

Commentaries on Companies Regulations, 2021 published by CAC

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REGULATIONS

The Honourable Minister for Industry, Trade and Investment on 31 December 2020 approved the Companies Regulations 2021 (“CR 2021” or “the Regulations”), pursuant to Section 4 of the Companies and Allied Matters Act (CAMA) 2020. The CR 2021, which was published by the Corporate Affairs Commission (CAC or “the Commission”), replaces the Companies Regulations, 2012 issued pursuant to the repealed CAMA, 1990.

The Regulations includes provisions that are aimed at leveraging technology to automate certain CAC’s administrative processes, clarifying certain compliance requirements of the CAMA 2020, and providing a comprehensive governance and procedural framework, in line with global regulatory best practices.

We have highlighted below some of the significant changes in the Regulations as follows:

1. Authentication of Documents

The CR 2021 provides for the automation of CAC’s pre- and post-incorporation procedures in line with the Federal Government’s mandate of improving the ease of doing business in Nigeria. These procedures include electronic authentication of documents submitted through the Commission’s web portal, delivery of electronic certified true copies of documents in lieu of physical documents and online real-time update of changes to information already submitted to the Commission, among others.

Please click [here](#) to access our previous Regulatory Alert in this regard.

2. Minimum Issued Capital

Paragraph 13 of the Regulations mandates all existing companies to issue all unissued shares in their capital before June 30, 2021. The Registrar General of the CAC, in a recent stakeholder session organised by the Institute of Chartered Secretaries and Administrators of Nigeria on the implementation of the Companies Regulations 2021, clarified that Paragraph 13 gives effect to the provisions of Sections 124 and 868 of CAMA 2020 which redefined share capital as “*issued share capital*.” Consequently, the concept of “*unissued share capital*” which derived from the repealed CAMA 1990 and allowed a company to have issued share capital that is less than its authorised shared capital, has effectively been obviated by CAMA 2020.

Further, Paragraph 13 of the CR 2021 imposes a daily default penalty on a company and every officer of the company that fails to meet the June 30, 2021 deadline as follows: ₦250 for small companies, ₦500 for private companies limited by shares other than small companies, and ₦1,000 for public companies. It is debatable how the implementation of the daily default penalty will apply to companies that fail to meet the deadline given that the Act did not prescribe any penalty for non-compliance. Nonetheless, the Registrar General of the CAC noted that companies that are unable to meet the June 30 2021 deadline may apply for up to a maximum of 2 years extension. It is expected that the Commission will issue an official public notice in this regard soon.

3. Turnover Qualifications for a Small Company

Paragraph 19 of the Regulations modifies the turnover requirement for a “*small company*” from ₦120 million stipulated in Section 394 of CAMA 2020 to the turnover prescribed in the Finance Act from time to time (which is currently ₦25 million). Though Paragraph 18 of the Regulations seeks to align the definition of a small company in both the Finance Act and CAMA 2020, it is doubtful if this provision can be implemented given that it amends the provision of the principal legislation, which is inappropriate.

4. Conditional Exemption of Foreign Limited Liability Partnerships from Incorporation

Paragraph 25 of the Regulations provides that a foreign Limited Liability Partnership (LLP) may apply to the Hon. Minister of Industry, Trade and Investment for exemption from incorporation in line with the conditions provided for exemption of foreign companies under CAMA 2020. The conditions are as follows:

- i. The LLP is invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project;
- ii. The LLP is in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organisation;
- iii. The LLP is owned by a foreign government and engaged solely in export promotion activities; or
- iv. The LLP is an engineering and technical expert engaged in any individual specialist project under an approved contract with any of the levels of governments or their agencies or with any other body or person.



5. Suspension of Trustees and Appointment of Interim Managers

Section 839 of CAMA 2020 provides that, under certain circumstances, the Commission may by an Order suspend the Trustees of an association and appoint an Interim Manager(s) to manage the affairs of that association.

Paragraph 28 of the Regulations provides the conditions that the Commission must fulfil in order to suspend a trustee, namely:

- ✓ conducting a full enquiry into the circumstances of the petition against the trustee by the authorised persons,
- ✓ notifying the affected trustee of the details of the alleged wrongdoings against him/ her per the petition submitted to it by the authorised persons,
- ✓ giving a fair opportunity to the trustee to respond to any allegation of wrongdoing, and
- ✓ allowing the trustee, a period of 30 days or such other period as may be extended by the Commission, where applicable, to remedy any wrongdoing established against him/ her, in line with provisions of Section 839 of CAMA, 2020.

The above conditions are necessary to ensure that an accused trustee is afforded the opportunity of a fair hearing and to discourage frivolous accusations from authorised persons.

Further, the Regulations provides guidelines for the appointment of Interim Managers, definition of their functions, powers, administration of duties and reporting obligations following the suspension of a trustee.

6. Timeline for post-incorporation filing for Incorporated

Paragraph 37 of the Regulations mandates that all post-incorporation applications for Incorporated Trustees, excluding annual returns, bi-annual statements and miscellaneous filings, must be submitted to the Commission within 15 days of the resolution or 28 days for published applications.

7. Merger of Associations

Paragraph 35 of CR 2021 provides an implementation framework for the merger of associations pursuant to Section 849 of the CAMA, 2020. The framework requires merging associations to, in addition to having similar aims and objectives, obtain a resolution of at least 75% of their respective members, publicize the application for the merger within the prescribed statutory timeline, and obtain a sanction of the scheme from the Federal High Court before the merger can be approved by the Commission.

The conditions prescribed in the framework, especially the approval of the merger by at least 75% of members, align with current global best practices and will ensure protection of the interests of minority members in the merging associations.

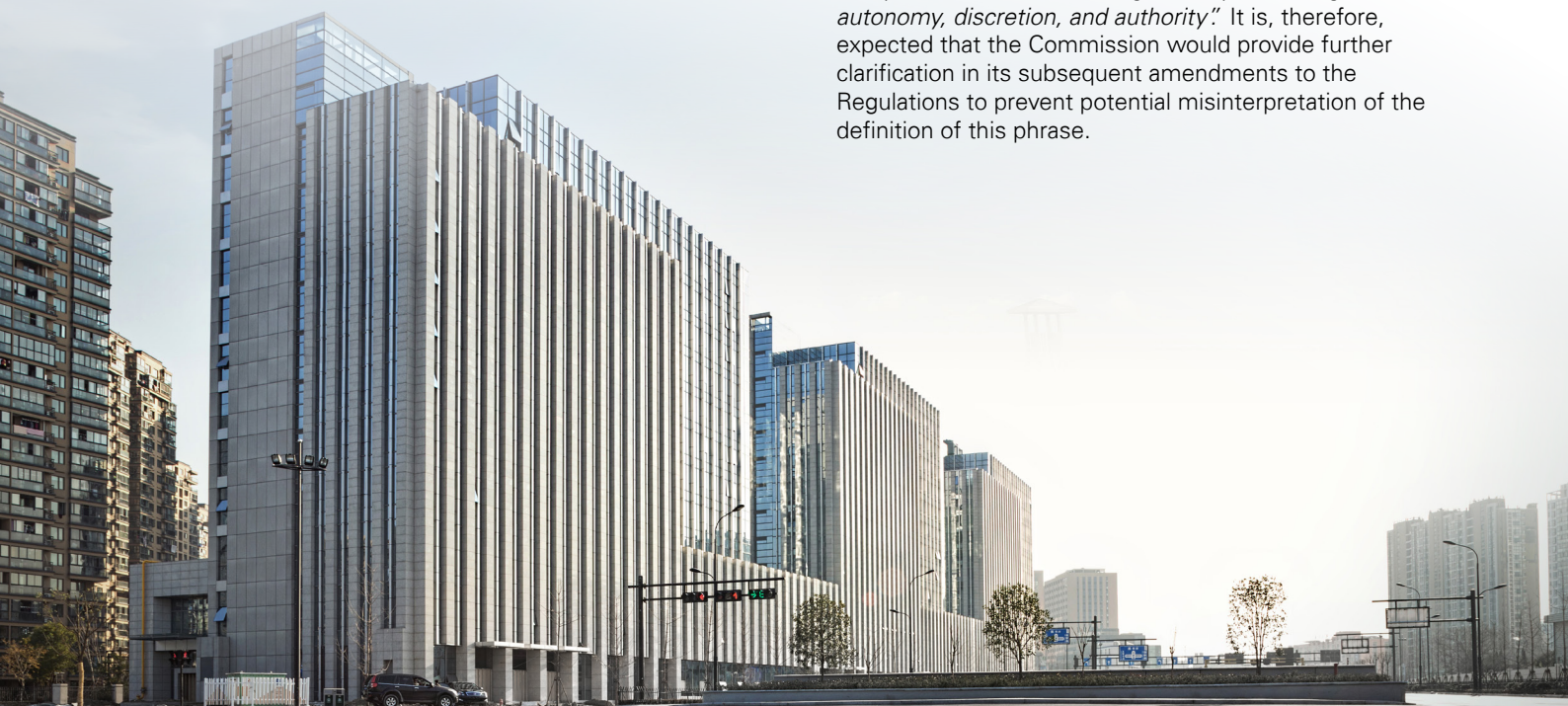
8. Revocation of Certificates

Pursuant to the provisions of Section 41 of CAMA 2020, Paragraph 10 of the Regulations requires the Commission to publish notices of revoked certificates which were obtained fraudulently, unlawfully or improperly in the Federal Gazette and on its website after the conclusion of a full inquiry by the Administrative Proceedings Committee. This will promote transparency and protect unsuspecting investors from investing in companies that are not lawfully registered to do business in Nigeria.

9. Clarification on persons required to disclose compensation at the Annual General Meeting

Section 257 of CAMA 2020 provides that compensation of managers of a company must be disclosed to members at the Annual General Meeting. Consequently, Paragraph 49 of the Regulations has defined a manager to include, *“any person by whatever name called occupying a position in senior management and who is vested with significant autonomy, discretion, and authority in the administration and management of the affairs of a company (whether in whole or in part)”*. This definition clarifies the category of employees noted in Section 257 of the Act.

However, the definition creates another ambiguity on the interpretation of the meaning and import of *“significant autonomy, discretion, and authority”*. It is, therefore, expected that the Commission would provide further clarification in its subsequent amendments to the Regulations to prevent potential misinterpretation of the definition of this phrase.



10. Model Articles of Association for all types of Companies

Unlike the erstwhile Companies Regulations, 2012, CR 2021 provides an extensive governance framework on the Model Articles of Association (“Model Articles”) for private companies, public companies and companies limited by guarantee.

Some of the key provisions of the framework are discussed under the relevant headers as follows:

10.1 Increased contribution by members of a company limited by guarantee

The Model Articles has increased the contribution by members of a company limited by guarantee from ₦10,000 to ₦100,000 in the event of winding up the company.

10.2 Directors and their Proceedings

The Model Articles exempts single director companies from the requirement for majority decision at directors’ meetings and recognises written resolutions by eligible directors for the purpose of reaching unanimous decisions. Further, it includes provisions to address conflict of interest for directors, appointment and termination of directors, functions and duties of alternate directors, and remuneration and expenses of directors.

10.3 Shares and Distributions

The Model Articles provides a framework for share-based transactions, such as powers to issue different classes of shares, shares certificates, company’s lien over partly paid shares, call on shares, forfeitures, surrender, share transfers and transmission, dividends and other distributions and capitalization of profits. Notably, the Model Articles provides that a company’s lien will take precedence over third party interest in that share and shall extend to any dividend or other money payable by the company in respect of that share.

Further, for dividend and non-dividend distributions, a company may decide to pay all or part of a dividend or non-dividend distributions by transferring non-cash assets of equivalent value including, without limitation, shares or other securities in any company, subject to the terms of issue. Also, recipients of such distribution may waive their entitlement to a dividend or other distributions in respect of a share by notifying the company in writing.

10.4 Decision making by Shareholders

The Model Articles provides guidelines for general meetings, proxies and resolutions which include voting by show of hands or by poll, where demanded, and voting electronically by count of voice concurrence for electronic meetings. Consequently, poll votes may now be demanded in advance to ensure that all members participate in decision making.

Further, it provides for the use of ordinary resolution to amend a special resolution provided that such amendments do not exceed correction of grammars or other non-substantive errors of the special resolution, if the changes are proposed by the chairman at the general meeting of the company.

10.5 Administrative arrangements

The Model Articles contains guidelines for administrative arrangements of companies, including modalities for communication, use of company seal, inspection of records, provision for employees on cessation of business, borrowing powers and directors’ indemnity and insurance. Consequently, companies are no longer required to have company seals, and where they choose to, the directors may decide by what means and in what form any common seal is to be used.



Conclusion

We commend the CAC for the timely issuance of the Regulations following the passage of the CAMA 2020. In order to achieve the priorities of CAMA 2020, including a seamless digital transition, the CAC has given registered entities up till **31 March 2021** to update and regularize their information and compliance status with the Commission. The automation of CAC's processes is expected to expedite regulatory compliance and minimize the administrative costs associated with the erstwhile physical storage and processing of documents.

However, there are still grey areas in CAMA 2020 which were addressed in the Regulations that can only be resolved by a legislative amendment. For instance, the mismatch between the turnover threshold stipulated for small companies in the Act and Regulations, respectively. Therefore, there may be challenges in the implementation of such conflicting provisions of the Regulations.

Further, there are minor gaps in CAMA 2020 which may create compliance challenges for companies that the Regulations failed to address. These issues include:

- The classification and treatment of irredeemable preference shares issued under the repealed CAMA 1990 given that companies are no longer allowed to issue irredeemable preference shares based on the amendments in CAMA 2020.

- How the register and data of LLPs created under the Partnership Law of Lagos State, 2009 will be recognised by the CAC considering the provisions of CAMA 2020. Will these LLPs be required to undergo fresh registrations with the CAC? Or will the CAC integrate their existing records with the Lagos State into its system?
- The timeframe for companies to disclose persons who held significant control in their companies prior to the commencement of CAMA 2020.
- What fines or penalty are applicable to persons who fail to disclose their beneficial ownership/ significant control to investee companies based on the requirements of CAMA 2020?
- What are the guidelines for companies transitioning from small companies with respect to their current regulatory obligations under the CAMA 2020?

We, therefore, expect subsequent legislative amendments to the CAMA 2020 and modifications to the Regulations to address the above noted gaps and align both the Act and Regulations with leading global regulatory practices.

In the meantime, registered entities are encouraged to comply with the provisions of CAMA 2020 and the concomitant Regulations advancing its provisions, and update their records with the CAC accordingly.

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