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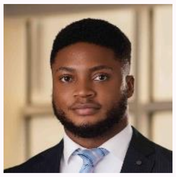

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TEMPLARS ThoughtLab

M&A, Restructuring, Creating and Enforcing Security Under Nigeria's Upstream Petroleum Regulations

The first round of the major divestments of upstream assets by the International Oil Companies is (almost) over. This round saw, M&A activity (obviously) but also saw internal and external restructuring, debt, equity, mezzanine financing, capital raising and reserve-based lending, with the attendant considerations given to taking and enforcing security.

Amidst all the above, the Nigerian Upstream Petroleum Regulatory Commission ("**NUPRC**" or "the **Commission**"), in exercise of its powers under the Petroleum Industry Act, 2021 (the "**PIA**"), issued the Nigerian Upstream Petroleum (Assignment of Interests) Regulations, 2024 (**the "Regulations**"). These Regulations replaced the Guidelines and Procedures for Obtaining Minister's Consent to the Assignment of Interest in Oil and Gas Assets (the "**Consent Guidelines**") in the middle of some transactions and will guide the market for the foreseeable future.

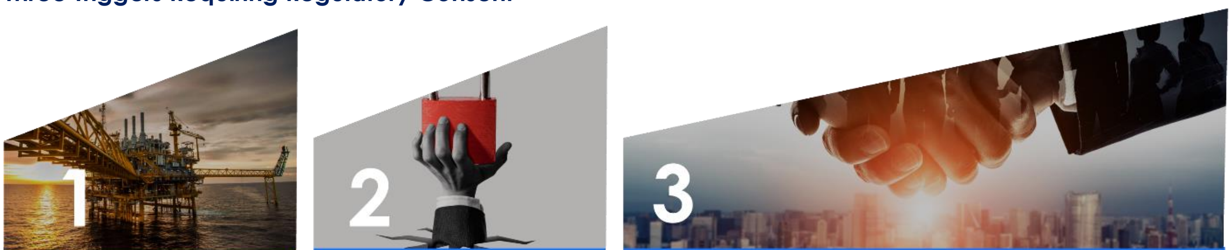
The scope of the Regulations is broad: They apply to any transaction involving the assignment of an interest in a licence or lease (whether direct or indirect), as well as to the creation of security over such interests, and critically, to changes in control of entities holding upstream assets.

For the Midstream and Downstream sector, the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) issued the *Assignment or Transfer of Licences and Permits Regulations* in 2023. Our analysis on this framework will be released by the end of Summer 2025, as we have seen and expect more activity in the sector also.

The market is expectant of another round of asset transfers expected to unfold over the next 6 to 18 months - including internal group restructurings, mergers and acquisitions among private entities, and potentially, a rationalization by NNPC of its upstream portfolio.

The new regime raises critical considerations for stakeholders, particularly around the expanded and evolving definition of "control," procedural ambiguities, the financial and compliance obligations tied to obtaining Ministerial consent, and its application to legacy (pre-PIA) assets. These issues have practical implications, directly influencing deal structuring, transaction timelines, and regulatory exposure in Nigeria's upstream sector.

Three Triggers Requiring Regulatory Consent



Assignment of Interest

Transfer (direct or indirect) of interest in an upstream licence or lease

Creation or Enforcement of Security

Granting or enforcing a security interest over a licence or lease

Change in Control

Control being broadly defined to include:

- Shareholding beyond **50%**
- Board control or voting influence
- Subsidiary or holding company relationships
- Any material influence over company policy

Transactions Covered by the 2024 Regulations[1]

The Regulations apply to the upstream petroleum sector and set out a detailed framework for transactions that may trigger the requirement for regulatory oversight and consent. Specifically, the scope of application, as outlined in the Regulations, covers three broad categories:

1. **Assignment of Interest**: This includes any assignment or transfer - whether direct or indirect, of an interest in an upstream petroleum licence or lease. It captures typical asset sales, farm-outs, and similar transactions where legal and/or beneficial ownership in the asset changes hands.

[1] Regulation 2 of the Regulations

2. **Creation or Enforcement of Security**: The Regulations also apply where a party creates or enforces a security interest, either wholly or partially, over a licence or lease. This provision is particularly relevant for financing transactions where interests in upstream assets are used as collateral, as it may trigger the consent requirement even in the absence of a full transfer of ownership.
3. **Change in Control**: Finally, the Regulations extend to situations involving a change in control of a company that holds an interest in a licence or lease. This includes not only changes in the shareholding that exceed certain thresholds but also more nuanced corporate restructuring arrangements that result in a shift in control as defined under the Regulations.

Beyond 50%: The Expanding Scope of "Control" Under the 2024 Regulations

The PIA provides that any assignment of interests or assets in a licence or lease requires the consent of the Minister, including a requirement that a "change of control" in the holder of such a licence or lease also requires Ministerial Consent. The Act defines "change of control" as the acquisition (whether direct or indirect)of beneficial ownership of **more than 50%** of the voting power in the licence or lease holder, whether by contract or otherwise.[2] This introduces a clear statutory threshold: only where control passes the 50% mark does the PIA trigger the requirement for Ministerial consent on account of a change of control.

However, the 2024 Assignment Regulations take a more commercial approach by expanding the definition of "control" to include a variety of legal and practical means by which control over a company may be exercised. These include:

- holding more than half of the issued share capital;
- entitlement to a majority of votes at general meetings or control over such voting through intermediaries;
- the ability to appoint or veto a majority of the board of directors;
- being a holding company or subsidiary in relation to the licensee;
- or having the capacity to materially influence the company's policy.[3]

This expanded definition suggests that even transactions or corporate governance changes falling short of a 50% equity acquisition (such as boardroom changes or shareholder arrangements), may still amount to a change of control requiring Ministerial consent.

In effect, the Regulations potentially widen the regulatory net beyond what is expressly contemplated under the PIA, capturing forms of influence that are not strictly tied to voting thresholds.
<u>*We expect clients on future transactions affected by these thresholds will have active engagement with the NUPRC to determine if their deal falls within the "Minister's Consent Required" threshold.*</u>

[2] Section 95(14) of the PIA
[3] Regulation 24 of the Regulations

Internal Restructurings

Further compounding the issue is the treatment of internal reorganisations under the Regulations. The Regulations explicitly list intragroup restructurings as a category of assignments requiring Ministerial consent.[4] *This has sparked debate.* One school of thought maintains that internal reorganisations should fall outside the consent regime, especially where there is no change in ultimate beneficial ownership or control. Another perspective argues that the Regulations adopt a form-over-substance approach, treating even internal group transfers as assignments per se, and thereby subject to the Commission's oversight regardless of whether the PIA threshold is met.

In this evolving regulatory landscape, stakeholders will have to navigate the potential divergence between the PIA's statutory standard and the broader framework introduced by the Regulations.

Whether the Regulation's approach is consistent with the hierarchy of laws remains an open and legally significant question.

Consent Fees and Financial Obligations

The Regulations emphasize that the Minister's consent to an assignment is conditional upon the payment of a fee amounting to seven percent (7%) of the transaction value - broken down into a two percent (2%) processing fee and a five percent (5%) premium. However, in the case of intragroup transfers, the assignor is only required to pay the two percent (2%) processing fee.[5] The transaction value is to be determined either by:

- the amount payable to the assignor as disclosed in the assignment application or in the relevant transaction contract; or
- an amount prescribed by the Commission, based on its established metrics for determining good and valuable consideration for the asset at the relevant time.[6]

Once consent is granted, the assignor has 90 days to make the required payment, with an additional 30-day grace period. Failure to make full payment within this extended period triggers a surcharge of 0.01% per day (calculated on a straight-line basis) of the outstanding amount, for up to 90 days. If the surcharge period lapses without full payment, the consent is deemed withdrawn.[7]

In addition to the statutory requirements for obtaining Ministerial consent, based on our experience in recent divestment transactions, the Commission has, as a matter of practice, required upfront payment under certain pre-sale obligations.

These typically include Decommissioning and Abandonment (D&A) liabilities, Host Communities Development Trust Fund obligations, and Environmental remediation obligations. These payments are generally required to be deposited into an escrow account accessible by the Commission, and in most

[4] Regulation 24 of the Regulations
[5] Regulation 19(2) of the Regulations
[6] Regulation 19(3) of the Regulations
[7] Regulation 19(7), (8) and (9) of the Regulations

cases, the amounts involved can run into hundreds of millions of U.S. dollars, significantly impacting transaction structure and timelines.

Based on our experience advising on such transactions, it is observed that the Commission may accept alternative forms of security in lieu of immediate cash payments, depending on the specifics of the deal and the parties involved.

This evolving practice introduces a layer of flexibility, though it also highlights the importance of early engagement with the regulator to align on expectations.

Unresolved Delays: The Risk of Regulatory Inaction

Following the assignor's notification to the Commission of its intention to assign,[8] the next procedural step requires the assignor to conduct a technical evaluation to identify qualified candidates for the transaction. Once this is completed, the assignor must submit the list of technically qualified candidates to the Commission for review.[9] Under the Regulations, the Commission is expected to assess the suitability of these candidates within 15 working days, and any candidate deemed unsuitable will be disqualified from proceeding to the commercial stage of the transaction.

While the Regulations expressly provide that the Commission must respond to the initial notice of intention to assign within 15 days, failing which approval is deemed granted,[10] this safeguard does not apply at the technical evaluation stage. In other words, if the Commission fails to respond within the 15-day window for assessing technical qualifications, the Regulations are silent on the consequence of such inaction.

This lack of a "deemed approval" mechanism introduces a potential bottleneck in the transaction timeline. It creates a regulatory vacuum that may inadvertently delay transactions, particularly in instances where the Commission's response is not forthcoming. Whether this was an intentional omission or a drafting oversight remains unclear, but the absence of a time-sensitive consequence at this stage stands in contrast to the more structured approach taken earlier in the process.

Given the importance of timing and regulatory certainty in upstream transactions, this gap may present a practical challenge for parties seeking to progress to the commercial stage without undue delay.

Does the Regulation apply to Non-Converts?

A recurring point of discussion is whether the newly issued Regulation applies to holders of upstream assets under the pre-PIA regime, specifically, existing **OPL** and **OML** holders who have not converted to the new regime. Under the now-superseded Consent Guidelines, it was clear that the requirement to obtain the Minister's consent applied strictly to assignments of interests in OPLs and OMLs.

However, the **interpretation section of the 2024 Regulation**[11] appears to broaden the scope of its application by defining "licenses and leases" to include not only **PPLs** and **PMLs** (the titles created under the Petroleum Industry Act) but a lso **OPLs and OMLs** issued under the repealed Petroleum Act, 1969. This definitional expansion brings non-convert holders within the purview of the Regulation.

[8] Under the Regulations, the first stage to obtain the Minister's consent involves written notification to the Commission of the proposed transaction relating to the license or lease
[9] Regulation 5 of the Regulations
[10] Regulation 4(7) of the Regulations
[11] Regulation 24 of the Regulations

Conclusion

The Nigerian Government and the NUPRC have sought to bring clarity and predictability to this area of deal making and they have certainly moved the needle, but clients must be nimble, practical and proactive in managing commercial expectation and legal requirements to get the deal done. That being said, the market is evolving, and we love to see it.

If you require any further clarification, do not hesitate to contact us.