
Business Facilitation Act, 2023

Client Briefing Note

May, 2023



Introduction

On 14 February 2023, the Business Facilitation (Miscellaneous Provision) Act 2023 (BFA) was signed into law by President Muhammadu Buhari. The provisions of the BFA make significant changes to 21 existing legislations that regulate crucial aspects of the business landscape in Nigeria, including corporate governance, intellectual property, investment, statutory contributions, and technology acquisition.

Some amendments that significantly impact Nigerian businesses are considered in turn below.

The Companies and Allied Matters Act, 2020

Compared to the other 20 legislations amended by the BFA, the Companies and Allied Matters Act (“CAMA”), which was passed into law in 2020, is front and centre of the BFA’s review. It makes large-scale changes to prominent portions of CAMA as follows:

Foreign Companies: Generally, foreign companies are required to incorporate a Nigerian company, except:

- they are granted an exemption by the Ministry of Trade and Investment; and
- they are subject to a treaty to which Nigeria is a party.

The CAMA has been amended by the provisions of Section 2 of the BFA to recognise companies that may be exempted by current or subsequent legislation of the National Assembly. This amendment prevents potential

conflict between the current provisions of the CAMA and this additional legislation. It also eliminates the bottlenecks that foreign companies exempted under these laws have to navigate in the absence of this BFA provision.

Share Capital Restructuring: Section 3 of the BFA amends Section 127 of the CAMA by introducing changes that provide that a company’s share capital can be increased at a general meeting or by a resolution of the Board of Directors.

Prior to this amendment, the provisions of the CAMA only provided for the increase of the share capital at a general meeting of the company.

Pre-Emptive Rights: Section 4 of the BFA amends Section 142 of the CAMA by limiting pre-emptive rights to only shareholders of

private companies. The previous provisions of the CAMA had blanket provisions that restricted the issuance of new shares by public and private companies to the effect that a company is not allowed to allot shares unless they were first offered to existing shareholders.

The CAMA has also been amended to exclude the provisions that require companies to state the share price in an offer to existing shareholders. The amendment also introduces a 21-day timeline for the acceptance of an offer to exercise the option.

Allotment of Shares: Section 5 of the BFA amends the allotment of shares provisions of the CAMA (Section 149(1)). The BFA provides that the board of directors shall not exercise the authority to allot shares unless the authority has been expressly vested in the board of directors by either:

- the company in its general meeting; and
- the articles of the company.

The previous provisions of the CAMA stated that the director could allot shares subject to "...conditions or provisions imposed in the articles or by the company in a general meeting". By making subtle amendments to these provisions, the authority to allot has to be expressly vested in the directors.

The BFA also deletes Section 149(3), which conflicted with Section 149(1) and limited the vesting of the authority to allot shares to private companies.

Filing Timeline: By virtue of Section 6 of the BFA, the timeline for the filing of the return of allotment has been reduced from 1 (one) month to 15 (fifteen) days.

Share Certificates: Section 7 of the BFA, which amends Section 171 of the CAMA, is largely driven by innovation.

Under the amendment, companies can issue share certificates as electronic or physical copies. The previous provisions only provided for physical share certificates.

Meetings: The BFA amends the provisions of the CAMA, which restricted public companies from holding general meetings electronically.

By virtue of the amendment, public companies may also hold general meetings electronically, provided the meetings are compliant with the company's articles.

Service of Notice: The BFA also amends Section 240 by combining the provisions of the erstwhile 240(3) into Section 240(1) and introducing provisions that permit companies

to effect service of notices electronically. The previous provision required service to be effected personally, at the address of the member to be served, or by electronic mail.

With the removal of the emphasis on electronic mail, companies are permitted to effect service via other electronic means such as digital applications.

Voting: The BFA introduces amendments that permit companies to utilise electronic voting as a substitute for voting by show of hands at a general meeting.

Independent Directors: The amendments introduced by the BFA to the independent director provisions of the CAMA (Section 275) require public companies to have a number of independent directors equivalent to one-third of the total number of directors. The previous provisions of the CAMA required companies to have at least three directors.

In order to ensure uniformity, the BFA also provides that where a person nominates candidates for appointment to the board, the person is required to nominate at least one-third of the total number of persons who would be required to be independent directors. The BFA largely reflects the previous CAMA position on this front, which required persons making nominations to

nominate at least 3 (three) persons to be independent directors.

Resignation Timeline for Multiple

Directorships: Section 307(3) CAMA 2020 provides that a person who is a director in more than five public companies has to resign in all but five of them at the next annual general meeting of the companies after the expiration of 2 (two) years from the commencement of the CAMA. This implied that the resignation could only take place at the next general meeting and not before. The BFA has, however, amended Section 307(3) of the CAMA by including "not later than" before "the next annual general meeting." This means that the person does not have to wait for the next annual general meeting of the respective companies to hand in their resignation, since it can be anytime before that. However, the period of resignation must not exceed the next annual general meeting of the companies.

Disqualification of Directors: The BFA amends the CAMA to include fraud, dishonesty, and unethical conduct as grounds for the disqualification of a person as a director.

Financial Statements: The financial statements of companies are required to comply with the accounting standards of the Financial Reporting Council of Nigeria.

Small Company Status: By virtue of the amendments introduced by the BFA, companies are now required to achieve each of the following qualifying conditions in the financial year of the assessment as well as in the preceding financial year in order to retain the lowered compliance burden of small companies:

1. be a private company with liability limited by shares;
2. have a turnover that does not exceed ₦120,000,000;
3. the value of its net assets should not exceed ₦60,000,000;
4. none of its shareholders should be a foreigner;
5. none of its shareholders should be a government, a government agent, or a government nominee; and
6. the directors should hold at least 51% of the equity share capital.

Fraudulent Preference in Insolvency: Section 658 of CAMA 2020 does not provide a specific timeframe, ending with the onset of the insolvency, in which to determine when preference has been given to a person connected to the company (otherwise than by reason of being its employee). This provision has now been amended by the BFA to reflect that, in determining such preference, the

relevant time would be a period of 2 (two) years ending with the onset of the insolvency.

Debt: The BFA provides that a company will be deemed to be unable to pay its debts if the company is unable to pay a sum deemed by regulation to be issued by the Corporate Affairs Commission.

The previous provision of the CAMA specified sums in excess of ₦200,000 as the threshold for determining indebtedness. With the changes introduced by the BFA, the determination of indebtedness is at the discretion of the Corporate Affairs Commission.

Nigerian Investment Promotion Commission Act, 2021

The BFA amends this legislation by introducing provisions to the effect that where a Nigerian entity acquires foreign participation after the commencement of operations, the entity has the obligation to register with the Nigerian Investment Promotion Commission within three months of the acquisition.

The BFA's amendments make the compliance burden as well as business operations more flexible than the preceding provisions, which restricted businesses from commencing operations before registration with the Nigerian Investment Promotion Commission.

Financial Reporting Council Act, 2011

The BFA amends the Financial Reporting Council of Nigeria (FRCN) Act to provide that all companies, regardless of the provisions of any other laws that regulate the form and content of their financial statements, are required to prepare their financial statements in accordance with the rules of the Financial Reporting Council of Nigeria.

These amendments disregard the exceptions that existed in favour of private companies, as the financial statements of all companies are required to reflect the compliance provisions of the FRCN.

Pension Reform Act, 2004

The BFA amends the Pension Reform Act, 2004 (“the Act”) by substituting the provisions of subsection (2) of the Act to the effect that pension assets are eligible for securities lending as the Commission may approve.

The amendment also empowers a pension administrator, subject to guidelines issued by the Commission, with the authority to apply a percentage of an individual’s pension assets in their retirement savings account towards the payment of equity contributions for the payment of residential mortgages and for the purpose of securities lending. This implies

that pension contributors need not worry about the restrictive nature of their contributions, as they can now use it for the specified investments.

Industrial Inspectorate Act, 2004

The amendments made by the BFA to this legislation lower the compliance burden for businesses. Companies are no longer required to notify the director of the Industrial Inspectorate Division in the event of capital expenditure of less than ₦5,000,000 on capital.

The previous provisions of this legislation had required all companies that incurred capital expenditures of at least ₦20,000 to notify the director of the Industrial Inspectorate Division.

Industrial Training Fund Act, 2004

Section 41 of the BFA amends the provisions of Section 6 of the Industrial Training Fund Act. By this amendment, any employer having 25 or more employees, that is not operational in a free trade zone, is required to contribute one percent of the annual payroll to the Industrial Training Fund.

Suppliers, contractors, or consultants with more than 25 employees are required to comply with the requirement to make contributions to the Industrial Training Fund

ahead of the submission of bids or solicitation of contracts from federal government ministries, departments, and agencies, as well as commercial, industrial, and private entities.

This amendment significantly reduces the compliance burden for employers. The previous provisions of the Industrial Training Fund Act required all employers with at least 5 employees or less than 5 employees and an annual turnover of at least ₦50,000,000 to make contributions to the Industrial Training Fund. With this amendment, employers will be able to retain and deploy capital for other purposes.

Investment and Securities Act, 2007

Generally, private companies are restricted from making public offers and allotting shares to the general public. The BFA amends the Investments and Securities Act to provide that private companies may allot shares to the public, subject to the provisions of the regulation to be issued by the Securities and Exchange Commission.

National Housing Fund Act, 1992

The BFA amends the National Housing Fund Act to reflect changes in the national minimum wage amount. The amendments to the National Housing Fund Act provide that

public sector employees who earn the minimum wage or above are required to contribute 2.5% of their basic monthly income to the National Housing Fund.

The BFA's amendments also provide that:

- 1.1. compliance with the provision to make a contribution is optional for employees in the private sector;
- 1.2. the interest rate on contributions is reduced to 2% from the previous 4%;
- 1.3. all self-employed persons who earn the equivalent of the minimum wage are required to make a contribution of 2.5% of their monthly income to the National Housing Fund; and
- 1.4. the Federal Government may make any grant of money to the National Housing Fund.

National Office for Technology

Acquisition and Promotion Act, 2004

By the amendments made by the BFA to this legislation, companies are exempted from liability for late registration fees in the first 2 years of business operations. However, in order to be eligible for this exclusion, the relevant technology contracts have to be registered with the National Office for Technology Acquisition and Promotion before the end of the second year of the company's business operations.

Trademarks Act, 2004

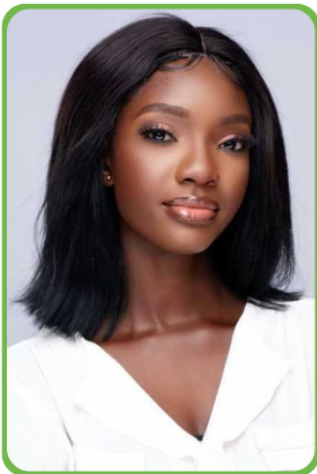
The BFA amends the Trademarks Act to include a definition of “goods” with services as a subset of goods. Previously, this omission had caused a fair amount of confusion regarding the protection of service marks.

In the wake of the definition of goods, the BFA also amends the definition of trademarks to include services.

Conclusion

The Business Facilitation Act makes large scale changes to several frontline legislation with ripple effects on the business ecosystem in Nigeria. These changes have varying degrees of impact on the compliance landscape, as these amendments saddle companies with the obligation to adapt their business and governance models to comply with and, where applicable, take advantage of the amendments introduced by the Business Facilitation Act.

TLP Advisory is well positioned to address any questions or concerns you may have, as well as help you and your business navigate the landscape of changes introduced by the Business Facilitation Act. We can be reached via email at info@tlpadvisory.com and look forward to hearing from you.



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