Exploring The Options Open To Private Companies To Publicly Offer Securities On An Exchange

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Introduction

Private companies, under the Companies and Allied Matters Act, 2020 (as amended) (the "**CAMA**"), are prohibited from publicly offering their securities or inviting the public to subscribe to their securities. However, that prohibition is not absolute as there are a number of ways a private company may publicly offer securities owned directly or indirectly by it. In the paragraphs that follow, we examine these methods in fuller details. This article also examines the treatment of publicly offered issuances by private companies in the United Kingdom, South Africa and India. However, even with the enactment of the Business Facilitation Act, it seems that the position of private companies is not much better than it was before. As such, this article concludes that the indirect modes of public offerings remain the best available options for private companies that wish to offer their securities to the public.

The Options Open to a Private Company Seeking to List its Securities

Section 22(2) of CAMA provides that subject to the provisions of the articles, a private company may restrict the transfer of its shares. The section additionally provides that(a) the company shall not, without the consent of all its members, sell assets having a value of more than 50% of the total value of the company's assets ; (b) a member shall not sell that member's shares in the company to a non-member, without first offering those shares to existing members ; and (c) a member, or a group of members acting together, shall not sell or agree to sell more than 50% of the shares in the company to a person who is not then a member, unless that non-member has offered to buy all the existing members' interests on the same terms.

Section 22(5) further 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; or (b) deposit money for fixed periods or payable at call, whether or not bearing interest."

The import of the aforementioned provisions is that there is a restriction on private companies, preventing them from inviting the public to subscribe to their securities, subject only to authorization by law. In light of the foregoing, it is unlikely that a private company as-is may lawfully offer its shares shares to the public. However, such public offering may be achieved in two broad modes- the indirect mode and direct mode.

Indirect Modes of Public Offer of Securities

If a private company wishes to have its securities, particularly their shares, listed on a stock exchange, there are certain options open to them. They are: (a) conversion/re-registration; (b) special purpose acquisition company; (c) reverse merger; and (d) scheme or share swap.

A. Conversion/Re-registration

A private company may explore a conversion or re-registration as a public company in order to list its securities. The procedure for the conversion or re-registration is provided for under Sections 56-62 of CAMA. Essentially, a special resolution approving the re-registration is passed at a general meeting and after fulfilling certain conditions and requirements as to share capital, net assets and others as contained in the aforementioned sections, a formal application for re-registration is made to the Corporate Affairs Commission accompanied by all relevant documents. After the re-registration, the registered company can list its shares and/or offer them to the public as there is no similar restriction on the offering of shares to the public by public companies.

B. Special Purpose Acquisition Company (SPAC)

A SPAC is a company that is created for the sole purpose of raising equity from the members of the public in order to acquire a business. In a SPAC, the SPAC is a public limited company that gets listed but holds no assets until it gets a target private company to acquire. Thus, those who hold shares in the SPAC will indirectly hold shares in the private company. A private company intending to go public can utilise a SPAC, to the extent that it has taken into consideration all the commercial and legal implications. This is regulated by SEC's New Rule on Special Purpose Acquisition Companies (SPACS) released in December 2021 (the "SPAC Rules"). The SPAC Rules states the conditions that must be fulfilled before this option can be utilized.

C. Reverse Merger

A reverse merger involves a smaller private company merging with a public company that is already listed on the stock exchange. This approach allows the private company to go public without going through the traditional initial public offering process. This is different from reverse acquisitions where there will be no formal merger at the end of the day. Where there is a reverse merger, the listed company has to be the acquiring entity. At the moment, reverse mergers are not specifically mentioned in any Nigerian regulation or statute in existence. Thus, we are of the opinion that the reverse merger will be subject to the rules that govern mergers.

D. Scheme or Share Swap

A private company could enter a scheme of arrangement with another company (a public company) which would be sanctioned by the court. This could involve the exchange of shares between the two companies, typically on a one-for-one basis. In the same vein, a new public limited company could be simply formed or bought to acquire the private company and then the shareholders of the private company could swap their shares in the private company for shares in the public and listed company. In recent times, the market has seen publicly listed Nigerian banks use schemes to create publicly listed HoldCos and become private companies. In principle, a private company could also utilize a scheme to become a public company.

Direct Modes of Public Offer of Securities

A Word on the Business Facilitation (Miscellaneous Provisions) Act, 2022 (the "BFA")[1].

The BFA, Part X, Paragraph 43 introduces an amendment to Section 67 of the Investments and Securities Act, 2007 (ISA) as follows:

> "Section 67 of the Principal Act is amended by substituting for subsection (1), a new subsection "(1)"
>
> "(1) No allotment shall be made of any securities of a company offered to the public for subscription unless in the case of 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 to this

[1] Our colleagues have in a separate article analysed this provision, and we refer you to the same for a fuller analysis of the arguments we have canvassed under this heading.
https://www.gelias.com/images/Newsletter/The_Business_Facilitation_Act-Alloting_Publicly_Offered_Securities_B.pdf

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 Commission may by regulation prescribe."** (Emphasis supplied).

At first glance, the inference seems to be that until the Securities and Exchange Commission (the "**SEC**") issues regulations, private companies cannot as-yet offer securities to the public for subscription. The SEC is currently yet to issue such regulations. We, however, take the view that this provision is faulty.

Firstly, the prohibition of listing by private companies was the consequence of at least two different provisions of the Companies and Allied Matters Act, 2020 (retained from the repealed Companies and Allied Matters Act, 1990). The first provision (now seen under section 22(2) of the CAMA 2020) is that which mandates a private company to place restrictions on the transfer of its shares in its Articles. This provision effectively makes it impossible for private company shares to be listed in the stock market as the stock market allows free and frequent trade in securities of companies listed on the exchange.

The second provision (seen under section 22(5) of the CAMA) is that which prohibits a private company, unless authorized by law, from inviting the public to subscribe for any shares in the company. Again, a private company cannot list its shares on an exchange without running afoul of this provision as an invitation to the public to subscribe for shares in the company typically precedes a listing.

It is our contention that any change to the position in respect of listing by private companies cannot be by way of a regulation without the enactment of new statutory provisions or an amendment or a repeal of the aforementioned provisions of CAMA which have the effect of restricting (i) private companies from publicly offering their securities and (ii) the shareholders of a private company from freely transferring their shares.

FMDQ Private Markets[2]

Meanwhile in Nigeria, FMDQ Group Plc provides a platform for private companies to raise capital within an organized environment designed specifically to meet their needs. This is called a 'securities noting' on a platform described as 'FMDQ Private Markets' and does not constitute an invitation to public prohibited for private companies under the ISA. The debt securities of private companies are issued to institutional investors via private placements, through eligible transaction sponsors, upon the satisfaction of key criteria contained in the FMDQ Private Markets Noting Guidelines. However, the availability of information on these securities is restricted to institutional investors.

Lessons from other jurisdictions: India, South Africa, London and Lagos

From our research on certain exchanges in India, South Africa and London, we noticed that not many exchanges have rules that allow for listing by private companies without going public or by private placement. Where an exchange has such a rule, it has to either create a separate category as in the case of the Johannesburg Stock Exchange or amend their rules to reflect the current reality as that of the London Stock Exchange/ Financial Conduct Authority of the United Kingdom.

In India, the Companies Act of India 2013 (as amended by the Companies (Amendment) Act 2020) in Section 2(68) (iii) defines a private company to be one that ***"by its articles, prohibits any invitation to the public to subscribe for any securities of the company***". As such under Indian law, private companies can only publicly offer securities by means of private placement or by conversion into a

[2] https://fmdqgroup.com/privatemarkets/about-us/

public company. The listing rules of the two most prominent exchanges in India- Bombay Stock exchange and the National Stock Exchange of India 5recognize and uphold this prohibition.

In South Africa, by Section 8(2)b of the Companies Act 2008 (as amended), a private company is one that its Memorandum of Incorporation prohibits it from **offering any of its securities to the public**. This means that a private company in South Africa cannot list its securities on any exchange. Despite this, Section 15 of the Johannesburg Stock Exchange (JSE) Limited Listing Requirements delineates its scope to include investment entities which are defined as *"… including investment companies, private equity companies, active private equity funds, investment trusts and unit trusts whose principal activity is the investment in securities that, for the purpose of this section, include private companies."* However, from our research, we observed that no private company is actually listed on the JSE.

In London, by virtue of the partnership between the London Stock Exchange (LSE) and Floww, a platform whose main purpose is to connect startups with investors, a new listing regime was created with Amended Listing Rules of the LSE rolled out by the Financial Conduct Authority (FCA). Under this regime, a capital market environment was created where it is immaterial whether a company is public or private before it can raise capital on the London Stock Exchange. Therefore, a private company can publicly offer its shares as long as it fulfils the requirements under the listing rules and any other special requirement imposed by the FCA.

Conclusion

It would appear that the provisions of the BFA discussed in this article do not significantly improve the fate of private companies, as they relate to public issuances. A regulation by the SEC allowing the allotment of publicly offered shares without statutory provisions being amended to allow private companies to publicly offer securities will not solve the problem.

Consequently, we can conclude that the indirect modes aforementioned are presently the readily available modes by which a private company can offer their securities publicly.

Disclaimer: We are not qualified to advise on South African, Indian or English law as-yet and this article is qualified to that extent.

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