

Oil Servicing Publication

NCDMB Issues Seven Ministerial Regulations

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The Nigerian Content Development Monitoring Board (NCDMB or “the Board”) recently released seven (7) Ministerial Regulations at the session held during the 2022 Nigerian Oil and Gas Conference. The Ministerial Regulations were issued pursuant to the relevant sections of the Nigerian Oil and Gas Industry Content Development Act (NOGICDA or “the Act”), which empowers the Minister (and or the Board) to make regulations with respect to training and development, and other matters in the oil and gas industry. The Regulations, which have a commencement date of 26 February 2021 (although made publicly available in 2022), were issued to provide pragmatic strategies for the implementation and enforcement of the Act, and they include:

1. **Nigerian Oil and Gas Research and Development Regulation, 2021**
2. **Regulation for the Further Growth of Indigenous Capacity, 2021**
3. **Regulation for Training in the Nigerian Oil and Gas Industry, 2021**
4. **Regulation for Registration of Oil and Gas Professionals with Nigerian Professional Bodies, 2021**
5. **Regulation for the Establishment of Operations in Nigeria, 2021**
6. **Nigerian Oil and Gas Industry Technology Transfer Regulation, 2021**
7. **Nigerian Oil and Gas Industry Content Development Compliance and Enforcement Regulation, 2021**

We have summarized below, the key provisions of the Regulations and our commentaries on them.



Nigerian Oil and Gas Research and Development Regulation, 2021

This Regulation is targeted at promoting the growth of research and development (R&D) using Nigerian facilities and intellectual resources, as well as monitoring, supervising and funding of such activities within the Nigeria Oil and Gas industry. This Regulation has given life to the provisions of sections 36 to 39 of the principal NOGICDA, with respect to the R&D requirements under the law. All operators are expected to comply with the provisions of this Regulation.

Based on the Regulations, operators are required to submit an R&D Plan within six months of submitting their Nigeria Content plan for each project. The Plan, which must contain the research programme, the nature of the R&D projects, the research scope, the research budget, and other research implementation mechanisms, amongst others, must be approved by the NCDMB and updated on a biannual basis. The NCDMB has the exclusive right to disapprove the research if the Board is of the opinion that the information regarding the research plan is inaccurate; the operator has an outstanding obligation from a prior plan or there are contradictions

with the NOGICDA. Where such disapproval occurs, the operator will be required to submit a revised plan and correct the anomaly within fourteen (14) days of notification of disapproval.

For monitoring purposes, operators are required to submit a progress report on their R&D activities to the Board at the beginning of each quarter or submit a request for an extension for a specified period, at least seven days before the due date of submission. However, no operator is allowed to request an extension more than once a year. The Regulation also requires the Board to establish Research Clusters and Centres of Excellence to promote R&D activities and innovation using local materials/technology, amongst others.

In order to ensure compliance with the provisions of the Regulation, any defaulting operator or entity will be liable to the fines, sanctions and penalties stipulated in the Nigerian Oil and Gas Industry Enforcement and Compliance Regulation, 2021 or as may be determined by the Board.



02

Regulation for the Further Growth of Indigenous Capacity, 2021

One of the major objectives of the NOGICDA is to promote the use of indigenous capacity to execute projects in the Nigerian Oil and Gas industry. This Regulation further accentuates this key objective by setting targets for the growth and full utilization of indigenous entities in the entire oil and gas sector value chain. The Regulation has simplified, in practical terms, the contents and provisions of the Schedule to the NOGICDA regarding percentage of Nigerian content in each work scope issued in the Nigerian oil and gas sector. The Regulation also considered the likely timeframe for achieving Nigerian content in setting the targets for each of the work scope captured. Consequently, specific industry activities have been listed, together with the estimated timeframe and yearly incremental targets from the commencement of the Regulation.

One key concept introduced in the Regulation is the concept of “beneficial ownership”, in trying to define

the meaning of an “indigenous company”. It defines an “indigenous company” as:

“a Nigerian company formed and registered under the Companies and Allied Matters Act 2020 with no less than 51% (fifty one percent) of its shares beneficially owned by Nigerians.”

Thus, the Regulation provides that the Board may request any operator, alliance partner or contractor to depose to an affidavit confirming the structure of its beneficial ownership, particularly of those who own at least 51% of the actual shareholding of a company. Such affidavit would contain the names and country of origin of the beneficial shareholders of the company, which will be updated regularly.

Based on the Regulation, priority consideration will continue to be given to goods produced and services provided by Nigerian companies, except where such capacities are not locally available. In such cases, the operator can apply for a waiver to procure the commodity from alternative vendor; and must provide evidence that such goods/services are not available locally.

Consistent with the provisions of the other Regulations, the NCDMB is empowered to investigate, verify, or assess any matter that relates to the Regulation – including routine visits to project sites and facilities of the operators as well as investigating any complaint received against any player in the industry.



03

Regulation for Training in the Nigerian Oil and Gas Industry, 2021

This Regulation provides the minimum standards and a common framework for the facilities, personnel, technology, and training programmes for the industry. Essentially, it seeks to improve the skill, experience, and exposure of oil and gas personnel through continuous learning and skills development.

The Regulation requires all operators and service providers to submit a training plan within ten (10) days of the award of a contract in the upstream sector, with a possible extension to 20 days by the Board.

The training plan, which must be approved by the NCDMB, should include the detailed information on the method and implementation strategies of the training program. This will also include the facilities, the schedule, the facilitator, the cost, and the beneficiaries amongst others. In addition, all operators are required to submit a compliance report with the training plan on a biannual basis. The Regulation further requires training providers to have the requisite professional qualifications; be accredited by the relevant certifying body and be registered on the Nigerian Content Joint Qualification System Portal. Apart from the above, they should be registered members of the Oil and Gas Trainers Association of Nigeria (OGTAN) or such other professional bodies as may be considered by the Board.

The Board is empowered to conduct routine inspections, assessments, ratings, and service delivery of all training programmes, and where an operator or service provider fails to comply with the requirements of this Regulation, the Board may, amongst other sanctions, disqualify such provider from participating in projects or other specified activities in the oil and gas industry for specified period as determined by the Board.



04

Regulation for Registration of Oil and Gas Professionals with Nigerian Professional Bodies, 2021

The Regulation reaffirms the need for professionals or operators operating within the industry to be registered with the relevant professional bodies in Nigeria. Therefore, operators and companies in the Nigerian oil and gas industry are required to be registered members of the relevant professional bodies and certified by their respective institutes. Professional employees are also required to obtain the minimum standard of training relevant to their profession and be certified by an accredited institution to practice the profession. The First Schedule to the Regulation provides a list of professionals that are required to be members of professional bodies. These include accountants, architects, auditors, economists, engineers, geographers, legal practitioners, medical practitioners, pharmacists, secretaries, surveyors and town planners.

Of particular importance is the fact that the evidence of registration/certification of a company or individual will continue to be a key registration requirement and renewal on the NOGICJQS platform. It would also be required for the application or renewal of expatriate quota, and application for the Nigerian Content Compliance Certificate, amongst other requirements. Professional expatriates and operators who intend to operate in Nigeria are required to register with the relevant professional bodies within ninety (90) days of arrival in the country.

Based on the Regulation, the NCDMB is empowered to liaise with relevant professional bodies to confirm and ensure compliance with, and enforcement of, the Regulation. The Board is empowered to enforce the fines, sanctions and penalties determined under the Nigerian Oil and Gas Enforcement and Compliance Regulation 2021 or as may be determined by the Board from time to time, on defaulters.



05

Regulations for the Establishment of Operations in Nigeria, 2021

This Regulation provides context to, and further insights on, the provisions of sections 47 and 48 of the NOGICDA with respect to the requirement for an operator, whether foreign or local, to invest in or set up facilities or operations within Nigeria to carry out any services or produce any goods that it would have otherwise imported into Nigeria. It prescribes the procedures that govern the establishment of a facility, factory or production unit, especially where such facilities would increase the participation of indigenous companies in the value chain as well as promote industrial development in Nigeria. Thus, companies are required to first consider locally made goods and services in line with the minimum content level set out in the schedule to the NOGICDA, and as modified by the Regulation for the Further Growth of Indigenous Capacity. Where such local capabilities are not available, the Company is expected to establish a Capacity Development Initiative ("CDI") to cover this gap within a timeframe (Initial Compliance Period or "ICP") to be approved by the Board. However, an operator may apply for an extension of the ICP for its CDI within ninety (90) days before the end of the ICP,

as long as the operator provides evidence of significant progress in its CDI.

The Regulation also empowers the Minister of Petroleum Resources to require any operator, contractor, subcontractor or vendor or any entity to set up or make qualifying investment in a facility for building capacity within Nigeria in respect of specific areas, which include but not limited to fabrication and welding, line pipes, equipment components, ship building and maintenance, rig servicing and maintenance and FPSO integration and maintenance, amongst others. To actualize the lofty objective of the NOGICDA and as enunciated in the Regulation, the latter provides that the Board shall, regularly, hold stakeholder engagement sessions where the areas of inadequate capacities will be determined and agree on the CDI to be pursued, together with the appropriate fiscal incentives to request from the government, through the supervising Governing Council of the Board and the Minister.

In the event of contravention of the provisions of this Regulation, the latter provides for a framework for rectifying such anomaly within a sixty-day period. Where such contravention is not resolved, the Regulation empowers the Board to withhold the approval of the Nigeria content plan or operations of the operator. An aggrieved operator may, thereafter, escalate any further disputes or complaints to the office of the Executive Secretary of the Board.



06

Regulation for Nigerian Oil and Gas Industry Technology Transfer, 2021

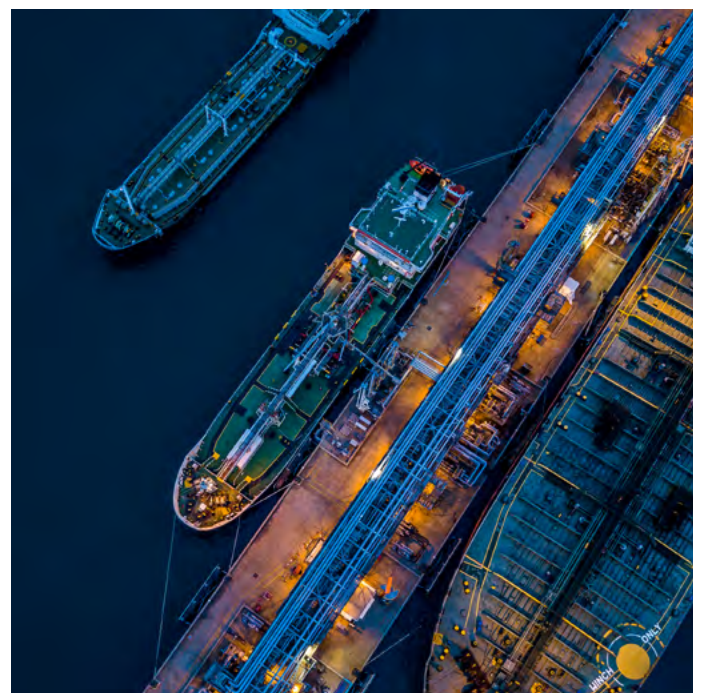
This Regulation aims to promote the advancement of technology in the Nigerian oil and gas industry through the transfer of technology to Nigeria and Nigerians. It establishes guidelines, standards and methods for the transfer of technology. The provisions of the Regulation apply to all operations that are carried out by companies operating in the Nigerian oil and gas industry.

Based on the Regulation, any company operating within the industry that uses foreign technology is mandated to include a Technology Transfer Program (TTP) in its Nigerian Content documentation to be submitted to the

Board. Upon satisfactory review and approval of the TTP by the NCDMB, such company may then commence the implementation of the Program. The TTP should include information on the extent, nature, type and source of technology that the operating company seeks to apply in its operations and the extent to which the technology will aid its operations. The Regulation also provides specific information on how the hardware, information and intangible technology should be transferred from the international oil service company to one or more Nigerian indigenous service companies that have been approved by the Board. Likewise, for intangible technology such as technical knowledge, the Regulation provides the framework for the transfer of such technology to Nigerians through strategic alliances with Nigerian Science and Technology Parks, Nigerian universities or other schemes approved by the Board. Thus, the Regulation also provides the general contractual arrangement to guide both parties in a TTP relationship.

From a compliance point of view, operating companies are required to submit an annual technology transfer report that contains the nature, type and extent of technological capabilities that have been transferred to Nigerians, valid technology transfer agreements, technical strategic alliances, the specific level of technology transfer, the extent of utilization of the technology by the Nigerian indigenous service company and the number of hardware technology transferred amongst others.

The Board is saddled with the responsibility of monitoring the progress of recipient Nigerian indigenous service companies, science and technology parks, universities and Nigerian citizens to ensure that the objective of technology development in the Nigerian oil and gas industry is achieved. In the event of a default with any provision of the Regulation, the relevant sanctions, fines and penalties stipulated under the Nigerian Oil and Gas Industry Enforcement and Compliance Regulation 2021 will apply. This is without prejudice to the provisions of section 68 of the Act.





Regulation for Nigerian Oil and Gas Industry Enforcement and Compliance Regulation, 2021

This Regulation focuses on compliance with the provisions of the NOGICDA and the Regulations issued pursuant to it. It is designed to ensure the implementation of section 68 of the law and promote Nigeria Content in different subsectors of the Nigerian Oil and Gas Industry. The provisions of the Regulation apply to persons and agencies that are required to comply with the provisions of the NOGICDA.

Largely, the Regulation reestablishes the provision of section 68 of the NOGICDA which provides for the imposition of a fine of up to five per cent of the project sum or cancellation of the project, on operators, alliance partners, contractors or project promoters who contravenes the provisions of the NOGICDA. The Regulation, therefore, lists twenty-two possible infractions that might lead to the imposition of the above penalties. Notable amongst the infractions are:

- i. Failure to submit the NC plan or obtain a certificate of authorization from NCDMB for any project.
- ii. Failure to give first consideration to Nigerian goods and services, or Nigerians with respect to employment and training as required by section 28 of the NOGICDA, or failure to submit employment and training plan to the Board.
- iii. Failure to comply with the minimum NC for any project, service or product as set out in the Schedule to the NOGICDA.
- iv. Failure to consider only Nigerians in the junior and intermediate cadre as stated in section 35 of the law.
- v. Failure or omission of Nigerian independent operators who met the requirement, in the award of oil blocks, oil field licenses, oil lifting and other awarded projects in the industry pursuant to the provision of section 3(1) of the NOGICDA.

- vi. Failure to give exclusive consideration to Nigerian service companies which demonstrate ownership of equipment, personnel and capacity to execute a bid.
- vii. Failure to deduct or pay 1% of contract cost awarded in the upstream sector of the industry.
- viii. Failure to submit specified documents to the Board for approval in respect of projects, contracts, subcontracts and purchase orders in excess of \$1,000,000.
- ix. Failure to obtain the Board's approval before applying for expatriate quota, while a public officer who exceeds the limit approved by the Board will be liable to an offence under section 8 of the Independent Corrupt Practices Commission Act or other relevant laws in Nigeria.
- x. Failure to maintain the employment of foreign personnel at a maximum level of five per cent.

In addition to the penalty stipulated under the NOGICDA and reinforced by the Regulation, the latter provides that any false representation to the Board will be considered an offence and punishable under the provisions of the Criminal Code Act and other relevant laws in Nigeria. In addition, the Board may impose a punitive capacity development initiative (CDI) on a defaulting operator where there is no specific sanction for the infraction. Such an operator will be required to respond to a notice of CDI within the time stipulated on the notice or within fourteen (14) days in the absence of a specific timeline. The NCDMB may impose additional administrative sanctions on an operator who failed to settle the CDI within the required timeline.

KPMG Commentaries

The issuance of the Regulations to provide additional clarity to companies operating in the oil and gas industry is a step in the right direction and a commendable action by the Board, particularly, given that some provisions of the NOGICDA were hitherto not clear. The Regulations have therefore provided some clarity on them. In addition, the Regulations seem to have provided some regulatory backing to the administrative procedures of the NCDMB. They seek to encourage local participation, improve the Nigerian human resource content in the oil and gas sector and enhance compliance with the provisions of the NOGICDA. These objectives are appreciable, considering the huge benefits that will accrue to Nigeria from the increase in in-country productivity.

Nevertheless, the Board may consider the following as they may affect the effective implementation of the provisions of the Regulations and by extension, affect the actualization of the set objectives:

- It is quite understandable why the Regulations

require operators to submit quarterly reports on R&D to the Board. However, the Regulations have inadvertently made the Board the ultimate decision-maker in R&D matters in the industry. This is given that the approval, suspension, and reversal of suspension of R&D plans is entirely at the discretion of the Board, as there is no provision for the intervention of an independent arbiter in the event of a dispute between operators and the Board. Generally, an independent arbiter is required to ensure that operators get a fair hearing, and act as a check to the powers conferred on the Board, which is the regulator in this instance. Otherwise, operators may feel unsafe from the possibility of the regulator becoming overly aggressive and arbitrary.

- The plan for the NCDMB to establish research clusters and centres of excellence is indeed a welcome development that will promote innovation and the use of local materials and technology in the oil and gas industry. They are expected to translate the theories formulated by the academia into practicable actions. In addition, the possibility of commercialising patentable research findings and innovations is a good incentive that may likely spur research activities in the industry. However, the Regulation did not specify the number of clusters that will be created and their locations. It is, however, expected that there will be sufficient centres to cater for the research needs of operators in their respective localities.
- The Regulation on Further Growth of Indigenous Capacity stipulated a specific timeline within which the Board must communicate its decision on an application submitted by an operator to seek a waiver, to import goods or services not locally produced, to operator. However, it is silent on what will happen when the Board does not respond to the operator's request within the stipulated time. Will such an operator consider that it has received a positive response from the Board or will the operator have to wait indefinitely? It is well known that delays in approvals for applications/ certificates and waivers are one of the issues affecting the ease of doing business indices in Nigeria. The issue is so significant enough that the Federal Government of Nigeria in Paragraph 4 of the Business Facilitation (Miscellaneous Provisions) Act, 2020, provided for default approvals where an agency or its official fails to communicate approval or rejection of an application for business registrations, certification, waivers, licenses or permits within the stipulated timeline. We do hope that the Board will respect the decision of operators who took the former's silence or lack of response as approval of latter's plans.
- Generally, there are several instances where the provisions of the Regulations stated that Board may reject an application for "reasons as may be provided by the Board for the achievement of the purpose of the Act." In essence, it appears that the Board has significant discretionary powers to determine

the approval or rejection of an application. Whilst discretions can be exercised by an authorized official, the use of discretion should be aimed at streamlining governance, filling legal voids, providing regulatory certainty and overcoming government stagnation for the benefit of the applicant and public interest. It will therefore be important that the Board exercises its discretion judiciously for the progress of the industry.

- Further, it seems that the provisions of the Regulations may have inadvertently empowered the Board to take up the responsibility of some regulatory bodies such as the Industrial Training Fund (ITF) and National Office For Technology Acquisition and Promotion (NOTAP) amongst others. For instance, section 8 (2) of the ITF Act as amended, provides for the imposition of penalties on companies that fail to provide adequate training for their indigenous staff. This means that companies operating in the oil and gas industry will be required to report to both the ITF and the Board on their training programmes for their employees. This may lead to avoidable duplication of efforts. Given that ITF is largely responsible for monitoring and evaluating training programmes of corporate organizations in Nigeria, it might be ideal that the NCDMB work collaboratively with the ITF on training-related issues rather than create a separate department with the NCDMB that interfaces directly with the Company on training related matters. Similarly, NOTAP- which was established in 1992, historically has the mandate to implement the acquisition, promotion and development of technology and at the same time correct certain imperfections in the acquisition of foreign technology into the country. In fact, one of the thematic focus areas of NOTAP is the attraction of foreign technologies and investment with the sole aim of using it to develop indigenous technology. Thus, it seems that there is some sort of regulatory overlap between NOTAP and NCDMB's technology transfer initiatives. Thus, it might be necessary that both regulators work in tandem, and not compete with each other, to ensure that Nigeria obtains the maximum benefits from the joint operations of these regulators.



Conclusion

The Regulations herald a new dawn concerning the operation of the NOGICDA. It is, therefore, paramount that operators, companies and professional employees in the industry take note of the key compliance requirements as well as the designated timelines under the Regulations to prevent the imposition of sanctions and penalties as may be determined upon conviction.

In addition, the successful implementation of these Regulations will depend on how the NCDMB is willing to work collaboratively with other regulators/ government agencies and different arms of government to first reduce the regulatory overlap between similar functions and adopt the safe harbour procedures in the event that a particular arm of government has been primarily saddled with the responsibility to discharge similar regulatory duties.

Notwithstanding, we consider that if the initiatives proposed in the Regulations are properly implemented, Nigeria is well on the journey to near self-sufficiency in the oil and gas industry.



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