



UDO UDOMA &  
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# THE COMPANIES AND ALLIED MATTERS ACT 2020

## WHAT EVERY DIRECTOR OF A PUBLIC COMPANY IN NIGERIA SHOULD KNOW 2.0

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**T**he Companies and Allied Matters Act 2020 ("**CAMA 2020**") was signed into law by President Muhammadu Buhari on 7th August 2020. The CAMA 2020 repealed the Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("**Repealed CAMA**"), which originally come into force in 1990.

In this note, we have highlighted some of the changes introduced by the CAMA 2020 that every director of a public company in Nigeria should know.



### **WHEN DID THE CAMA 2020 COME INTO EFFECT? DO COMPANIES HAVE TO COMPLY IMMEDIATELY?**

The CAMA 2020 came into effect on 7th August 2020, which is the date on which it was signed by the President. It was published in Gazette No. 124 (volume 107) which became widely available in November 2020. The Corporate Affairs Commission ("CAC") subsequently issued the Companies Regulations 2021 (the "Regulations") to provide the framework for the full implementation of the CAMA 2020. The Regulations came into effect on 1st January 2021. Other than the registration of limited partnerships and limited liability partnerships, which the CAC has confirmed will commence in April 2021, all other provisions of the CAMA 2020 are being implemented.



### **THERE IS A COPY OF THE CAMA 2020 CIRCULATING. CAN WE RELY ON IT?**

Since 7th August 2020, there have been copies of the CAMA 2020 circulating on social media, but the only reliable copy is the copy that was published in the Federal Government of Nigeria Official Gazette. A copy of the Gazette can be obtained from the Federal Government Press.



### **SEPARATION OF THE ROLES OF THE CHAIRMAN AND THE CHIEF EXECUTIVE OFFICER OF A PUBLIC COMPANY**

This is not new; the existing restrictions in the Nigerian Code of Corporate Governance 2018 (the "NCCG"), that preclude the chairman of a public company from acting as the chief executive officer (the "CEO") of the same company, have now been incorporated into the CAMA 2020. <sup>1</sup>

<sup>1</sup> Section 265 (6)



## 4

## APPOINTMENT OF INDEPENDENT DIRECTORS

There are three major changes in relation to independent directors. The first and most significant is that every public company must now have a minimum of three independent directors.<sup>2</sup> The second change is that the CAMA 2020 makes it the obligation of anyone (i.e. any shareholder) that has the power to nominate the majority of the members of the Board to nominate at least three independent directors for the company.<sup>3</sup> The third change is that in order to qualify for appointment as an independent director the nominee or his relatives must not, in the two years preceding the nominee's appointment to the board, have:

- (a) owned (directly or indirectly) more than 30% of the shares of the company;
- (b) been employed by the company;
- (c) acted as an auditor of the company;
- (d) paid or received from the company, sums exceeding NGN 20 million, or held up to 30% of the shares (or acted as a partner, director or officer) of an entity that received or made such a payment to the company. The 30% shareholding threshold mentioned above differs from the requirement of the NCCG which states that an independent director should not hold more than 0.01% of the paid-up share capital of the company. It is not yet clear how this conflict will be resolved.

## 5

## MULTIPLE DIRECTORSHIPS

No person can be a director of more than five public companies at the same time.<sup>4</sup> Any person that was on the board of more than five public companies as at the date on which the CAMA 2020 came into effect has a two-year period within which to comply.<sup>5</sup> CAMA 2020 also requires persons who are nominated as directors of public companies to disclose their existing positions on the boards of other public companies, before taking up the new appointment.<sup>6</sup>

<sup>2</sup> Section 275(1)

<sup>3</sup> Section 275 (2)

<sup>4</sup> Section 307 (2)

<sup>5</sup>Section 307 (3)

<sup>6</sup>Section 278 (2)



## 6

## CHANGES TO SHARE CAPITAL

There is no longer a concept of an authorised share capital. This has been replaced by a requirement that companies must have at least the minimum issued share capital required by the CAMA 2020 (NGN100,000.00 for private companies and NGN2,000,000.00 for public companies<sup>7</sup>), and must ensure that at least 25% of this issued share capital is paid up.<sup>8</sup> What this means for existing companies is that all of what used to be their authorised share capital must be fully issued. The CAMA does not, however, specify a timeframe within which this must be done, but this has been dealt with by the CAC in the Regulations.

Regulation 13 of the Regulations states that companies that have unissued shares in their share capital must issue those shares by 30th June 2021. Companies that comply with this directive will not be required to pay any CAC filing fees on the shares when they file their return of allotments at the CAC. This is to say that the CAC will recognise the fees previously paid by the companies on their unissued shares. Where, however, a company does not issue all its unissued shares by the specified date, the company and every officer of the company shall be liable to a daily penalty prescribed by the Commission. The Regulations state that the daily penalty payable by public companies is N1,000 while the daily penalty for private companies is N500 and for small companies is N250.

The effect of the directive to issue all unissued shares by 30th June 2021 is that companies will need to reach a decision, quickly, on how they plan to achieve this. Some available options are a bonus issue or a rights issue to existing shareholders. Companies also have the option of cancelling their unissued shares through a process of reduction of share capital. For public companies where the approval of the Securities and Exchange Commission and other regulators might be required, the process of issuing those shares would have to be implemented within an unusually tight timeframe. The CAC has stated that it is willing to consider extending this timeline either generally or on a case-by-case basis and is expected to issue a statement on this shortly.

## 7

## POWER OF BOARDS OF PUBLIC COMPANIES TO ALLOT SHARES

Section 124 of the Repealed CAMA which dealt with the allotment of shares was short and straight-to-the-point: the power to allot shares resided with the company

<sup>7</sup> Section 27 (2)(a)

<sup>8</sup>Section 128(1)





and could be delegated to the directors, subject to any conditions imposed either in the articles or from time to time by the company in general meeting. Under the CAMA 2020, Section 149(1) of CAMA 2020 applies only to private companies and has a similar result. The position in relation to public companies is, unfortunately, not so clear.

Since there is no longer a concept of authorised share capital, this means that shares will have to be issued and allotted at the same time, either by the shareholders or by the board. What Section 149(3) of CAMA 2020 appears to do is that it permits the board of directors of public companies to issue and allot new shares, provided the board is expressly authorised by the articles to do so or has been so authorised by the shareholders in general meeting.

The Regulations have sought to clarify the powers of directors to issue shares. Regulation 14 confirms that a private company may delegate the power to issue and allot shares to the board of directors. With respect to public companies, certain restrictions apply.

Regulation 14 states that, "A public company may delegate the power to issue and allot shares to the board of directors if - .

- (a) it is authorised by the articles generally or specifically; or
- (b) it is authorised by resolution of the company in general meeting stating -
  - i) the maximum number of shares that the board should issue
  - ii) the specific transaction that the shares should be issued for, and
  - iii) the timeframe within which the board should issue the shares, failing which the authorisation shall lapse."

The use of the word "or" between paragraphs (a) and (b) above means that public companies can get around the restriction in section 149 of the CAMA 2020 by inserting a general authorisation in their articles to empower their boards to issue and allot shares.

## 8

### **MANDATORY PRE-EMPTIVE RIGHTS FOR ALL COMPANIES**

CAMA 2020 requires all companies - public or private - to first offer newly issued shares to their existing shareholders, in proportion to their existing holdings.<sup>8</sup>

<sup>9</sup> Section 142

The implication of this for public companies is that any issue of new shares, whether by way of a public offer or a private placement, must be preceded by a rights offer to existing shareholders. Apart from the cost and time associated with carrying out a rights issue, one possible consequence is that if the shareholders of a company decide to take up the shares that are offered to them during such a rights issue, the company might not be able to issue the number of shares it needs for the transaction it originally intended to execute.

## 9

### COMPANY SECRETARY

Public companies are still required to have a company secretary, even though this requirement has been dispensed with for private companies.

## 10

### COMPANY SEALS

The use of company seals is now optional for all companies.<sup>10</sup> The CAMA 2020 provides for how a company may execute certain documents in the absence of a seal.<sup>11</sup>

## 11

### REGISTER OF DIRECTOR'S RESIDENTIAL ADDRESS AND USE AND DISCLOSURE OF PROTECTED INFORMATION

All companies must keep a new register called a "Register of Directors' Residential Addresses", which must contain the usual residential address of the company's directors.<sup>12</sup> The information in this register will differ from the Register of Directors which, typically, will specify a "service address" for the directors that, in some cases, could be the company's registered office.

The CAMA 2020 classifies information relating to the residential address of a director as being "protected information."<sup>13</sup> There are restrictions on how the company and the CAC can deal with such protected information.<sup>14</sup>

<sup>9</sup> Section 142

<sup>10</sup> Section 98

<sup>11</sup> Section 103

<sup>12</sup> Section 320

<sup>13</sup> Section 323 & 324

<sup>14</sup> Sections 323 - 326



## 12

**REMOVAL OF A DIRECTOR IS NOW A BASIS FOR DISQUALIFICATION**

The CAMA 2020 retains the procedure for removal of directors outlined under the Repealed CAMA. A key change, however, is that directors who are suspended or removed from office by a company will also be disqualified from being directors of other companies.

## 13

**DISCLOSURE AND TRANSPARENCY – SUBSTANTIAL SHAREHOLDERS AND PERSONS WITH SIGNIFICANT CONTROL**

The threshold for determining the substantial shareholders of a public company has been reduced from 10% to 5%.<sup>16</sup> In addition, another new register called the “Register of Persons with Significant Control” has to be maintained by all companies.<sup>17</sup> A person has significant control of a company where that person directly or indirectly holds at least 5% of the shares, interest or voting rights in the company; directly or indirectly holds the right to appoint or remove a majority of the directors in the company; or otherwise has the right to exercise or actually exercises significant influence or control over a company. Disclosures are required to be made by both substantial shareholders and persons with significant control.

## 14

**REMUNERATION OF MANAGERS NOW ORDINARY BUSINESS AT ANNUAL GENERAL MEETINGS**

The compensation of the managers of a company must now be disclosed to members of the company as part of the ordinary business to be transacted at the annual general meeting.<sup>18</sup> The term “Manager” is defined in the Regulations 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).<sup>19</sup>

<sup>15</sup> Section 283 (c)

<sup>16</sup> Section 120

<sup>17</sup> Section 119

<sup>18</sup> Sections 237 and 257

<sup>19</sup> Section 240(2)



## 15

### VIRTUAL GENERAL MEETINGS

The provision in CAMA 2020 that permits private companies to hold their general meetings electronically, does not extend to public companies.<sup>20</sup> This means that, absent any special dispensation from the regulators (such as those granted in 2020 as a result of COVID), public companies must continue to hold their general meetings physically.

## 16

### VIRTUAL BOARD MEETINGS

Section 289(1) of the CAMA 2020 replicates s. 263(1) of the Repealed CAMA, and neither of these provisions make it clear that board meetings can be held virtually. Prior to the CAMA 2020, companies took the precaution of ensuring that their articles authorised the board to meet virtually, otherwise board meetings had to be held physically. Section 289(1) has been clarified by Regulation 16 titled 'Electronic Meetings of Directors'. Regulation 16 provides that:

- a) Directors may, in the exercise of their power to regulate their meeting as they think fit, hold their meetings electronically and by any means that would allow all directors to participate, speak and vote at the meeting.
- b) Where the meeting of the directors is held electronically, the minutes of the meeting shall indicate that fact.
- c) For the purpose of section 289 (1), it shall be sufficient to reflect the registered office address of the company as the physical venue of the meeting provided that a director and the company secretary (if any) shall be present at the physical venue of the meeting.
- d) Where the registered office address of the company cannot be used due to the absence of a director and the company secretary (if any) at such address, any other address in Nigeria would suffice for purposes of recording the minutes.

Regulation 16, therefore, provides more flexibility to boards for holding their meetings, even where the articles of the company do not provide for this. It is unclear why paragraphs (c) and (d) above were included under the regulations for electronic board meetings, since s. 289(1) does not require board meetings to be held in Nigeria. Paragraphs (c) and (d) would have been more relevant to s. 240(1) of

<sup>20</sup> Section 377 (2)(h)





the CAMA 2020, which requires virtual general meetings of private companies to be held in Nigeria.

17

### FINANCIAL STATEMENTS

Every public company must now include a statement relating to “changes in equity” in its financial statements.<sup>21</sup> The CAMA 2020 also requires every public company to display its audited accounts on its website.<sup>22</sup>

18

### AUDIT COMMITTEE

The composition of the audit committee of a public company has been amended. The audit committee is now required to consist of five members, made up of three shareholders and two non-executive directors.<sup>23</sup> All members of the audit committee must be financially literate, and at least one member of the committee must be a member of a professional accounting body in Nigeria established by an Act of the National Assembly.<sup>24</sup> As was also the case under the Repealed CAMA, the members of the audit committee are not entitled to receive any remuneration.

19

### UNCLAIMED DIVIDENDS

Under the Repealed CAMA, the law recognised dividends as special debts due to and recoverable by shareholders within 12 years and actionable only when declared. The CAMA 2020 retained this position but went further to say in s. 432 that after 12 years, the unclaimed dividends could be included in the company's distributable profits which could be distributed to the shareholders of the company. Other changes made by the CAMA 2020 are that companies are now required to publish their list of unclaimed dividends in two national newspapers. The list must be attached to the notice of the next annual general meeting circulated to the members of that company.<sup>25</sup> The company may invest the unclaimed dividend for its own benefit three months after the publication and the issuance of the notice of the annual general meeting to shareholders.<sup>26</sup> Shareholders are not entitled to receive any interest on unclaimed dividends.

The Finance Act, 2020 came into law on the last day of the year 2020. It established

<sup>21</sup> Section 374 (6)

<sup>22</sup> Section 404 (3)

<sup>23</sup> Section 404 (5)

<sup>24</sup> Section 429 (1)

<sup>25</sup> Section 429 (2)

<sup>26</sup> Section 342



the Unclaimed Funds Trust Fund ("Fund") and amended s.432 of the CAMA 2020. Specifically, section 432 of the CAMA 2020 has been amended to include two new sub-sections which have the effect of distinguishing the manner in which unclaimed dividends of a public company that is listed on the Nigerian Stock Exchange ("NSE") should be treated. After a period of six years from the date of declaring any dividends, the unclaimed dividends of a public company that is listed on the NSE shall be immediately transferred to the Fund. Unclaimed dividends that are transferred to the Fund shall be a special debt owed by the Federal Government of Nigeria to the relevant shareholders and may be claimed by such shareholders at any time.

## 20

### MAJOR ASSET TRANSACTIONS

A company may not undertake a "major asset transaction" unless its shareholders have approved the transaction.<sup>27</sup> A major asset transaction means a transaction or series of related transactions which include:

- (a) any purchase or other acquisition outside the usual course of the company's business; and
- (b) the sale or other transfer of the company's property or other rights which, on the date of the relevant transaction, is valued at 50% or more of the book value of the company's assets based on the company's most recently compiled balance sheet.

Major asset transactions must be approved by a special resolution, unless the company's articles permit the company to approve such transactions by an ordinary resolution.

<sup>27</sup> Section 342



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### Disclaimer

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