The Business Facilitation Act – Allotting Publicly-Offered Securities

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Introduction

On February 8, 2023, the erstwhile President Muhammadu Buhari assented to the Business Facilitation (Miscellaneous Provisions) Act, 2022 (the "**BFA**"). The BFA aims to improve the Nigerian business environment by removing administrative hindrances through the amendment of extant legislation to facilitate business activities. BFA, s. 1(1). The BFA has eleven (11) sections and a Schedule containing amendments to twenty-one (21) existing statutes, including the Investments and Securities Act, No. 29, 2007 (the "**ISA**") and the Companies and Allied Matters Act 2020 ("**CAMA**"), to mention a few.

This article critically analyses the possible interpretation and implications of the BFA's amendment of the provisions of the ISA as it relates to the allotment of shares to invited members of the public and the power of private companies to allot securities to the public.

Public Offering of Securities

The offering of securities is making securities available for subscription or purchase. A *public* offering is an invitation by a company to the public to subscribe to or purchase its securities. Subsequent to receiving a subscriber's interest in the securities offered during a public offering, the company thereafter allots or issues the securities to the subscriber.

In some jurisdictions, a distinction is drawn between allotment and issuance of securities. In the United Kingdom, an a*llotment* of securities is the offering of ownership rights to securities to subscribers while the *issuance* of securities, on the other hand, is the completion of registration of the shares in the name of a subscriber in the register of the issuer.[2] This distinction would appear to be pivotal to the discourse, since the BFA specifically refers to 'allotment', and not 'issuance'. However, it is not clear that this distinction is significant especially under CAMA, where there are a number of references to '*issue or allot*' as if they are interchangeable. 'Issuance' can mean: (a) creation; (b) offering; and/or (c) allotment. See CAMA, s. 148(1) where there is reference to "*issue or allot shares"* and the *"issue or allotment of those shares*".[3] In some cases, CAMA refers to the *allotment* of newly *issued* shares[4].

Public offerings of securities (including their issuance/allotment) are regulated by the ISA, the Securities and Exchange Commission ("**SEC**") Rules, 2013 (with its various amendments) ("**SEC Rules**") and the CAMA. By ISA, s. 69, an invitation to the public includes both an offer or an invitation to make an offer to purchase securities through various media such as publication, newspaper advertisement, broadcast, cinematography, circulation among individuals or any other means, provided that the invitation can be calculated to make such securities available to persons other than those receiving the offer or invitation.

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[1] The authors are grateful to Mr. Segun Omoregie for his insightful comments on the early draft of this Article.

[2] See Sections 558 of the UK Companies Act, 2006; Lexis Nexis, 'Allotment and Issue of Shares- Fundamentals' < https://www.lexisnexis.co.uk/legal/guidance/share-allotment-issue-pre-emption-fundamentals > accessed on September 18, 2023.

[3] CAMA, s. 148 provides that "Where a company has purported to issue or allot shares and the issue or allotment of those shares was invalid by reason of any provision of this Act or any other enactment, of the articles or the terms of issue or allotment were inconsistent with or unauthorized by any such provision, the company may within 30 days of an application made by the holder, mortgagee of those shares or by a creditor of the company, and by special resolution, validate the issue or allotment of those shares or confirm the terms of the issue and allotment, as the case may be."

[4] See CAMA, ss. 142(1) and 150(1). CAMA, s. 142 provides that "A company shall not in any event allot newly issued shares unless they are offered in the first instance to all existing shareholders of the class being issued in proportion as nearly as may be to their existing holdings".

The ISA, s. 67(1) – The Pre-Amendment Position

Before the BFA, the ISA, in s. 67(1) identified (a) who could invite the public to subscribe to securities, and (b) permissible circumstances for an invitation to be made to the public. ISA, s. 67(1) provides that:

> "*No person shall make any invitation to the public to acquire or dispose of any securities of a body corporate or to deposit money with any body corporate for a fixed period or payable at call, whether bearing or not bearing interest unless the body corporate concerned is-*
>
> *(a) a public company, whether quoted or unquoted, and the provisions of sections 73 to 87 of this Act are duly complied with; or*
>
> *(b) a statutory body or bank established by or pursuant to an Act of the National Assembly and is empowered to accept deposits and savings from the public or issue its own securities (as defined under this Act), promissory notes, bills of exchange and other instruments:*
>
> *Provided that nothing in this subsection shall render unlawful the sale of any shares by or under the supervision of any court or tribunal as may be authorised by law."*

Thus, invitation to the public to subscribe to securities was permissible in respect of the:

(a) (i) acquisition or disposal of securities of a body corporate, or (ii) deposit of money, for a fixed period or payable at call, whether bearing or not bearing interest, with a body corporate which must be either (A) a quoted or an unquoted public company and has complied with ISA, ss. 73-87 (which largely contain provisions on the content, advertisement and registration of a prospectus, and civil and criminal liabilities for misstatements in a prospectus), or (B) a statutory body or bank established by an Act of the National Assembly and given the power to accept deposits and issue its securities; and

(b) authorized sale of shares by law under the supervision of any court or tribunal.

The ISA, s. 67(1) – The Post-Amendment Position

BFA, schedule 1, para. 43 (subsequently referred to as "**BFA, para. 43**" or the "**Amendment"**) has now replaced the above provisions on the invitation to the public to subscribe to publicly offered securities with two key additional criteria for the allotment of publicly offered securities.[5] One is that, in the case of a public company, the minimum amount required to be raised in the opinion of the directors of the company as stated in the company's prospectus pursuant to para. 2 of the Third Schedule of the ISA must have been subscribed to and the sum payable has been paid and received by the company. The other is that, in the case of a private company, such allotment is carried out through lawful means as may be prescribed by SEC regulation.

In detail, BFA, para. 43 amends ISA, s. 67(1) by replacing the same with a new s.67(1) provision, *viz*:

"No allotment shall be made of any securities of a company offered to the public for subscription unless in the case of a: –

[5] It is noteworthy that there are other criteria in the ISA required to be fulfilled in relation to the allotment of publicly offered securities. See ISA, ss. 89 - 92.

(a) *a public company, the amount stated in the prospectus, as the minimum amount, which in the opinion of the directors, is required to be raised by the issue of share capital in order to provide for the matters specified in paragraph 2 of the Third Schedule of this Act, has been subscribed and the sum payable on application for the amount so stated has been paid to and received by the company; or*

(b) *private company, through any lawful means, as the [Securities and Exchange] Commission may by regulation prescribe*."

Possible Implications of the Amendment

We have set out below possible implications of BFA, para. 43:

A. Are Private Companies now Permitted to Allot Securities to the Public? Prior to the Amendment, the ISA provided that only public companies could invite the public to subscribe to their securities and subsequently *allot* such securities to the public. Private companies, on the other hand, could *allot* their securities so far it is not a product of a public invitation within the meaning of the ISA. Now, by BFA, para. 43, in addition to public companies, private companies may become entitled to *offer* securities to the public and *allot* those shares as SEC may prescribe by regulation.

CAMA, s. 22(5)(a) provides that, "*[a] private company shall not,* ***unless authorised by law,*** *invite the public to (a) subscribe for any share or debenture of the company*". Given the provision of CAMA, s. 22(5)(a) which prohibits private companies, unless so authorized by law, from offering their securities to the members of the public, the intention of the Amendment remains unclear. Does the BFA (a) permit private companies to invite the public to subscribe to publicly offered securities, or (b) merely reiterate the existing position of the law that private companies can allot securities provided the public is not invited?

The BFA does not authorize private companies to invite the public to subscribe to shares or debentures. Rather, it purportedly permits private companies to *allot* securities offered to the public further to any regulations that may be issued by the SEC. Consequently, to the extent that private companies cannot yet offer securities publicly, the power to allot such securities further to a public offering will not arise. Moreover, since the BFA does not mandate nor compel the SEC to issue such a regulation, those provisions are, at best, prescriptive. Thus, the Amendment appears to have done very little to change the *status quo* — the securities of private companies can neither be offered publicly nor allotted or issued further to a public offering.

Further, the Amendment raises an interesting question. Is it not premature for the BFA to permit private companies to *directly* allot their securities to the public when there is no provision in the first place permitting private companies to invite the public to subscribe to such securities? Arguably, it is indeed premature. "*You cannot put something on nothing and expect it to stay there. It will collapse.*" See *MacFoy v United Africa Company Limited (West Africa)* (1961) 3 All ER 1169.

Second, can a regulation by the SEC permitting private companies to *offer* securities to the public and subsequently *allot* their securities constitute the requisite legal authorization as contemplated under CAMA, s. 22(5)(a) (i.e., an Act of the National Assembly)? We think not. The BFA recognizes that private companies can allot securities but does not provide that private companies may invite the public to subscribe to their securities (which is what CAMA prohibits). As such, even with a regulation by the SEC permitting private companies to allot shares, the provisions of the BFA are

redundant in the absence of any law authorizing private companies to publicly offer their securities. It is settled law that a statute can only be amended or repealed by another statute; a statute cannot be amended or repealed by a subsidiary legislation. See *Phoenix Motors Ltd v National Provident Fund Management Board* (1993) 1 NWLR (Pt. 272) 718 at728 (CA); *Kuusu v. Udom* (1990) NWLR (Pt 127) 421 (SC). Conversely, it can be argued that any proposed regulation by the SEC would be a subsidiary legislation fulfilling the 'unless authorized by law' requirement in CAMA, s. 22(5)(a).

B. The Minimum Amount Payment Requirement: BFA, para. 43 now requires that before an allotment by a public company is made, the minimum amount stated in the prospectus must have been paid by the subscribers and received by the company. The requirement for the payment of the stated minimum amount will ensure that companies raise the capital needed, as ascertained by the directors in charge of the management of the company. This has extended the application of ISA, s. 90, which requires allotment to be made only where the level of subscription for securities exceeds the minimum percentage prescribed by the SEC from time to time. Furthermore, by ISA, s. 91(1), issuing houses are to hold money deposits paid for securities in a separate account pending allotment. Since all deposits for securities would be received by the issuing house(s), issuing houses need to guide/liaise with issuers on fulfilling this requirement during such allotments.

C. Trading in the Primary Market: BFA, para. 43 only applies to allotment of securities to the public for subscription, as opposed to the pre-amendment provisions which covered both acquisition and disposition of securities. It can be argued, and rightly so, that the Amendment only envisages a primary market arrangement and does not factor secondary market activities of disposal of securities initially subscribed to and issued.

D. Incoherence in the Rules on Invitation to the Public: Prior to the Amendment, the primary focus of the ISA, s. 67 was invitation to the public and not allotment of securities. The marginal note to the ISA, s. 67 offers guidance on this.[6] The current provisions on allotment can be argued to have removed the prohibition on the *offering* of securities (under the ISA, s. 67(1)). Consequently, the provisions of ISA, s.67(2)-(4) (*penalty and remedies for breach of provisions regulating invitation to the public)* have become redundant, as far as the ISA is concerned. Please note that to the extent that the restrictions on the public offerings by private companies are also contained in SEC Rules, the restrictions will continue to apply unless the SEC Rules are amended or repealed. In our view, the Amendment should have been an additional provision to the ISA, s. 67(1) rather than a replacement.

Conclusion

The amendment of ISA, s. 67(1) by BFA, para. 43 provides additional regulation on the allotment of securities and purportedly now seeks to allow private companies to allot their securities publicly.

The Amendment shows that the draftsmen are not conversant with statutory provisions on the subject and appears disjointed from existing provisions on what it might seek to address. There may be a need for the draftsmen to take a deeper look into BFA, para. 43 to clarify identified grey areas and address the lacuna caused by the Amendment.

[6] The marginal note reads "Control of Invitations to the Public."

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