appointment of Auditors

A small company or a company that is yet to commence business operation since its incorporation, is exempted from the requirement to appoint an auditor.

21. Recognition and Confirmation of the Enforceability of Netting Arrangements

The New CAMA introduces provisions for Netting Arrangements, which confirms the enforceability of netting arrangements against an insolvent party, and, where applicable, a guarantor or such other person providing security for a party. Provisions of a netting arrangement under qualified financial contracts shall not be affected by any applicable insolvency law limiting the right to set-off or net-out obligations, payment amounts, or values owed between an insolvent party and another party.

22. Introduction of Limited Liability Partnerships (LLPs) and Limited Partnerships

The concept of Limited Liability Partnerships (LLPs) and Limited Partnerships (LPs) are now recognised under the Act and can be registered and ascribed legal personality.

An LLP shall be governed by a Limited Liability Partnership Agreement, which must be filed at the Commission. Every LLP must have at least two designated partners who are individuals, one of which must be resident in Nigeria. There is no requirement for an LLP to have a share capital, as contributions of the partners shall be governed by their partnership agreement.

LP's are limited to a maximum of 20 members and shall comprise of General Partners and Limited Partners. General Partners shall be liable for all the debts and obligations of the partnership, and Limited Partners shall only be liable for the debt obligations of the partnership to the extent of their actual or proposed capital contributions. An LP not registered in accordance with the New CAMA shall be deemed to be a General Partnership, and every Limited Partner shall be deemed to be a General Partner.

In view of the foregoing, it may be necessary for LLPs registered under the Partnership Law of Lagos State 2009 to re-register in accordance with the provisions of the New CAMA. This will help avoid scenarios where the legal validity of their LLP, which was registered under the Partnership Law of Lagos State 2009 will be challenged. Similarly, it may prevent these entities from incurring penalties for improper use of the words, Limited Liability Partnership or LLP.

Conclusion

The innovations and reforms in the New CAMA are in line with global best practices. The New CAMA is a step in the right direction for the business and corporate landscape in Nigeria and will improve the ease of doing business indices in the country. The New CAMA also introduces additional compliance requirements, which must be adhered to by all entities to which the Act applies, to avoid being liable to penalties and sanctions.

Detail Commercial Solicitors is distinct as Nigeria's first commercial solicitor firm to specialize exclusively in non-courtroom practice. Based in Lagos, Nigeria's business capital, DETAIL is totally committed to its clients' business objectives and reputed for dealing with the minutiae. Email: info@detailsolicitors.com

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Detail Commercial Solicitors
DCS Place, 8, DCS Street,
Off Remi Olowude Way
Lekki Phase 1, Lagos, Nigeria
+234(0) 12771400-5
www.detailsolicitors.com