

AUGUST, 2020.

# NIGERIA'S COMPANIES AND ALLIED MATTERS ACT AMENDMENT

## KEY CHANGES AND IMPLICATIONS



## INTRODUCTION

Recently, the President on Friday the 7th of August, 2020 assented to the Companies and Allied Matters Act, (Repeal and Re-enactment) Bill 2020, which repealed and replaced the Companies and Allied Matters Act, 1990, and introducing after 30 years, several corporate legal innovations geared towards enhancing ease of doing business in Nigeria. The amendment introduced 200 new sections making it 870 sections, distinct from the initial 670 sections under the old Act. The new principles and changes are nothing short of impressive.

## OBJECTIVES OF THE ACT:

*The major objective of the amendment is to bring our corporate commercial laws and regulations in tune with the current international best practice and also ensure some degree of ease in doing business under the current corporate commercial structure. The amendment is plausible because it seeks to further the ease of doing business in Nigeria, promote foreign direct investment and aggrandize Nigeria's global competitive index.*



# ANALYSIS OF THE KEY CHANGES AND THEIR IMPLICATION.

*The innovations introduced by the amendment and re-enactment include:*

## **1. PENALTY FOR CARRYING ON BUSINESS WITHOUT REGISTRATION.**

Pursuant to the provision of section 863 of the new Act, carrying on business in Nigeria as a company, Limited Liability Partnership, limited partnership or under a business name without being registered is now an offence and has been penalized as such.

## **2. ALTERATION OF THE DEFINITION OF SMALL COMPANIES UNDER THE ACT**

The definition of a small company has been changed under the new amendment, pursuant to the provision of section 394 of the new Act. The qualifying requirement of not having up to N2,000,000 (Two million) naira annual turnover for that financial year has changed, the threshold is now N120,000,000 (One hundred and Twenty Million) naira and the net asset is N60,000,000 (Sixty Million) naira.

It is observed that the increase is meant to help small and medium enterprises.

## **3. REDUCING THE COMPLIANCE REQUIREMENTS FOR SMALL COMPANIES**

Under the new Act, the numerous requirements under the Act has been greatly reduced sic:

- a. Single Directorship.
- b. Exemption From the Appointment of Auditors.
- c. No statutory obligation to hold Annual General Meetings.
- d. Exemption from the mandatory requirement of appointing a company secretary/ keeping register of secretaries.

## **4. SINGLE MEMBERSHIP COMPANIES: S. 18(2)**

By the provisions of section 18(2) of the Companies and Allied Matters Act, one person may form and incorporate a private company,

## **5. UNRESTRICTED OBJECTS OF A COMPANY: S. 35(1)**

By the provisions of the amended Act, unless the company's articles specifically restrict the object of the company, its objects are unrestricted. To this end, the potency of the ultra vires doctrine has been diminished thus, a company can only truly be restricted by itself.

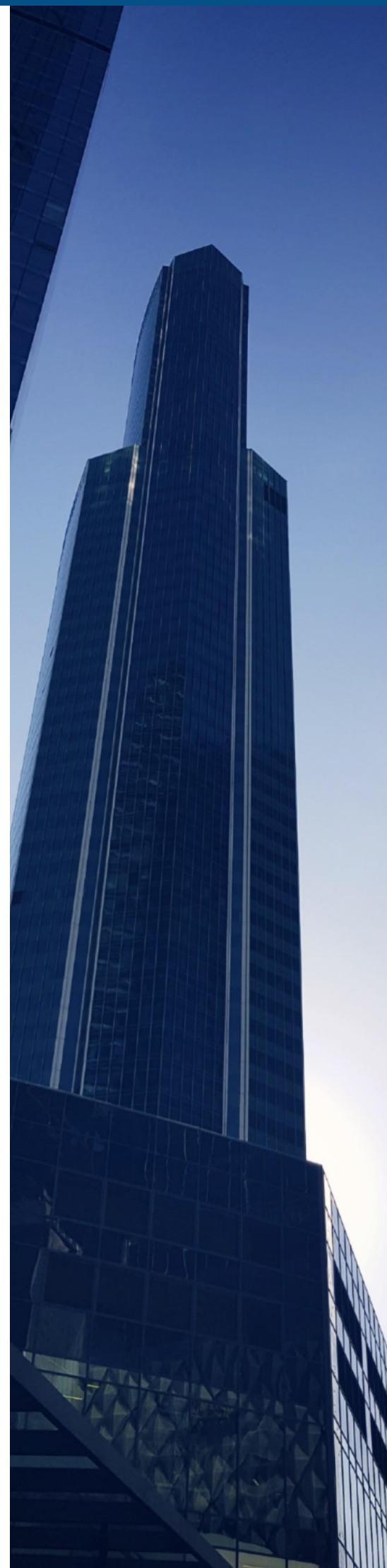
## **6. SUBSTITUTION OF AUTHORIZED SHARE CAPITAL WITH MINIMUM ISSUED SHARE CAPITAL S. 27(2)**

The old act used the words "Authorized Share Capital", but in the amended Act, it was substituted with "Minimum Issued Share Capital." This is not just a matter of semantics; it implies that the promoters of a company need not issue shares that are not material until said shares become needed.

## **7. INCREASE IN MINIMUM SHARE CAPITAL REQUIREMENT S. 27(2).**

The amendment increased the minimum share capital requirement to N100,000 for private companies and N2,000,000 for public companies. This is against the initial authorized share capital of N10,000 and N500,000 for private and public companies respectively, consequently, the initial 25% minimum issued and paid up share capital requirement makes it N2,500 for private companies and N125,000 for public companies under the old Act. It is not clear how this expedites the intended ease of doing business or further complicates it.

Within 6 months from the commencement of this Act, companies with a minimum issued share capital less than the required amount will have to ensure that they comply or risk the penalties.



## 8. INCORPORATION DOCUMENTS

Under the new Act, the scope of incorporation documents has been increased to include the Statement of Capital and Initial Shareholdings for companies whose members' liability is limited by shares or a statement of guarantee where the members' liability is limited by guarantee.

## 9. STATEMENT OF COMPLIANCE S.40(1):

Under section 40(1) of the new Act, the statement of compliance required to be delivered during the course of registering a company can be done by the applicant or his agent, and it would be deemed that the requirements of the Act as to registration have been complied with.

To this end, the Amendment has removed the requirement that only legal practitioners can make such declarations of compliance.



## 10. BENEFICIAL OWNERSHIP AND DISCLOSURE OF SIGNIFICANT CONTROL S. 119

Pursuant to section 119 of the amended Act, companies are under an obligation to disclose whether shares are held in the capacity of beneficial owner or nominee of an interested person. For transparency reasons, such disclosures are mandatory.

## 11. PROCUREMENT OF COMMON SEAL IS NO LONGER A MANDATORY REQUIREMENT S.98

Unlike the CAMA 1990 that mandated every company to have a common seal of which its use will be regulated by the articles of association, the amendment removed that mandatoriness, and provided that a company need not have a common seal, but where it decides to have one, then the usage and ownership thereof must comply with the provisions of the Act to that effect

## **12. LIMITED LIABILITY PARTNERSHIP AND LIMITED PARTNERSHIP.**

The Act has given investors additional ways or methods of carrying on business in Nigeria by the introduction of Limited Liability Partnerships (LLP) and Incidental Matters.

Section 797-810 of the Act deals with registration of Limited Partnerships and incidental matters.

## **13. IRREDEEMABLE PREFERENCE SHARES BY COMPANIES LIMITED BY SHARES.**

Pursuant to the provision of section 147 of the new Act, preference shares can be issued by a companies limited by shares and no such company can make such issued preference shares irredeemable.

By this amendment preference shares issued are redeemable subject to the terms of issue or the articles of the company.

## **14. ISSUE OF SHARES AT A DISCOUNT**

Pursuant to the provision of section 146 of the new Act, it is now unlawful for a company to issue shares at a discount.

## **15. PROHIBITION OF BEARER SHARES**

By the provision of section 174 of the new Act, no company has the power to issue bearer shares. Bearer shares areshares represented by a certificate, warrant or other document which states or indicates that the bearer of the certificate is the owner of the shares.



## **16. COMPANY'S ACQUISITION OF ITS OWN SHARES**

Under the old ACT, a company may not purchase or otherwise acquire shares issued by it save for grounds specified under section 160(2) and conditions specified under section 161. Under the new ACT, a limited liability company may subject to certain conditions acquire its own shares, including redeemable shares if so permitted by its articles, approved by shareholders through a special resolution, and said acquisition would result in the cessation of issuing the shares of the company other than redeemable shares or shares held as treasury shares. Any dissenting shareholder who did not vote in favor of the share buyback can make an application to the court to cancel the resolution.

## **17. FINANCIAL ASSISTANCE TO MEMBERS.**

The old ACT made a clear prohibition on companies giving financial assistance to persons for the purpose of acquiring its own shares. Under the new ACT under section 188(3) of the Act, exemptions have been made to the extent that a company can lend money in the ordinary course of its business, where the lending of money is part of its ordinary business; or the provision is made in accordance with a scheme by the company of money for 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.

The company can also issue/give out loans to persons, other than directors, that are in the employ of the company with the 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.

A company is also not prohibited from bona fide giving out loans to its members by any act or transaction authorized by law, or anything done in pursuance of an order of court under a scheme of arrangement or an assistance given where the company's principal purpose in giving said loan is not to reduce or discharge any liability incurred by a person for the purpose of acquisition of shares in the company or its holding company, or the reduction or discharge of any such liability, but an incidental part of some larger purpose of the company.

## **18. PROTECTION OF DIRECTORS' INFORMATION**

Under the new ACT, there is a restriction on use or disclosure of directors' addresses. Such information is regarded as protected information and it does not cease to be protected information when the person ceases to be a director of the company.

The protected information can not be disclosed by the company save for certain exceptions like compliance with the provisions of ACT, to notify the Commission of change(s) in the company's directorship or with the consent of the director concerned. The court may also in certain instances make an order of disclosure. These are some of the exceptions created under the Act for the disclosure of directors' information. This provision contrasts the earlier provision of the old CAMA, wherein the information of the directors is open to inspection by any member of the company in the register of directors.



## **19. COMPANY RESCUE:**

The new Act made provision for the rescue of distressed companies by helping to keep them solvent. COMPANY'S VOLUNTARY ARRANGEMENT (S.434 TO S.442), ADMINISTRATION (S.443 TO S.549), AND NETTING (S.718 to S.721).

The insolvency procedures introduced were adopted from the United Kingdom, in a bid to promote the development and sustenance of businesses in Nigeria, by helping viable and yet, distressed companies through some compromises that enables it recuperate from its financial quagmire.



## **20. ELECTRONIC TRANSFER OF SHARES.**

From a close examination of the letters of the Act prior to its amendment, it is clear that share transfers must be done with a physical documents in order for it to be cognized under the Act. The jet age and current digitalization of most of human affairs has mandated the amendment to take cognizance of electronic transfer of shares pursuant to the provision of section 175(1) of the Act, sic: *...instruments of transfer shall include electronic instruments of transfer.*

## **21. ELECTRONIC MEETING, VOTING, AND NOTICES FOR PRIVATE COMPANIES.**

Prior to its amendment, the old Act required the physical presence of members of a private company in order for it to hold its Annual General Meetings. There was no provision for electronic meetings, and the practicability of holding virtual meetings have aroused both scanty and deep ended research on the subject. Interestingly, the amendment captured this although for private companies and as such electronic meetings, voting and notices have been cognized under the new amendment, pursuant to the provision of section 240(2) of the Act.

Notices for all meeting can be delivered electronically, by sending it to the relevant mail provided by the members of the company pursuant to section 244(3) of the Act.

## **22. ENHANCEMENT OF MINORITY SHAREHOLDER PROTECTION AND ENGAGEMENT. S. 256 (6).**

Private companies now have additional form of minority protection, the Act now restricts companies from appointing a director to hold the offices of the Chairman and Chief Executive Officer.





### **23. RESTRICTION ON MULTIPLE DIRECTORSHIP IN PUBLIC COMPANIES S. 307(1)**

The amendment places a restriction on the number of public companies that a person can hold the directorship position. Under the new Act, a person cannot be a director in five public companies at a particular time.

### **24. MERGER OF INCORPORATED TRUSTEES S. 849**

Although the Act used the word “Association”, since Associations are usually registered as Incorporated Trustees, it implies that Incorporated Trustees can be merged, and pursuant to Section 849, two or more associations with similar aims and objects may merge under the terms and conditions as the Commission may by Regulation prescribe.

### **25. SUSPENSION OF TRUSTEES AND APPOINTMENT OF INTERIM MANAGER(S)**

Unlike under the old Act, the Corporate Affairs Commission under the new Act under section 839 reserves the power to suspend the trustees of an association and appoint interim managers to manage and oversee the affairs of the association. This is possible when the commission believes that the association is being mismanaged, there is some administrative misconduct or that the association is being run fraudulently.

### **26. REDUCTION OF FILING FEES FOR REGISTRATION OF CHARGES 222(12)**

Section 222(12) of the new Act provides that the total amount payable with the filing, registration or release of a charge with the commission shall not exceed 0.35% of the value of the charge.

### **27. CORPORATE RESPONSIBILITY FOR FINANCIAL REPORT**

Pursuant to section 405 of the new Act, the chief executive officer and chief financial officer of a company other than a small company or persons performing similar functions shall certify in each Audited Financial Statement that the officer who signed the audited financial statement has reviewed them, and based on the officers knowledge, the AFS



does not contain any untrue statement of material fact or omit to state a material fact, which would make the statements misleading, in the light of the circumstances under which the statement was made, and that the audited financial statements and all other financial information included in the statements fairly present, in all respects, the financial condition and results of operation of the company as of and for the periods covered therein.

Any officer who signs said AFS and fails to discharge the said obligations, is held to have committed an offence and is liable upon conviction to a penalty as the commission may from time to time specify in its regulations.



## 28. IMPROPER INFLUENCE ON CONDUCT OF AUDIT

Flowing from the corporate responsibility above, it is similarly an offence under section 406 of the new Act for an officer, insider or director of a company or any other person acting under the direction or instruction of the said person, to take any action targeted at influencing, coercing, manipulating or misleading any external auditor engaged for the purpose of performing an audit on the financial statement of the company, in a bid to making said statement inaccurate or misleading.

## 29. BI-ANNUAL STATEMENT OF AFFAIRS & ACCOUNTING RECORDS FOR INCORPORATED TRUSTEES

Unlike in the old Act, the new Act has now made specific requirements that the Trustees of an association shall submit a bi-annual statement of affairs of the association to the Commission, and where the trustees fail to meet such requirement, they will be liable to such penalty as the Commission may from time to time determine by a Regulation.

The Trustees are also under an obligation to keep accounting records as are sufficient to disclose with reasonable accuracy the financial position of the association at the time and also contain entries and expenditures, a record of assets and liabilities.



### **30. PENALTY FOR FALSE STATEMENTS OR INFORMATION**

Under the new Act, where any person in any return, report, certificate, balance sheet, or any other document required for the purpose of the provisions of the Act, willfully makes a statement which is false in any material particular, knowing it to be false, shall be guilty of an offence and liable upon conviction to imprisonment for a term of two years in the case of individuals and fine in the case of a company. Such fine is imposed any amount the court deems fit.



### **31. DUTY TO SEEK COMMENTS OF GOVERNMENTAL DEPARTMENT OR OTHER BODY**

With reference to the restricted and prohibited names in section 852 of the new Act, the Commission may require under section 853 that in connection with an application for the approval of the Commission under the said section 852, the applicant must seek the view of the specified government department or other body whether it has any objection to the proposed name.

Evidence of the request and the response received are material requirements in making an application for registration of any form of business.

### **32. UPWARD REVIEW OF FINES**

There is no gainsaying that the fine imposed in the old Act has outlived its usefulness.

Interestingly, everything relating to fines in the previous Act has either been upwardly reviewed or left open to the discretion of the commission, which said discretion will be exercised through regulations.

### **33. ESTABLISHMENT OF THE ADMINISTRATIVE PROCEEDINGS COMMITTEE**

Under the new Act, there has been established the Administrative Proceedings Committee, a body responsible for the provision of a hearing opportunity for persons alleged to have contravened the provisions of the Act or the regulations made therein. The Committee also resolves disputes or grievances arising from the operations of the Act or its regulations and imposes administrative penalties for the contravention of the provisions of the Act and its regulations. From the clear wordings of the Act, the decisions of the APC are subject to the confirmation of the Board and can be appealed to the Federal High Court.



### **CONCLUSION**

The introduction of these innovative provisions to the arena of corporate law in Nigeria is long overdue. The amendment can also be said to be timeous especially because it was introduced in the heat of the debate on the issue of ease of doing business; thus the amendments can be said to be targeted at creating an enabling environment for SMEs to thrive. Currently, SMEs contribute a whopping 48% of the national GDP, and account for 96% of businesses and 84% of employment, so there is need to make provisions targeted toward easing the participation of SMEs in businesses.

In as much as the amendment can be said to be wholesomely innovative and a giant stride towards creating an enabling environment for businesses to thrive, it is imperative to state saliently, that making a company's object unlimited removes the entire essence of the Ultra Vires doctrine, which bothers on the fact that some

investors may choose to invest in a company because of the business it currently has designated itself to undertake. The restriction gives investors the option of choosing the businesses they intend to invest in and otherwise. There ought to be some form of restriction on the operation of the provision, especially to the extent that the creditors have a say in the nature of business that the company decides to undertake, especially if they were not contemplated by the investors of the company at the time of investment.

Ultimately, there would be need to amend the Partnership Act 1890 to bring it in line with the current realities. It is noteworthy that there would be a substantial development in the industry of trade and commerce in the country because of the apparent ease of doing business introduced by the amendment.

Compiled by:



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