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## **REVIEW OF THE PETROLEUM INDUSTRY GOVERNANCE AND INSTITUTIONAL FRAMEWORK BILL**

### **INTRODUCTION**

Many commentators and stakeholders, in the Nigerian oil and gas industry have called for the much-publicized Petroleum Industry Bill to be enacted into law in piecemeal. Thus, it comes as no surprise that there is presently in circulation, an Executive sponsored Bill titled the “**Petroleum Industry Governance and Institutional Framework Bill 2015**” (the “**Bill**”), which we understand is yet to be formally presented to the National Assembly. From the long title of the Bill, it would appear that same makes provision for the governance and institutional framework for the petroleum industry and other related matters.

The main objectives of the Bill include:

- the creation of efficient and effective governing institutions with clear and separate roles for the petroleum industry;
- establishment of a framework for the creation (out of existing government-owned entities) of commercially oriented and profit driven entities that will ensure value-add and internationalization of the petroleum industry;
- the promotion of transparency and accountability in the petroleum industry; and
- the creation of a conducive business environment for operators in the petroleum industry.

Presumably, the intent of the proponents of the Bill is to ensure that there is a high level of transparency in the Nigerian Petroleum Industry whilst at the same time ensuring that the industry is commercially driven and attractive to potential investors. Highlighted below are salient provisions of the Bill, which may impact the Nigerian Petroleum Industry, if same is passed into law in its current form.

#### **1. Powers of the Minister**

Section 2 of the Bill sets out the functions and powers of the Minister of Petroleum Resources (the “**Minister**”). Specifically, Section 2(1)(g) provides that the Minister shall upon the **recommendation of the Nigerian Petroleum Regulatory Commission** (the “**Commission**”), grant, amend, renew, extend or revoke petroleum exploration and production licenses and leases pursuant to the provisions of this Act or any other enactment.

The Bill in its current form seeks to fetter the discretion of the Minister by subjecting the exercise of his powers to grant, amend, renew, extend or revoke petroleum exploration and production licenses and leases to the recommendation of the Commission, which is not the case under the Petroleum Act, Cap P10, Laws of the Federation of Nigeria (LFN) 2004 (the “**Extant Act**”). Under the Extant Act, the Minister has an **absolute** discretion to grant, amend, revoke and extend oil prospecting licenses and oil mining leases to applicants that satisfy statutorily prescribed conditions.

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The foregoing is particularly significant because most of the members of the Commission's board would be appointed by the President of the federal republic of Nigeria and not the Minister, which in our view, further dilutes the power vested in the Minister.

Furthermore, the above presupposes that there will be a new process for applying for an amendment, renewal, extension or revocation of a license or lease, which will involve applying through the Commission and not directly to the Minister. However, the Bill is silent on the procedure for applying for an amendment, renewal, extension or revocation of a license or lease.

The Bill, in Section 3, retains the Minister's power as currently preserved in the Extant Act, to exercise a right of pre-emption on all petroleum and petroleum products obtained, marketed or otherwise dealt with under any license or lease granted under the Act in the event of a state of national emergency or war.

Although the Extant Act imposes a fine of N2, 000 (Two thousand Naira), payable as a penalty by any person who, without reasonable excuse (the burden of proof of which shall lie on the defaulter), fails to comply with a requisition made by or on behalf of the Minister or fails to conform to or obey a direction issued by the Minister in exercise of his right of pre-emption; the Bill, prescribes more stringent penalties and stipulates a fine of –N- 10,000,000 (Ten Million Naira) or imprisonment for a period not exceeding 6 months or both for any of the above-identified infractions.

Further, any person who obstructs or interferes with the Minister or his servants or agents in the exercise of the pre-emptive powers conferred on the Minister under paragraph 8 of the Second Schedule to the Extant Act shall be guilty of an offence and shall on conviction be liable to a fine not exceeding N200 (Two Hundred Naira) or to imprisonment for a period not exceeding six months, or to both. However, the Bill increases the fine to an amount not exceeding N5, 000,000 (Five Million Naira) or to an imprisonment for a period not exceeding 6 months or both.

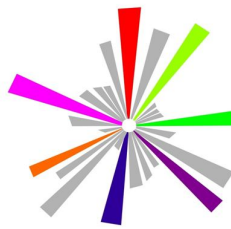
## **2. Establishment of the Nigerian Petroleum Regulatory Commission**

### **(a) General**

The Bill seeks to establish a body to be called the Nigerian Petroleum Regulatory Commission (the "**Commission**") which shall assume the rights, interests, obligations and liabilities of the Petroleum Inspectorate,<sup>1</sup> the Department of Petroleum Resources ("**DPR**") and the Petroleum Products Pricing Regulatory Agency ("**PPPRA**") as well as serve as the regulator of the upstream, midstream and downstream sub-sectors of the oil and gas industry. The Bill also seeks to vest the Commission with the assets, funds, resources and other movable and immovable properties, which are held by the Inspectorate, DPR and the PPPRA.

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<sup>1</sup> Although, the Petroleum Inspectorate (the "**Inspectorate**" which was a unit under the Nigerian National Petroleum Corporation (the "**NNPC**") was excised from the NNPC, and transferred to the Ministry of Petroleum Resources as the Technical arm and renamed the Department of Petroleum Resources, the Inspectorate still exists fictionally under the Nigerian National Petroleum Corporation Act



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From our reading of the Bill, the objectives of the Commission, include, the promotion of (i) a healthy, safe and efficient conduct of petroleum operations; and (ii) an efficient, safe, effective and sustainable infrastructural development of the petroleum industry. The Bill also seeks to vest the Commission with technical, commercial and environmental regulatory functions.

Pursuant to the provisions of Section 4, the Commission shall specifically be empowered to administer and enforce policies, laws and regulations relating to all aspects of petroleum operations, which are assigned to it under the provisions of the Act or any regulations made in pursuance of the Act or any other enactment. In addition to the foregoing, the Commission is empowered to define and approve standards of design, procurement, construction, operation and maintenance of all plants, installations and facilities utilized or to be utilized in petroleum operations. Furthermore, the Commission shall be empowered to establish, monitor, regulate and enforce health and safety measures relating to all aspects of petroleum operations.

The development and publication of tariff and pricing methodologies relating to third party access to petroleum facilities from time to time as specified in any regulation shall also be within the remit of the Commission. Also, advising the Minister on fiscal and other issues pertaining to the petroleum industry is intended to be within the remit of the Commission.

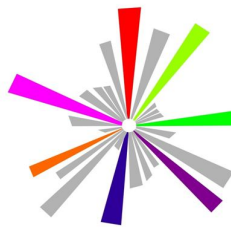
The Bill also seeks to charge the Commission with responsibility for issuing licences, permits or other authorizations necessary for all activities connected with, but not limited to, seismic, drilling, design and construction of all facilities for upstream petroleum operations. Furthermore, the Commission shall be conferred with powers to regulate the activities of the downstream petroleum industry in a non-discriminatory and transparent manner in addition to being empowered to make regulations necessary to give proper effect to the provisions of the Bill.<sup>2</sup>

It is clear from the provisions of section 4 of the Bill that the draftsman intends to reduce the number of regulators in the petroleum industry by subsuming the powers of the PPPRA and the DPR into the regulatory purview and the remit of the Commission. Additionally, any decision or order of the Commission shall contain the basis of the decision or order, recorded in writing and shall be accessible to the public at reasonable times and places.

Unlike in the case of the NNPC where members of the board are appointed by the President, members of the board of the Commission are appointed by the President, and their appointments are subject to the confirmation by the Senate. The Board of the Commission will consist of a non-executive chairman, a non-executive commissioner, an executive vice chairman, and three executive commissioners. The Board of the

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<sup>2</sup> The Bill seeks to ensure that the Commission conducts public hearings prior to issuing Regulations whilst also empowering it to issue Regulations without necessarily seeking public participation, **where the exigencies of the circumstances require**. Regulations issued in such circumstances shall however be deemed spent after six (6) months, where no public hearing is conducted in that period.



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Commission shall also include representatives of the Ministry of Petroleum Resources, the Ministry of Finance and the Ministry of Environment, all of whom shall not be below the rank of director.

It is also pertinent to note that the Bill does not require the Minister of Petroleum Resources to sit on the Board of the Commission. There is, therefore, a presumption that the Commission shall be **independent** and shall not be subject to the influences of the Minister. To further underscore the intent of the Bill to imbue the Commission with independence, the Bill specifically provides that members of the Commission may only be removed or suspended by the President.

Nonetheless, it is noteworthy that section 15 of the Bill still empowers the Minister to issue directions to the Commission on matters pertaining to the petroleum industry and the Commission is bound to implement such directions, provided that same are not in conflict with the provisions of the Bill.

(b) Funding of the Commission

Section 26 makes provision for the funding and revenue generation of the Commission. Specifically, the Commission is entitled to keep for its use a percentage of the income generated by the Commission for the federal government of Nigeria, as may be appropriated to the Commission by the National Assembly.

Whilst the Commission may accept gifts, loans and grants-in-aid, Section 27 (2) prohibits any member of its board or any of its employees from accepting gifts for his/her personal use. In this regard, we are of the view that a proper watchdog will need to be established to ensure that Commission's board members and/or employees do not use any gifts, accepted for and on behalf of the Commission for personal gain.

(c) Exemption from Income Tax

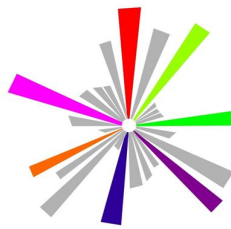
By virtue of section 30, the Commission is exempt from paying income tax.

(d) Limitation of Suits

Similar to the provisions in the NNPC Act, Section 31 provides for issuance and service of a one (1) month pre-action notice as a condition for instituting and commencing any suit against the Commission. Furthermore, the said section seeks to assure that no suit may be commenced against the Commission and/or, any member of its board and/or its employees unless: (i) such a suit is instituted within three (3) months<sup>3</sup> after the act, neglect or default complained of; or (ii) in the case of a continuing damage or injury, the suit is instituted within six (6) months after the damage or injury ceases.

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<sup>3</sup> The NNPC enjoys a similar privilege. However, unlike the period specified herein, there is a longer period of twelve (12) months enjoyed by the NNPC. For a continuing event there is a twelve (12) month period within which the NNPC must institute such matters.



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(e) Restriction of Execution Against the Commission's Property

Similar to the privilege accorded the NNPC, Section 33 seeks to preclude the execution or attachment of the Commission's physical property in satisfaction or enforcement of any Judgment against the Commission. However, judgments against the Commission may be enforced by means of attaching its Funds in the custody of a 3<sup>rd</sup> Party; provided that a judgment creditor gives at least three (3) months' notice of its intention to commence garnishee proceedings against the Commission.

3. Establishment of the Nigerian Petroleum Assets Management Company and the National Petroleum Company

(a) General

Similar to the previous drafts of the PIB, which sought to split the NNPC into three commercial entities, Section 36 of the Bill provides for the incorporation of two entities to be known as the Nigerian Petroleum Assets Management Company ("**NPAMC**") and the National Petroleum Company ("**NPC**"), which will be vested with certain liabilities and assets of the NNPC.

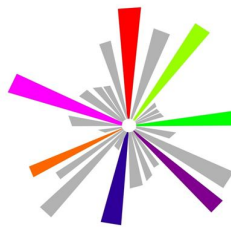
The NPAMC shall be responsible for the management of the NNPC's oil and gas investment in assets where government is not obligated to provide any upfront funding (essentially the production sharing contracts), whilst the NPC shall be an integrated oil and gas company operating as a fully commercial entity across the energy value chain.

(b) Nigerian Petroleum Assets Management Company ("**NPAMC**")

Section 37 provides that, the initial shares of the NPAMC at incorporation shall be held by the Federal Ministry of Finance Incorporated ("**MOFI**") and the Bureau for Public Enterprises ("**BPE**") in a ratio of 99% to 1% respectively. Further, Section 40 provides that within 3 months of incorporation, the Minister shall make an order that the assets, rights, obligations, employees and liabilities of the NNPC shall be transferred to the NPAMC. The Bill does not specify which assets, rights, obligations, employees and liabilities will be transferred but we presume that these will be specified in the said Order. Additionally, Section 47 provides that the company shall be entitled to charge the Federal Government of Nigeria ("**FGN**") fees for the management of its oil and gas investments/ interests and such fees shall be a percentage of the revenue generated by the NPAMC for the Federal Government, as determined and appropriated by the National Assembly. All income of the NPAMC (other than its operating funds provided by its shareholders, fees earned from the FGN, gifts and donations it receives) shall be paid into the Federation Account.

(c) Nigerian Petroleum Company

Section 60 provides in relation to the NPC, that its initial shares as in the case with the NPAMC will be held by the MOFI and the BPE at incorporation.. Further, the Bill provides that within 6 years from the date of incorporation of the NPC, it shall divest of



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not less than 30% of its shares to the public in a transparent manner. It is however, unclear; as the section is silent, if the contemplated divestment of the NPC's Shares will be limited to Nigerians.

(i) Funding of the NPC

Section 62 provides that the Minister shall, in consultation with the MOFI and BPE no later than 6 months from the date of incorporation of the NPC, present through the MOFI, a request for funds to be appropriated for the initial capitalization of the NPC. This amount shall not be less than the five (5) year average of amounts appropriated by the National Assembly for the funding of the NNPC's share of cash calls in all its joint venture operations.

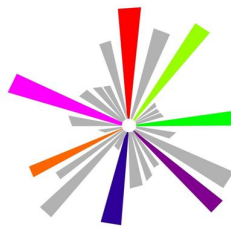
Unlike in the case of the NNPC, section 64 provides that the NPC, shall be entitled to retain revenue from its operations (without remitting same in the first instance to the Consolidated Federation Account), and shall defray its joint venture cash call obligations as well as loan and other repayments to its lenders and financiers from such revenues. The Bill also provides that the dividend policy of the NPC is to be determined by its Board of Directors in accordance with the provisions of Companies and Allied Matters Act (CAMA) and such dividend policy is subject to the approval of the shareholders. It is useful to note that under CAMA, dividends are not generally subject to the approval of the shareholders, however, under section 379(3), the members in general meeting have the power to decrease the amount of dividend recommended by the directors but they shall have not have the power to increase the recommended amount.

(ii) Transfer of Assets and Liabilities

Section 66 provides that the Minister shall within 3 months of incorporation of the NPC make an order to transfer the assets, employees, liabilities, rights and obligations of the NNPC including those held by the Federal Government of Nigeria to the NPC and as with the NPAMC we presume that such Order will be more granular as to which assets and liabilities will be transferred to NPC. Further, the Bill provides that with effect from the date of the order, all agreements, contracts, instruments and working arrangements subsisting prior to the transfer date and relating to the assets to be transferred, to and which NNPC was a party shall be fully effective or enforceable against or in favour of the NPC, as if it had been named as a party therein.

The Minister may also, by order, require that certain employees, assets, rights, liabilities and obligations of the NNPC be transferred to any successor entity created by the Minister, and such shall be binding on the NNPC, the successor entities and any other persons.





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(iii) Management and Governance of the NPC

Section 79 provides that upon incorporation, the NPC shall be organised and managed on the basis of the provisions of the CAMA and its Memorandum and Articles of Association. This further emphasizes the intent of the legislature to ensure that the NPC operates as a separate commercial entity.

(iv) Exemption of NPC from the Public Procurement Act 2007 (the "PPA") and the Fiscal Responsibility Act 2007 (the "FRA")

The Bill seeks to remove the NPC from the purview of the PPA and FRA. Whilst the PPA requires that a competitive bid process must be undertaken prior to any procurement (except in a very few cases) by public bodies., the FRA stipulates stringent financial reporting obligations. Although both the PPA and FRA appear to encourage transparency, the provisions of both legislations will arguably, slow down business operations.. In our view, the intendment of Section 61 of the Bill is to engender efficiency and businessman-like operations, such that NPC operates in a similar manner as other international national oil companies.

#### 4. Repeals, Transitional and Savings Provisions

These provisions are set out in Part 6 of the Bill. Specifically section 84 provides that the provisions of all existing enactments or laws including but not limited to the Petroleum Act, the Pipeline Act, the Petroleum Profit Tax Act<sup>4</sup> and the Companies and Allied Matters Act are to be read with modifications to bring them into conformity with the Bill and where any inconsistency is found the provisions of the Bill shall prevail.

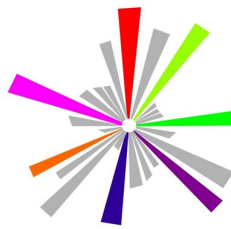
Although the above mentioned modifications to the Petroleum Act, the Pipeline Act, the Petroleum Profit Tax Act<sup>5</sup> and the Companies and Allied Matters Act, as well as the repeal of the Petroleum Products Pricing Regulatory Agency (Establishment) Act ("**PPPRA Act**"), will take effect upon the enactment of the Bill into law, section 85 of the Bill specifically provides that the NNPC Act, the Nigerian National Petroleum Corporation (Projects) Act and the NNPC Amendment Act will only become repealed on the date the Minister issues the legal notice vesting the assets and liabilities of the NNPC in the relevant successor entities.

The Bill also seeks to modify the provisions of the Oil Pipelines Act ("**OPA**") by stating that all references to Minister in the OPA should be deemed to refer to the Commission; whilst Section 31 of the OPA which relates to fees payable for application of a permit and licenses or its variations shall be amended to provide that such fees shall be determined by regulations made by the Commission.

Additionally, Section 86 provides that every permit or license issued by the DPR before the commencement of the Bill will continue to be effective as if same was issued by the

<sup>4</sup> The inclusion of the Petroleum Profits Tax Act herein would appear curious as the Bill does not make fiscal arrangements.

<sup>5</sup> The inclusion of the Petroleum Profits Tax Act herein would appear curious as the Bill does not make fiscal arrangements.



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Commission. The Minister may also make further transitional or savings provisions consistent with the transitional or savings provisions contained in the Bill within three months from its effective date.

Given the intention to repeal the PPPRA Act, Section 87 provides for the transfer of staff from the PPPRA and the DPR to the Commission whilst Section 89 provides for the vesting of, all assets, funds, resources and other moveable or immovable property hitherto vested in the Inspectorate or the DPR and the PPPRA in the Commission. Further, any proceeding or cause of action pending or existing, which could have been taken by or against the DPR before the effective date may be commenced, continued, enforced or taken by or against the Commission. Also, Section 89 (5) and (6) further provides that all rights, interests, obligations or liabilities under any contract in equity or law and entered into by the PPPRA and the DPR or Petroleum Inspectorate existing immediately before the effective date which shall have been held by or on behalf of or have accrued to or incurred for its own benefit or use shall be assigned to or vested in the Commission, such contract shall also be enforceable as fully and effectively as if the Commission had been named as a party thereto and any proceeding or cause of action in relation thereto may be commenced, continued, enforced or taken by or against the Commission.

### CONCLUSION

It is evident from our review of the Bill that the draftsman seeks to ensure that the petroleum industry is run in an efficient and transparent manner for the benefit of the country and we can only hope that this is ultimately achieved.

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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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