



## CLIENT UPDATE

# THE BUSINESS FACILITATION ACT AND ITS IMPLICATIONS FOR CERTAIN CORPORATE MATTERS UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020

## Introduction

The Business Facilitation Act and its implications for certain corporate matters under the Companies and Allied Matters Act 2020

The Business Facilitation (Miscellaneous Provisions) Act 2023 ("BFA") was signed by the President on 8th February 2023 and is applicable throughout Nigeria. The primary objective of the BFA is to promote the ease of doing business in Nigeria by eliminating bottlenecks affecting smooth business operations. The BFA amends 21 business-related laws with the objective of removing bureaucratic constraints to doing business in Nigeria.

At Udo Udoma & Belo-Osagie, we have stayed close to all developments leading up to the Companies and Allied Matters Act 2020 ("CAMA"), as well as all amendments to it, and regulations published by the Corporate Affairs Commission ("CAC" – the Nigerian companies' registry) to implement provisions of the CAMA. In this update, we will highlight some of the amendments the BFA has made to the CAMA and the impact that these changes are likely to have on corporate entities in Nigeria.

## **1. Full Automation of the business registration process**

The BFA requires the Registrar-General of the CAC to ensure that all application processes at the CAC are fully automated from commencement to completion within 14 days of the commencement of the Act. It appears that this requirement applies not only to the business registration process but to any application processed by the CAC, including numerous post-incorporation applications. While the side note to section 8 of the BFA is titled “Registration of businesses,” the key phrase used in the section is “all application processes at the CAC...”, which suggests that the section relates to all CAC applications. As a practical matter, the CAC has increasingly automated its processes, but this has come with a fair number of teething problems, which the CAC still has to resolve. While the pre-incorporation applications at the CAC, which are mainly for the registration of businesses, were already automated as of the date of the enactment of the BFA, this is not the case in relation to all post-incorporation applications.

## **2. Additional ground for the exemption of foreign companies from incorporation**

The BFA provides an additional ground for granting foreign companies an exemption from the requirement to register a separate entity in Nigeria. While the existing grounds for exemption set out in section 78 of the CAMA 2020 have been retained, a new ground has been included which is that the National Assembly may prescribe exemptions from registration to foreign companies under any other enactment other than the CAMA 2020. This new ground for exemption from registration recognizes that other Acts, and not just the CAMA 2020, may grant exemptions to foreign companies from incorporation in Nigeria. An example is the Nigeria Export Processing Zones Authority (NEPZA) Act CAP N107 LFN 2004. Under the NEPZA Act, foreign companies can, on the basis of an exemption granted by NEPZA, operate within an export processing zone without the need to register a separate entity in Nigeria and without obtaining an exemption under the CAMA.

## **3. Increase of share capital by the board of directors**

The BFA amended section 127(1) of the CAMA 2020 by providing that a company may increase its issued share capital “...in a general meeting; or by a resolution of the board of directors, subject to the condition or direction that may be imposed in the Articles or by the company in general meeting.” Before the amendment, only members in a general meeting could pass a resolution for an increase in share capital. This was to safeguard the shareholders from dilution of their shareholding where the board increased the share capital

(which, under the CAMA 2020 also includes allotted all the newly created shares) without the sanction of the shareholders. It appears that this amendment is to make it easier for the company's share capital to be increased without having to wait till the next Annual General Meeting (AGM) or an Extra-Ordinary General Meeting (EGM) is convened.

#### **4. Authority of the board of directors to allot shares**

The BFA amended section 149(1) of the CAMA 2020 to bring it in line with the amendment to section 127(1) of CAMA. The board of directors may only allot shares upon the express authorisation by the members in a general meeting or by the articles of the company. Although the previous section 149(1), which expressly stated that the power to allot shares was vested in the company only in relation to a private company, and that such power may be delegated to the directors, was deleted by the BFA, there is nothing in the BFA that prevents a company in a general meeting from allotting shares. In practice, it is expected that both the company in general meeting or the board of directors, with the authorisation of the articles or company in a general meeting, may exercise the concurrent powers to allot shares. The approach to be adopted would be determined by business expediency and the peculiar circumstances of each transaction as well as any restrictions imposed by the shareholders either in general meeting or by prescription in the Articles, on the power of the board to allot shares.

#### **5. Mandatory pre-emptive rights to newly issued shares no longer applicable to public companies**

By limiting the provisions of section 142(1) of CAMA 2020 to private companies, the BFA eliminates the compulsory requirement for public companies to offer newly issued shares to their existing shareholders first. This comes as a relief, as the previous extension of pre-emptive rights to public companies made it difficult for such companies to structure schemes, private placements and other transactions involving the issue of their shares. The change to s. 142(1) will save public companies the cost and time they may encounter in carrying out a rights issue, especially where a rights issue is not the preferred structure for their recapitalisation objectives.

#### **6. Timeframe for exercising pre-emptive rights**

The BFA amended section 142(2)(c) of CAMA 2020 to provide more clarity on what constitutes a reasonable time within which a pre-emptive offer to existing shareholders may be accepted or declined. A pre-emptive rights offer must be accepted within 21 days, after which it shall be deemed declined. This would

help companies and investors save time and avoid unnecessary delays to transactions by existing shareholders who may not be in a financial position to exercise their pre-emptive rights or may not be interested in exercising their pre-emptive rights.

## **7. Abridged time for filing return of allotment**

The BFA has shortened the time within which a company is required to notify the CAC about the allotment of shares from one month to 15 (fifteen) days. It is important for corporate counsel and company secretaries to note this reduction in reporting time to avoid penalties for late filings of return of allotment of shares post incorporation.

## **8. Electronic Share Certificates**

The BFA introduces the use of electronic share certificates by providing a new subsection 171(7) of CAMA 2020 and amending section 181(1) of CAMA 2020 accordingly. The use of electronic share certificates will allow companies to adopt environment-friendly practices that align with global climate change and environmental protection aspirations through the reduction of paper-based document management systems. It will also increase flexibility in corporate secretarial functions and eliminate the time and costs of printing and delivering hard copy certificates to new shareholders.

## **9. Priority of charges**

The BFA amended section 207(4) of the CAMA 2020 to clarify the ambiguity between section 204 and the old section 207(4) of CAMA. The provisions of the old section 207(4) of CAMA 2020 provided that a fixed charge created by a company would take priority notwithstanding any provision in CAMA, including section 204, which provided a contractual exception to the rule that a fixed charge generally takes priority over a floating charge. With the amendment to section 207(4) of CAMA, by the insertion of the phrase, "...and without prejudice to the provisions of section 204..." the contractual rights of parties to restrict the ability of the creator of a floating charge to create a subsequent fixed charge is preserved, and where a subsequent fixed charge is created contrary to such restriction, such a fixed charge shall, in accordance with s. 204, be subordinated to the existing floating charge.

## 10. Newly defined terms under Chapter 9 of CAMA 2020

The BFA amended section 222(13) of the CAMA by defining “cash,” “financial collateral,” “financial instruments,” and “security interest.” The definitions were inserted for completeness and clarification of the terms used in Chapter 9 of CAMA in relation to debentures. The definitions are reproduced in the table below:

<b>Cash</b>	means money in any currency, credited to an account, or a similar claim for repayment of money and includes money market deposits and sums due or payable to, or received between the parties in connection with the operation of a financial collateral arrangement or a close-out netting provision
<b>Financial collateral</b>	cash or financial instruments
<b>Financial instruments</b>	includes — <ul style="list-style-type: none"> <li>(a) shares in companies and other securities equivalent to shares in companies,</li> <li>(b) bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradeable on the capital market ; and</li> <li>(c) any other securities which are normally dealt in, and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment).</li> </ul>
<b>Security interest</b>	means a — <ul style="list-style-type: none"> <li>(a) pledge;</li> <li>(b) mortgage;</li> <li>(c) fixed charge; or</li> <li>(d) charge created as a floating charge, where the financial collateral charged is delivered, transferred, held, registered or otherwise designated so as to be in the</li> </ul>

possession or under the control of the collateral-taker or a person acting on its behalf.

### **11. Virtual meetings for public companies**

The BFA has removed the restriction in s. 240 that granted only private companies the right to hold their general meetings electronically. With the deletion of the word, “private,” both public and private companies may now hold their general meetings electronically, provided that such meetings are conducted in accordance with the articles of association of the company.

### **12. Electronic notice of meeting**

The BFA amended section 244 of the CAMA 2020 to allow companies to give notice of meetings to their members electronically without restricting electronic communication to emails only. This allows companies to take advantage of all other means of electronic communication, including the use of electronic messaging applications.

### **13. Electronic voting**

The BFA amended the procedure of voting under section 248 of CAMA to include electronic voting as an alternative to the show of hands. This provision allows companies that hold their general meetings electronically on virtual platforms to utilise online polls and other means of electronic voting for decision-making.

### **14. Independent directors of public companies**

The BFA has amended section 275(1) of the CAMA to provide that at least one-third of the directors of a public company must be independent directors. Prior to this amendment, public companies were required to have a minimum of three independent directors. This amendment means that there is no longer a fixed number of independent directors that a company is expected to have. The number will be determined by the overall number of directors on the board on a case-by-case basis. One rationale behind appointing independent directors is the expectation that it would promote the quality of board decision-making and increase transparency and accountability in public companies. A higher percentage of independent directors on the board of public companies is expected to increase the ability of independent directors to influence the decision-making process at the board level.

To align with the amendment of Section 275 (1), the BFA also amended section 275(2) which had previously provided that a person who nominates the majority of the members of the board of directors of a public must nominate at least 3 independent directors. The BFA now provides that a person who nominates the majority of the members of the board shall nominate at least one-third of the persons to be appointed as independent directors. This amendment does not address the issue previously raised by this section of the CAMA 2020, which is whether mandating a controlling shareholder to nominate independent directors will achieve the objective of increasing the independent voices on the boards of public companies.

#### **15. Disqualification of a person from being a director on the ground of fraud, dishonesty, or unethical conduct**

The BFA amended section 283 (c) of the CAMA 2020, which previously provided that one of the grounds on which a person would be disqualified from acting as a director of a company was where such a person had been ‘suspended or removed under s. 288” of the CAMA 2020. Curiously, s. 288 does not contemplate the suspension of directors, but rather, sets out the process by which shareholders may remove a director. The previous s. 282(c) was controversial and caused great concern, because its effect was that any removal of a director as a matter of course under section 288 of CAMA, without any malfeasance or wrongdoing by such a director, would have automatically made such a person disqualified from being appointed as a director in another company. The amendment by the BFA has resolved this rather absurd criterion for the disqualification of a person from being appointed as a director in a company.

#### **16. Restriction from being a director of more than five public companies**

The BFA introduced a new section 307(3) of CAMA 2020 which reiterates that a person can only be a director of not more than five public companies but also goes on to state that where a person is a director in more than five public companies before the commencement of the CAMA 2020, such a person shall resign as a director of all but five of the companies not later than the next annual general meeting of the companies after the expiration of two years from the commencement of the CAMA 2020. This is in contrast with the old section 307 (3) which required the resignation of the director from the relevant companies to be done at the next annual general meeting of the companies after the expiration of two years from the commencement of the CAMA 2020.

## **17. Form and content of financial statements**

The BFA has expunged the requirement under section 378(1) of the CAMA 2020 that the financial statements of a company must comply with the contents of the First Schedule to the CAMA. The financial statements of a company are now only required to comply with the accounting standards prescribed by the Financial Reporting Council of Nigeria from time to time. This gives room for flexibility and adoption of global best practices as they evolve, without further amendment of the first schedule to the CAMA 2020.

## **18. Qualification as a small company**

The BFA introduced a new section 394 (2) to clarify that a company will qualify as a small company in any financial year after its first financial year, if the company meets the qualifying conditions provided in the CAMA 2020 for a small company, in the year under consideration and the preceding financial year. This amendment resolves the confusing provisions of the previous section 394(2).

## **19. Threshold for determining insolvency to be prescribed by the CAC**

Before the enactment of the BFA, a company was deemed to be unable to pay its debt (i.e., insolvent) when it is indebted to a creditor to a sum exceeding N200,000 (two hundred thousand Naira) and had neglected to pay the sum owed for three weeks after the creditor had served a demand notice demanding payment. The BFA, however, has amended section 572 by deleting the N200,000 threshold and instead, stating that the monetary threshold shall be determined by a regulation issued by the CAC from time to time.

## **20. Winding-up and Administration: fraudulent preference**

The BFA amended section 658(6) of the CAMA by clarifying the period within which acts of preference or undue advantage (i.e., fraudulent preference) that are given to a creditor in the eve of insolvency, may be invalidated upon the onset of insolvency. Acts of fraudulent preference given within two (2) years preceding the onset of insolvency will be liable to be deemed invalid. Before the enactment of the BFA, the CAMA 2020 did not specify how many years prior to insolvency may be scrutinised to determine if any acts of fraudulent had been committed.



## 21. Deletion of the definition of an Insolvency Practitioner

The BFA amended section 868 of the CAMA 2020 (interpretation section) by deleting the definition of an Insolvency practitioner which defined an insolvency practitioner as “a legal practitioner within the meaning of the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an act of the National Assembly”. This deletion was required because the definition did not align with the provisions of the CAMA 2020 (section 705) on the persons who are permitted to act as insolvency practitioners.

### Conclusion

The BFA is a much-welcome development as it makes some key amendments to the CAMA just less than three years after the CAMA 2020 was passed. The changes made by the BFA address concerns that have been expressed by the business community including some of the issues presented to the National Assembly Business Environment Roundtable (NASSBER) for consideration during the review of several CAMA amendment bills before the National Assembly. Some of the issues already addressed by the BFA include:

- limiting mandatory pre-emptive rights to private companies only;
- permitting public companies to hold virtual meetings; and
- removal of a director will not disqualify the director from appointment to other boards.

There are, however, still errors in the CAMA 2020 that BFA did not address, and it is hoped that other opportunities will be presented for further amendments to the CAMA 2020 by the 10th National Assembly. At UUBO some of the changes we would like to see include:

- clarifying the right of existing private companies to convert into single-member companies, by deleting the provision in section 571 (1) of the CAMA 2020 that makes such conversion a ground for winding up the company;
- clarifying the criteria for persons who may be appointed as independent directors, such that including whether the criteria should be left to codes of corporate governance rather than the CAMA;
- restoring the provisions clarifying how a company with unissued shares can cancel them by resolution of the company,
- clarifying whether share transfers should be filed at the CAC and if so, requiring the CAC to prescribe a form for this purpose.

We, therefore, expect and would welcome further amendments to the CAMA 2020 in view of the lingering unresolved issues that have come to light as the business community works through the new opportunities and challenges that the CAMA 2020 provides.

### **Disclaimer**

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