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CAMA 2020 - DRAWING THE CURTAINS ON UNISSUED SHARES OF A COMPANY

NEWS LETTER

INTRODUCTION

The share capital of a company plays a vital role in the capital structure of the company and is a key element of companies' equity investment which determines ownership and control. Share capital is also useful in measuring the capitalisation of companies and determining compliance with regulatory thresholds for companies operating in specific sectors.

The promulgation of the Companies and Allied Matters Act ("CAMA") 2020 into law in August 2020 changed the landscape for the operation and regulation of companies in Nigeria. Amongst other changes, CAMA 2020 abolished the concept of Authorized Share Capital ("ASC") for companies and introduced a new regime.

THE OLD REGIME

Under the old regime provided for under CAMA 1990, companies had an ASC, which used to be the total share capital in a company. The ASC consists of the companies' Issued Share Capital ("ISC") i.e. share capital which has been allotted to shareholders, and Unissued Share Capital ("USC") i.e. share capital which has not been allotted to any shareholder. In the old regime, at least 25% of the ASC must be ISC and companies could have up to 75% USC.[1]

In the old regime, companies enjoyed the flexibility of making upfront payment of the necessary taxes and fees on their USC and allotting shares as the need arise, but this has now changed in the new regime.

THE NEW REGIME

The promulgation of CAMA 2020 displaced the old regime as CAMA 2020 does not recognise the concept of ASC; indeed, all references to ASC under the old regime has been replaced with ISC. In fact, in defining share capital, CAMA 2020 provides that share capital means the issued share capital of a company at any given time.[2] This presupposes that CAMA 2o2o only recognises issued share capital with no provision for a company to have unissued shares.

However, the position under CAMA 2020 does not expressly state what should be done with USC from the old regime. To provide direction on the provisions CAMA 2020, the Companies Regulation 2021 ("CR") was published by the Corporate Affairs Commission ("CAC"). Rule 13(1) of the CR mandates all companies with USC to ensure that their shares are fully issued no later than 30th June 2021. However, by a publication dated 16th April 2021, the CAC extended the deadline for compliance to 31st December 2022.[3]

[1] Section 27 (2)(b) CAMA 2020. See also section 99 (3) CAMA 1990; section 99(4) CAMA 1990; section 103 (a) CAMA 1990.
[2] Section 868 of CAMA 2020
[3] CAC, "PUBLIC NOTICE: existing companies and the requirements of issued share capital under the Companies and Allied Matters Act 2020" available at https://www.cac.gov.ng/public-notice-existing-companies-and-the-requirements-of-issued-share-capital-under-the-companies-and-allied-matters-act-2020/

COMPLYING WITH THE NEW REGIME

Companies are advised to comply within the new timeline for compliance as it does not appear the CAC will extend the deadline further. Companies that do not comply within the stipulated timeline may be liable to pay as high as N1,000 (one thousand Naira) fine for each day of default pursuant to the penalties provisions in the CR. In addition, the USC shall not be recognised as forming part of the company's share capital of the company until it is fully issued or reduced accordingly.

Compliance options available to companies include carrying out a bonus issue, allotment to new shareholder(s), share cancellation and reduction of capital. The appropriateness of each option is examined, on a general basis, below:

- **BONUS ISSUE**: Bonus issue involves issuing the unissued shares to existing shareholders in the proportion of their shareholding at no cost to shareholders. It may be considered where the company wishes to distribute its unissued shares to the existing shareholders and maintain the existing shareholding structure at no cost to existing shareholders. The option is ideal when the company has sufficient shareholders' fund to make up for the bonus issue;

- **RIGHTS ISSUE**: Rights issue involves offering the unissued shares to existing shareholders in the proportion of their shareholding. However, shareholders who take up the offered rights will be required to pay for the additional shares they take up. Where shareholders are unwilling to take up some or all the shares, the remaining shares may be cancelled by the company or the company may issue such shares to other existing shareholders or new shareholders, depending on the provisions of the company's article of association;

- **REDUCTION OF CAPITAL**: This option is available to companies whose Article of Association authorises reduction of capital. To reduce share capital, the company must pass a special resolution (resolution approved by ¾ of members present and voting), either obtain the consent of its creditors to the reduction or discharge/determine/secure the debt/claim of such creditors and obtain a Court order confirming the reduction. Subsequently, the minutes of meeting (as approved by the Court) where the resolution for reducing of share capital was passed, the amended Memorandum of Association (containing the new share capital) and the Court order confirming the reduction are filed with the CAC.

- **SHARE CANCELLATION**: Companies can cancel unissued shares by filing a shareholders' resolution and an amended Memorandum of Association to that effect. Indeed, share cancellation is a more seamless process than reduction of capital and is therefore a preferred option for companies.

- **ALLOTMENT TO NEW SHAREHOLDER(S):** As a preliminary point, it must be noted that companies looking to issue shares to new shareholders are required to first offer the shares to existing shareholders on a pro-rata basis[4]. Where the existing shareholders are unwilling or unable to take up the shares, the company may then allot the shares to new shareholders.

CONCLUSION

It is important that companies not only comply with the new regime, but also adopt the most appropriate options or combination of options. The ideal option or combination of options can only be determined on a case-by-case basis, taking account of the realities of the company and its shareholders.

[4] Section 142, CAMA 2020

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