WHAT EVERY DIRECTOR OF A PUBLIC COMPANY IN NIGERIA SHOULD KNOW

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The 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 The CAMA 2020 repealed the Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 ("Repealed CAMA"), which originally came into force in 1990.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.

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

Legally, CAMA 2020 came into effect on 7th August 2020, which is the date on which it was signed by the President. More practically, agencies such as the Corporate Affairs Commission ("CAC") that will have to implement the Act's provisions have waited for the Act to be published in the Federal Gazette ("Gazette") before commencing formal implementation and enforcement of the Act. The CAMA 2020 was published in Gazette No. 124 (volume 107) which became widely available in November 2020. Shortly after this, the CAC announced that it would publish new regulations that would provide the framework for full implementation of the CAMA 2020 from 1st January 2021.

2 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 Gazette.

3 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 2020.¹

¹ Section 265 (6)
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.² 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.³ 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.

MULTIPLE DIRECTORSHIPS

No person can be a director of more than five public companies at the same time.⁴ 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.⁵ 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.⁶

² Section 275(1)
³ Section 275 (2)
⁴ Section 307 (2)
⁵ Section 307 (3)
⁶ Section 278 (2)
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\(^7\)), and must ensure that at least 25% of this issued share capital is paid up.\(^8\) 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, and we expect this to be dealt with in the regulations that the CAC will issue pursuant to the CAMA 2020.

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 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. Section 149(1) of CAMA 2020 applies only to private companies and has a similar result. Under the CAMA 2020, however, 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.

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.\(^9\)

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

\(^7\) Section 27 (2)(a)
\(^8\) Section 128(1)
\(^9\) Section 142
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.

**COMPANY SECRETARY**

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

**COMPANY SEALS**

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

**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. 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.” There are restrictions on how the company and the CAC can deal with such protected information.

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10 Section 98
11 Section 103
12 Section 320
13 Section 323 & 324
14 Sections 323 - 326
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.¹⁵

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%.¹⁶ In addition, another new register called the “Register of Persons with Significant Control” has to be maintained by all companies.¹⁷ 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.

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.¹⁸ Neither the CAMA 2020 nor the NCCG define the term “manager”. This might be clarified when the CAC issues its new regulations. Until then, the NCCG’s description of the “executive management” of a company could offer some guidance. The NCCG defines the “executive management” of a company to mean “the Chief Executive Officer and other persons having authority and responsibility for planning, directing and controlling the day-to-day activities of the company, whether or not they are members of the Board of Directors of the company.”

¹⁵ Section 283 (c)
¹⁶ Section 120
¹⁷ Section 119
¹⁸ Sections 237 and 257
VIRTUAL GENERAL MEETINGS

The provision in CAMA 2020 that permits private companies to hold their general meetings electronically, does not extend to public companies.¹⁹ 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.

FINANCIAL STATEMENTS

Every public company must now include a statement relating to “changes in equity” in its financial statements.²⁰ The CAMA 2020 also requires every public company to display its audited accounts on its website.²¹

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.²² 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.²³ As was also the case under the Repealed CAMA, the members of the audit committee are not entitled to receive any remuneration.

UNCLAIMED DIVIDENDS

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.²⁴ 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.²⁵ Shareholders are not entitled to receive any interest on unclaimed dividends.

¹⁹ Section 240(2)
²⁰ Section 377 (2)(h)
²¹ Section 374 (6)
²² Section 404 (3)
²³ Section 404 (5)
²⁴ Section 429 (1)
²⁵ Section 429 (2)
MAJOR ASSET TRANSACTIONS

A company may not undertake a “major asset transaction” unless its shareholders have approved the transaction. 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, although the company’s articles may permit the company to approve such transactions by an ordinary resolution.

26 Section 342