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### REFORMING THE BUSINESS CLIMATE IN NIGERIA: CRITICAL CHANGES INTRODUCED BY THE COMPANIES AND ALLIED MATTERS BILL, 2018



On Tuesday, January 22, 2019, the House of Representatives of the Federal Republic of Nigeria, at plenary, considered and adopted all the provisions of the ***Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018*** (the “CAM Bill”). By this development, the CAM Bill has received concurrent passage by the two chambers of the National Assembly; having been earlier passed by the Senate of the Federal Republic of Nigeria on May 15, 2018. It is expected that in the coming weeks, the CAM Bill would be transmitted to the President for assent after which it will become the new governing regime for setting up and running business entities in Nigeria.

The CAM Bill is a watershed in the Nigerian business and economic landscape and a big boost to the Ease-of-Doing-Business (“EoDB”) campaign of the Government. By repealing and replacing the Companies and Allied Matters Act, 1990 (“1990 Act”), the CAM Bill seeks to promote reform of the onerous legal and regulatory framework as well as administrative bottlenecks which, for close to three decades, have made doing business in Nigeria substantially difficult – particularly for Micro, Small and Medium Enterprises (“MSMEs”) – and had made the economy less attractive to investments hence less competitive.

This piece highlights some of the critical changes which the CAM Bill has introduced to the principal framework regulating the business climate in Nigeria.



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### **(A.) Starting and running a business to become more seamless and less expensive:**

The following alterations have been made to the extant regime by the CAM Bill for the purpose of improving ease of registering and running business entities in Nigeria:

- **Provision for Single Member/Shareholder Companies**

The minimum number of members/shareholders required to form and incorporate a company under the 1990 Act is two (2). The CAM Bill in section 18(2) has amended this provision by allowing a promoter to establish a private company with only one (1) member/shareholder.

- **Declaration of Compliance no longer required to be made by a Legal Practitioner**

The documents required for submission at the Corporate Affairs Commission (“**CAC**”) in relation to the incorporation of companies under the 1990 Act include a statutory Declaration of Compliance by a Legal Practitioner. This requirement has been replaced in section 40(1) of the CAM Bill with a Statement of Compliance which can be signed by an applicant or his agent, confirming therein that the requirements of law as to registration have been duly complied with.

- **Replacement of Authorised Share Capital with Minimum Issued Share Capital**

Under the 1990 Act, the limit on the maximum amount of shares a company can allot is specified by the Authorised Share Capital. In practice, shareholders sometimes agree to raise this limit above the capital requirements of the company at any point in time, so as to avoid the cost and time involved in raising additional capital where the need arises in the future. Since the amount of stamp duty and filing fees payable for company incorporation are based on the Authorised Share Capital, this leads to front-loading of costs thereby making it a more expensive venture. The CAM Bill in section 27 has eliminated the concept of an Authorised Share Capital and replaced same with Minimum Issued Share Capital for companies.

- **Incorporation of a Private Company Limited by Guarantee – Consent of AGF no longer required**

Incorporation of a company limited by guarantee is subject to the authority of the Attorney-General of the Federation (“AGF”) under the 1990 Act and as such, no memorandum of a company limited by guarantee is registrable by the CAC except the consent of the AGF is sought and obtained.

The CAM Bill in section 26 has dispensed with the requirement for the approval of the AGF and has instead provided that where the CAC is satisfied with contents of the Memorandum and Articles of Association submitted by the promoters, it shall cause the application for registration of a company limited by guarantee to be advertised in a prescribed form in three (3) national daily newspapers, inviting possible objections from the public.

- **Common Seal no longer mandatory for companies**

Every company is required, under the 1990 Act, to have a Common Seal, the use of which is to be regulated by the Articles of Association. The CAM Bill in section 98 has removed the mandatory requirement for a Common Seal and made its possession and use optional for a company.

- **Provisions for electronic filing & issue of documents, electronic Share Transfer and e-Meetings for private companies**

Documents required to be filed with the CAC for registration can now be filed electronically through a e-portal deployed for the process. As provided in section 861 of the CAM Bill, certified true copies of such electronically filed documents are admissible in evidence; with equal validity with the original documents.

In a similar vein, the CAM Bill provides in section 176(1) that instruments of transfer of shares shall include electronic instruments of transfer.

In addition to the foregoing, a private company is permitted to hold its general meetings remotely, provided that such meetings are conducted in accordance with the Articles of the company. This will facilitate participation at such meetings from any location in the world at a cheaper cost.

- **Exemption from Audit & Annual General Meeting**

Every company, without qualification, is required under the 1990 Act to appoint an auditor or auditors at its Annual General Meeting (“AGM”) to audit the financial records of the company. This mandatory

provision has now been modified, in section 403 of the CAM Bill, to exempt a set of companies from the requirements of the law relating to the audit of accounts in respect of a financial year.

Hence, a company (other than an insurance company or a bank or any other company as may be prescribed by the CAC) shall be exempted from appointing auditors to audit its annual accounting records if; (1) it has not carried on any business since its incorporation; or (2) it is a small company as defined under the CAM Bill.

In like manner, a small company and/or any company having a single shareholder (Single Member Company) is exempted, in section 238(1) of the CAM Bill, from the requirement of holding AGM.

- **Appointment of a Company Secretary – Optional for Private Companies**

Under the 1990 Act, every company is mandatorily required to have a Secretary. This requirement has changed under the CAM Bill, which in section 331, has restricted the appointment of a Secretary to only public companies. Appointment of a Company Secretary is henceforth not mandatory but optional for private companies. This is expected to lessen the regulatory burden of MSMEs and Single Member Companies.

- **Prescription of Model Articles for adoption by companies**

Every company is required to register an Article of Association prescribing regulations for the company, in consonance with the form and contents prescribed in the 1990 Act. However, in accordance with the provisions of sections 32, 33 and 34 of the CAM Bill, a company may elect not to register an Article of Association, in which case it will be deemed to have adopted the Model Articles prescribed in the CAM Bill for a company of its description.



- **Provisions for Limited Liability Partnership (LLP) & Limited Partnership (LP)**

The CAM Bill creates a new form of legal entity known as a Limited Liability Partnership (“**LLP**”), which is to exist separately from its members as a body corporate. An LLP is unique in that it combines organizational flexibility and tax status of a partnership with the limited liability of members of a company. In an attempt to safeguard the interest of those dealing with LLPs, it is provided that company law and insolvency law shall apply to LLPs with appropriate modifications. In like manner, disclosure of significant control in a LLP is also required.

The CAM Bill equally provides for the establishment of a Limited Partnership (“**LP**”). The unique feature of a LP is that it must, at any point in time, have at least one general partner and one limited partner. Other than this, an LP is not materially different from the common form of partnership. LPs are run by one or two partners, known as general partner(s) while other contributor(s), known as limited/silent partner(s) provide capital but do not take part in managerial decisions. This form of business entity is the most suited for private equity (PE) funds. Notably, Lagos State, in a bid to bridge the gap in the 1990 Act created a legal framework for forming LPs through the enactment of the Partnership Law of Lagos State some years back; thereby attracting foreign portfolio investments to Nigeria. The provisions for LP in the CAM Bill has not only resolved the constitutional issue around the legislative competence of the Lagos State House of Assembly to make a law in respect of entities with limited liability but has also provided legal framework for other States of the Federation to play host to LLPs and LPs.

- **Reduction in Filing Fees for Registration of Charges**

The total fees payable to the CAC in connection with the filing, registration or release of a charge in respect of a company is prescribed, in section 223(11) of the CAMA Bill to be a maximum of 0.35% of the value of the charge or such other amount as the Minister of Trade and Investment may specify in a Gazette. This is expected to lead to up to a sixty-five percent (65%) reduction in the associated cost payable under the regime in operation pursuant to the 1990 Act.

- **Merger of Incorporated Trustees**

Under the new regime introduced by the CAM Bill (section 850), two or more associations (Incorporated Trustees) with similar aims and objects may merge under such terms and conditions as may be prescribed by the CAC from time to time.

**(B.) Corporate governance practice to improve within business organizations:**

- **Disclosure of persons with Significant Control in companies**

Only a member of a public company is under obligation, under the 1990 Act, to disclose in writing when required, the capacity in which he holds any shares in the company; either as a beneficial owner or as a nominee of an interested person.

The CAM Bill in section 119 has extended such obligation (to disclose the particulars of shareholding by notifying the company) to persons with significant control in all companies. Similarly, as provided in section 120 of the CAMA Bill, a person who is a substantial shareholder in a public company and holding (either by himself or by his nominee) shares in the company which entitle him to exercise at least five per cent (5%) of the unrestricted voting rights at any general meeting of the company, is required to disclose such holding by notifying the company within a stipulated time.

This new disclosure provisions are expected to enhance transparency and prevent asset shielding as well as combat money laundering, terrorism financing and all forms of illicit financial flows by members of registered entities having limited liability.

- **Restriction on Multiple Directorship in Public Companies**

The CAM Bill in section 308 prohibits a person from being a director in more than five public companies at a time. And where any person becomes a director in more than five public companies at any time, he is required to, at the next annual general meeting of the companies after the expiration of two years from the commencement of the CAM Bill, resign from being a director from all but five of the companies. This is expected to reduce conflict of interest situations, enhance the performance of directors and improve corporate transparency.

- **Public companies to display their Audited Accounts on Websites**

In furtherance of the objective of promoting corporate transparency and accountability, the CAM Bill in section 375(6) requires each public company to keep its audited accounts displayed on its website.

**(C.) Clear and practical framework for resolving insolvency:**

- **Business Rescue Provisions for Insolvent Companies**

The CAM Bill contains frameworks for rescuing a company in distress and keep it alive as against allowing it to go into insolvency. Hence, provisions are made with respect to **Company Voluntary Arrangements** (sections 435 – 443); **Administration** (sections 444 – 550), and **Netting** (sections 719 – 722).

Upon coming into force of the CAM Bill, the following provisions will be in full operation:

- i. A financially distressed company (or a company likely to become financially distressed) will be able to partake in a business rescue re-organization such as a Company Voluntary Arrangement and Administration, as an alternative to Winding Up.
- ii. Winding Up and Receivership will be converted to Administration.
- iii. While a company is undergoing Administration, there will be a suspension on the enforcement of securities, court actions, sequestration of assets, etc.
- iv. A company will now be able to disclaim onerous contracts with the leave of court.
- v. If it is found that certain undervalued transactions may have led to a company's financial distress, such a company can obtain a court order restoring it to its previous position.



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- vi. During winding up or a re-organization, contracts for the supply of essential services may be entered into or continued on the basis that the supplier obtains a personal guarantee by the officeholder in charge of rescuing the company.

The CAM Bill has also modified the conditions for Winding up and clearly set out the rights of secured creditors in Winding up. Henceforth;

- i. The minimum trigger debt for bringing a Winding up petition against a company will be ₦200,000 (Two Hundred Thousand Naira) as opposed to the former debt trigger of ₦2,000 (Two Thousand Naira).
- ii. Interests/claims of holders of fixed charges will rank in priority to other claims and expenses of winding up.
- iii. While a company is being wound up, only a fixed charge holder (or any other validly created and perfected security interest holder other than a floating charge holder) will now be able to enforce security, sequester, attach or levy execution on the assets of the company.

### **(D.) More statutory safeguards against oppression of minority shareholders:**

#### **• Enhancement of Minority Protection and Shareholder Engagement**

There are various provisions in the CAM Bill which seek to either prevent injustice to, or further ensure justice for, minority shareholders in the events of actions of the company which are considered oppressive, prejudicial or illegal outright. In this connection, upon the CAM Bill becoming operational, the following conditions shall apply:

- i. Restriction of the appointment of the same person as Chairman and Chief Executive Officer (CEO) of a private company.
- ii. Full disclosure of all material facts relating to buyer-seller transactions and the existence of a conflict of interest, where it applies.
- iii. Preservation of the preemptive rights of existing shareholders where new shares are issued.
- iv. Expansion of the grounds under which shareholders can hold the Board liable for damages caused by related third-party transactions, now to include conflict of interest.
- v. Disqualification of erring directors from continuing to serve for a one-year period, for causing loss to the company.
- vi. The requirement of a minimum of three (3) independent directors on the Board of private companies.



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- vii. The courts will now be able to rescind third party transactions which are proved to be unfair or oppressive or cause economic harm to the company, in general.
- viii. It will now become mandatory to seek and receive the consent/approval of minority shareholders whenever there is a proposed sale of more than fifty-one per cent (51%) of the company's assets.

### **(E.) Regulation and Compliance**

New mechanisms for making regulations more effective, and compliance a lot easier, are introduced into the governing framework for supervising business entities. These include the following:

- **A more inclusive CAC Governing Board**

In constituting the Governing Board of the CAC, the CAM Bill provides in section 2(2)(f) that one representative of the Nigerian Association of Small and Medium Enterprises shall be appointed by the Minister of Trade and Investment on the recommendation of the Association. This will ensure that inputs from MSMEs are factored into policy formulation at the CAC. This is expected to promote policies and regulations that are conducive to the growth of MSMEs.

- **Power of the CAC to initiate investigation of a company**

In addition to circumstances where the court orders investigation into the affairs of a company, as is the case under the 1990 Act, the CAM Bill has in section 359(2) conferred on the CAC power to *suo moto* initiate investigation into the affairs of a company, by appointing one or more competent inspectors to investigate the affairs of the company and report on them, where it appears to the CAC that there are circumstances suggesting that the provisions of the law have been contravened through acts of omission or commission by the company. This is expected to enhance CAC's regulatory capacity and ensure quick intervention in the affairs of companies in the interest of the public.

- **Treatment of Related Associations as one**

The CAM Bill in section 832 provides for the treatment of any two or more associations having the same trustees to be treated as a single association. This is without prejudice to the provisions of section 850 on mergers of Incorporated Trustees. This provision is expected to facilitate effective supervision and regulation of registered association with related operations. It is equally expected to promote accountability and enforcement of compliance, as well as establish nexus between associations for the purpose of determining control and ultimate ownership of property.

- **Pre-Action Notice to precede institution of court actions**

From the commencement of the CAM Bill, no suit shall be commenced against the CAC before the expiration of a period of thirty (30) days after a written notice of intention to commence the suit shall have been served upon the CAC by the intending plaintiff or his agent. Section 17(2) of the CAM Bill states that the required Pre-Action Notice shall clearly and explicitly state: (a) the cause of action; (b) the particulars of the claim; (c) the name and place of abode of the intending plaintiff; and (d) the relief sought. This provision is expected to reduce litigation for the CAC as faster resolution of issues is facilitated with reduced cost.

**Comment:**



Considering the far reaching provisions contained in the CAM Bill, its passage by the National Assembly represents a significant milestone in Nigeria's efforts at putting in place a framework that promotes EoDB and reduces regulatory hurdles.

Promoted by the CAC with the collaborative efforts of key public and private sector stakeholders supported by the Enabling Business Environment Secretariat (“**EBES**”), the Section on Business Law of the Nigerian Bar Association (NBA-SBL), Nigerian Economic Summit Group (NESG), the National



Assembly Business Environment Roundtable (NASSBER) and leading commercial law firms; the CAM Bill is expected to receive presidential assent and become operational without further delay.

Notably, substantial parts of the changes provided in the CAM Bill have been promoted and are currently being implemented as key reform initiatives of the Presidential Enabling Business Environment Council (“**PEBEC**”), under the series of *National Action Plans on the Ease of Doing Business in Nigeria* (“**NAPs**”). EBES was established in 2016 to implement the mandate and vision of PEBEC with fantastic outcome of moving Nigeria phenomenally twenty-four (24) places up the World Bank EoDB Index; from 169<sup>th</sup> position to 145<sup>th</sup> position globally between 2017 and 2018 as well as naming Nigeria as one of the top ten (10) most reformed economies in the world. It is also expected that the provisions of the CAM Bill would enhance the current aspiration of PEBEC/EBES to move Nigeria to a sub-100 position in the Doing Business Report which would be released in October this year.

***The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo***

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