



Persons with Significant Control (PSC) Regulations 2022

Background

Nigeria, like other nations, has taken steps to enhance corporate transparency and combat money laundering and corruption through various legal and regulatory measures. One of such measures is the introduction of the concept of Persons with Significant Control ("PSC") under section 119 of the Companies and Allied Matters Act 2020 ("CAMA"). Subsequently, the Corporate Affairs Commission ("CAC") issued the Persons with Significant Control Regulations dated 23 November 2022 ("PSC Regulations" or the "Regulation") to provide a framework for obtaining information on PSCs.



Key provisions in the PSC Regulation

1 Scope of the Regulation

The Regulation is applicable to companies, Limited Liability Partnerships ("LLPs") and other relevant entities as may be specified by the Regulation.

If a government-owned entity is incorporated or established by other enactments and owns or exercises significant control over any company or LLP, the company or LLP (where it has shares or control) is required to submit PSC information to CAC.

2 Definition of PSC

CAMA 2020 defines a PSC as a person who:

- holds at least 5% of the issued shares in a company or interest in an LLP either directly or indirectly;
- exercises at least 5% of the voting rights in a company or LLP directly or indirectly;
- holds a right, directly or indirectly, to appoint or remove the majority of the directors of the company or partners of the LLP;
- exercises significant influence or control, directly or indirectly, over the company or LLP; or
- has the right to exercise, or actually exercises significant influence or control over the activities of a trust or firm whether or not it is a legal entity but would itself satisfy any of the first four conditions above if it were an individual

The Regulation defines "significant influence or control" as the ability to direct or materially influence the finances, financial policies, management, operations, structure of a company or limited liability partnership, or derive significant economic benefits from the company or limited liability partnership.

The Regulation purports to extend the meaning of a PSC to a Beneficial Owner, which (for the purposes of the Regulation), means a natural person(s) who ultimately owns or controls a company or LLP or the natural person on whose behalf a transaction is being conducted; and includes those natural persons who exercise ultimate effective control over a legal person or arrangement.

3 Obligation to Disclose

The Regulation imposes an obligation to disclose information on PSCs during incorporation, filing of annual return(s) or amendments to corporate information with the CAC.

A PSC is required to notify the company or LLP of its status within seven days of becoming a PSC. Thereafter, the company or LLP has a corresponding obligation to disclose the PSC information to CAC within one month.

In any instance where a company or LLP has reasonable cause to believe that a person is a PSC, it must notify and request the PSC to provide the relevant information required by the Regulation. A PSC who receives a notice is required to provide the relevant information within seven days, failing which the company/LLP shall issue a warning notice.

If a PSC fails to comply with the warning notice, the company/LLP shall restrict the relevant interest (for example, the right to transfer shares, first refusal, pre-emption etc), enter the restriction in the register of members and file the restriction at the CAC.

Confidentiality of PSC Information

A company/LLP can only use the PSC information for the purpose of:

- communicating with the PSC;
- complying with any requirements of the Regulation; or
- complying with a court order.

In addition to the above, information relating to a PSC:

- may be disclosed by the CAC with the written consent of the PSC
- will be available to the public at no cost subject to the Companies Regulation 2021 on Restriction of Protected and Personal Information; and
- will be made available to Law Enforcement Agencies, Investigation Agencies and any other relevant Competent Authority.

Sanctions

The penalty for noncompliance are 'inactive' status and daily administrative penalty imposed on the company/LLP, the officers and any other person in default (as the circumstances warrant). A company with an inactive status cannot transact any business with the CAC until the outstanding obligations are performed and the status is updated to active.

In addition to the above, a person who defaults in furnishing any statement required by the CAC in respect of a PSC is liable (if convicted) to imprisonment for a term of two years or a fine of not less than N200,000 or both.

Finally, CAC will also not issue a Letter of Good Standing for a company/LLP that is in breach of its PSC obligation.

Takeaway

While the mandatory disclosure of Persons with Significant Control (PSCs) is a positive stride toward enhancing corporate governance by promoting accountability and transparency, the current breadth of the PSC Regulation introduces possible hurdles that may hinder full administrative cooperation. Notable considerations include:

- a. The scope of the administrative disclosure requirement encompasses all companies, including public entities, which are already obligated to disclose substantial shareholders to regulatory bodies such as the Nigerian Stock Exchange, the Securities and Exchange Commission, and are overseen by the Central Bank of Nigeria (CBN). This creates an additional layer of administrative filing and documentation.
- b. The definition of "significant influence" within the regulation could potentially be construed to bring within scope executive management even where they are merely executing employment duties, as well as financiers and lenders.
- c. The extension of the PSC definition to beneficial owners effectively confines it to natural persons. The Corporate Affairs Commission (CAC), in aligning with Section 119 of the Companies and Allied Matters Act (CAMA) 2020, has configured the Company Registration Portal to exclusively collect information on natural persons as the sole identifiable PSCs. This limited definition may prove impractical for companies with intricate structures, such as Nigerian entities with public listed companies as their ultimate parents.

Furthermore, certain provisions in the Regulation concerning the restriction of PSC rights based on non-compliance may face potential legal challenges as they seem to infringe upon shareholders' rights guaranteed under CAMA 2020, for instance, Section 142 pertaining to pre-emptive rights.

Amendments to these provisions to introduce limitations / exceptions may be ultimately beneficial.

Despite these concerns, companies and Limited Liability Partnerships (LLPs) are urged to adhere to the requisite filing deadlines, as failure to do so may result in accumulating daily penalties that could become financially significant over time. It is also important for entities to comply with the Regulations in order to uphold corporate transparency.



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