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### **SYNOPSIS OF THE NIGERIAN OIL AND GAS INDUSTRY CONTENT DEVELOPMENT (AMENDMENT) BILL 2015**

#### **Introduction**

Between June 2 and June 5, 2015, employing an unprecedented process of concurrence, the Senate fast tracked the passage of forty-six (46) bills (covering a wide range of subjects), already considered and passed by the House of Representatives.

One of the major bills passed by the 7<sup>th</sup> Assembly of the National Assembly by the above mentioned novel process, was the Nigerian Oil and Gas Industry Content Development (Amendment) Bill, referred to as the House of Representatives Bill, HB 452, ("**HB 452**" or the "**Bill**").

HB 452 was introduced in 2013, into the House of Representatives by Hon. Asita Hounorable, -then Chairman of the Local Content Committee of the House of Representatives. The said Bill had undergone a first reading in the House of Representatives at the end of February 2013 and a second reading in March 2013. Thereafter, in July 2013, the Bill was subjected to public hearings, after which stakeholders' perspectives and contributions to the Bill were collated. The Bill then remained under consideration by the Local Content Committee of the House of Representatives, until June 2, 2015, when it underwent third reading and passage by the House of Representatives. Thereafter it was transmitted to the Senate where, together with forty-five (45) other bills it was passed without any deliberation.

The Bill is currently awaiting presidential assent.

#### **Objective**

The enactment of the Nigerian Oil and Gas Industry Content Development Act, No. 2 of 2010 (the "**NCA**") in April 2010 has been praised as one of the most significant achievements of the Jonathan administration and there are countless reports of gains realized in terms of local content since the enactment of the NCA. However, both operators and practitioners have continually expressed their discontent with numerous challenges encountered during the implementation and enforcement of the NCA.

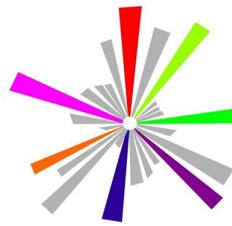
The main challenges include, on the one hand, time limits for waivers and thresholds for Nigerian content in certain sectors which now appear unachievable based on existing commercial and economic realities; and on the other hand, ambiguous and seemingly conflicting provisions in the NCA which have created loopholes and compelled the Nigerian Content Development Monitoring Board ("**NCDMB**") to expend significant effort in issuing clarifying regulations.

Notwithstanding the foregoing challenges, the explanatory memorandum of the Bill however identifies its main purposes as, extending the waiver window, removing difficulties of access to funding and correcting an obvious heading error.

We have presented a brief synopsis of the key amendments sought to be introduced by the Bill.

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### The Bill

On a preliminary note, it would appear, from our review of the Bill that although the header of the Bill suggests that it is an amendment bill, same will best qualify as a “restatement” bill. Strictly speaking, a restatement bill should repeal its predecessor but this one doesn't. Where this Bill is assented to in its present form, there exists the risk of inconsistency between the provisions in the extant Act and those of the restated Act, which will then trigger the application of the doctrine of implied repeal of provisions of the extant Act that are inconsistent with those of the restated Act.

### Alteration of Limited Waiver Provisions

The extant NCA grants the Minister<sup>1</sup> the discretion to **grant a waiver** to an entity to import relevant items<sup>2</sup> **for a maximum period of three years from the commencement of the NCA** within which time, local capacity is expected to have been built in the relevant area. However, the Bill has introduced a welcome change by deleting a specific timeframe within which a waiver for continued importation of relevant items can subsist. Indeed, Section 11(4) of the Bill charges the Board with the responsibility of making a recommendation to the Minister for approval in instances where the Board is convinced that an entity lacks adequate capacity to meet any of the minimum Nigerian/local content benchmarks in relation to any of the items set out in the Schedule to the Act.

In order to guide against arbitrary abuse of the powers granted to the Board to make recommendations and/or to the Minister to grant waivers, under the said section, the Bill further seeks to introduce a Capacity Development Initiative ('CDI'), which every entity seeking authorization to import certain relevant items must submit and get approval for before they can import the items<sup>3</sup>. The CDI must contain an intention of the applicant entity to develop the relevant capacity in Nigeria.

Approval for continued importation of relevant items is not granted as a matter of course but is predicated on the satisfaction of certain requirements which include:

- (i) Advertisement of the need for such goods and services, the description of same, relevant category in the Schedule to the Act, the quantity required and when it is required must have been made on the Joint Qualification System (JQS) not less than 30 days before submission of the application to the Board<sup>4</sup>;
- (ii) Evidence of lack of capacity in-country within the duration of the project for which the goods and services are required<sup>5</sup>;
- (iii) Submission of a detailed CDI or collaboration plan with an existing CDI indicating the CDI Sponsors, existing in-country capacity, list of stakeholders including technical partners and their roles, expected outcomes, timing of the project, indicative cost and other relevant information as may be required by the Board which relates to the item to be imported<sup>6</sup>; and

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<sup>1</sup> Minister for Petroleum Resources.

<sup>2</sup> The NCA does not specifically define what “relevant items” are but a community reading of the NCA suggests that it relates to goods and services which might be required by operators, contractors, subcontractors and other entities in the Industry

<sup>3</sup> Section 11(4) of the Act.

<sup>4</sup> Section 11(4)(a)

<sup>5</sup> Section 11(4)(b)

<sup>6</sup> Section 11(4)(c)

(iv) any other conditions as may be prescribed in the guidelines to be issued by the Board<sup>7</sup>.

By virtue of the provisions of Section 11(5), the Bill seeks to charge the Board with the responsibility of convening a stakeholder's meeting before January 31<sup>st</sup> of each year with a view to determining areas of inadequate capacity within the Industry and agreeing on CDIs to upgrade existing capacity or develop new capacity in specific areas of demand for the Industry. Clearly, this provision constitutes one of the additions to the Act, which would help to facilitate the implementation of the CDIs, fortify and expand the capacity found within the industry amongst Nigeria indigenous companies.

### **Scanning and ranking of qualifying CDIs/Standing Committee of NCCF**

Although the NCA set up the Nigerian Content Consultative Forum (NCCF) for information sharing and collaboration in the Industry, same made no provisions for the screening and ranking of qualifying capacity development initiatives from indigenous Nigerian Companies for financing support by the Nigerian Content Development Fund<sup>8</sup>. This is however contained in the Bill and same would help in determining which indigenous Nigerian CDI is most suitable for financial support in order to develop and or increase capacity in certain areas of need or demand in the Industry.

The Bill seeks to establish a standing committee of the NCCF, provide for the membership constitution of the committee and charge the committee with the functions set out in Section 104(4)(a).

### **Procedure and Criteria for disbursement of Funds from the 'Fund'**

Another proposed amendment to the NCA is an introduction of a proviso to Section 104(3), which delimits and prescribes the percentage of the Fund which the Board can:

- (i) appropriate to discharge its functions (a maximum 10% of the Fund in any year for the operations of the Board (inclusive of General and Administrative expenses whether as operating or capital expenditure))<sup>9</sup>; and
- (ii) disburse to Nigerian Indigenous Companies for in-country capacity development, (a minimum of 70% of the Fund to be used for long-term, low cost asset acquisition, infrastructure or facilities development support, equity investment, direct grants for in-country Research and Development (R& D), technology acquisition and in-country manufacturing<sup>10</sup>).

Additionally, the Bill in Section 104(4) provides modalities and criteria, which will govern application for funding support, evaluation and disbursements of funds<sup>11</sup>. The Bill also provides that the NCCF Standing Committee shall evaluate all proposals for capacity development funding support from Nigerian Indigenous Companies<sup>12</sup> while in each quarter, the qualifying proposals shall be forwarded to the Executive Secretary of the Board for processing and disbursement.<sup>13</sup>

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<sup>7</sup> Section 11(4)(e)

<sup>8</sup> Section 57 of the Act.

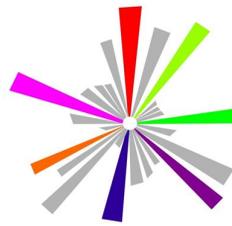
<sup>9</sup> Section 104(3)(a) of the Act.

<sup>10</sup> Section 104(3)(b) of the Act.

<sup>11</sup> Section 104(4) of the Act.

<sup>12</sup> Section 104(4)(a). The proposals are to be evaluated based on established selection and ranking criteria and then the NCCF will recommend qualifying CDI applications for funding on a quarterly basis.

<sup>13</sup> Section 104(4)(b) of the Act. The Proposals are selected from the screened and ranked list of Proposal.



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Furthermore, the Bill provides that a half yearly disbursement report specifying beneficiary companies, amounts disbursed, recovery-to-date, assets acquired and infrastructure/facility developed shall be published in the JQS and at least two national newspapers<sup>14</sup>; and any of funds, which are not spent in any one year may be allocated and disbursed in the succeeding years<sup>15</sup>

### **Definition of 'Nigerian Indigenous Company and 'Operator'**

Another important addition, which the Bill seeks to introduce into the NCA is the definition of the phrase "**Nigerian Indigenous Company**". Though the "Nigerian Indigenous Company", as mentioned in the preceding section, was used in the Act, it was not defined anywhere throughout the NCA and thus became a subject of many interpretations.

"**Nigerian Indigenous Company**" is defined in the Bill as a company which:

- (a) **Entire issued** share capital is **owned by Nigerians**;
- (b) Board of Directors comprises **only Nigerians**.
- (c) Own **all its** assets.

The Bill retained the definition of "Nigerian Company" as "*a company formed and registered in Nigeria in accordance with the Companies and Allied Matters Act, with not less than 51% equity shares by Nigerian*".

Clearly, the Bill seeks to provide a distinction between a 'Nigerian Indigenous Company' and a 'Nigerian Company', probably in an attempt to provide better guidance and perspective to the specific category of companies that Sections 3(2), 16, 41 and 49 (amongst others), of the NCA apply to. However, the Bill still contains inconsistent versions of this term as the substantive provisions of the Bill still contain terms like "Nigerian indigenous service companies" and "Indigenous companies". The term Nigerian Company is still not used in the substantive provisions of the Act even though it is defined.

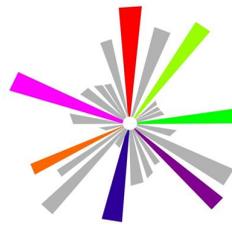
More importantly, it will appear from the definition of 'Nigerian Indigenous Company', that corporate entities which have hitherto benefitted from the interpretation of Section 3(2), 16 and 41 of the NCA to mean 'Nigerian Company' (which had a lower qualifying threshold than what is specified in the Bill), will now be precluded from benefitting from the provisions of the above sections in relation to their consideration for contracts and/or their bids.

Also, under the NCA, an '**Operator**' was defined as: "*Nigerian National Petroleum Company (NNPC), its subsidiaries and joint venture partners and any Nigerian, foreign or international oil and gas company operating in the Nigerian Oil and gas industry under any petroleum arrangement*"; whilst the Bill defines "**Operator**" as "*Nigerian National Petroleum Company (NNPC), its subsidiaries and joint venture partners and any Nigerian, foreign or international oil and gas company operating in the Nigerian Oil and gas industry **or using hydrocarbon as main input under any petroleum arrangement, contract or business venture***".

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<sup>14</sup> Section 104(4)(c) of the Act.

<sup>15</sup> Section 104(4)(d)



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The additions to the definition of the term “Operator” appear to clarify speculations, which had hitherto hovered around the interpretation of the phrase “petroleum arrangement”. This new definition is now clearly wide enough to accommodate virtually every company whether foreign or Nigerian that is operating in the Nigerian Industry.

### **Conclusion**

The amendments proposed to the NCA are very minimal and only relate to a few sections of the NCA as already observed above. We are of the opinion that a holistic review of the extant Act in order to address several challenges identified by operators and practitioners would have been more useful.

In summary, though the Bill (if assented by the President) confirms the resolve of the Nigerian government to increase and enforce involvement, utilization and participation of Nigerians and Nigerian indigenous companies in the Nigerian oil and gas industry, it still retains most of the ambiguity occasioned by the inelegant drafting of the NCA and we are certain, as the participation of Nigerians in the sector matures, there will be more and more amendments to the NCA.

Finally, it is noteworthy that by Section 58(5) of the Constitution, where a bill is passed by both Houses in the National Assembly, the President must, no later than 30 days from the passing by the latter of both houses, either assent to the relevant bill or withhold his assent from same. Where the President withholds his assent, the bill must then go back to each House. Where the relevant bill is again passed by two-thirds majority of each House in the National Assembly, the bill shall become law and the assent of the President shall not be required.

Thus, where 30 days expires before the President can assent to the Bill, there is likelihood that same will have to be re-considered afresh by the newly constituted members of the House of Representatives and Senators, since the Bill was passed during the last dispensation. Where this is the case, hopefully, some of these persisting grey areas can now be finally put to rest.

### **Banwo & Ighodalo**

Banwo & Ighodalo (“B&I”) is a full service commercial law firm known for providing innovative, competent, cost-effective and well-timed solutions. B&I is frequently ranked as one of the leading law practices in Nigeria and the Firm has advised, and continues to provide legal advisory support in its chosen areas of practice.

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