



**INSTITUTE OF
CERTIFIED PUBLIC ACCOUNTANTS
OF UGANDA**



INFORMATION PAPER ON THE COMPANIES ACT 2012



FEBRUARY 2014

Important Notice

This information paper is based on selected sections of the Companies Act 2012 (the Act).

Please note that this information paper is not a comprehensive summary of the new Act. It includes information on matters which are practical and indeed relevant to ICPAU members. In the interest of brevity, the information paper summaries certain provisions of the new Act or refers to extracts. The paper is not intended to be exhaustive and should not be viewed as a substitute for reading the Act. The information contained in this paper does not constitute legal advice and should be treated with caution.

At the time of developing this paper, the interpretations of the new Act have not been tested in a court of law. Therefore, where the paper suggests a particular interpretation or approach to any matter, this is based only on ICPAU's current view of the interpretation of the Act. Although ICPAU has consulted widely on contentious issues, it is possible that a different view may ultimately be followed in practice.

ICPAU recommends that any decision or actions being considered in relation to the new Companies Act be checked with appropriately qualified legal advisors. This paper does not consider the related Regulations, since they have not yet been issued. However, once issued, ICPAU will incorporate the guidance of the Regulations as deemed appropriate.

Executive Summary

The new Companies Act, 2012 (the Act) replaced the Companies Act Cap 110 (the previous Act) in its entirety on 1 July 2013. The implementation of this Act presents both opportunities and challenges to companies. The purpose of this Information Paper is to provide members of ICPAU serving in different companies with an indication of some of the important issues that arise as a result of the anticipated changes to the corporate landscape.

TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	3
1.0 PRELIMINARY	5
1.1 Introduction	5
2.0 OVERVIEW	6
3.0 THE HIGHLIGHTS.....	6
3.1 Mode of forming an Incorporated Company	6
3.2 Meaning of a Private Company.....	7
3.3 The re-registration of registered companies	7
3.4 Adoption and application of Table F.....	8
3.5 A company’s capacity not limited by its memorandum	8
3.6 No duty to enquire as to capacity of a company or authority of directors.....	8
3.7 Pre-incorporation contracts.....	9
3.8 Prohibition of provision of financial assistance by company for purchase of or subscription for its own or its holding company’s shares.....	9
3.9 Directors’ actions bind the company.....	10
3.10 Investigation of a company’s affairs in other cases.....	10
3.11 Minimum age of Director now at Eighteen years.....	10
3.12 Prohibition of loans and guarantees to directors.....	10
3.13 Substantial property transactions involving directors and related particulars.....	11
3.14 Alternative remedy to winding up in cases of oppression.....	11
3.15 Certain companies to publish periodical statement.....	11
3.16 Directors are given strict duties to carry out in company management to ensure that companies do not collapse.....	12
3.17 Returns and related particulars filed out of time	12
3.18 Offences and penalties.....	12
3.19 Special resolution for reduction of share capital	13
3.20 Registered office of a company	13
3.21 Qualifications of Company Secretaries	13
3.22 Annual Return	14
3.23 Disqualification for Appointment as Auditors	14
4.0 CONCLUSION	14

1.0 PRELIMINARY

1.1 Introduction

The Institute of Certified Public Accountants of Uganda (ICPAU) was established in 1992 by an Act of Parliament now the Accountants Act, 2013. The functions of the Institute, as prescribed by the Act, are:

- To regulate and maintain the standard of accountancy in Uganda.
- To prescribe and regulate the conduct of accountants and practicing accountants in Uganda.

Vision

To be a world-class professional accountancy institute.

Mission

To develop, promote and regulate the accountancy profession in Uganda and beyond.

Core Values

- Professional Excellence.
- Accountability
- Integrity.
- Innovation

International Affiliations

- The Institute is a member of the International Federation of Accountants (IFAC),
- The Pan African Federation of Accountants (PAFA)
- The Association of Education Assessment in Africa (AEAA).

2.0 OVERVIEW

The Companies Act, 2012 (the Act) was assented to on 27th day of August 2012 and later published in the Gazette for public information. Accordingly, a statutory instrument No. 24 of 2013 for commencement of the Act was issued by the Minister on the 21st day of June, 2013, therein the Act was appointed a date for commencement as 1st July 2013.

The main objective of introducing the Companies' Act 2012 was to reform company law in Uganda, based on the principles of;

- a) Promotion of business formalisation,
- b) Ease registration of companies/businesses
- c) Promote competitiveness,
- d) Ensure proper and efficient management of company affairs,
- e) Regional harmonization of company law,
- f) Aligning the law to current trends in Uganda, and
- g) Generally to incorporate best practices in Company matters.

A number of changes were introduced in the Act, and as such the Institute of Certified Public Accountants Uganda (ICPAU) deemed it fit that an Information Paper with Guidance information on matters that are practical and relevant to its members and other individuals in business who engage with company law be developed. This was primarily done as a way of simplifying the Act.

3.0 THE HIGHLIGHTS

3.1 Mode of forming an Incorporated Company

Section 1 of the Act provides that any one or more persons may for a lawful purpose, form a company, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability. The previous act provided for any seven or more persons, or, where the company to be formed was to be a private company any two or more persons, associated for any lawful purpose would form a company.

The implication of this amendment is that the Act now introduces the hitherto untenable concept of a single member company. It provides that the single member

shall nominate two individuals one of whom shall become a nominee director in the event of death of the single member and the other to act as an alternate nominee director in the event of non availability of the nominee director (Section 185). The law further imposes on the nominee director in the event of death, functions akin to those of an administrator under the Succession Act. These include the power to manage the affairs of the company until the transfer of the shares to the legal heirs. The company may upon the death of the single member either wind up or by special resolution convert to a private limited liability company.

This should provide relief to some existing companies that have had challenges with non-resident directors and more so dormant directors ('absentee directors'). The resident director can now choose to amend the articles of the company to keep out the absentee directors.

3.2 Meaning of a Private Company

Section 5 (1) b limits the number of members of a private company to one hundred, not including persons who are employed by the company and persons who, have been formerly employed by the company. As such the Act increases the maximum membership of a private company from fifty members to one hundred members with the resultant increase in the ability of the company to raise capital through increased share subscription and share holder loans from more members.

3.3 The re-registration of registered companies

The act provides for re-registration of already registered companies. For example Section 23 provides that a company registered as unlimited may re-register under the Act as limited or a company already registered as a limited liability company may re-register under the Act as unlimited (Unlimited to limited); Section 24 provides that a private company, other than a company not having a share capital, may be re-registered as a public company (Private company to public company) if;

- a) a special resolution that it should be so re-registered is passed; and
- b) an application for re-registration is delivered to the registrar, together with the documents specified in subsection (4) of section 24.

Section 29 provides that a company which is registered as a limited liability company may be re-registered as an unlimited company on an application for the purpose of complying with the requirements of this section (Limited to unlimited)

and Section 33 requires that a public company may be re-registered as a private company provided any of the conditions of section 33 (1) (a)-(d) are satisfied (A public company may re-register as a private company).

3.4 Adoption and application of Table F

Notably the Act amply provides for corporate governance and sustainability reporting issues. Previously recourse was to corporate governance principles imposed upon public listed companies as provided for under the Capital Markets Authority Act, its regulations and guidelines. Section 14 (1) requires a public company, at the time of registration of its articles, to adopt and incorporate into its articles the provisions of the code of corporate governance contained in Table F. Subsection (2) makes the above requirement non mandatory for private companies. All companies that adopt these rules are under an obligation to file a statement of compliance with both the Capital Markets Authority and the Registrar of Companies.

This is intended to ensure efficient and proper Management of companies while protecting all the stakeholders in a company.

3.5 A company's capacity not limited by its memorandum

The rather traditional doctrine of 'ultra vires' that existed in the previous Act has been repealed by the current law. The Act provides that any act done by the company shall not be called into question on the ground of lack of capacity or by reason of anything contained in the Company's Memorandum. Section 51 (1) states that "the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything contained in the company's memorandum." However a member of the company may still bring proceedings to restrain a company from engaging in an action beyond the companies' capacity (Section 51 (2)).

3.6 No duty to enquire as to capacity of a company or authority of directors

A person dealing with a company is not required to inquire into the capacity of the Company/Directors. Section 53 requires that a party to a transaction with a company is not bound to enquire whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorize others to do so.

3.7 Pre-incorporation contracts

Section 54 states that; “A contract which purports to be made on behalf of a company before the company is formed, has effect, as one made with the person purporting to act for the company. Although the position regarding pre-incorporation contracts remains considerably the same, these are only binding on the promoter rather than the company itself. The Act provides that such contracts may be adopted by the company without the need for novation and thereafter the liability of the promoter shall immediately cease. In simple illustration, this implies that an entity can now adopt pre-incorporation agreement for example purchase of a major asset.

3.8 Prohibition of provision of financial assistance by company for purchase of or subscription for its own or its holding company's shares

The Act takes on a more liberal approach to the concept of financial assistance by a company in the purchase of or subscription for its own shares or in a holding company. While the former position was that the above was strictly prohibited save for certain exceptions, the current law maintains the same exceptions but for example does not prohibit the allotment of bonus shares, a reduction of capital confirmed by the Court, a distribution of the company assets by way of dividend lawfully made or distributed in the course of the company's winding up, a redemption or purchase of shares made in accordance with the Act to mention but a few (section 63 (3) (a) –(g)).

Private companies are further not prohibited from providing financial assistance for the acquisition of their shares or those in their private holding company for as long as a portion of the capital is reserved as capital on which a call may only be made in the event of the Company's winding up. However the private company must comply with the requirements as to notice to the Registrar where such acquisition would ultimately result into a consolidation of share capital, conversion of shares into stock or any related particulars (section 65).

The above is however restricted with respect to public companies. In this case, financial assistance may only be given if the company has net assets, which are not reduced by the financial assistance, or to the extent that those assets are reduced by the financial assistance, if the assistance is provided out of distributable profits (section 64). This is primarily intended to avoid fraud on the part of the person borrowing from the Company to acquire shares in the same Company.

3.9 Directors' actions bind the company

Section 52 (1) states that, "the power of the board of directors to bind the company or authorise others to do so in favour of a person dealing with the company in good faith shall not be limited by the company's memorandum." This implies that the director's actions even if limited in the company's memorandum may still bind the company. This seems to be in tandem with section 51 of the Act that opens up a company's objects.

3.10 Investigation of a company's affairs in other cases

On request by members of the company the registrar may appoint an inspector to inspect the affairs of the company. Section 174 of the Act highlights the fact that investigations may be commenced where it appears to the registrar that there are circumstances suggesting –

- a) that the company's business is being conducted with intent to defraud its creditors.
- b) that there is misconduct in management among others, then it would be desirable for the registrar to conduct the investigation.

This is primarily intended to reduce the time spent in court hearings as the case has been with the previous Act.

3.11 Minimum age of Director now at Eighteen years

Section 196 of the Act provides that a person shall not be capable of being appointed a director of a company if at the time of appointment he or she has not attained the age of eighteen years. This brings down the minimum age for directors from twenty one years in the previous Act.

3.12 Prohibition of loans and guarantees to directors

The Act prohibits a company from making a loan or guaranteeing a loan to a person who is its director or a director of its holding company or enter into a guarantee of a loan or provide security in connection with a loan made to that person by any other person and a company shall not make a loan to an officer of the company who is not a director (section 203). However, this provision does not apply to

- a) a loan made by a money-lending company to any person; or

- b) a money-lending company entering into a guarantee in connection with any other loan, provided conditions of subsection 3 of section 207 are satisfied.

3.13 Substantial property transactions involving directors and related particulars

A company is prohibited from any arrangement by which a director or a person connected to the director acquires non-cash assets. Section 219 bars a person from entering into any arrangement by which;

- a) a director of the company or its holding company or a person connected with such a director, acquires or is to acquire one or more non-cash assets of the prescribed value from the company; or
- b) by which the company acquires or is to acquire one or more non-cash assets of the prescribed value from that director or a person so connected, unless the arrangement is first approved by a resolution of the company in general meeting and, if the director or connected person is a director of its holding company or a person connected with the director, by a resolution in general meeting of the holding company.

Section 220 provides exception to the above section.

3.14 Alternative remedy to winding up in cases of oppression

Section 247 gives the registrar powers to hear complaints from oppressed minority shareholders who may consider the affairs of the company being conducted in a manner oppressive to some part of the members including themselves or in a case falling within section 178(5) of the Act.

3.15 Certain companies to publish periodical statement

Section 266 requires all insurance companies or a deposit, provident or benefit society, whether registered in or outside Uganda to make and file with the registrar a statement in the form set out in the Seventh Schedule to the Act or as near to it as circumstances admit. This is to be done in the prescribed time lines as provided for in the Act.

3.16 Directors are given strict duties to carry out in company management to ensure that companies do not collapse

The Act has codified a number of common law principles. These include the lifting of the corporate veil in the event of fraud by the directors of the company and the duties of directors to include the duty to treat all shareholders equally and to ensure compliance with the Act and any law applicable to the company. The grounds for disqualification from acting as a director have further been extended to include failure to comply with filing statutory returns. Strict director qualifications and disqualifications are intended to ensure proper company management (sections 185, 195 to 201)

3.17 Returns and related particulars filed out of time

Whereas the previous Act defined the term "document" to include summons, notice, order and other legal process, and registers; the new Act defines the term "document" broadly to include; summons, notice, order and other legal process and registers, indices, reports, certificates and accounts and may be in any form including any writing, any material, and any information recorded or stored by means of any mechanical or electronic device and any material derived from them. This is in conjunction with section 275 which paves way for electronic filing of documents. As such anything required to be filled manually may be filled electronically as well. This is in line with the Electronic Transactions Act 2011 of the laws of Uganda.

3.18 Offences and penalties

The Act has revised the fines and penalties under the previous Companies Act. There has been an introduction of the term currency points (1st Schedule to the Act). The penalty for any person who in any return, report, certificate, balance sheet or other document, required by or for the purposes of any of the provisions of the Act specified in the Eighth Schedule to the Act, willfully makes a statement false in any material particular, knowing it to be false, he or she commits an offence and is liable on conviction to imprisonment not exceeding two years or a fine not exceeding two hundred currency points or both. This has changed from a fine not exceeding ten thousand shillings in the previous Act.

The penalty for improper use of the word "limited" also changed from a fine not exceeding one hundred shillings for every day upon which that name or title has been used (in the previous Act) to imprisonment not exceeding one year or a fine

not exceeding one hundred currency points or both and in addition to a fine not exceeding ten currency points for every day upon which that name or title is used (in the new Act) if one is held liable on conviction.

3.19 Special resolution for reduction of share capital

The Act introduces a further obligation on the company that has reduced its share capital to advertise the relevant resolution for reducing share capital in the Gazette and a newspaper of nationwide circulation. The purpose of the advertisement would be to put the world on notice, particularly the creditors who have a right to object to the court confirmation of such resolution where the effect may be detrimental to their interests (Section 76 & 77).

3.20 Registered office of a company

The Act places stringent terms in respect of the obligation of each company to have a registered office. In the event of non-compliance the Registrar of Companies reserves the right to de register such company where the company fails to remedy the above breach of the law upon notice of the same being given to it in the Gazette and in a newspaper of wide circulation (Section 115).

3.21 Qualifications of Company Secretaries

Whereas the previous Act provided for the position of a company secretary, the new Act under section 190 now stipulates the qualification of company secretaries. The Act provides that it is the duty of the directors of a public company to take all reasonable steps to ensure that the secretary or each joint secretary of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company and who—

- a) is an advocate of the High Court;
- b) is a person who, by virtue of his or her holding or having held any other position or his or her being a member of any other body, appears to the directors to be capable of discharging those functions;
- c) is a member of or is qualified to be a member of any of the bodies specified in subsection (2).

Among the bodies mentioned in subsection (2) is the Institute of Chartered Public Accountants in Uganda.

3.22 Annual Return

Whereas it has always been proposed by the ICPAU, to have a provision that requires all limited liability companies to file returns with the registrar and hence annex to their return a certified copy of the report of the auditors on the report of the Directors, this has not changed in the new Act. The Act still requires only public limited companies to file the return. ICPAU's argument is built on the fact that like the practice is in other countries around the world, having return completed by even the private limited companies would enable the different stakeholders dealing with these companies to adequately understand the nature and potential of the companies they deal with. This in one way is to guide and safeguard the interests of the stakeholder in matters related with such companies.

3.23 Disqualification for Appointment as Auditors

The Act also guides on who qualifies for appointment as an auditor of a company. The Act requires that for a person or firm to be appointed auditor of a company, he/she or every partner in the firm must be a member of -

- a) one or more of the professional bodies specified in the Accountants Act; or
- b) The Institute of Certified Public Accountants of Uganda established under the Accountants Act, or is a person registered as an associate accountant under the Accountants Act (section 169).

4.0 CONCLUSION

The above Act, which has been passed shall repeal the long standing Companies Act, 1961 which had for all intents and purposes, given the global trends in corporate practice, become burdensome, onerous and outdated. The new law will hopefully instill and stimulate greater international governance principals and good business practice. It is hoped that the Uganda Registration Services Bureau, which has sought to make the company registry services available online for convenience and ease will create new efficient policies and systems that will render the good work of the legislators practical, accessible and easily performable.



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