ICSAN'S POSITION PAPER ON THE COMPANIES AND ALLIED MATTERS ACT 2020

1. INTRODUCTION

After thirty years of guiding our corporate practices with the erstwhile foremost substantive corporate legislation, Companies and Allied Matters Act 1990 (as amended), the corporate Nigeria finally, severed her umbilical cord with the moribund CAMA 1990, with the enactment of a new corporate law, Companies and Allied Matters Act 2020 (CAMA 2020), which was signed into law by President Muhammadu Buhari on August 7, 2020.

As expected, this new law features some notable innovations aimed at catching up with current corporate developments in the last three decades. These innovations range from provisions meant for entrenching the ease of doing business, to the codification of some best practices of Corporate Governance.

However, there are also due exigencies which the law fails to provide for while we have some provisions which have engendered controversies, some of which appear serious enough to warrant review of the Act as soon as possible.

The Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN) is a statutory body established by Act No. 19 of 1991 (now CAP I13 LFN 2004) to provide education and conduct examinations leading to the professional qualification as a Chartered Secretary and Administrator. ICSAN is reputed for being a leading global voice on good Corporate and Public Governance.

ICSAN has also consistently been in the vanguard of public policy advocacy and contributing to the socio-economic welfare and good governance in Nigeria.

Therefore, ICSAN shares the rationale and values behind this new substantive corporate law which is to overhaul effective administration of corporate regulation and entrench best practices in corporate culture in the country.

The Institute hereby offers the following insights which highlight the strengths and areas of improvement in the new law with a view to sensitizing the stakeholders to areas requiring review and possible amendments.

2. MAJOR HIGHLIGHTS OF THE ACT: OUR PERSPECTIVES

Major highlights

Some of the major provisions of the new CAMA 2020 include the following:

(i) Provision for electronic filing (S. 860); as well as electronic share transfer (S.176) and e-meetings for private companies (S. 240);
(ii) Reduction of filing fees of charges to not more than 0.35%: [S.222 (12)];
(iii) Provision of single Member/ Shareholder Companies [S.18 (2)];

(iv) Prohibition of the appointment of a director to hold the office of the chairman and chief executive officer of a public company [S.265 (6)];
(v) Expansion of Ordinary Business at the AGM to include the disclosure of remuneration of Managers; [S. 238];
(vi) Statement of compliance need not be signed by a lawyer [S.40 (1)];
(vii) Merger of Incorporated Trustees between two or more associations with similar aims and objects **[**S.849];
(viii) Provision for Limited Liability Partnership & Limited Partnership [S.746]
(ix) Business salvaging provisions for insolvent companies [S.443- S.549], Netting [S.718 to S.721];
(x) Optional use of a corporate common seal [S.98];
(xi) Exemption of a small company as defined in S. 394 or any company having a single shareholder from appointing auditors [S.402];
(xii) Exemption of a small company as defined in S.394 from the obligation to appoint a company ssecretary [S.330 (1)];
(xiii) Substitution of authorized share capital with minimum issued share capital [S.27]
(xiv) Posting of audited accounts of public companies on websites. [S.374 (6)];
(xv) Disclosure obligations on individuals with significant control in companies and disclosure of the capacity in which the shares are held e.g. as beneficial owner or as a nominee. [S. 119];
(xvi) Restriction of individuals from multiple directorships of more than five public companies at any one time. [S.307(2)];
(xvii) Provision for the acceptance of electronic signature. [S. 101];
(xviii) Provision for instruments of transfer of shares shall include electronically stored instruments of transfer. [S. 176 (1)]

Our perspectives

Most of the above innovations are to remove the regulatory barriers that impede the ease of doing business. They are to expand business operations, deepen entrepreneurial activities and stimulate growth and economic development.

Section 307 (2) stating that no person shall be a director in more than five public companies, is a positive development as it will reduce conflict of interest, enable individuals to give their best to the boards they serve rather than to merely “tick the box” on their resume.

Furthermore, sections 101 and 176 (1) are also welcome provisions for giving recognition to electronic mode in the execution of corporate actions.

We also believe that the aspects of the innovations that codified some notable principles in Corporate Governance [like S.265 (6)] will go a long way in entrenching best governance practices in the private sector.

3. SOME CONTROVERSIAL AREAS OF THE ACT: OUR POSITION

A. Requirement to publish details of unclaimed dividends in two national dailies under S. 429

Section 429. (1) provides that details of unclaimed dividends should be published in two national newspapers.

Comment

While we duly recognize the intention behind the provision above which is aimed at solving the challenges of reducing the burden of unclaimed dividends, this provision is introducing other issues of concern. In precise terms, publication of details of unclaimed dividends in two national dailies is capable of exposing shareholders' information to fraudsters who may take undue advantage of such information to creatively formulate a means to access dividends of innocent shareholders.

Furthermore, the right to data privacy of the shareholders could be compromised by such undue publicity leading to unintended infringement of rights. The Corporate Affairs Commission (CAC) and the government would need to review this particular provision, as we must be mindful not to allow fraudsters capitalise on the system as well as ensure that there is no violation of the right to privacy. A better approach would for the CAC to work with the Securities and Exchange Commission (SEC) and the Central Bank of Nigeria (CBN) to simplify the e-dividend management system. They should also work with the Chief Judges of the High Courts of all the States and the Federal Capital Territory to remove the bottlenecks in processing probate / letter of administration and abolishing the requirement of the payment of 10% estate duty since the shares are not to be sold.

B. New requirement of five persons in the Audit Committee S. 404 (3)

Under the old CAMA 1990, the Statutory Audit Committee was made up of six persons. However, CAMA 2020 has reduced this to five by S. 404 (3).

Comment

This development seems to have created some concerns as many companies had already held their Annual General Meetings (AGMs) under the CAMA 1990 before the new one was signed on August 7, 2020. Thus, the said companies had already elected six persons as members of the Audit Committee. The pertinent

question is how do companies manage this challenge given the fact that members of the Committee can only be appointed at the AGM?

We are of the view that the above concerns could be addressed by the Repeal and Saving provisions in S. 869 of CAMA 2020 such that the status quo will continue to be in force in the meantime before the next AGM by companies.

C. Relief of "Small Companies" of obligation to appoint Company Secretary under S. 330 of CAMA

Section 330 of the CAMA 2020 provides that "**Except in the case of a small company**, every company shall have a secretary"

Comment

There have been some controversies on the scope of the provision of S.330 with inaccurate interpretations in some quarters that the section relieves every private company from the obligation to appoint a company secretary. This is an erroneous interpretation. What the section provides is to make it mandatory for all companies to have a company secretary, except those that qualify as a "small company" which may not appoint a company secretary, if they so elect.

The requirements to be qualified as a "small company" are stated in section 394. The section states that a company is qualified to be a small company if:
(a) it is a private company;
(b) its turnover is not more than N120,000,000 or such amount as may be fixed by the Commission from time to time;
(c) its net assets value is not more than N60,000,000 or such amount as may be fixed by the Commission;
(d) none of its members is an alien;
(e) none of its members is a government or government corporation or agency or its nominee; and;
(f) in the case of a company having share capital, the directors between themselves hold at least 51% of its equity share capital.

It should be noted that the CAMA 2020 is based on the framework of the Ease of Doing Business of the Federal Government. Therefore, Section 330 does not absolve any company from appointing a company secretary except those categorized as "small company" as stated above.
We expect that many forward looking private but "small companies" for whom the appointment of a secretary has been made optional, will nonetheless

appoint a professional company secretary because they understand the relevance and benefit in building a sustainable corporate institution.

D. Limitation of electronic AGM to private and small companies (S. 240)

Under S. 240 of CAMA 2020 allows private companies, small companies and single-shareholder companies to hold its AGM electronically.

Comment

We believe that the provision allowing private and small companies to hold AGM virtually is a very good step in the right direction as it fosters greater ease of doing business and addresses the challenges of COVID 19 pandemic.

CAMA 2020 should have extended this concession of holding AGM electronically to public companies in order to encourage more participation of the shareholders rather than the present experiment of holding AGM by proxy.

E. Power of the Minister to remove a member of the Board under S. 3 (2)

Under Section 3 (2), the Minister is vested with the power to remove a member of the board, with the approval of the President, if he is of the opinion that membership of such a person is not in the best interest of the Commission.

Comment

We are of the opinion that this provision ought to have incorporated the principles of fair hearing in order not to vest the Minister with arbitrary power of removal of board members of the Commission. Since each member of the board represents different sectors of stakeholders, transparency and fairness require that to remove a member, the Act should have specified the grounds for the proposed removal, the grounds upon which such opinion is formed by the Minister and provision for fair hearing so that the member can respond to the allegations before a decision will be taken.

F. Lack of provision for the office, qualification, roles, appointment and removal of the Secretary for CAC

CAMA 2020 has no provision for the office, qualification, roles, appointment and removal of the Secretary for the CAC. Section 6(4) only provides that "The Board **may** appoint any of its officers to act as secretary at any of its meetings."

Comment

That there is no office created by CAMA 2020 as the office of the Secretary of CAC is a low point. It is not proper that the CAC regulating the affairs of private and public companies that are required to appoint company secretary do not have a provision for the office of a secretary. The law only gives the Board the

discretion to appoint any of its officers to act as secretary at any of its meetings just to take minutes of the meeting. Consequently, the law does not provide for the officer responsible for compliance, governance and strategic roles of the secretary of the CAC. It is strange that the Board may choose any officer to act secretary as no qualification is prescribed. In addition, the Board may appoint different officers to act as secretaries for different meetings in a year thereby creating a memory gap and big governance issue for the Board and CAC.

There are many other agencies as well as ministries and departments which are involved in diverse activities in corporate Nigeria which have laws providing that they should have a Secretary serving their boards with the functions, roles and responsibilities of such a secretary clearly spelt out in their laws. It is therefore strange that the CAMA 2020 does not make a similar provision for the CAC.

The ideal thing is for CAMA 2020 to not only make provision for the appointment of a statutory secretary for the CAC but to also specify the qualifications, experience, appointment, reporting lines and mode of removal of such a Secretary as provided in CAMA 1990 and 2020 for the company secretaries of public companies in line with good corporate governance practice .

G. Absence of an omnibus clause for the Minister to make some regulations

Unlike what obtained in Section 16 of the CAMA 1990, CAMA 2020 does not contain an omnibus clause empowering the Minister to make regulations generally with the approval of the National Council of Ministers or other authorities under the Act (except in relation to specifically defined issues).

Comment

There should have been an omnibus clause empowering the Minister to make regulations generally to address any loopholes in the law as was provided in Section 16 of CAMA 1990 because there is no law that can envisage all possibilities and challenges.

H. Introduction of disclosure of Managers remuneration as part of Ordinary Business at AGM (S. 238)

The ordinary business of the AGM of a company has by virtue of Section 238 been expanded to include the remuneration of managers of the company.

Comment

By expanding the scope of the traditional ordinary businesses at the shareholders meeting to incorporate disclosure of remuneration of managers, the Act introduced some unnecessary controversies. To start with, CAMA 2020 itself does not define who a "manager" is to know the scope of the disclosure.

Furthermore, the purpose of the disclosure is not stated in the law: is it for just information or for the shareholders to approve by voting on such disclosed remuneration? If it is just for disclosure, then, what is the purpose considering that the remuneration of all employees is already disclosed in the accounts?

I. Power of CAC to suspend erring Trustees of associations (Section 839)

Section 839 (1) empowers the Commission by order to suspend trustees of an association and appoint interim managers to manage the affairs of the association where it reasonably believes that-

(a) There is or has been misconduct or mismanagement in the administration of the association;

(b) it is necessary or desirable for the purpose of;

i. Protecting the property of the association;

ii. Securing a proper application for the property of the association towards achieving the objects of the association, the purpose of the association of that property or of the property coming to the association;

iii. Public interest; or

(c) the affairs of the association are being run fraudulently.

Comment

This is by far the section that has generated the most heated controversy so far, especially from the religious circle, which construes it as an attempt to subjugate the religious institutions under state control.

We believe that this section does not vest in the Registrar General of the CAC any arbitrary power since this can only be done by the order of court as stated in sub-section 2 which provides as follows:

"The trustees shall be suspended by an order of Court upon the petition of the Commission or Members consisting of one-fifth of the association, and the

petitioners shall present all reasonable evidence or such evidence as requested by the Court in respect of the petition."

The real controversial provision is section 839 (7) which provides that "***Where at any time after the Commission has made an enquiry*** into the affairs of the association, ***it is satisfied*** as to the matters mentioned in subsection (1), it may suspend or ***remove*** –

a) any trustee who has been responsible for or privy to the misconduct or mismanagement or whose conduct contributed to or facilitated it; or
b) by order of the Court, establish a scheme for the administration of the association."

It is our view that if the court is only given the power to suspend **(and not to remove)** the trustees under section 839(2), then, it becomes an issue when the CAC after an enquiry can either suspend or remove a trustee without the order of the court. There appears to be a drafting error in section 839 and we expect that both suspension and removal of a trustee by the CAC must be with the order of the court.

J. Obligation of the PLCs to have three independent non-executive directors (S, 275)

Section 275. (1) provides thus: "A public company shall have at least three independent directors."

(2) "In a public company, any person who nominates candidates for the board who would comprise a majority of the members of the board shall nominate at least three persons who would be Independent directors."

Comment
We think this provision is controversial as it does not take cognizance of the peculiar size and structure of some public companies. Imagine a public company with six directors, and three of them are automatically required by this new law to be independent non-executive directors. How many of them will be Executive Directors especially if the nature of the company requires certain executive functions by directors, and how many are to be non-executive directors?

Besides, the requirement that "any person who nominates candidates for the board who would comprise a majority of the members of the board shall nominate at least three persons who would be independent directors" is also problematic. This is because, the term "independent non-executive director" presupposes

someone with no pre-existing link with any vested interest and thereby free from subjective influences and biases. Now, it appears it would be self-contradictory to expect someone to be nominated solely by "any person who nominates candidates for the board, who would comprise a majority of the members of the board" and expect him or her to be truly independent.

Another grouse with this provision is the tendency for it to undermine the voice of minority shareholders since it allots pre-conceived seats to "independent non-executive directors" who would be nominated by the nominator of most of the board members. This is tantamount to crowding out the minority who are already disadvantaged by their disproportionally low representation on the board.

Furthermore, the definition of independent director to include a person who does not own more than 30% of the shares of the company is contrary to similar definition in the Nigerian Code of Corporate Governance 2018 which states that shareholding of independent director should not be more than 0.01% of the shares of the company. The major challenge is: how can a person who own 30% shares be independent? Such a person will be an "interested" independent director.

K. Non-recognition of electronic shareholding / allotment of shares

CAMA 2020 does not make specific provision for electronic shareholding / allotment of shares in line with the current trend in the capital market. The law only provides for electronic instrument of transfer.

Comment

This non-recognition of electronic shareholding / allotment seems to negate the entrenched practice introduced by the Central Securities Clearing System (CSCS) with the dematerialization of shares. We are all familiar with the problems posed by the issuance of physical share certificates including but not limited to delays in issuance and dispatch of certificates, delays in verification of share certificates, loss, theft and forgeries of certificates. One would have expected CAMA 2020 to give due recognition to the concept of electronic shareholding and electronic allotment of shares and thus have a substantive legal provision on the concept.