

# GEPLAW **Focus**

*COVID-19 Special Edition*



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## COVID-19: PRACTICAL CONSIDERATIONS FOR COMPANY MEETINGS IN NIGERIA



## 1.0. INTRODUCTION

As the lingering COVID-19 pandemic continues to pose a serious threat to life and livelihood, various countries have restricted the movement of its citizens through the declaration of states of emergency and lockdown orders. On the 29th of March, Nigeria joined global efforts to curb the pandemic by enacting the COVID-19 Regulations 2020 (“Regulations”) made pursuant to the Quarantine Act 2004. The Regulations order the cessation/restriction of movement of all non-essential persons in Lagos State, the Federal Capital Territory (FCT) and Ogun State (“Affected States”). In addition, some states such as Delta, Kano, Bayelsa and Osun States, have also implemented various preventive measures, ranging from partial to full restriction of movement. Tentatively, this lockdown ordered by the Regulations in the Affected States is currently in place until the 27th of April, 2020.

This article aims to underscore the effects of the lockdown on company meetings and to offer available options for companies based on the recent guidelines introduced by the Corporate Affairs Commission (CAC) and other current trends and practices.



## **2.0. EFFECTS OF LOCKDOWN RESTRICTIONS ON COMPANY MEETINGS**

In addition to restricting the movement of persons, the Regulations direct the closure of all offices and businesses within these Affected States with the exception of essential workers and certain industries. This not only affects the bottom line of said businesses, but also hampers their business operations and compliance with the provisions of the Companies and Allied Matters Act CAP C20 LFN 2004 (CAMA) with regard the holding of company meetings.

Generally, Section 211 CAMA mandates every public company to hold a general meeting of the members of the company within a six-month period from its incorporation, and thereafter, Section 213(1) CAMA mandates that it holds its annual general meeting with not more than fifteen months between the last and the next. Also, although Section 263 of CAMA gives the directors the discretion to regulate their meetings as they think fit, Regulation 10 of the Code of Corporate Governance for Public Companies states that the board of directors is mandated to hold its meetings every quarter (Thus, where the lockdown does not extend past the 30th of June 2020, being the end of the second quarter, meetings of the board of directors of companies may still be held).

Prior to the coronavirus outbreak, many companies across the nation may have fixed meetings and sent out notices of same or be preparing to, all of which are currently rendered redundant by the Regulations and other lockdown state-wide measures. The appropriate approach towards mitigating the challenges of complying with statutory requirements is currently moot as many factors are still up in the air. As a result, companies are being forced to explore other options in having their meetings.

## **3.0. AVAILABLE OPTIONS FOR MITIGATING THE IMPACT OF COVID-19 ON GENERAL MEETINGS**

In a bid to ameliorate the difficulties faced by public companies in holding their AGMs and to

ensure compliance with CAMA, the CAC, on the 26th of March 2020, released the Guidelines on Holding of AGMs of Public Companies Using Proxies (“CAC Guidelines”). The CAC Guidelines are built upon the existing prerogative of members of a company eligible to attend and vote in a meeting, to appoint a proxy, whether a member of the company or not, to attend the meeting on their behalf. The CAC Guidelines, however, require the AGMs to be held solely by proxy attendance, among others.

The procedure for public companies to conduct their AGMs in accordance with the CAC Guidelines include:

### **i. Obtaining the Prior Approval of CAC**

The CAC Guidelines provide that the approval of the CAC must be sought and obtained before an AGM held by proxy can take place. Therefore, a public company desirous of holding its AGM amid the pandemic is directed to submit an application to do so at the CAC head office or any of the branch offices in the state where such a company is situated.

### **ii. Presence of CAC Representatives**

Another requirement of the CAC Guidelines includes the presence of its representative(s) in an observatory capacity at the AGM held by proxy. The presence of CAC representatives is to ensure compliance with the CAC Guidelines and provisions of CAMA.

### **iii. Restriction On Company Business to be discussed**

Generally, both ordinary business and special business of the company may be discussed during an AGM. However, the CAC Guidelines state that only ordinary business may be discussed at such AGMs held by proxy. Ordinary business on an agenda include acts such as; the declaration of dividends, the presentation of financial statements and the reports of the directors and creditors, the election of a director in the place of those retiring etc. Any other business not specified by CAMA as ordinary shall be deemed to be special business, which is prohibited under the CAC Guidelines.

### **iii. Dispatch of Notices and Proxy Forms with Evidence of Postage.**

The CAC Guidelines state that the notice of meeting must state clearly that attendance of the AGM shall be only by proxy, with proxy forms provided to members alongside a list of proposed proxies which members may select. Companies who hold their AGMs will be subsequently required to provide evidence of postage of the notices to every member entitled to attend.

### **iv. Quorum requirements for AGMs as specified by CAMA and the company articles of association**

Generally, the quorum of a meeting shall be, one-third of the total members or twenty-five members, whichever is less, or such number specified in the articles of association of the company. In addition, the CAC Guidelines state that for the purpose of determining quorum of the AGM held by proxy, each duly completed proxy form shall be counted as one member.

A Business Day article published on the 25th of March 2020 reported that Guarantee Trust Bank (GTB) had sought and obtained the approval of CAC to hold its AGM on the 30th of March 2020 in line with the CAC Guidelines. GTB's AGM proceedings was also scheduled to be live streamed on their website so members could log in and observe proceedings.

In consideration of the above, the CAC Guidelines only apply to public companies, which consequently leaves private companies without the alternative of holding AGMs using proxies. Furthermore, the applicability of the CAC Guidelines is currently hindered by the provisions of the Regulations and other state-wide directives in other states which restrict the movement of persons and direct the closure of offices and businesses, rendering it applicable only in the non-affected states in Nigeria.

Nonetheless, the following are available options open to companies in Affected States in light of the current realities, which include:

### **a. Written Resolution of Shareholders in a Private Company.**

Section 234 of CAMA permits a private company to pass written resolutions in place of having its general meetings. Such resolutions must however be signed by all the members entitled to attend and vote to guarantee its validity and effectiveness as if passed in a general meeting. Written resolutions are usually signed physically. In light of the lockdown, this may prove to be a difficult exercise, except where such a company's articles provide for the use of electronic signatures by members on written resolutions. However, this alternative of written resolutions in the current circumstances is available only to private companies due to their limited membership, while public companies are mandated to pass such written resolutions at their general meeting.

### **b. Virtual/Hybrid meetings.**

Virtual meetings mean the hosting of meetings through the use of computer software for video or audio conferencing in a virtual environment, eliminating the need for the physical meeting of participants. Hybrid meetings are a combination of physical and virtual meetings in which a subset of persons convene at a physical location for the purpose of holding the meeting, while also making use of electronic means such as video conferencing software, to communicate with other participants in the meeting. This option enables companies meet their quorum requirement while other members communicate through video conferencing. Due to the Regulations directing the cessation/restriction of movement, hybrid meetings are unlikely to be helpful in Affected States given the current circumstances.

It should be noted that Section 218 of CAMA requires that the notice of a meeting to be sent to members must specify the place, date and time of the meeting. As a result, there is an argument to be made that the Act does not acknowledge meetings which are not held in a physical place.

On the other hand, this provision does not expressly prohibit virtual meetings, as it does not qualify the 'place' to mean a physical place. It can also be argued that the drafters of the Act did not rightfully anticipate scenarios such as pandemics which greatly impact the economy. The provision of Section 216 of CAMA cannot be overlooked, as it simply states that all statutory and AGMs shall be held in Nigeria. Consequently, virtual meetings in which participants with Internet Protocol (IP) Addresses identify their locations as Nigeria, can be said to fulfil this requirement.

It may be concluded that the physical place where a meeting would have been held or the registered office could be recorded as the venue of a virtual meeting. It is important that in this case, the notice of the meeting should state the address but also include that it will be held via a virtual platform due to the pandemic. This may solve the issue of venue and legality of the meeting. It is also important to note that for the holding of the virtual/hybrid meeting to be legal, the articles, shareholders agreement or a board resolution must approve the holding of such meeting.

Recently, the Nigerian Stock Exchange (NSE) issued Guidelines on Companies' Virtual Board, Committee and Management Meetings ("NSE Guidelines") which seeks to provide some guidance to the capital market and other stakeholders in conducting productive virtual meetings in an accessible, transparent and cost-effective manner, while meeting the important business and corporate governance needs of the company. The NSE Guidelines address virtual participation in varied scenarios including hybrid and virtual meetings, and also highlights other key considerations such as the need for proper technological support and the responsibilities of participants in virtual meetings.

For example, it provides for a precise agenda to be laid out before the meeting; for the company secretary to have at hand, other means of reaching virtual attendees who may get disconnected during the meeting and; for the presence of a good technical support team during

the meeting, to name a few. It is important to note that the provisions of the NSE Guidelines are not legally binding, but are simply to offer a guide for companies desirous of holding virtual meetings.

### **c. Postponement of all AGMs**

AGMs in affected states may be postponed altogether until the restriction of movement of persons and closure of businesses is lifted. This is an option open only to companies still within the fifteen (15) month time frame as provided by Section 213 of CAMA.

## **4.0. RECOMMENDATIONS**

While there are a few options open to companies desirous of holding their AGMs, not all may be able to enjoy such alternatives. This underpins the necessity for further action to be taken by the regulator to mitigate the impact of the pandemic on company meetings and provide solutions for now and similar issues in the future. The following are some necessary recommendations that may be implemented to remedy the current issues brought about by the pandemic:

### **1. Issuance of Additional Guidelines for Companies in affected states**

The CAC Guidelines did not envisage the total or partial restriction of movement and closure of businesses across affected states. However, since the lockdown came into effect, CAC, as the apex regulator, may follow the lead of the NSE by issuing additional guidelines for companies in affected states which herald the practice of virtual meetings and detailing the procedure in holding AGMs in line with the Regulations and the provisions of CAMA.

### **2. Extension of Time**

Section 7 of CAMA empowers CAC to undertake activities as are necessary to giving full effect to the provisions of the Act, giving the regulator an important role to play at this time. Section 213 (1) (b) of CAMA empowers CAC to extend the time within which any AGM may be held by not more than three (3) months. Therefore, in order to prevent mass contravention with the law, CAC may grant an extension of time to all companies

which may not have held their AGM and are likely to miss the fifteen-month timeframe as a result of the lockdown.

### **3. Passage of the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2020 into law.**

On the 10th of March 2020, the Senate passed the CAMA (Repeal and Re-enactment) Bill 2020, however its enactment has been stalled by the delay in securing the Presidential assent. The proposed Bill permits private companies to hold their general meetings and board meetings electronically as long as they are conducted in accordance with their articles of association. The Bill also makes provision for notices to be served by electronic mail and for necessary documents to be authenticated through an electronic signature.

However, in relation to the holding of electronic/virtual meetings, the Bill does not provide same for public companies. Public companies should also be permitted to hold virtual/hybrid meetings in order to circumvent difficulties such as those occasioned by the lockdown. Furthermore, an amendment may be made to enable public companies to pass valid written resolutions without the need of doing so at an AGM. This will be made easier where electronic signatures are deemed valid as envisaged by the Bill.

As the Bill was passed without consideration given to situations such as a pandemic or a national/economic lockdown, it is imperative that its provisions be revisited in order to accommodate attendant issues.

### **4. Alteration of Company Articles of Association**

Section 48 of CAMA allows for a company to alter or add to its articles through a special resolution, subject to the provisions of the Act. This means that while every company is bound its provisions, companies may also make provisions in their articles of association to guide the management of its affairs, where such CAMA provisions are not mandatory provisions. Consequently, in view of the current circumstances, private companies are urged to also amend their articles to

accommodate the hybrid or virtual meetings for both AGMs and Board Meetings. This will ensure that in the event of a lockdown or similar scenario, members who are unable to attend scheduled or emergency meetings may choose to attend through electronic means.

### **5. Court-Ordered Meetings**

Generally, Section 223 of CAMA provides for the power of the court to order meetings of a company or the board of directors suo moto, or upon the application of any director or member entitles to attend and vote at a meeting, where it is impracticable to call such a meeting. However, due to a directive issued by the Chief Justice of Nigeria on the 23rd of March, 2020, the courts are only allowed to entertain urgent or time bound matters. In determining the importance of the nature of the meetings, it is unknown whether the courts may entertain applications to hold their AGMs. If entertained, a company, its member or director, may apply to the court to hold a virtual meeting as it is currently impracticable to hold a physical one. Again, the CAMA in Section 213 gives the CAC the power to direct a member of a company to apply to court for an order to take a decision which shall bind all the members, where there is a default in holding an AGM.

### **5.0. CONCLUSION**

While it is commendable that CAC issued guidelines to mitigate some of the effects of the COVID-19 pandemic, the CAC Guidelines do not encompass all outstanding issues, bearing in mind that they were issued before the lockdown became effective. AGMs, being a statutory requirement of every company, must be better protected by the very laws that provide for their validity.

Based on the foregoing, it is clear that the current legal framework does not provide enough solutions to deal with the current pandemic, thus, CAC is enjoined to rise to the occasion by taking pragmatic steps in mitigating the current challenges and ensuring that all companies are better equipped to manage a similar situation going forward. It is also imperative that both the legislature and the executive make the Bill a top priority as soon as the lockdown order is lifted.



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