

# **FISCAL REALITY**

**(Fiscal Responsibility Act Monitoring Manual)**



**Centre for Social Justice (CSJ)**  
**(Mainstreaming Social Justice In Public Life)**

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By

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## **ABBREVIATIONS**

All. NLR: All Nigeria Law Report

Act: Fiscal Responsibility Act

Cap: Chapter

CBA: Cost Benefit Analysis

CSO(s): Civil Society Organisation(s)

CSJ: centre for Social Justice

DMO: Debt Management Office

Doc: Document

ESC: Economic, Social and Cultural

ESCR: Economic, Social and Cultural Rights

FRA: Fiscal Responsibility Act

FRC: Fiscal Responsibility Council

FSP: Fiscal Strategy Paper

GDP: Gross Domestic Product

HUM. RTS.Q: Human Rights Quarterly

ICESCR: International Covenant on Economic, Social and Cultural Rights

MDA: Ministries, Departments and Agencies of Government

MDGs: Millennium Development Goals

MTEF(s): Medium Term Expenditure Framework(s)

MTSS: Medium Term Sector Strategies

NDIC: Nigeria Deposit Insurance Corporation

NEEDS: National Economic Empowerment and Development Strategy

NGO: Non Governmental Organisation  
NMLR: Nigeria Monthly Law Reports  
NNLR: Northern Nigeria Law Reports  
NSCC: Nigeria Supreme Court Cases  
NWLR: Nigeria Weekly Law Reports  
OPEC: Organization of Petroleum Exporting Countries  
PEM: Public Expenditure Management  
UN: United Nations  
USD: United States Dollars

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## **EXECUTIVE SUMMARY**

The Fiscal Responsibility Act 2007 (FRA) is made as an Act provide for the prudent management of the nation's resources, ensure long term macroeconomic stability of the national economy, secure greater accountability and transparency in fiscal operations within a medium term fiscal policy framework, and the establishment of the Fiscal Responsibility Commission to ensure the promotion and enforcement of the nation's economic objectives and for related matters.

However, the FRA is hardly known outside the circles of core public expenditure management analysts. The Manual is a response to this fact and it is the first civil society publication focused on the FRA. It is designed to popularise the provisions of the FRA and suggest engagement strategies for civil society interventions. Like the FRA, the Manual takes into account developments in civil society budget work over the years and seeks to advance into new opportunities created by the FRA. The Manual benefitted from contributions of stakeholders at workshops and other forums.

Chapter One focuses on the starting from the basics and introduces the concept of fiscal responsibility, the mischief in the existing law that led to the enactment of the FRA. It concludes with an overview of the FRA and its relationship with other laws. The concept of fiscal responsibility is noted to cover a very wide field of fiscal action including aggregate fiscal discipline, operational and allocative efficiencies. Fiscal responsibility covers the entire life of fiscal policies and processes from programming, planning and budgeting. It includes expenditure conceptualisation within the medium term expenditure framework, the fiscal strategy paper, the revenue and expenditure framework and ensuring that these documentations are produced with the best available data. It also includes the process of appropriation approval, the aggregate expenditure ceiling, the information to be sent by the Executive to the Legislature and the process of public participation at this stage.

The chapter affirms that fiscal responsibility is central to enhanced service delivery, poverty eradication, guaranteeing adequate standard of living, sustainable economic growth, good governance and the institutionalisation of democracy. Simply put, it implies living according to your means, planning your expenditure, ensuring sustainability, borrowing only when necessary and as much as you have the ability to pay back, being accountable, transparent and open, encouraging popular participation, planning fiscal activities in a logical manner, maintaining fiscal discipline, promoting strategic priorities and delivering value for money, etc.

The mischief in the existing law and practice before the enactment of the FRA were detailed to include the boom burst fiscal cycle without a savings culture, unsustainable debts and deficits, poor intergovernmental fiscal relations, lack of popular access to fiscal information, and popular participation in budgeting and fiscal policy making was minimal. There were also accountability challenges, corruption, a fiscal framework that de-linked policy, planning and budgeting, unrealistic revenue forecasts, poor linkages between capital and recurrent expenditure, etc.

The chapter ends by emphasising the link between the FRA and other public expenditure management laws such as the Public Procurement Act, Debt Management Office Act and the anti-corruption laws, such as those establishing the Economic and Financial Crimes Commission and the Independent Corrupt Practices Commission.

Chapter Two focuses on strategic issues in monitoring and reporting fiscal responsibility. It discusses the objectives, basis and focus of monitoring and reporting. It also discusses the rights based approach to monitoring and reporting, qualities of a monitor and expected conduct, monitoring approach, qualities of a good report, dissemination strategies and engaging the process. The objectives of monitoring and reporting fiscal responsibility include to:

- ❖ determine compliance with the FRA and regulations made thereunder;

- ❖ determine whether expected outputs and outcomes are being realised;
- ❖ evaluate how realistic the FRA is;
- ❖ elevate transparency and accountability;
- ❖ provide information and data for evidence based advocacy;
- ❖ determine the legality and appropriateness of the use of state resources.

The basis for monitoring includes constitutional provisions (S.24 of the 1999 Constitution), the African Charter on Human and Peoples Rights, the Universal Declaration of Human Rights, and the FRA itself. The rights based approach to monitoring discusses basic state obligations under the Covenant on Civil and Political Rights and these include the obligations to respect, protect and fulfil economic, social and cultural rights using the instrumentality of the budget and the FRA. Discussions also centred on the monitoring approach which is expected to be strategic with a rock solid capacity to analyse pertinent issues. Accuracy, timeliness and accessibility are recorded as qualities of a good fiscal report. Engaging the system discusses issues of legislative and ministerial engagement, parallel frameworks, possible litigations, etc.

Chapter Three takes a clause by clause analysis approach to the FRA and is aptly headed “Monitoring In Action”. The major provisions attract comments analysing the law and its relations with some other laws and policies. Suggested action points by civil society are detailed and these include the timing and possible collaborations. Some of the suggested actions include engagement in the preparation and review of the MTEF comprising the macroeconomic framework, the fiscal strategy paper, revenue and expenditure framework. Analysis and studies of relevant fiscal policies, reminders to the authorities when prescribed actions are late in coming, constant engagement of the Minister of Finance, the Budget Office of the Federation, etc are expected of monitors.

Litigation as a strategy for engagement is also analysed considering the provisions of section 51 of the Act. Essentially by S.51, a person shall have legal capacity to enforce the provisions of the law by obtaining prerogative orders or other remedies at the Federal High Court without having to show any special or particular interest. This provision, a product of civil society

advocacy during the consideration of the bill by the Legislature has shattered the glass ceiling that hindered public interest litigation in public finance management. Thus, the courts can no longer throw out suits concerning fiscal issues on the ground that the petitioner has failed to show his *locus standi*, or what he has suffered over and above other Nigerian citizens as to justify his maintenance of the action in court. The courts are no longer in a position to ask the petitioner to show that his personal interests have been affected or threatened or to show sufficient interest peculiar to him and not one he shares with the general public before he can come to court.

A civil society checklist for documenting the implementation of the Act is provided in Appendix One while the Act is reproduced in Appendix Two.

CSJ presents this Manual to kick-start the process of active engagement of the FRA by civil society. The Manual hopes to inspire other publications and countless activities by civil society for the enthronement of sound fiscal governance in Nigeria.

***Eze Onyekpere Esq***

Lead Director

# Chapter One

## STARTING FROM THE BASICS

### 1.1 INTRODUCTION TO FISCAL RESPONSIBILITY

The word “fiscal” is generally defined as relating to financial matters, i.e. money and taxes and public revenues belonging to the public treasury. It relates to accounts or the management of revenue and public finances of government<sup>1</sup>. Fiscal policy refers to government’s actions with respect to aggregate levels of revenue and expenditure and the resulting surpluses or deficits. It is the primary means by which government influences the economy<sup>2</sup>. Governments set and implement fiscal policy through a number of means including the budget. “Responsibility” as a noun is about something which it is your duty to do or look after and for which you take the credit if it goes right and the blame if things go wrong. It is the state of being answerable for an obligation and includes judgement, skill, capacity and ability<sup>3</sup>. Thus, a combination of the words “fiscal” and “responsibility” to produce fiscal responsibility connotes the responsibility of a government in terms of fiscal issues and policy and how the government is able to pilot fiscal policy based on national and international best practices to the advantage or detriment of its citizens.

Fiscal responsibility addresses issues of aggregate fiscal discipline, allocative and operational efficiencies<sup>4</sup>. Aggregate fiscal discipline communicates medium term fiscal policy and targets and the policy of fiscal sustainability. As such, it disciplines policy making. Allocative efficiency disciplines decision making and highlights the need for action by showing future costs of current policies and investments and communicates decisions of commitment to specific priorities through forward estimates and indicative medium term allocations. Thus, it opens up budget space for the reallocation of funds to new priorities. Operational efficiency improves predictability of funding and policy for strategic planning, management and operational performance at sector level.

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<sup>1</sup> *Blacks Law Dictionary*, Centennial Edition, at page 636.

<sup>2</sup> *A Guide to Budget Work* of the International Budget Project, (2001) at page 82.

<sup>3</sup> *Blacks Law Dictionary*, Centennial Edition, at page 1312.

<sup>4</sup> These are all achieved through medium term planning under the Medium Term Expenditure Framework. See *Critical Issues in Public Expenditure Management*, page 18, Budget Transparency Network, 2006.

Fiscal responsibility covers the entire life of fiscal policies and processes from programming, planning and budgeting. It includes expenditure conceptualisation within the medium term expenditure framework, the fiscal strategy paper, the revenue and expenditure framework and ensuring that these documentations are produced with the best available data. It also includes the process of appropriation approval, the aggregate expenditure ceiling, the information to be sent by the Executive to the Legislature and the process of public participation at this stage. It reaches out to bring big corporations and institutions such as the Nigeria National Petroleum Corporation and the Central Bank of Nigeria and their profits and losses within budgetary purview and legislative control. It covers budget execution and reporting, issues of increase or decrease in taxation and personnel expenses. It further includes borrowing, deficits, debts and indebtedness and the duties of legislative oversight over fiscal policy implementation.

The concept of fiscal responsibility implies that there is an opposite called fiscal irresponsibility and illustrations of this state of affairs would include excessive spending in periods of boom and inability to maintain basic services in lean periods, unsustainable indebtedness, de-linking policy, planning and budgeting and generally, all such matters that would negatively affect the fiscal wellbeing of the state. It appears that fiscal responsibility legislation has a history of being enacted after a fiscal crisis. For instance, the Brazilian fiscal responsibility law became necessary after high levels of indebtedness, lack of public expenditure control and successive annual deficits; personnel expenditure was out of control and general lack of acceptable expenditure regulation and deficit financing mechanisms. However, Nigeria's Fiscal Responsibility Act was enacted at a time of high oil prices when the country had exited the debt trap. This provides a good opportunity for enhanced implementation of the Act. Other countries that have fiscal responsibility legislation include Argentina, Chile, India, New Zealand, etc.

Fiscal responsibility is also linked to anti corruption - that public resources are not stolen, misappropriated or mismanaged. The fact that huge sums of money have been mismanaged since Nigeria's return to civil rule makes a very glaring case for the enactment and implementation of fiscal responsibility legislation at all tiers of governance.

Fiscal responsibility raises several country specific questions and posers and answers to these will be found in the laws, policies, regulations and practices of countries. However, international best practices exist which can be adapted by countries to suit their specific circumstances. The posers for a national fiscal responsibility regime will include:

- ❖ What are the definitions of acceptable fiscal behaviour for governments at all tiers, institutions, and individual officials? Any legal or policy provisions covering fiscal policy and how comprehensive are these laws and policies?

- ❖ What fiscal limitations are placed on governments and authorities?
- ❖ What are the transparency and disclosure rules?
- ❖ How is value for money guaranteed?
- ❖ How is accountability guaranteed?
- ❖ How is popular participation guaranteed and what role for civil society?
- ❖ What checks and balances exist between the arms of government?
- ❖ What are the sanctions for fiscal malfeasance and the adequacy of the sanctions?
- ❖ The probability of prosecution and sanctions - are the sanctions in the books applied for fiscal malfeasance or do they merely exist on paper?
- ❖ What relationship exists between observance of fiscal responsibility rules and economic growth and development?

Fiscal responsibility is central to enhanced service delivery, poverty eradication, guaranteeing adequate standard of living, sustainable economic growth, good governance and the institutionalisation of democracy. Simply put, it implies living according to your means, planning your expenditure, ensuring sustainability, borrowing only when necessary and as much as you have the ability to pay back, being accountable, transparent and open, encouraging popular participation, planning fiscal activities in a logical manner, maintaining fiscal discipline, promoting strategic priorities and delivering value for money, etc.

## **1.2 THE MISCHIEF IN THE LAW BEFORE THE FISCAL RESPONSIBILITY ACT**

New laws are made to cure mischief in existing law or where there is a lacuna in the legal framework. The posers are; what was the mischief in the existing framework that the Fiscal Responsibility Act was enacted to remedy? What was the mischief and defect for which existing law did not provide? What remedy did the legislature provide to cure the defect? What are the true reasons for the remedy contained in the FRA?<sup>5</sup> Although the mischief rule is used as a canon of statutory interpretation, it is however useful as a basis of understanding the need for a new law, especially within

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<sup>5</sup> . *Heydon's Case* (1584) 3 Co. Rep 7a; *International Bank for West Africa Ltd v Imano (Nig) Ltd & Anor* (1988) 3 N.W.L.R. (Pt.85) 633 at 668.

the Nigerian fiscal context where poor fiscal outcomes fuel underdevelopment.

The following (listed in paragraphs A-K hereunder) were the background issues and the mischief in the existing law and practice that led to the enactment of the FRA<sup>6</sup>. It is therefore the duty of civil society in interventions under the Act to move in suppression of the mischief while advancing the remedy proposed in the FRA and to decisively call in public opinion and the courts to suppress subtle inventions and evasions for the continuance of the mischief and to add life and force to the remedy according to the intention of the legislature<sup>7</sup>. Apparently, some of the mischief continued till date despite the enactment of the Act. The intervention of civil society through monitoring and reporting is premised on the need to ensure that the promises of fiscal responsibility legislation are not mere pipe dreams. The mischief in the previous legal system is detailed as follows.

**A. Boom Burst Fiscal Cycle - No Savings Culture:** Over the years, governments at the federal, state and local government levels had managed Nigeria's fiscal affairs in an unsustainable manner that leads to the conclusion that there is no tomorrow. The pattern of expenditure had been uncoordinated and unplanned. It rose and fell with the boom burst cyclical nature of the mainstay of our national economy - the commodity price of oil. At some time, a former Nigerian leader was quoted as saying that Nigeria's problem was not money but what to do with its money. The country spent any huge revenue windfall from oil as soon as it came, and when prices crash, it became difficult to even maintain basic governmental services such as payment of civil servants. The country had little or no savings<sup>8</sup>.

Despite the enactment of the FRA, the boom burst mindset is still prevalent in the country and this has led twenty states of the federation to file a suit against the Federal Government on the legality or illegality of the Excess Crude Account which is the savings provided under S.35 of the Act.

#### **BOX 1- FISCAL RESPONSIBILITY ACT TO THE RESCUE**

Nigeria faces severe fiscal and economic crisis in the year 2009 considering dwindling oil revenues and the economic meltdown that has affected all

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<sup>6</sup> Hereinafter called "FRA" or "the Act".

<sup>7</sup> Adapted from the rule in Heydon's case, and specifically per Aniagolu JSC in *Ifezue v Mbadugha* (1984) N.S.C.C. 314 at 325.

<sup>8</sup> Dr Okonjo Iweala, former Minister of Finance in *Why We Need the Fiscal Responsibility Law* stated as follows: "The Fiscal Responsibility Law when passed will help us solve this problem. It will set out criteria on how additional earned revenue coming into national coffers will be managed to ensure that we save something for the rainy day, invest in profitable projects and provide more infrastructure and for development to enable us truly diversify our economic base in a steady fashion".

developed countries. The 2009 federal budget proposals are based on a shaky foundation. This will affect revenue accruable to the federal government, states and local governments. The 2009 budget is based on an oil benchmark price of \$45 per barrel while oil sold for less than \$40 per barrel for the first three months of the year. The projection of N125=1USD has been rubbished as the naira currently exchanges officially for about N147=1USD. The projection for a single digit inflation rate is apparently unrealisable in the year 2009. Oil production projection of 2.292m barrels a day is unrealistic considering last years figures which were below 2m barrels a day, the continued crisis in the Niger Delta and OPEC lowered production quota for Nigeria of under 1.7mbpd for the first quarter of 2009. The implication of the foregoing is that with diminished resources to fund public expenditure, the need for fiscal discipline, allocative and operational efficiencies have become overwhelming so as to ensure that available resources are not frittered away.

*Source: Adapted from the 2009 Appropriation Act.*

**B. Unsustainable Borrowing, Debts And Deficits:** Before the debt relief of 2005, Nigeria's external indebtedness was in excess of \$34 billion and a good part of the borrowing could not be traced in terms of where they were invested. Nigeria had to cough out \$18 billion dollars under a debt relief arrangement to international creditors to exit the debt trap. The \$18 billion could have been used to rebuild some vital sectors of our economy. In terms of local debts, in 2004, Nigeria had pension arrears in excess of N1 trillion and outstanding payments in excess of N600 billion owed to contractors.

Parts of the debt were incurred during military dictatorship and as such were incurred without popular authorisation. During previous civil regimes, the executive incurred debts without legislative approval and only informed the legislature when there was need for appropriation to repay the debts. At the state level, since the return to civil rule, there appears to have been a lot of "fiscal irresponsibility", leading to alarms by newly elected governors in 2007 on huge debt profiles and empty treasuries left by their predecessors<sup>9</sup>. Just like the federal level debts, in many of these states with huge debt profiles, there is nothing on the ground to justify the procurement and expenditure of these debts.

**C. Poor Intergovernmental Fiscal Relations:** The third issue is the challenge of intergovernmental fiscal relations which was not properly addressed under the old system. The three tiers of government share the same currency, central bank and domestic credit market and the same international credit reputation. Free riding governments refused to abide by

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<sup>9</sup> The Jigawa State governor between 1999 and 2007 was reported to have left debts in excess of N130 billion which is in excess of all the states revenue earnings in five years.

the rules through reckless fiscal behaviour but they bore only part of the costs and would receive all the benefits emerging from the good fiscal behaviour of others. Thus, the choice of individual governments can lead to suboptimal outcomes for all other governments. There was no law to discourage such defection and free riding, rather, there were perverse incentives for governments to engage in fiscal misbehaviour<sup>10</sup>. Thus, during the \$18billion debt payback, it was noticed that while some states owed minimally, others owed very extensively and as such had to suffer greater deductions from their statutory allocations for their share of the debt.

**D. Access to Fiscal Information:** The fourth issue is that public access to fiscal and budgetary information was virtually non-existent. With the mindset of the Official Secrets Act, every government file was marked “secret” and it was presumed that civil society and the populace were outsiders that need not be allowed to pry into government’s fiscal affairs. No reports of budget implementation were available in the public domain and up till date, the Access to Official Information Bill has not been passed into law by the National Assembly. With little or no disclosure, the people did not know how much accrued as revenue and how it was spent.

**E. Popular Participation Was Very Minimal:** During the budget preparation, implementation and reporting stage, there was little or no room for the participation of “outsiders”, that is individuals and organisations outside the government. With the exception of the Nigeria Labour Congress and the organised private sector that were allowed to submit budget memorandum, the circle appeared closed to civil society. No opportunities for participation in public hearings existed either at the executive or legislative arms of government.

**F. Accountability Challenges:** There was no enforceable accountability framework that ensured both vertical and horizontal accountability. By vertical accountability, we mean the accountability of government to the holders of Nigeria’s sovereignty - the electorate and the populace through whom government derives all its powers and authority<sup>11</sup>. There were no clear reporting rules and timelines. Horizontal accountability refers to checks and balances between the arms of government particularly the Legislature with the power of appropriation and the Executive with the power of execution of fiscal policies and budgets<sup>12</sup>. There were also no clear rules on when and how the Executive will report to the Legislature on the implementation of the budget and fiscal policies.

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<sup>10</sup> *Subnational Discipline and Fiscal Responsibility Law- A Framework for Action* (2009) by Eze Onyekpere; Occasional Paper of the Centre for Social Justice.

<sup>11</sup> Section 14 (2) (a) of the Constitution under the Fundamental Objectives and Directive Principles of State Policy.

<sup>12</sup> For further details on the analysis between vertical and horizontal accountability, see the treatise on *Transparency and Accountability- A Conceptual Analysis* by Dr Asisi Asobie, paper delivered at the first Nigerian Stakeholders Summit on Transparency and Accountability, April 14-15, 2005.

**G. Corruption Was (And Is Still) In Vogue:** There were so many loopholes in the laws governing fiscal issues that fiscal corruption was the order of the day. It was easy for ministers and accounting officers to mismanage and steal government money entrusted in their care. With so much discretion and lack of clear cut rules, it was easy for leakages in the system to continue. The enactment of the Independent Corrupt Practices Commission Act<sup>13</sup> and the Economic and Financial Crimes Commission Act<sup>14</sup> are testimonies of existing grave corruption and the need to take definitive steps to curb corruption.

**H. De-linked Policy, Planning and Budgeting:** Policy, planning and budgeting are all parts of an integrated and holistic process for the determination of state priorities, strategising for the realization of policy goals and objectives and the deployment and management of resources in the direction of these priorities, goals and objectives. Ideally, they should be harmonised, reinforce and support one another. The failure to integrate the three is the single most important cause of poor budgeting outcomes at all tiers of government in Nigeria. Budgets are supposed to be the anchor for the implementation of economic, developmental, social and other policy provisions. It gives effect to the various legal commitments and standards the state has accepted. At the federal and other tiers of government, the experience had been that budgets fail to capture the links between expenditure decisions and the wider policy process and the political, legal and institutional context of economic and developmental imperatives.

However, many policies and plans are worth no more than the paper on which they are printed. They are usually made to satisfy an international development fad or to be seen to be compliant with donor's requirements or simply for the government to pretend to be doing something about social and economic problems. During the budgeting cycle, no reference is made to policies, agreed programmes and officially adopted plans. What follows is a haphazard rule of the thumb allocation of resources without a clear guide, a map for the determination of priorities and the disbursement of available income.

**I. Unrealistic Forecasts:** In many instances, budgets were unrealistic in terms of revenue forecasts and projections and this led to less revenue inflow to fund the budget. Weak financial and management systems also mean that budgeted sums are hardly disbursed in a full, timely and predictable manner to meet the demands of the spending units. Unrealistic forecasts may be a product of technical deficiency or it may be the product of pressure coming from political quarters to give the impression that fiscal targets for expenditure have been met. This in turn gives room to unpredictability in expenditure, which could be arrived at by comparing budgeted and actual expenditures.

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<sup>13</sup> Cap C31, Laws of the Federation of Nigeria, 2004.

<sup>14</sup> Cap E1, Laws of the Federation of Nigeria, 2004.

**J. Poor Linkage Between Recurrent And Capital Expenditure:** The links between recurrent and capital budgets were not properly understood and addressed, tended to be weak and therefore misaligned expenditure priorities. The capital expenditure of today will demand a recurrent vote for its maintenance and the delivery of services in the years to come. There was a perpetual demand for new projects without a proper examination of the need to strengthen existing projects or even rationalize where it is necessary. In many instances, mere increments to existing baselines appear to be the norm. The National Economic Empowerment and Development Strategy (NEEDS) in 2004 had proposed aligning the capital (40%) to recurrent expenditure (60%) by the year 2007<sup>15</sup>. This is yet to be achieved in the year 2009.

**K. Saying One Thing - Doing Another:** In the past, government's stated policies were different from their actions. The political will to engage in fiscal reforms was lacking despite pretensions to the contrary. For instance, while the Abacha administration pretended to be fighting corruption, the leadership was deeply immersed in corruption. Thus, monitoring becomes imperative under the new regime to ensure that the dry letters of the law have the breath of life. Also, the Yar'adua administration failed to constitute the National Council on Public Procurement after signing the bill into law while the Fiscal Responsibility Commission was constituted in response to a CSO challenge<sup>16</sup>.

### 1.3 OVERVIEW OF THE FISCAL RESPONSIBILITY ACT

The FRA came into force on 30<sup>th</sup> day of July 2007 and in the long title, it is made as an Act to provide for prudent management of the nation's resources, ensure long term macroeconomic stability of the national economy, secure greater accountability and transparency in fiscal operations within a medium term fiscal policy framework, and the establishment of the Fiscal Responsibility Commission to ensure the promotion and enforcement of the nation's economic objectives and for related matters.

Incidentally, the economic objectives which the FRA seeks to promote are found in the constitutional Fundamental Objectives and Directive Principles of State Policy which are stated by section 6 (6) (c) to be non justiciable. However, the National Assembly is empowered under item 60 of the Exclusive Legislative List of the Constitution to make laws for the establishment and regulation of authorities for the Federation or any part thereof for the promotion and enforcement of the Fundamental Objectives

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<sup>15</sup> NEEDS at page 19.

<sup>16</sup> Following CSJ's intervention in July 2008 in Suit No FHC/ABJ/CS/383/08 between *Centre for Social Justice and Anor v The President of the Federal Republic and 2 Ors*, the President sent a list of members of the Commission to the Senate for their screening and approval.

and Directive Principles of State Policy. It has been stated by Supreme Court as follows<sup>17</sup>:

*The Constitution itself has placed the entire Chapter 11 under the Exclusive Legislative List. By this, it simply means that all Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand.*

The Court further stated that the meaning of the word “establish” is clear enough and requires no further elaboration. It is however imperative to construe the expressions “regulate”, “promote” and “enforce” to determine their functions in item 60 (a). To regulate means to control, govern and direct the affairs of the authorities set up by the National Assembly to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in Chapter 11. To promote means such laws as will advance, further and contribute to the enlargement and growth of the Fundamental Objectives and Directive Principles. To enforce means to execute, make effective and compel obedience to the Fundamental Objectives and Directive Principles<sup>18</sup>. Essentially, by the force of the FRA, the provisions in the economic objectives have derived some measure of justiciability.

The FRA is a useful tool for all tiers of government - Federal, State and Local Governments. It is divided into fourteen parts and fifty seven sections. The FRA streamlines the power of the Legislature in the allocation of public expenditure while enhancing legislative oversight over its management. Fiscal Responsibility reforms include annual budgeting based on the reference commodity price, Medium Term Expenditure Framework<sup>19</sup>, efficient debt management, etc. The FRA mandates the Minister<sup>20</sup> to prepare a MTEF and encourages popular participation in its formulation through public consultations. The MTEF is the basis for annual budgets and contains a Fiscal Strategy Paper<sup>21</sup>. The FSP includes the strategic economic, social and developmental priorities of the Government for the next three financial years and an explanation of how the financial objectives, strategic economic, social and developmental priorities and fiscal measures relate to the economic objectives set out in S.16 of the Constitution. The MTEF also includes a macroeconomic framework,

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<sup>17</sup> Per Uwaifo J.S.C. in *Attorney General Ondo State v Attorney General Federation* (2002) 9 N.W.L.R. (Pt.772) 222 at 391.

<sup>18</sup> See Sasegbon's *Encyclopedia of Nigerian Law and Practice*, First Edition, Vol. 4 Paragraph 185 at page 113.

<sup>19</sup> Hereinafter called “MTEF”.

<sup>20</sup> Minister of Finance.

<sup>21</sup> Hereinafter called “FSP”.

expenditure and revenue framework, consolidated debt statement and a statement on the nature and fiscal significance of contingent liabilities.

The FRA seeks to enhance accountability, transparency and value for money in budgeting and fiscal management of federal resources and as such, promote the economic objectives contained in the Fundamental Objectives and Directive Principles of State Policy in chapter 2 of the Constitution of the Federal Republic of Nigeria 1999. The FRA provides for the establishment of a Fiscal Responsibility Commission (FRC) with representation from diverse stakeholders including civil society. The FRC is charged with ensuring the implementation of the provisions of the FRA.

The FRA regulates budget execution and achievement of targets, requiring the preparation and publication of the Annual Cash Plan by the Accountant General of the Federation and a Budget Disbursement Schedule by the Minister of Finance. It also regulates official budget monitoring and publication of the results, limitation of deficit financing, debts, indebtedness and borrowing. Under the new dispensation, governments shall only borrow for capital expenditure and human development provided that such borrowing shall be on concessional terms with low interest rates and reasonably long periods of amortisation and subject to legislative approval. The FRA further demands that government conducts its fiscal and financial affairs in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures.

Nigeria is a federation with strong fiscal federalism provisions in the 1999 Constitution. With the exception of debts, borrowing and deficit management which are on the Exclusive Legislative List<sup>22</sup>, the FRA can only apply to a state if the state decides to adopt or domesticate it as its own law. However, the provisions of the FRA on debts, deficit control and borrowing which applies to the three tiers of government provides some mechanism for managing intergovernmental relationship and the tensions that may arise from it. Although we have 36 states of the federation and 774 local governments, the economy is like a human body interconnected as a network of flesh, bones and nerves - what happens to one part affects the others<sup>23</sup>.

Previous attempts to regulate the fiscal conduct of states have failed at the Supreme Court. For instance, in the *Attorney General Abia State v Attorney General of the Federation*<sup>24</sup>, the constitutionality of the Monitoring of Revenue Allocation to Local Governments Act was challenged. The Act sought to allow agents of the Federal Government to participate in the

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<sup>22</sup> See Constitution of the Federal Republic of Nigeria, 1999, Second Schedule, Part 1, Exclusive Legislative List, items 7 and 50.

<sup>23</sup> Okonjo Iweala, supra, in Footnote 8.

<sup>24</sup> (2006) 16 N.W.L.R. (Pt.1005) 265.

meetings of the Joint State and Local Government Account Allocation Committee and to direct a report of the meetings to be made to the Accountant General of the Federation. The Supreme Court declared the Act unconstitutional and held as follows:

*The intendment of the provisions in the 1999 Constitution is to grant power and autonomy to a State Government in its relationship with Local Governments in a state and to subordinate Local Government Councils to a State Government. That explains why sections 7 (6) and 162 (5) of the Constitution only gives the power to allocate funds from the Federation Account to a Local Government Council and to leave the distribution of such funds to a State Government while confining the National Assembly only to allocate funds... The Federal and State Governments are sovereign when acting within the limits of the power granted them by the Constitution.*

The federal government is however enjoined by section 54 of the FRA to provide technical and financial assistance to States and Local Governments that adopt similar fiscal responsibility legislation along the same lines as the FRA for the modernisation of their respective tax, financial and asset administration. Essentially, there is the need for advocacy to encourage states to pass fiscal responsibility laws. Up till date, only about five states have enacted fiscal responsibility laws.

A most interesting aspect of the FRA is its recognition of the citizen as a stakeholder in the implementation of the law. Essentially by S.51, a person shall have legal capacity to enforce the provisions of the law by obtaining prerogative orders or other remedies at the Federal High Court without having to show any special or particular interest. This provision, a product of civil society advocacy during the consideration of the bill by the Legislature has shattered the glass ceiling that hindered public interest litigation in public finance management. Thus, the courts can no longer throw out suits concerning fiscal issues on the ground that the petitioner has failed to show his *locus standi*, or what he has suffered over and above other Nigerian citizens as to justify his maintenance of the action in court<sup>25</sup>. The courts are no longer in a position to ask the petitioner to show that his personal interests have been affected or threatened or to show sufficient interest peculiar to him and not one he shares with the general public before he can come to court.

Unlike the fiscal responsibility laws of some other countries, no limitations are paced by the FRA on personnel expenditure and there are no real sanctions in the FRA. The Brazilian FRA model places limitations on the

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<sup>25</sup> See the old tradition of the common law on locus standi in the cases of *Senator Adesanya v The President of Nigeria* (1981) All N.L.R. (Pt.1) 1 at 29; *Olawoyin v Attorney General Northern Nigeria* (1961) N.N.L.R 84.

personnel expenditure of federal, state and municipal governments<sup>26</sup>. It also provides sanctions for violations and this includes position loss, prohibition from contesting elections into public office for five years, fines which can range up to 30% of annual salary and jail terms ranging from three months to four years.

#### **1.4 FRA AND OTHER RELATED LAWS**

It is imperative to point out that the FRA must not be considered in isolation of other related laws on public expenditure management reforms. The other laws include constitutional provisions on budgeting, auditing and reporting on the accounts of the Federation and the States, the Public Procurement Act 2007, Debt Management Office Act<sup>27</sup>, the Allocation of Revenue (Federation Account) Act<sup>28</sup>, the anti corruption laws, etc. Success in the implementation of the other laws will to a great extent facilitate the enhancement of fiscal responsibility.

The Public Procurement Act regulates government commerce and the requisite due process in capital budget implementation - award of contracts, monitoring and implementation. The Debt Management Office Act to a great extent regulates local and international borrowing and debt management of the three tiers of government. It provides the conditions precedent to borrowing and the duties of the Debt Management Office. Anti corruption laws ensure that corrupt acts do not torpedo the realisation of government budgetary objectives, apprehend and punish offenders and sets legal standards for acceptable fiscal conduct.

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<sup>26</sup> The limitation is defined in terms of a percentage of the Net Current Revenue and no personnel expenditure increases are permitted 180 days before the end of a term of office.

<sup>27</sup> Cap D12, Laws of the Federation of Nigeria, 2004.

<sup>28</sup> Cap A15, Laws of the Federation of Nigeria, 2004.

## Chapter Two

### STRATEGIC ISSUES IN MONITORING AND REPORTING FISCAL RESPONSIBILITY

#### 2.1 OBJECTIVES OF MONITORING AND REPORTING FISCAL RESPONSIBILITY<sup>29</sup>

The overall goal of monitoring and reporting is to improve the fiscal system and process for the purpose of enhancing value for money, public expenditure management (PEM) reforms and ultimately the enhancement of the standard of living of the people who elected the government being monitored. The specific objectives are discussed hereunder.

**A. To Determine Compliance With The FRA And Regulations Made Thereunder:** Laws and regulations are made in the expectation that institutions and persons whose conduct the law intends to regulate will respect the law. Laws are also made to change the values and conduct of its addressees. In its utilitarian perspective, the FRA seeks to promote the economic objectives of government in section 16 of the Constitution under the Fundamental Objectives and Directive Principles of State Policy. Monitoring and reporting fiscal responsibility will facilitate a determination of whether institutions and individuals are complying with the law and how far section 16 of the Constitution is being respected. Also, MTEFs and budgets made under the FRA need to be complied with. Monitoring will facilitate the determination of whether there has been compliance or whether laws and regulations made thereunder have been placed on the shelf to gather dust.

**B. To Determine Whether Expected Outputs And Outcomes Are Being Realised:** With changed values and new ways of conducting fiscal affairs, a new set of fiscal outputs and outcomes are expected. It is possible that the law is being meticulously followed on paper, yet the outcomes fail to materialise. Law as an instrument of social engineering seeks to transform lives and solve societal problems. Essentially, a law is as good as the social problems, it solves. Thus, monitoring and reporting will facilitate the determination of whether those outputs and outcomes are being realised.

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<sup>29</sup> This part on “objectives of monitoring and reporting fiscal responsibility” is taken and modified from *Manual on the use of State and Administrative Resources*, Eze Onyekpere, Socio Economic Rights Initiative, 2007, pages 30-31.

In the right to health for instance, monitoring will determine whether health indicators such as child and maternal mortality and morbidity are improving.

**C. To Determine Whether Human Rights Obligations Are Respected, Protected And Fulfilled:** Nigeria is under obligation to respect, protect and fulfil its human rights obligations under various national laws and international treaties<sup>30</sup>. Monitoring the FRA will provide the opportunity to determine whether the government is:

- ❖ *Respecting human rights* - taking no action that interferes or violates already existing rights, for example engaging in forced evictions and demolitions of homes as happened in the Federal Capital Territory, Abuja under Minister el-Rufai.
- ❖ *Protecting human rights* - by preventing non state actors and third parties such as powerful corporations from violating entrenched rights.
- ❖ *Fulfilling human rights* - how far government has gone in taking proactive steps in policies, legislation, projects, budgetary appropriations and judicial mechanisms to ensure that the rights of citizens are fully guaranteed.

Further, monitoring will help to determine whether obligations of conduct are leading to obligations of results.

**D. Evaluate How Realistic The FRA Is:** The FRA appears good on paper but it may not be realistic within a given society. The monitoring process and its results will indicate popular perceptions and attitudes towards the law in terms of whether it is realistic and feasible to expect compliance with its provisions by persons and institutions whose conduct it is supposed to regulate. Popular respect for laws is sometimes tied to the effectiveness of the monitoring, enforcement and sanction mechanisms. If laws are made without effective enforcement and sanction mechanisms, they would be no more than moral adjurations. Monitoring and reporting will help reveal whether the law is realistic in this regard.

**E. To Elevate Transparency And Accountability In FRA:** Monitoring and reporting will illuminate the dark spots of the FRA. Transparency and accountability in fiscal issues will translate to enhanced ethics in governance since the fiscal transactions of government will be in the public domain. Adequate disclosure and regulation of fiscal activities are necessary prerequisites for controlling abuse of processes, corruption and misapplication of resources. Transparency and accountability will prevent the secret build up of illegal transactions, which will not meet the standards

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<sup>30</sup> See the International Covenant on Economic, Social and Cultural Rights.

for public approval. Monitoring and reporting will increase public confidence in the fiscal system.

**F. To Provide Information And Data For Evidence Based Advocacy For The Reform Of Fiscal Responsibility Laws And Regulations:** Monitoring and reporting will provide evidence of the provisions of the law that attracts compliance and those that the institutions and officials breached; the reasons for compliance and non compliance, etc. It will identify the gaps, challenges and problems associated with the implementation of the law. The whole essence of monitoring is to collect evidence, not hearsay or anecdotal evidence. If circumstantial evidence must be used, it must be compelling and pointing in the direction of a single reasonable conclusion. The report of the monitoring will provide supporting data and evidence for the reform of laws and associated policy and implementation frameworks.

**G. To Determine The Legality And Appropriateness Of The Use Of State Resources:** State resources, except as permitted by law, are not to be converted for the personal use of any person or institution. Monitoring and reporting will provide the framework to determine whether there has been compliance with the laws in this regard.

## **2.2 BASIS FOR MONITORING**

The Constitution of the Federal Republic of Nigeria 1999, the FRA, other related laws and best practices in PEM envisage a fiscal system that defines institutional roles and responsibilities with clarity including checks and balances; a comprehensive budget that captures the totality of government's financial operations; accurate and timely information and projections; and a process that is both transparent and allows for meaningful participation by the Legislature and the citizenry. But the foregoing cannot be realised if citizens do not have oversight on the fiscal system. Accountability is not guaranteed by sheer legal provisions but by the eternal vigilance of the beneficiaries of accountable fiscal governance to ensure that life is breathed into abstract legal provisions. For instance, since the FRA came into force on July 30 2007, the President of Nigeria failed, refused and neglected to constitute the FRC until late 2008. This was on the prompting of the suit filed by the Centre for Social Justice seeking an order of the Federal High Court to compel him to perform his statutory duty<sup>31</sup>.

There is always a "we and them mentality" in government circles which may make it difficult for even independent commissions such as the FRC to do effective monitoring and oversight that will indict senior officers of state. The "we" are those in government while the "them" are those outside government. Thus, other mechanisms of oversight to confirm whether the

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<sup>31</sup> Following CSJ's intervention in July 2008 in Suit No FHC/ABJ/CS/383/08 between *Centre for Social Justice and Anor v The President of the Federal Republic and 2 Ors*, the President has constituted the Commission.

official agencies are acting in accordance with the law have become necessary.

It has therefore become imperative that citizens and the civil society in the discharge of their civic duties and obligations become involved in the monitoring of the FRA and its processes. The results of such monitoring will be used for a number of purposes and will be submitted to the authorities who legally have the obligation to activate the enforcement mechanisms.

The obligation to perform this civic duty is supported by the FRA itself. By section 51 of the FRA, a person shall have legal capacity to enforce the provisions of this Act by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest. For a person to exercise this legal right, there is the statutory presumption and recognition that he must have been following and monitoring its implementation. The provision also recognises the restrictive provisions of the extant law on standing to sue or *locus standi* and decided to expand it and this informs the use of the specific words “without having to show any special or particular interest”.

Further, the provisions of S. 24 of the 1999 Constitution as follows:

It shall be the duty of every citizen to-

(a) *abide by this Constitution, respect its ideals...*

.....

(d) *make positive and useful contribution to the advancement, progress and well-being of the community where he resides;*

(e) *render assistance to appropriate and lawful agencies in the maintenance of law and order*

Already, the FRA anchors the functions of the FRC on the promotion of section 16 of the Constitution. What better and more noble duty can a citizen or a civil organisation render to government than to ensure the implementation of constitutional provisions? Rendering assistance to appropriate and lawful agencies (FRC) in the maintenance of law and order (fiscal responsibility) is a constitutional demand on every citizen.

The 1999 Constitution, the African Charter on Human and Peoples Rights<sup>32</sup> and the Universal Declaration of Human Rights<sup>33</sup> recognise the right of a

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<sup>32</sup> Article 13 of the African Charter on Human and Peoples' Rights (Cap.A9, Laws of the Federation, 2004): *Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*

citizen to participate in the government of his country. If laws and regulations on fiscal responsibility are consistently breached, participation in government will be meaningless because such government can no longer deliver on the human rights and development aspirations protected by law, especially economic, social and cultural rights encapsulated in the right to an adequate standard of living. Civil society therefore needs to intervene to ensure that this does not happen.

Citizen and civil society monitoring of fiscal responsibility has been undertaken in a number of countries. Nigeria is member of the comity of nations. In today's globalised world, the replication of best practices that facilitate and enhance development have become the norm.

### **2.3 FOCUS OF MONITORING -THE FRA**

The focus in terms of subject matter is the FRA and its contents, especially compliance with or violation of the law. Thus, it is important for the FRA monitor to be familiar with the contents of the FRA in the monitoring exercise. The fuller details of how to monitor each and every section and subsection will be detailed in the next chapter. The parts and sections of the FRA are as follows.

Part I – Establishment, Functions, Powers of the Fiscal Responsibility Commission.

1. Establishment of the Fiscal Responsibility Commission
2. Responsibility, powers and functions of the Commission
3. Functions of the Commission
4. Establishment of a Fund for the Commission
5. Composition of the Commission
6. Tenure of Office
7. Powers of the Commission
8. Cessation of membership
9. Emoluments etc of members
10. Submission of annual report of the Commission

PART II – The Medium – Term Expenditure Framework

11. Medium-Term Expenditure Framework
12. Aggregate Expenditure Ceiling
13. Preparation of a Medium-Term Expenditure Framework
14. Time Limit for Presentation of Medium-Term Expenditure Framework to Federal Executive Council.

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<sup>33</sup> Article 21 of the Universal Declaration of Human Rights: *Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

15. Publication of Medium-Term Expenditure Framework in the Gazette
16. Adjustment to the Medium-Term Expenditure Framework
17. Assistance to States and Local Governments.

#### Part III – The Annual Budget

18. Annual Budget to be derived from Medium-Term Expenditure Framework
19. Annual Budget to be Accompanied by Certain Documents
20. Application of part III to States and Local Governments

#### Part IV – Budget Planning of Corporations and Other Related Agencies

21. Preparation of Estimate of Revenue and Expenditure by Corporations etc.
22. Operating Surplus and General Reserve Fund
23. Classification of Corporation Operating Surplus
24. Cessation of Application of Part IV

#### Part V – Budget Execution and Achievement of Targets

25. Annual Cash Plan
26. Disbursement Schedule
27. Power of Minister to Approve Virement
28. Power to Restrict Further Commitments
29. Restriction on the Grant of Tax Relief
30. Responsibility of the Budget Office to Monitor and Report on Implementation
31. Application of Part V to States and Local Governments

#### Part VI – Public Revenues

32. Forecast and Collection of Public Revenues
33. Revenue Forecast
34. Executive to Breakdown Estimated Revenue.

#### Part VII – Savings and Asset Management

35. Savings.

#### Part VIII – Public Expenditure

36. Condition for Increasing Government Expenditure
37. Condition for Increasing Personnel Expenditure
38. All Contracts to Comply with Rules and Guidelines
39. Effect of Violation of Public Expenditure Rules
40. Application of Part VIII to States and Local Governments.

## Part IX – Debt and Indebtedness

- 41. Framework for Debt Management
- 42. Limit on Consolidated Debt of Federal, State and Local Governments
- 43. Servicing of External Debt.

## Part X - Borrowing

- 44. Conditions for Borrowing and Verification of Compliance with Limit
- 45. Lending by Financial Institutions
- 46. Prohibition against CBN in its Relation with Government Agencies and Parastatals
- 47. Power of the Minister to Grant Guarantees.

## Part XI – Transparency and Accountability

- 48. Fiscal Transparency
- 49. Publication of Audited Accounts by all Arms of Government
- 50. Publication of Summarized Report on Budget Execution.

## Part XII - Enforcement

- 51. Enforcement

## Part XIII – Miscellaneous Provisions

- 52. Government Securities as Collateral to Guarantee Loans
- 53. Restriction on Utilization of Proceeds of Sale of Public Assets etc
- 54. Technical and Financial Assistance to States and Local Governments
- 55. Power of President to Make Regulations.

## Part XIV - Interpretation

- 56. Interpretation
- 57. Citation.

## **2.4 RIGHTS BASED APPROACH TO FRA MONITORING**

The focus of FRA monitoring is on applied budget work which is of direct relevance to the existential needs of the majority of the population. FRA monitoring should also focus on ongoing fiscal policy debates. From a rights based perspective, the following issues are important in monitoring fiscal policy and its implementation. Monitoring should not just focus on general human rights concerns but should focus on the right to an adequate standard of living. This comes from the background of the poverty of the majority of the Nigerian population and the fact that fiscal policy is central to the alleviation of poverty, economic growth and societal development. The

focus is therefore on how the provisions of the FRA impact on economic, social and cultural rights.

In delineating the nature of Nigeria's obligations in matters of economic, social and cultural rights ("ESC") rights, resort has to be made to the International Covenant on Economic, Social and Cultural Rights ("ICESCR") which apparently is the most comprehensive ESC rights standard that has been ratified by Nigeria. This is necessary for a proper understanding of what specific monitoring points FRA monitors can focus on. The ICESCR states in article 2 (1):

*Each State Party to the Present Covenant undertakes to take steps individually and collectively and through international assistance and cooperation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means including particularly the adoption of legislative measures.*

An examination of the operative phrases in this article will follow.

**A. To The Maximum Of Available Resources:** The phrase "maximum of available resources" recognises the difference in wealth and resources available to the different countries in the world who are State Parties to the ICESCR. In accordance with the Limburg Principles,<sup>34</sup> states are obligated regardless of economic development, to ensure respect for minimum subsistence rights for all. Resources include what can be sourced locally and from aid and general international cooperation. Resources could be classified into different categories<sup>35</sup>. For a state party failing to meet its obligations on ESC rights to rely on lack of resources, it must show that every effort has been made to use all the resources at its disposal to satisfy the minimum ESC rights obligations<sup>36</sup>. In times of grave economic crisis, vulnerable groups are still entitled to subsistence rights by the states adoption of low cost measures. The question of prioritising the expenditure of the state becomes relevant here. It has been noted that corruption absorbs a lot of resources that could have been invested in housing, education, health etc. In the circumstances, it would be problematic for Nigeria to plead the unavailability of resources as a reason for the non

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<sup>34</sup> The Limburg Principles on the Implementation of ICESCR, UN Document E/CN.4/1987/17

<sup>35</sup> Resources have been classified into human, technological, information, natural and financial resources; see Roberts E. Robertson *Measuring State Compliance with the Obligation to Devote the Maximum of Available Resources to Realising Economic, Social and Cultural Rights* (1994) 16 HUM RTS.Q 693, 695-697.

<sup>36</sup> See General Comment No. 3 of the UN Committee on ESCR, adopted at the Fifth Session of the ESCR Committee in 1990, UN Doc E/199/123, Annex 111, para 10.

implementation of ESC rights while refusing to plug the leaking pipes of corruption<sup>37</sup>.

**B. To Achieve Progressively The Full Realisation Of ESC Rights:** The progressive realisation phrase is not to be interpreted to mean an indefinite postponement of action to realise ESC rights. Rather it obliges states parties to move immediately and as expeditiously as possible towards the realisation of ESC rights. The obligation exists independently of increase in resources; requiring effective use of available resources and developing societal resources for the realisation of ESC rights<sup>38</sup>. The concept of progressive realisation is a recognition of the fact that full realisation of ESC rights will generally not be achieved in a short time<sup>39</sup>.

Fiscal policies and their implementation should not in any way impinge on the realisation of already entrenched rights. They should not result in discriminatory official practices that deny certain groups their ESC rights<sup>40</sup>. Further, there is an obligation for forward movement using fiscal policy; a government is not permitted to use clear and deliberate fiscal policies to move backwards by derogating already protected ESC rights. Thus, fiscal policies which derogate entrenched rights without adequate safety nets and compensatory mechanism for the poor and vulnerable will be in violation of state obligations under the ICESCR and chapter 2 of the 1999 Constitution.

**C. To Take Steps... By All Appropriate Means Including Particularly The Adoption Of Legislative Measures:** The phrase recognises the need for the state to take deliberate, concrete and targeted steps which are as clear as possible towards meeting the obligation to protect ESC rights.<sup>41</sup> It acknowledges legislation as an important step while not limiting the steps to be taken by states parties to legislation alone. It is expected that state parties before ratification or immediately after ratification should bring their domestic laws (including fiscal policies) in conformity with the requirement of the ICESCR. Other means to be adopted by the state may include administrative, judicial, economic, social and educational measures consistent with the nature of ESC rights<sup>42</sup>. The State is also under an obligation to provide an effective remedy to persons whose ESC rights have been violated and this may include judicial remedies. States enjoy a margin of discretion in the selection of the means and methods for implementing

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<sup>37</sup> Nigeria has refused to prosecute the culprits of the Wilbros, Haliburton, etc scandals and has even shielded former governors from prosecution in foreign countries.

<sup>38</sup> See principles 21-24 of the Limburg Principles

<sup>39</sup> See para 9 of General Comment No. 3 of the UN Committee on ESCR.

<sup>40</sup> Non discrimination is a peremptory norm of customary international law and is part of the fundamental human rights entrenched in the 1999 Constitution.

<sup>41</sup> General Comment No. 3 of the UN ESC Rights Committee (Supra).

<sup>42</sup> Principle 17 of the Limburg Principles.

obligations on ESC rights under the ICESCR. This is also the case for many civil and political rights<sup>43</sup>.

While the most appropriate fiscal policies for the achievement and full realisation of ESC rights will inevitably vary significantly from one state party to another, the ICESCR clearly requires that each state party take whatever steps are necessary for that purpose.

It is imperative to point out that violations of ESC rights precipitated by fiscal policy whether directly perpetuated by the state (action) or by private entities which could have been prevented by the state (omission) engages the states responsibility. The state is obligated to prevent, investigate and punish any human rights violation carried out in its territory not only by the acts of public officers but also directly resulting from acts not directly imputable to officers of the state. This has been aptly captured in the following words<sup>44</sup>:

*..to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out investigations of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victims adequate compensation.*

In accordance with Maastricht Guidelines, there are three layers of obligations in matters of ESC rights: obligations to respect, protect and fulfil. Like civil and political rights, ESC rights impose three different types of obligations on states: the obligations to respect, protect and fulfil. Failure to perform any one of the three obligations constitutes a violation of such rights. The obligation to respect requires states to refrain from interfering with the enjoyment of ESC rights. Thus, the right to housing is violated if a state engages in arbitrary forced eviction. Fiscal policy that imposes greater taxation on the poor either through direct or indirect taxation may infringe the obligation to respect. For instance, the planned increase in Value Added Tax from 5% to 10% which would have reduced the purchasing power of majority of Nigerians would have come under this violation of the obligation to respect existing rights. This would have been so considering that the leaking pipes of the federal treasury would not have allowed the additional revenue to be of any benefit to the majority of the population.

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<sup>43</sup> Guideline 8 of the Maastricht Guidelines on Violations of ESCR developed by the Experts Meeting held from January 22-26 1997 at the instance of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute of Human Rights (Cincinnati Ohio, USA) and the Centre for Human Rights of the Faculty of Law of the Maastricht University (The Netherlands).

<sup>44</sup> *Velasques Rodrigues* case- Inter American Court of Human Rights of July 29 1988, 1 ACHR series C, Decisions and Judgements No.4, paras 174-175 or (OAS/ser.I/V111 19, doc 13 1998, para 174. the position in this case can be rightly asserted to be *jus cogens*.

The obligation to protect requires states to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to just and favorable conditions of work. Fiscal policies on oil and gas exploitation provide a good case study. Gas flaring has been empirically identified as a source of great environmental pollution, contributing to global warming and with negative consequences (rights to food, health, adequate housing, standard of living, etc) for the residents of the Nigeria Delta. Yet the government's stated penalty for gas flaring is not prohibitive enough to stop gas flares. Rather it treats violators of a plethora of rights with kid gloves to the extent that oil companies prefer to pay for the flares than to invest in gas gathering infrastructure. Attempts to fix deadlines for end of gas flares have come and gone and goal posts have been shifted several times.

The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation of the right to health<sup>45</sup>. A clear case of a violation of the obligation to fulfil is what happened to the implementation of the federal budgets 2007 and 2008; Ministers and accounting officers refused to implement their budgets and billions of naira were being returned to the Treasury at the end of the year. Thus, this was not a case of lack of resources but a failure of the government to use available budgetary resources.

**D. The Minimum Core Content Of ESC Rights:** There is a duty to satisfy what the ESC Rights Committee has identified as the minimum core obligations of the Covenants articles to wit; a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights<sup>46</sup>. The Committee went ahead to state that if the ICESCR were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. Thus, the minimum core obligation is the threshold below which no state will be allowed to descend. It is an obligation which must be met regardless of resources available to the state. Thus, monitoring will ensure that provisions in the MTEFs and the annual budget on the satisfaction of the right of the majority to an adequate standard of living do not go below this core obligation.

Lack of access to resources has been touted as one of the main reasons for the non implementation of ESC rights. Although this argument to a great extent lacks merit since no human rights is cost free, it is pertinent to point out the duties to respect and protect ESCR can be implemented without expending too much resources. The obligation to respect is a negative duty (freedom from forced eviction requires no resources) while the obligation to

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<sup>45</sup> See Guideline 6 of the Maastricht Guidelines.

<sup>46</sup> See General Comment No. 3 (supra).

protect imposes no greater burden than that incurred through the normal law enforcement mechanism. It is only fulfilment bound obligations that directly require resources to implement. In a state like Nigeria, proper management of resources and mobilisation of manpower can go a long way in addressing the problems raised by lack of resources.

In accordance with the Maastricht Guidelines, there is a distinction in the minimum state obligations in obligations of conduct and obligations of result:

*The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. In the case of the right to health for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires states to achieve specific targets to achieve a detailed substantive standard. With respect to the right to health, for example, the obligation of conduct requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference of Population and Development and the 1995 Beijing Fourth World Conference on Women.*

## **2.5 QUALITIES OF A MONITOR AND EXPECTED CONDUCT**

The cardinal principle for monitors is to maintain independence from partisan politics, be impartial and conduct oneself with utmost decorum and integrity. The monitor must possess probity, maturity and discipline. He should not be involved in dishonest acts and conduct like bribery and corruption or use any information garnered in the course of monitoring for private gain. A monitor must be an adult of 18 years and above, literate in English since he needs to read and fill checklists and provide reports. A monitor must be abreast of Nigerian laws and regulations on the subject of fiscal responsibility. A monitor must show some deep care and passion about the need to positively change the fiscal system and ensure Nigeria's fiscal development. Essentially, he must show commitment to working for fiscal reforms that drive development and economic growth. A monitor shall take reasonable steps to be factual and substantiate information she provides on fiscal performance. Where this cannot be done, the monitor shall state the inability to verify the truth of the information.

## **2.6 MONITORING APPROACH**

The approach may be a combination of monitoring and investigation. An investigation is to follow up, step by step, by patient enquiry or observation; to trace or track, to search into; to examine and inquire into with care and accuracy; examination, the taking of evidence, etc. On the other hand, monitoring involves checking and observation for information and significance and to raise warning signals when fiscal policies, laws and regulations are not complied with. Monitoring here involves a process of

formal and informal engagement of agencies, institutions and persons that would lead to voluntary disclosure of information or the gathering of evidence from which analysis and deductions can be made on a balance of probabilities. In this case, monitoring powers may confer authority on the monitor to compel institutions and persons to disclose facts under section 51 of the FRA.

Monitoring and the resultant report should in addition to determining whether a duty was performed or not, and in the traditional media approach, seek to provide answers to:

- ❖ What – what is the fiscal duty or assignment?
- ❖ Who - who or which institution is responsible for carrying out the assignment?
- ❖ Which – which institution has oversight responsibilities over the primary duty holder?
- ❖ When - at what time is the duty supposed to be performed?
- ❖ Where - where will the duty be performed?
- ❖ Why - why should the duty be performed? and
- ❖ How - how is the assignment to be undertaken?

It must be borne in mind that the authorities being monitored will not always be happy with the monitoring results especially when it is critical of their failings. Thus, it is imperative while highlighting the failures to also give due credit for successes achieved by governments. The monitoring report should be balanced.

The following issues in Box 2 and 3 should be considered when designing a monitoring approach and strategy.

*Box 2: A Strategic Approach To FRA Engagement*

Civil society work on the FRA is not about focusing analytic resources on a topic just because it is of academic interest to researchers. The work must be part of a larger strategy aimed at informing and influencing fiscal policies. For many groups, fiscal policy work focuses on putting the poor first in the ordering of fiscal priorities. Civil society work must be solid, but it is not neutral. Effective civil society fiscal work pursues its objectives by combining effective analysis with strong public education and advocacy.

*Box 3: Analytic Capacity that is Rock Solid*

The analytic work on the FRA must be serious and rock solid. The work must be done beyond dispute on the facts and clear and compelling in its analysis. Anything less undermines the credibility both of the work and the organisations that produce it. Most credibility with policy makers comes from rock solid analysis. That analytic solidness comes not from quick or one time analytic work but by looking at the same general topics year after year, developing expertise and credibility that increases over time.

Box 2 and Box 3 are adapted from page 23 of *Promises to Keep: Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights*<sup>47</sup>.

Monitoring fiscal responsibility is not a one off project but a continuous exercise that follows through all the steps in a cycle. Thus, it may be imperative to design the issues to be monitored through a template and all year round continue to garner information and data even before the time that those information will be needed to compile a report. The advantage is that when the time for reporting comes and deadlines need to be met, it will be easy to access materials and assemble them in a logical sequence.

An electronic monitoring template could be designed which deals with a plethora of issues including timing. Those time specific activities can be designed in such a way that once the duty is due and has not been performed triggers an alarm system.

The primary source of fiscal information is the executive arm of government. Monitors should approach the executive arm of government for information on fiscal policy and implementation updates. Two websites are important in this regard. They are the websites of the Ministry of Finance ([www.fmf.gov.ng](http://www.fmf.gov.ng)) and the Budget Office of the Federation ([www.budgetoffice.gov.ng](http://www.budgetoffice.gov.ng)). Happily, the FRA has made provisions for quarterly budget reports, Annual Cash Plan and a Budget Disbursement Schedule and the need for the publication of most products of the FRA in the mass media and the website of the Ministry of Finance.

Information for monitoring reports can also be sourced from the Legislature. The Legislature is traditionally less secretive than the Executive in their work. Committees and subcommittees of the Legislature are good sources of otherwise unavailable fiscal documents. The Legislature gets these documents in the exercise of its oversight role in the monitoring of laws and public expenditure in particular.

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<sup>47</sup> Reflections and Strategies based on a three day dialogue between international human rights activists, convened by the Mexico City office of the Ford Foundation and FUNDAR-Centre for Analysis and Research, in Cuernavaca, Mexico, January 2002.

The local media is an important source of information. Liaising with the media facilitates access to information which would otherwise not be in the public domain. However, caution must be exercised to cross check information received from the media since the media may fail to disclose the source of their information. This is imperative since fiscal policy reporting is based on empirical evidence which can be produced when the state challenges the report. Monitors should take steps to verify and substantiate every statement or information she provides in connection with the FRA. Subscribing to appropriate fiscal electronic listserves may also provide regular updates on fiscal information. If violations of the FRA are observed, the monitor should seek clarification from the government agency involved. If any information cannot be verified, the monitor should state so in her report. This is especially important with regard to information provided by the media.

Information on fiscal issues are also available from international development and financial institutions who are working in a country. These include the International Monetary Fund and the World Bank, African Development Bank, etc. Many of these institutions have web pages and various publications dedicated to the fiscal review of countries and as such, they are rich sources of fiscal information.

## **2.7 REPORTING**

### **Qualities Of A Good Report**

**A. Accuracy:** A monitor should report accurately, completely and honestly. She is required to lay all the facts on the table. Where the facts available do not point to a conclusion, this should be so stated in the report. The monitor should not engage in exaggerations and fantastic story-telling to embellish his report. If the monitor is unsure of particular figures and numbers, she should verify and cross check. The checklists and forms should be completed as soon the activity is over so that details are not forgotten due to memory lapses. Personal opinion and comments can be made on separate attached sheets of paper. Monitors should access all necessary information to enable them come to an informed opinion as to the compliance of the fiscal proceedings with the FRA, other relevant laws, policies and guidelines of the FRC.

The need for accuracy of the analysis and the reporting is borne out of the fact that the work will only be taken seriously by policy makers and the general public if it is of sound quality. For the media, it must be newsworthy but that does not mean producing a report that is unnecessarily sensational. Experts could be employed to review draft reports to ensure that it makes eminent sense to dish it out to the public.

**B. Timeliness:** Reports have to be timely and address critical issues of prevalent concern at the time it is released. For instance, general

assessments and reviews of the budget will need to be undertaken and published as soon as the budget is released. Interventions on the Medium Term Sector Strategies are best undertaken before they are finalised so that the interventions can influence the process. Post mortem interventions and reviews suffer from the poverty of remedial justice and can only influence the future (if accepted by policy makers) and not reverse already taken actions. Civil society budget breakdowns may best be disseminated in the public domain on the same day or a day after the Finance Minister undertakes the official breakdown.

Timeliness is best achieved by the continuous engagement of the fiscal process so as to know the timeframes for definite official actions. It is also facilitated by the continuous garnering of fiscal statistics and information which can be recalled easily as a counterpoise to official statistics.

**C. Accessibility:** Reports should be written in a language that is accessible to its target audience. The report should target the audience and adapt the writing style to their level and attention span. An academic report will definitely be different from one targeted at policy makers. A report targeted at technocrats in the ministries, departments and agencies will also be different from one meant for political office holders who do not have technical depth. High sounding technical jargons and a mass of technical data in a long and unwinding report may not be necessary for policy makers who have short attention spans and need concrete solutions to the practical challenges they face in their day to day work. Short analyses may be most useful and it could be the executive summary of a detailed long analysis but contains the major policy recommendations made by the organisation. If the report is long, recommendations and results of analysis should not be lost in the body of the work but should be accessible in smaller pullouts.

## **2.8 DISSEMINATING THE REPORT**

The FRA reports should identify the target audience and move expeditiously to ensure that the reports reach the audience. The audience could be a small compact legislative committee or a long list of stakeholders from the Executive, Legislature and the civil society.

A media strategy will be required to ensure that reports get published at the appropriate time with the deserving due prominence. Issues could be raised from FRA reports as news items, letters to the editor, opinion articles, specific discussions on radio and television, etc. It is imperative to establish a working relationship with the media beat in charge of fiscal and economic reporting and investigation and further relationships with the general news departments. Considering that the media focuses on reporting news and information to the people, it may be better positioned sometimes to collect information which it may share with monitors. This kind of collaboration means that it will give wide publicity to reports of NGOs that contain good materials on fiscal policy implementation.

## 2.9 ENGAGING THE PROCESS

After reporting and dissemination, a strategic engagement plan needs to be worked out in terms of achievement of concrete results with the report. In some instances, getting the report to the FRC or the Minister may be the first step. Thereafter, if remedial action is not taken, other steps such as getting the Legislature involved and urging them to use their oversight powers to compel action may arise.

Naming and shaming through effective use of the media may also be a good engagement strategy where there are persistent breaches of the FRA. A CSO book or *hall of fiscal infamy* may be opened for highly placed public officials who through the immunity clause are somehow “above the law”. Where a member of a professional association such as law and accountancy is behind constant violations of the Act and such violations may also amount to an offence under the professional association’s rules of professional conduct, it may be necessary to report the said officer to his professional disciplinary body.

In some other instances, there may be need to use litigation through mandamus to seek enforcement of fiscal duties or to obtain injunctions to stop a proposed or pending course of action in violation of the Act. In other instances, litigation may involve a declaratory action to reaffirm the position of the law. In many of these instances where the facts of the case are not in dispute, an originating summons may be the best approach to reaffirm the position of the law.

In other instances, where the report indicates that the malfeasance arose out of loopholes in the law, an opportunity to engage the Legislature through legislative advocacy may arise. This may be the case in many instances where actions are declared an offence and unlawful without sanctions being provided to checkmate such unlawful actions. It may also be that the FRC or the President needs to exercise its rule making powers under the law to fill the loopholes. If this is the case, then the engagement strategy should focus on advocacy to achieve that result.

Monitoring could also lead to alternative or parallel frameworks or recommendations which deviate from the official position. For instance, an alternative macroeconomic framework including the fiscal strategy paper and the revenue and expenditure framework could be designed if the official position appears contradictory and its implementation would lead to derogations of basic human rights. The alternatives would point the way and show new strategies for an inclusive framework where the rights of all segments of society are taken on board.

## Chapter Three

### FRA - MONITORING IN ACTION

#### GENERAL APPROACH

The approach adopted in this chapter, after each relevant section and subsection, is to make comments, identify issues and then suggest action points including what can be monitored, the persons or institutions to be monitored, how they can be monitored and the time for the monitoring exercise, etc. Where no issues are identified, no comments and action points are raised. In some instances, comments are made without action points where there is no need for action.

#### FISCAL RESPONSIBILITY ACT, 2007

**AN ACT TO PROVIDE FOR PRUDENT MANAGEMENT OF THE NATION'S RESOURCES, ENSURE LONG-TERM MACRO-ECONOMIC STABILITY OF THE NATIONAL ECONOMY, SECURE GREATER ACCOUNTABILITY AND TRANSPARENCY IN FISCAL OPERATIONS WITHIN A MEDIUM TERM FISCAL POLICY FRAMEWORK, AND THE ESTABLISHMENT OF THE FISCAL RESPONSIBILITY COMMISSION TO ENSURE THE PROMOTION AND ENFORCEMENT OF THE NATION'S ECONOMIC OBJECTIVES; AND FOR RELATED MATTERS.**

[July 30 2007]

Commencement

ENACTED by the National Assembly of the Federal Republic of Nigeria:

#### **PART I – ESTABLISHMENT, FUNCTIONS AND POWERS OF THE FISCAL RESPONSIBILITY COMMISSION**

1. (1) There shall be established, a body to be known as the Fiscal Responsibility Commission (“in this Act referred to as the Commission”).

Establishment  
of the Fiscal  
Responsibility  
Commission

**Comment:** Although the FRA came into force on July 30 2007, it appeared there was a deliberate delay in making the Act effective by constituting the

FRC which is the oversight and monitoring body. The FRC has been finally constituted and budget vote provided for it in the 2009 Appropriation Act. CSOs should be interested in the adequacy of the budget votes for the Commission and the performance of the Commission.

(2) The Commission shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.

**Comment:** This provision grants legal personality to the Commission.

2 (1) For the purpose of performing its functions under this Act, the Commission shall have power to -

Responsibility,  
Powers and  
Functions of the  
Commission

(a) compel any person or government institution to disclose information relating to public revenues and expenditure; and

**Comment:** The operative word is “compel” which means to urge forcefully; under extreme pressure - the hallmark of compulsion being the presence of some operative force producing an involuntary response<sup>48</sup>. In the past, some agencies of government have hesitated or failed to divulge information on public revenues and expenditure within their knowledge. Engaging the FRC to carry out its statutory mandate is expected from civil society in such cases, particularly when it is meant to ensure that the Treasury is not defrauded.

(b) cause an investigation into whether any person has violated any provisions of this Act.

**Comment:** The investigatory powers of the FRC do not appear complete as it does not detail the specifics of such powers. Does it include the power to compel witnesses to come and testify on oath before officers of the Commission?; Search and seizure of documents, real evidence and property even if it has to be done pursuant to court orders obtained *ex-parte* or on notice? Would the FRC do the investigation on its own or will it involve the Police and other agencies such as the Economic and Financial Crimes Commission? To investigate has been defined as following up, step by step by patient enquiry or observation; to trace or track; to search into, to examine and inquire into with care and accuracy; to find out by careful inquisition; the taking of evidence; a legal inquiry<sup>49</sup>.

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<sup>48</sup> See Blacks Law Dictionary, Centennial Edition at page 282 and the case of *United States v Escandar* C.A. Fla., 465 F.2d 438,442.

<sup>49</sup> . See Blacks Law Dictionary, supra, at page 825.

**Action:** Civil Society Organisations (“CSOs”) should identify *prima facie* violations of the Act, document them and send such reports to the FRC for follow-up investigations. Examples of such *prima facie* violations would include where governments in the Federation have exceeded their borrowing limits, when the Minister of Finance fails to produce quarterly reports, etc.

- (2) If the Commission is satisfied that such a person has committed any punishable offence under this Act or violated any provisions of this Act, the Commission shall forward a report of the investigation to the Attorney-General of the Federation for possible prosecution.

**Comment:** Merely forwarding a report of the investigations to the Attorney General without more does not guarantee that action will be taken to prosecute offences and eventual punishment for offenders. The likely violators of the Act will be high ranking government officials and even ministers like the Attorney General. Thus, expecting the office of the Attorney General to prosecute such officers may be wishful thinking. Further, the teeth of the penal provisions of the FRA have been removed. For instance S. 39 declares that any violations of sections 36, 37 and 38 shall be an offence and S. 41 (3) also states that non compliance with the S.41 (1) and (2) shall be an offence. However, there are no penalties prescribed for the offence! So what is the Attorney General going to base his prosecution on? Assuming there is prosecution and conviction, the court will declare that an offence has been committed but no sanction will follow!

**Action:** CSOs should engage in advocacy for the provision of punishment provisions in the FRA. This advocacy should be directed at the FRC and National Assembly. Where FRC investigations clearly disclose violations of the Act and such violations are also offences under other laws such as the Criminal and Penal Codes, CSOs should engage the Attorney General for the prosecution of identified offenders. Engagement strategies would include letters to the Attorney General, media advocacy, etc.

**3. (1)** The Commission shall-

Functions of the  
Commission

- (a) monitor and enforce the provisions of this Act and by so doing, promote the economic objectives contained in section 16 of the Constitution;

**Comment:** The function conferred on the FRC by this subsection (1) (a) appears omnibus. To promote means such laws and actions as will advance, further and contribute to the enlargement and growth of the FRA and to enforce means to execute, make effective and compel obedience to

the FRA<sup>50</sup>. The operative parts of the economic objectives in S.16 of the Constitution are reproduced below:

**16.- (1) *The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-***

*(a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self reliant economy;*

*(b) control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;*

*(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage or operate the major sectors of the economy;*

*(d) without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.*

**(2) *The State shall direct its policies towards ensuring -***

*(a) the promotion of a planned and balanced economic development;*

*(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;*

*(c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and*

*(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare of the disabled are provided for all citizens.*

The challenges militating against the FRC's performance of this function are legion. Considering that Chapter 2 of the Constitution is not justiciable i.e. it cannot be the basis of an action in court<sup>51</sup> and various government policies have eroded the provisions of S.16 of the Constitution, for example, privatisation versus S.16 (1) (c) of the Constitution. Also, the current political economy encourages the concentration of wealth and the means of production in a few hands. However, the National Assembly by item 60 of the Exclusive Legislative List is empowered to legislate on the

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<sup>50</sup> See Sasegbon's Encyclopedia of Nigerian Law and Practice, First Edition, Vol. 4 Paragraph 185 at page 113.

<sup>51</sup> See S. 6 (6) (c) of the Constitution and *Archbishop Okogie v Attorney General, Lagos State*, (1981) 2 N.C.L.R 337.

establishment and regulation of authorities for the Federation or any part thereof to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Rights entrenched by this exercise of federal legislative powers cannot be said to be non justiciable. The Supreme Court had stated as follows<sup>52</sup>:

*The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together to give expression to anyone of them through appropriate enactment as occasion may demand.*

**Action:** CSOs should engage in budget analysis, identify lapses and shortfalls in fiscal policy and appropriations on the basis of the afore-listed economic objectives and move the Ministry of Finance, the Legislature and the FRC to action to ensure changes in fiscal policy and budgetary prioritisation which will guarantee the right to an adequate standard of living for the populace. Particularly, the provisions of section 16 (2) (d) of the Constitution are of great importance in terms of entrenching concrete claimable rights. CSOs can also compile a list of laws and policies in the respective sectors that violate the constitutional economic objectives with recommendations for amendment and forward same to the Legislature.

- (b) disseminate such standard practices including international good practice that will result in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters;
- (c) undertake fiscal and financial studies, analysis and diagnosis and disseminate the result to the general public;
- (d) make rules for carrying out its functions under this Act; and

**Comment:** The provision on disseminating fiscal best practices appears close to the duties of the Revenue Mobilisation Allocation and Fiscal Commission which by section 6 (1) (c) of its enabling Act<sup>53</sup> is to advise the Federal, State and Local Governments on fiscal efficiency and methods by which their revenues can be increased. Also, the duties of the Commission

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<sup>52</sup> Per Uwaifo J.S.C. in *Attorney General Ondo State v Attorney General Federation* (2002) 9 N.W.L.R. (Pt.772) 222 at 391.

<sup>53</sup> Revenue Mobilisation Allocation and Fiscal Commission, Cap R7, Laws of the Federation of Nigeria, Vol. 14, 2004.

on debt control appear similar to the duties of the Debt Management Office<sup>54</sup>.

A number of fiscal and financial studies are needed to explode the myth of current retrogressive fiscal practices and show them to be unsustainable in the long run. Such studies undertaken from an empirical approach and disseminated to the public will create a momentum for change in fiscal policy and practice. For instance, many of the fiscal provisions of the 1999 Constitution need to be amended to ensure efficiency in the allocation and management of public expenditure. The issues for study would include the limitation (or lack of limitations) on political appointments by the Executive and its effect on personnel and overhead costs, the provisions for auditing and how these affect service delivery, accountability and transparency in governance, the Excess Crude Account and section 162 of the Constitution, the division of powers between the Executive and Legislature in budget making, state creation and fiscal sustainability, etc.

Poor capital budget implementation has been the bane of the civil administration since 1999 – a study on the reasons underlying this and proposals for change could be considered. It has become a recurring decimal in the last ten years for capital budgets at the federal level to be poorly implemented. In some years, not up to 50% of the budget is implemented. The astonishing point is that resources are available and monies will be returned to the Treasury at the end of the financial year. This goes on while the country is in dire need of massive infusions of infrastructure. While some commentators have dubbed it lack of absorptive capacity, others lay the blame at the footsteps of the new procurement process, etc. The causes of the problem need to be identified and solutions proffered if Nigeria is to meet the Millennium Development Goals.

Also, a number of rules and regulations will need to be made for the purpose of energising the provisions of the FRA.

**Action:** CSOs can propose rules and regulations and areas of fiscal policy that needs in-depth studies with justifications, forward same to the FRC and follow-up with lobby action. CSOs can also propose joint studies with the FRC if the FRC is willing to collaborate.

(c) perform other functions consistent with the promotion of the objectives of this Act.

(2) The Commission shall be independent in the performance of its functions.

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<sup>54</sup> See section 6 of the Debt Management Office (Establishment, etc) Act, Cap.D12, Laws of the Federation of Nigeria, 2004.

**Comment:** Independence of a Commission is not merely a function of it being proclaimed independent in the enabling law. It extends to issues such as funding, appointment and removal procedure, staffing, operational matters, etc.

**Action:** CSOs should monitor the funding of the FRC to see if it is getting sufficient funds to carry out its mandate and whether the funding is not delayed. Monitoring points should include adequacy of staff and necessary logistics for executing the mandate. It should also seek to find out whether there are unnecessary interventions in the FRC's day to day activities by higher-up political powers and whether these interventions impede the realisation of the objectives of the FRA. If information gathered indicates that the independence is being impeded, recommendations for amendment of the law to guarantee greater independence can follow. Alternatively, naming and shaming those persons and authorities who are unduly frustrating the work of the FRC should be considered. Also, submitting the report of the findings to the Legislature to use their oversight powers to call the persons and authorities to order should be considered.

- (3) The provision of Public Officers Protection Act shall apply to the members of the Commission in the discharge of their functions under this Act.

**Comment:** The Public Officers Protection Act<sup>55</sup> is made as a law to provide for protection against action of persons acting in the execution of public duties. However, the protection of the law does not extend to manifestly unlawful actions, abuse of office, acting *malafide* and outside the scope of duty<sup>56</sup>.

4. (1) The Commission shall establish and maintain a Fund from which shall be defrayed all expenditure incurred by the Commission. Establishment of a Fund for the Commission
- (2) There shall be credited to the Fund established pursuant to subsection (1) of this section, the budgetary allocation from the Federal Government and grants from any other source.

**Comment:** This section merely creates a Fund and this does not make the funding a first line charge or in any way prioritise the funding in the scheme of federal financing.

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<sup>55</sup> Cap.P41, Laws of the Federation of Nigeria, 2004

<sup>56</sup> . Per Ademola C.J.N. in *L.C.C. v Ogunbiyi* (1969) 6 N.S.C.C. 283 at 284; See also *Nwankwere v Adewunmi* (1966) 4 N.S.C.C. 140 at 143.

5. (1) The Commission shall consist of –

Composition of  
the  
Commission

- (a) chairman, who shall be the Chief Executive and accounting officer of the Commission;
- (b) one member representing-
  - (i) the organized private sector,
  - (ii) Civil Society engaged in causes relating to probity, transparency and good governance,
  - (iii) Organized labour;

**Comment:** Available information indicates that the President has appointed a civil society representative. However, the appointee is yet to engage CSOs working in causes related to probity, transparency and good governance. Representation implies an agency relationship and CSOs should have a voice in the work of the FRC through this representative.

It appears that there can be a confluence of interests between labour and civil society working in causes related to probity, transparency and good governance. Labour, *stricto sensu*, is part of civil society. Also, such confluence of interests could be found with the representative of the private sector. The major issues of concern in the Nigeria of today are existential and basis issues of access to basic infrastructure needed by both civil society and the private sector and general issues of adequacy in the standard of living. Thus, civil society is placed in a good position to influence the decisions of the Commission

**Action:** CSOs working on probity, etc should as a group seek audience with the CSO representative and let him know the concerns of the constituency he represents. They should also liaise with the representatives of labour and the private sector. CSOs should demand quarterly briefings and meetings with their representative and an open door from him to get regular updates on the concerns of his constituency. In the future, CSOs should attend legislative confirmation hearings to support or oppose candidates nominated by the President to represent civil society. This is based on the fact that CSOs need credible representation with a theoretical and practical knowledge of fiscal policies and its implications for poverty reduction and protection of basic rights.

(c) a representative of the Federal Ministry of Finance of a level not below the rank of a Director; and

(d) one member to represent each of the following six geopolitical zones of the country, that is: North-Central, North-East, North-West, South-East, South-West and South-South.

- (2) All members of the Commission shall be persons of proven integrity and must possess appropriate qualifications with not less than 10 years cognate post qualification experience.

**Comment:** Proven integrity is not defined but the issues for cessation of membership in S.8 may provide a guide. Proven integrity is a very high standard of integrity - which in itself implies probity, honesty, uprightness, soundness of moral character, etc<sup>57</sup>.

**Action:** CSOs should monitor whether any of the FRC members have fallen short of the requirements in S.8 and promptly bring it to the attention of the authorities. During the screening of members by the Senate, CSOs should also bring forward to the Legislative Committee, the media and the President, any information indicating that any proposed member does not possess the sterling qualities stated above.

- (3) The Chairman and other members of the Commission other than ex-officio members shall be appointed by the President subject to confirmation by the Senate.

**Comment:** Appointments from constituencies such as civil society, labour and the private sector should not just be chosen by the President. It would have made eminent sense if the organisations are required to forward to the President a shortlist of three names and he will select from the shortlist and forward to the Senate for screening. The advantage of this is that the representatives are actually selected by those they claim to represent and this enhances the agency relationship.

**Action:** CSOs should consider advocacy for amendments to the Act after some years of implementation.

- (4) The Chairman and members representing the six geo-political zones shall be full time members.

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<sup>57</sup> Black's Law Dictionary (supra) page 809.

**Comment:** Restricting the representatives of civil society, labour and the private sector to part time membership in the Commission will not allow such constituencies to contribute meaningfully to the work of the Commission. It would have been better if the representatives work full time on the Commission.

**Action:** CSOs should consider advocacy for the amendment of the law.

6. The Chairman and members of the Commission shall hold office for a single term of 5 years. Tenure of office

**Comment:** It appears that this provision is designed to further facilitate the independence of the Commission to the extent that members are not working to please the authorities by looking forward to re-appointment to a second term.

7. The Commission shall have power to- Powers of the Commission
- (a) formulate and provide general policy guidelines for the discharge of the functions of the Commission;
  - (b) superintend the implementation of the policies of the Commission;
  - (c) appoint for the Commission, such numbers of employees as may in the opinion of the Commission be expedient and necessary for the proper and efficient performance of the functions of the Commission;
  - (d) determine the terms and conditions of service in the Commission, including disciplinary measures for the employees of the Commission;
  - (e) fix the remuneration, allowances and benefits of the employees of the Commission as approved by the Salaries and Wages Commission;
  - (f) do other things, which in its opinion are necessary to ensure the efficient performance of the functions of the Commission; and

(g) regulate its proceedings and make standing orders with respect to the holding of its meetings, notices to be given, the keeping of minutes of its proceedings and such other matters as the Commission may, from time to time, determine.

**Comment:** From these provisions, it is clear that the employees of the Commission have been removed from the normal civil service structure. They will have their own terms and conditions of service and rules which will specifically be made to suit the demands of the work.

**8- (1)** Notwithstanding the provisions of section 5 (2) of this Act, a member of the Commission shall cease to hold office if-

Cessation of  
Membership

(a) he becomes bankrupt or makes a compromise with his creditors;

(b) he is convicted of a felony or any offence involving dishonesty, corruption or fraud;

(c) he becomes incapable of carrying out the functions of his office either by reason of an infirmity of mind or body;

(d) the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office and the President removes him from office;

**Comment:** This provision about the President being satisfied that it is in the public interest to remove a commissioner is reminiscent of the provisions in draconian military decrees and does not enhance the independence of the Commission. It is an omnibus ground for removal because the satisfaction of the President appears to be a subjective issue and is not subject to any objective criteria.

**Action:** Monitor to ensure that no member of the FRC is removed for faithfully discharging his duties. If removal for frivolous reason(s), not in the public interest, is about to happen, raise an alarm and name and shame whoever is behind the scandal.

CSOs should in the long run consider advocacy for amendment of the Act to restrict removal of commissioners by the President only to when he is acting on an address supported by two thirds majority of the Senate

praying that the commissioner be so removed for inability to discharge the functions of his office either arising from infirmity of mind or body or for misconduct. The justification lies in the fact that the Senate screens the commissioners and as such should also have an input in their dismissal. This would further guarantee the Commission's independence of action.

(e) he has been found guilty of violation of the code of conduct or serious misconduct in relation to his duties;

**Comment:** Being guilty of a breach of the Code of Conduct for Public Officers<sup>58</sup> in relation to his duties may be different from being found so when the authorities are not eager to prosecute or take the official steps.

**Action:** CSOs should document and report on *prima facie* cases of violations qualifying a member to vacate his seat and bring it to the public domain. If this does not solve the problems, then consider an enforcement action under section 51 of the FRA.

(f) he resigns his appointment by a notice under his hand, addressed to the President; or

(g) in the case of a person who becomes a member by virtue of the office he occupies, he ceases to hold such office for whatever reason.

(2) Where a vacancy occurs in the membership of the Commission, it shall be filled by the appointment of a successor to hold office for the remainder of the term of office of his predecessor, provided that the successor shall represent the same interest as his predecessor.

**(9)** (1) There shall be paid to the Chairman of the Commission such salaries, allowances and benefits as the Revenue Mobilization Allocation and Fiscal Commission may, from time to time, approve.

Emoluments,  
etc of Members

(2) There shall be paid to other members of the Commission such sitting allowances and benefits as may be determined by the Revenue Mobilization Allocation and Fiscal Commission from time to time.

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<sup>58</sup> See Part 1 of the Fifth Schedule to the Constitution on Code of Conduct for Public Officers.

**Comment:** Section 9 (2) does not seem to tally with S.5 (4) which states that the chairman and the members representing the six geopolitical zones shall be full time members. Thus, the representatives of the geopolitical zones should be entitled to salaries and not mere sitting allowances and benefits.

**10.** The Commission shall prepare and submit to the National Assembly not later than 30<sup>th</sup> June in each financial year, a report of its activities including all cases of contravention investigated during the preceding financial year, and shall include in the report a copy of its audited accounts for the preceding financial year.

Submission  
of Annual  
Report of the  
Commission

**Comment:** This provision derives from the oversight powers of the National Assembly enshrined in section 88 of the Constitution. The inclusion of a copy of the audit report is in line with best practices, which ensures that the Public Accounts Committee of the legislature reviews audited public accounts. The report has a time frame as it is supposed to come not later than 30<sup>th</sup> June in each financial year.

**Action:** Review the report to determine if it contains all cases of contraventions during the preceding financial year; whether it was accompanied by the audit report and whether it came on time as stipulated or at all. Report of findings can be sent to the Joint Finance Committee of the National Assembly and the FRC.

## **PART II – THE MEDIUM-TERM EXPENDITURE FRAMEWORK**

**11.** (1) The Federal Government after consultation with the States shall-

Medium-Term  
Expenditure  
Framework

- (a) not later than six months from the commencement of this Act, cause to be prepared and laid before the National Assembly, for their consideration a Medium-Term Expenditure Framework for the next three financial years; and
- (b) thereafter, not later than four months before the commencement of the next financial year, cause to be prepared a Medium-Term Expenditure Framework for the next three financial years.

(2) The framework so laid shall be considered for approval with such modifications if any, as the National Assembly finds appropriate by a

resolution of each House of the National Assembly.

**Comment:** The provision that the MTEF is to be prepared not later than four months before the commencement of the financial year is to ensure that the annual budget which derives from it is prepared on time and sent to the Legislature. The MTEF is a rolling framework and it is reviewed yearly. The need for approval is in recognition of the Legislature's constitutional powers of appropriation laid down in sections 80 and 81 of the Constitution. Further, since annual budgets must be derived from the MTEF, it makes eminent sense to ensure legislative approval of the MTEF.

**Action:** Confirm from the Appropriation and Finance Committees in the National Assembly if the MTEF got to the legislature on time "not later than four months before the commencement of the next financial year" or whether it got to the Legislature at all. Confirm if the MTEF got to the Legislature before the presentation of the annual appropriation bill or with the bill. If it is late, draw the attention of the Legislature and the Ministry of Finance to the lateness. If it is not presented at all, draw the attention of the legislature to it. The next consideration is whether the Legislature amended the MTEF and if the answer is in the affirmative, what informed the amendment. Cross check if the amendment followed sound fiscal practices and prepare a report on the amendments.

- (3) The Medium-Term Expenditure Framework shall contain-
  - (a) a Macro-economic Framework setting out the macro-economic projections, for the next three financial years, the underlying assumptions for those projections and an evaluation and analysis of the macroeconomic projections for the preceding three financial years;

**Comment:** The macroeconomic framework is the overall big picture that situates revenue and expenditure and other fiscal policies for the next three financial years.

**Action:** Recall that the first function of the FRC is to monitor and enforce the provisions of this Act and by so doing, promote the economic objectives contained in section 16 of the Constitution. Therefore, CSOs should review the macroeconomic framework from a plethora of prisms especially to see if it promotes the economic objectives in section 16 of the Constitution. This requires expert analysis and dedicated fiscal policy activism. The draft macroeconomic framework should be reviewed and recommendations sent

to the Finance Ministry before they conclude the framework. If there are enough expert hands available, consider the design of an alternative macroeconomic framework.

- (b) a Fiscal Strategy Paper setting out-
  - (i) the Federal Government's medium-term financial objectives,
  - (ii) the policies of the Federal Government for the medium-term relating to taxation, recurrent (non-debt) expenditure, debt expenditure, capital expenditure, borrowings and other liabilities, lending and investment,

**Comment:** "Capital Expenditure" has been defined in the interpretation section to mean spending on an asset that lasts for more than one financial year and expenses associated with the acquisition of such assets. A FSP is necessary because the burden of taxation and debt expenditure need to be certain and predictable over the medium term. This allows the private sector and other economic actors to plan over the medium term. FSP will give the picture of the fiscal climate in the medium term to guide all stakeholders.

**Action:** Analyse the FSP to confirm if the tax policy is progressive and pro-poor while generally supporting businesses to grow; If recurrent expenditure is properly aligned to capital expenditure; If capital expenditure is geared towards meeting basic rights and the Millennium Development Goals; If borrowing is within the legal ceilings; If debt repayment is sustainable; If proposed lending rates can support economic growth, etc. Intervene at the stage the draft is published or intervene as a CSO participant/observer at the MTEF/MTSS preparations stages, make recommendations available to the Ministry of Finance and the Legislature. Engage the media with the recommendations.

- (iii) the strategic, economic, social and developmental priorities of the Federal Government for the next three financial years,

**Comment:** The FSP declares in advance the strategic priorities and helps monitoring and evaluation.

**Action:** The strategic economic, social and developmental priorities are expected to be in consonance with governments publicly declared agenda and priorities such as NEEDS 2, the 7 Point Agenda, Vision 2020, the

Millennium Development Goals, ratified international development and human rights treaties such as the International Covenant on Economic, Social and Cultural Rights, etc. However, the challenge is that currently, government's 7 Point Agenda has remained uncharted and is simply delineated in one piece of paper without targets, action plans and a monitoring and evaluation framework. NEEDS 2 is still-born and does not exist after two and half years of the Yar'adua administration. Further, Vision 2020 is still a vision that has not crystallized - no documentation and blueprint yet. Only the cliché of joining the twenty most industrialised and advanced countries in the world in the year 2020 without a roadmap of getting there exists.

Analyse the priorities and determine how far they are consistent with the above policy intentions. Feed the report of the analysis to the Ministry of Finance and the Legislature. Disseminate it through the media.

- (iv) an explanation of how the financial objectives, strategic, economic, social and developmental priorities and fiscal measures set out pursuant to sub-paragraphs (i), (ii) and (iii) of this paragraph relate to the economic objectives set out in section 16 of the Constitution;

**Comment:** The Constitution made it mandatory that governments must abide by the Fundamental Objectives and Directive Principles of State Policy. Under section 13 of the Constitution, *it shall be the duty and responsibility of all organs of government and of all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this Chapter of this Constitution.* This provision is in line with the constitutional aphorism that the security and welfare of the people is the primary purpose of government. Although, S.16 provides a number of general issues, it appears that the most relevant and pointed parts of section 16 of the Constitution provides as follows:

*(2) (d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare of the disabled are provided for all citizens.*

**Action:** Analyse the FSP to confirm if it is pro-poor, progressive and can generate development and economic growth. Make the report available to the Legislature, the Ministry of Finance and the media.

**Further Comments on the FSP:** The FSP should be reviewed to confirm: If the forecasting of total oil revenue makes sense; whether there has been over-estimation of production or petroleum profit tax; relationship between OPEC quota and the oil production projections; feasibility of exchange rate assumptions. Further, confirm the feasibility of projected GDP growth; target inflation and interest rates; macroeconomic, fiscal and expenditure risks and whether provisions have been made for them, etc.

- (c) an expenditure and revenue framework setting out-
  - (i) estimates of aggregate revenues for the Federation for each financial year in the next three financial years, based on the predetermined Commodity Reference Price adopted and tax revenue projections;

**Comment:** From the interpretative section of this Act, “Reference Commodity Price” means such price as may be determined by the President subject to the approval of the National Assembly. The commodity here refers to crude oil stated in United States Dollars per barrel, which is the main export product of Nigeria. Tax revenue projections refer to taxes accruable to the Federal Government.

**Action:** Based on recent experiences and moving averages of the commodity price in the last couple of years, confirm if the reference commodity price is reasonable and can be expected to materialise. Are tax revenue projections conservative or overtly ambitious? Make recommendations based on your empirical findings to the Ministry of Finance and the Legislature. Ensure that budget forecasts and updates reflect recent revenue and expenditure trends, underlying macroeconomic developments, and well-defined policy commitments.

- (ii) aggregate expenditure projection for the Federation for each financial year in the next three financial years,
- (iii) aggregate tax expenditure projection for the Federation for each financial year in the next three financial years,
- (iv) minimum capital expenditure floor for the Federation for each

financial year in the next three years;

**Comment:** All these projections and floors facilitate medium term planning.

**Action:** Verify if the projections and floors are in tandem with earlier projections in this section. Make your findings known to the Finance Minister and the Legislature.

Provided that, the estimates and expenditures provided under paragraph (d) of this subsection shall be-

(i) based on reliable and consistent data certified in accordance with section 13(2) (b) of this Act,

**Comment:** There is nothing in section 13 (2) (b) of this Act about data certification. Rather, it is about the Minister consulting certain agencies during the preparation of the MTEF. Apparently, there was a mix up in the final documentation because when the Act was presented as a bill, S.13 (2) (b) referred to a process of certification. However, that section has been removed from the Act.

**Action:** Confirm that the data used is verifiable and coming from appropriate sources mentioned in S. 13 (2) (b) of the FRA.

(ii) targeted at achieving the macro-economic projection set out in subsection (2) (a) of this section,

(iii) consistent with and derive from the underlying assumptions contained in the Macro-economic framework, the objectives, policies, strategic priorities and explanations in the Fiscal Strategy paper;

**Comment:** The provision makes eminent sense.

**Action:** Simply confirm consistency in accordance with the tenor of the Act and make your findings known to the authorities of the Finance Ministry and the Legislature.

(d) a Consolidated Debt Statement setting out and describing the fiscal significance of the debt liability of the Federal

Government and measures to reduce any such liability; and

(e) a statement describing the nature and fiscal significance of contingent liabilities and quasi-fiscal activities and measures to offset the crystallization of such liabilities.

**Comment:** “Consolidated debt” as defined in the interpretative section means the aggregate of the outstanding financial obligations of Government including those of its parastatals and agencies at any point in time arising from borrowed money including principal, interest, fees of such borrowed money; the deferred payment for property, goods or services; bonds, debentures, notes or similar instruments; letters of credit and reimbursement obligations with respect thereto; Guarantees; Trade or banker’s acceptances; Capitalized amounts of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased; agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and a conditional sale agreement, capital lease or other title retention agreement.

**Action:** From available information, confirm if the liabilities are overstated or understated. Information can be available from the Debt Management Office, Ministry of Finance, Legislative Committees, the media and international financial institutions. Get the report to be at the disposal of the Ministry of Finance and the Legislature.

**12. The estimates of-**

- (1) aggregate expenditure and the aggregate amount appropriated by the National Assembly for each financial year shall not be more than the estimated aggregate revenue plus a deficit, not exceeding three percent of the estimated Gross Domestic Product or any sustainable percentage as may be determined by the National Assembly for each financial year.

Aggregate  
Expenditure  
Ceiling

**Comment:** The limitation of deficit financing is in line with international best practices on the subject matter on the ratio of deficits to Gross Domestic Product.

**Action:** Analyse the aggregate expenditure to confirm if it is within the limits set by law.

- (2) aggregate expenditure for a financial year may exceed the ceiling imposed by the provisions of subsection (1) of this section, if in the opinion of the President there is a

clear and present threat to national security or sovereignty of the Federal Republic of Nigeria.

**Comment:** This provision gives the government a margin of discretion and an elbow room to respond to emergencies and threats to national security. But the word “security” is not defined in the Act; whether it includes issues of human security beyond physical security is not clear by the provisions of the law.

**Action:** The words used in the Act are “clear and present threat..”. Thus, the monitor should verify and confirm the existence of the threat and whether in his opinion, the threat is sufficient to warrant a departure from the rules. The verification should be based on objective criteria and all publicly available facts.

13. (1) The Minister shall be responsible for the preparation of the Medium-Term Expenditure Framework.

Preparation  
of the  
Medium-  
Term  
Expenditure  
Framework

(2) In preparing the draft Medium-Term Expenditure Framework, the Minister-

(a) may hold public consultation, on the Macro-economic Framework, the Fiscal Strategy Paper, the Revenue and Expenditure Framework, the strategic, economic, social and developmental priorities of government, and such other matters as the Minister deems necessary;

Provide that, such consultations shall be open to the public, the press and any citizen or authorized representatives of any organization, group of citizens, who may attend and be heard on any subject matter properly in view;

**Comment:** The provision for the Minister of Finance to hold public consultation is a boost for popular participation in fiscal and public expenditure decision making. The FRA is justified inter alia in literature as opening up the fiscal process to popular participation. However, the word used is “may” and this to an extent implies discretion whether to hold the consultation or not. But once the Minister decides to hold a consultation, such consultation shall be open to the public. The current practice of the Budget Office is to invite one non governmental organisation and ask the organisation to choose others who will attend the Medium Term Sector Strategies design meetings of MDAs. Alternatively, the Office simply picks and chooses CSOs. Thus, CSOs willing and able are yet to be invited to

hearings and consultations on the Macro-economic Framework, the Fiscal Strategy Paper, the Revenue and Expenditure Framework, the strategic, economic, social and developmental priorities of government.

The central challenge for CSOs in relation to the MTEF is that consultations may not be held at all by the Minister, and if held, such consultations will be merely perfunctory. As such, CSOs may not have access to the documents before and after the Federal Executive Council approves of it. CSOs will also not likely have access to the documents until it has been considered by the National Assembly. Thus, CSOs may not have any real opportunity to make inputs into the process.

But a combined reading of the provisions of this subsection and section 48 of the FRA will indicate that the Legislature intends that CSOs should have access to information and should be allowed to fully participate in MTEF preparation. Section 48 states:

*(1) The Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances.*

*(2) The National Assembly shall ensure transparency during the preparation and discussion of the Medium-Term Expenditure Framework, Annual Budget and the Appropriation Bill.*

**Action:** CSOs should call on the Minister to hold the consultations anticipated under the Act. The Minister *strico sensu* should have no discretion in matters of holding consultations since the government prides itself as opening up fiscal policy formulation and implementation. Letters from coalitions of NGOs should be addressed to the Minister early in the year by the end of the first quarter insisting that consultations be held and opportunity afforded every interested person or group to attend and participate. Letters should also demand opening up the MTSS design of MDAs to more NGOs who have capacity in the sector instead of just choosing one NGO as the clearing house. The media could also be used for advocacy purposes in this regard. If consultations are held, monitoring should document how open it was and the opportunities provided for popular participation.

- (b) shall seek inputs from the-
  - i. National Planning Commission
  - ii. Joint Planning Board,

- iii. National Commission on Development Planning,
- iv. National Economic Commission,
- v. National Assembly,
- vi. Central Bank of Nigeria
- vii. National Bureau of Statistics,
- viii. Revenue Mobilization Allocation and Fiscal Commission,
- ix. any other relevant statutory body as the Minister may determine; and

(c) shall consider and reflect as may be deemed appropriate the input of the bodies and persons referred to in subsection (a) and (b) of this section.

- |   |  |
|---|--|
| <p><b>14.</b> (1) The Minister shall before the end of the second quarter of each financial year, present the Medium-Term Expenditure Framework to the Federal Executive Council for consideration and endorsement.</p> | <p>Time Limit for Presentation of Medium-Term Expenditure Framework to Federal Executive</p> |
|---|--|

**Comment:** The timing – the second quarter for the consideration and endorsement of the MTEF by the Federal Executive Council is to ensure that the MTEF is ready early in the year to inform the preparation of the annual budget. However, compare this subsection with section 11 (1) (b) which provides a permissive timeline of not later than four months before the commencement of the next financial year for the preparation of the MTEF. If the preparation of the MTEF commences late, it will not meet the end of the second quarter deadline for presentation to the Federal Executive Council.

The timing for the consideration and endorsement of the MTEF makes eminent sense considering that states that have enacted the Fiscal Responsibility Law will await the approval of the macroeconomic assumptions and fundamentals in the federal MTEF to inform the preparation of the state MTEF.

**Action:** Verify whether the Minister complied with the time line provided in this section. If the Minister did not comply on time, draw the attention of the Legislature to the lapse.

- (2) The Medium-Term Expenditure Framework as endorsed by the Federal Executive Council shall take effect upon approval by a resolution of each house of the National Assembly.

**Comment:** The need for legislative approval is in recognition of the powers of appropriation of the National Assembly over public funds as

stipulated in sections 80 and 81 of the Constitution. The MTEF is expected to be the anchor of annual budgets. Legislative approval of the MTEF may reduce Executive Legislative feuds over the quantum of, and specific projects in the budget which has been a recurring decimal in Nigeria's budgeting process.

**Action:** Verify from the Appropriation and Finance Committees of the National Assembly whether the MTEF was sent to them for their approval. Remind the Legislature of the provisions of the law.

15. The Medium-Term Expenditure Framework as approved by the National Assembly shall be published in the Gazette. Publication of Medium-Term Expenditure Framework in the Gazette

**Comment:** Publication in a gazette promotes access to information and transparency.

**Action:** Confirm from the Ministry of Finance if the gazette has been published. Send reminders to the Ministry if the gazette is not published within two weeks of the approval of the MTEF by the National Assembly.

16. (1) Subject to subsection (2) of this section, the President may cause adjustment to be made to a Medium-Term Expenditure Framework. Adjustments to the Medium-term Expenditure Framework
- (2) Any adjustment to a Medium-Term Expenditure Framework shall be limited to-
- (a) the correction of manifest error; and
  - (b) changes in the fiscal indicators, which in the opinion of the President are significant.

**Comment:** The implication of the foregoing provision is that although the power to make adjustments resides with the President, no significant adjustments can be made to the MTEF after it has been gazetted.

**Action:** If an adjustment has been made, verify if the adjustments can be justified under subsections (2) (a) and (b). If it cannot be justified, draw the attention of the President and the Legislature.

17. States and Local Governments which so desire shall be assisted by the Federal Government to manage their fiscal affairs within the Medium-Term Framework. Assistance to States and Local Governments

**Comment:** This section is in recognition of the fact that Nigeria is a federation. The Federal Government can only offer to assist States in their pursuit of fiscal responsibility and not to impose its policies and programmes on the States.

**Action:** Document the nature and extent of any assistance to States. CSOs should engage in legislative advocacy for the passage of Fiscal Responsibility Laws at the State level.

**Further Comments And Action On MTEF:** The MTEF has been held out in literature as having a number of advantages. The challenge for civil society monitors of fiscal responsibility is to engage in an evaluation after some years of MTEF implementation to see if the promised results are being realised. The advantages which should be used as the evaluation points include that the MTEF<sup>59</sup>:

- ❖ Aligns system inputs including facilities, personnel, equipment and supply that are required for service delivery and production by service providers and the larger issue of enhanced service delivery which reflects as system outputs and outcomes;
- ❖ Strategically realigns public expenditure and management to focus on those areas that make the greatest contribution to government's strategic objectives as articulated in the National Economic Empowerment and Development Strategy (NEEDS), the 7 Point Agenda and the Millennium Development Goals (MDGs). This would essentially involve a focus on priority interventions responsive to the predominant needs of Nigerians, that is, pro-poor and developmental issues;
- ❖ Aligns capital and recurrent expenditure over the medium term to ensure programme sustainability;
- ❖ Assures predictability of funding;
- ❖ Guarantees efficient and effective use of resources in the implementation of strategic priorities<sup>60</sup>. The thrust is to introduce value for money with its cardinal parameters of economy, efficiency and effectiveness into the public sector;
- ❖ Identifies challenges and bottlenecks in the public sector and constructively addresses them;

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<sup>59</sup> See the *Federal Medium Term Sector Strategies Monitoring Manual*, 2006.

<sup>60</sup> The foregoing will help the federal government generally to maintain fiscal discipline, promote strategic priorities and deliver value for money; see World Bank, *Public Expenditure Management Handbook* (1998).

- ❖ Facilitates monitoring and evaluation that feeds into the policy, planning and budgeting cycle;
- ❖ Fiscal (aggregate fiscal) discipline which communicates medium term fiscal policy and targets and the policy of fiscal sustainability and disciplines policy making;
- ❖ Allocation (allocative efficiency) which disciplines decision making and highlights need for action by showing future costs of current policies, future costs of new policies and investments and communicates commitment to specific priorities through forward estimates and indicative medium term allocations; opens up budget space to reallocate funds for new priorities.
- ❖ Resource Use (operational efficiency) which improves predictability of funding and policy for strategic planning and management and operational performance at sector level.

For sectoral strategies which form part of the MTEF, they could be examined to see if they met the objectives of the MTSS exercise as follows:

- ❖ Articulating medium-term (three years) goals and objectives against the background of the overall goals of the NEEDS, the 7 Point Agenda and the attainment of the Millennium Development Goals;
- ❖ Identifying and documenting the key initiatives (that is, projects and programmes) that will be embarked upon to achieve the goals and objectives;
- ❖ Costing the identified key initiatives in a clear and transparent manner;
- ❖ Phasing implementation of the identified initiatives over the medium-term;
- ❖ Defining the expected outcomes of the identified initiatives in clear measurable terms; and
- ❖ Linking expected outcomes to their objectives and goals.

For a fuller understanding of the federal public expenditure and fiscal system, it may be imperative, subject to capacity constraints for CSOs, to undertake a parallel public expenditure review of federal spending. This should focus on budget credibility, comprehensiveness and transparency of budgets, policy based budgeting, predictability and control in budgeting, account recording and reporting, external scrutiny and legislative oversight.

### PART III – THE ANNUAL BUDGET

18. Notwithstanding anything to the contrary contained in this Act or any other law, the Medium-Term Expenditure Framework shall-

Annual Budget  
to be Derived  
from Medium-  
Term  
Expenditure  
Framework.

- (1) be the basis for the preparation of the estimates of revenue and expenditure required to be prepared and laid before the National Assembly under section 81 (1) of the Constitution.
- (2) The sectoral and compositional distribution of the estimates of expenditure referred to in subsection (1) of this section shall be consistent with the medium-term developmental priorities set out in the Medium-Term Expenditure Framework.

**Comment:** The consistency of the MTEF and the annual budget facilitates planning and the realisation of policy results through the budget. The fact that the MTEF is a product of both Executive and Legislative processes also firmly anchors it in good stead to inform annual budgets. The current position where the executive constantly alleges that the Legislature introduces constituency and other projects in the annual budget (which may not be contained in the MTEF) goes to show that the Legislature did not have the opportunity to review, make input and approve the MTEF. Constituency projects are supposed to fit into the overall spending framework, compete with other projects during the preparation of the MTSS and if they come out as priorities, be well costed and packaged for inclusion in the annual budget.

**Action:** Compare and contrast the approved MTEF first year projects, activities and expenditure with the Appropriation Bill to determine their compatibility. Raise issues in a letter or memorandum to the Ministry and the Legislature if there is a departure from the approved MTEF in the annual appropriation. Get the media involved to highlight the differences if the issue is not resolved on time.

19. The estimates of revenue and expenditure (in this Act referred to as the “Annual Budget”) shall be accompanied by-

Annual Budget  
to be  
Accompanied  
by Certain  
Documents

- (a) a copy of the underlying revenue and expenditure profile for the next two years;
- (b) a report setting out actual and budgeted revenue and expenditure and

detailed analysis of the performance of the budget for the 18 months up to June of the preceding financial year;

(c) a revenue framework broken down into monthly collection targets prepared on the basis of the predetermined Reference Commodity Price as contained in Medium-Term Expenditure Framework.

**Comments:** The above documents are necessary to inform the Legislature of the revenue sources of government; to put the Legislature in a position to determine whether previously budgeted sums have been judiciously utilised and whether there would be sufficient and consistent resource flow to implement the budget when passed into law. Understanding the reasons for poor or credible budgetary performance as envisaged in the report coming under (b) above will put the Executive and the Legislature in a position to take ameliorative action against poor performances or identify best practices for replication where successes have been recorded.

**Action:** Verify from the Finance and Appropriation Committees of the National Assembly whether these documents accompanied the annual appropriation bill as stipulated by law. Move the Legislature to action if the documents do not accompany the Appropriation Bill.

(d) measures on cost, cost control and evaluation of results of programmes financed with budgetary resources;

(e) a Fiscal Target Appendix derived from the underlying Medium-Term Expenditure Framework setting out the following targets for that financial year-

- (i) target inflation rate,
- (ii) target fiscal account balances,
- (iii) any other development target deemed appropriate; and

**Comment:** “Fiscal Risk Target” is defined in the interpretation section as providing numerical target of each risk indicator with which a fiscal entity will be considered fiscally healthy. The last subsection on any other development target deemed appropriate should be further explored and made specific. This is because fiscal responsibility practices have been ongoing since NEEDS 1 but have achieved little or no results in the development index. Despite budgeting in accordance with laid down conditions, unemployment has increased, capacity utilisation in

manufacturing has reduced, and the standard of living of the people has reduced.

**Action:** Verify from the Finance and Appropriation Committees of the National Assembly whether these targets and rates accompanied the annual appropriation bill as stipulated by law. Engage in advocacy with the Ministry of Finance and the Legislature that the budget indicates the new employment figures it will create, rates of increase in manufacturing capacity utilisation, number of children to be immunised, enhancement of educational standards, recorded improvements in standard of living, etc after budget implementation.

- (f) a Fiscal Risk Appendix evaluating the fiscal and other related risks to the annual budget and specifying measures to be taken to offset the occurrence of such risks.

**Comment:** “Fiscal Risk Appendix” has been defined in the interpretative section to mean an explanatory attachment that provides a set of indicators that can be used to measure local fiscal risks.

**Action:** Verify from the Finance and Appropriation Committees of the National Assembly whether these targets and rates accompanied the annual appropriation bill as stipulated by law. Move the Legislature to action if these targets and rates do not accompany the Appropriation Bill.

**20.** In preparing their annual budget, States and Local Governments may adopt the provisions of this Part with such modification as may be appropriate and necessary.

Application of Part III to States and Local Governments.

#### **PART IV – BUDGETARY PLANNING OF CORPORATIONS AND OTHER RELATED AGENCIES**

**21.** (1) The Government corporations and agencies and government owned companies listed in the Schedule to this Act (in this Act referred to as “the Corporations”) shall, not later than 6 months from the commencement of this Act and for every three financial years thereafter and not later than the end of the second quarter of every year, cause to be prepared and submitted to the Minister their Schedule estimates of revenue and expenditure for the next three financial years.

Preparation of Estimates of Revenue and Expenditure by Corporations, etc

- (2) Each of the bodies referred to in subsection (1) of this section shall submit to the Minister not later than the end of August in each financial year-
  - (a) an annual budget derived from the estimates submitted in pursuance of subsection (1) of this section; and
  - (b) projected operating surplus which shall be prepared in line with acceptable accounting practices.
- (3) The Minister shall cause the estimates submitted in pursuance of subsection (2) of this section to be attached as part of the draft Appropriation Bill to be submitted to the National Assembly.

**Comment:** This section seeks for the first time to extend oversight and scrutiny to the appropriations, revenue and expenditure of government corporations, agencies and government owned companies. This provision will facilitate oversight of the agencies by the Legislature. It appeared that most of these institutions were on their own, and outside the constitutional fiscal framework. The exceptions to this generalisation include the Nigerian Communications Commission which under its enabling law prepares and presents its budget for the approval of the National Assembly<sup>61</sup>.

However, the Act did not state what the Legislature should do with the estimates - whether to scrutinise and approve them. This issue is raised in consideration of the fact that the appropriation powers of the some of the scheduled corporations have been vested in other bodies. For instance, the Central Bank of Nigeria Act vests the power to consider and approve CBN budgets in the Board of Directors of the Bank. It therefore appears that the attachments in the case of the CBN are merely for the information of the Legislature.

The estimates referred to in subsection 1 and 2 above is the equivalent of the MTEF- the annual budget is derivable from it. The subsection did not however define operating surplus although it stated that it shall be prepared in line with acceptable accounting practice. Operating surplus is an accounting concept used as a proxy for total pre-tax profit income - but these corporations are not set up for profit. Operating surplus should include factor income, value added, increase in the value of inventories held with or without a valuation adjustment reflecting average prices

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<sup>61</sup> Section 19 of the Nigerian Communications Commission Act, Cap.N97 of the Laws of the Federation of Nigerian, 2004.

during the accounting period<sup>62</sup>. Since it is the duty of the Accountant General for the Federation to publish general standards for the consolidation of government accounts<sup>63</sup>, it may be imperative to await the Accountant General's directives in the computation of operating surplus.

**Action:** Verify if the required submissions were made to the Minister and whether the Minister attached the submissions to the Appropriation Bill. Analyse the attachments to see whether there is harmony between the three year estimates and the annual budget purportedly derived therefrom. Seek to find if the submissions to the Minister were within the time contemplated by law.

- 22.** (1) Notwithstanding the provisions of any written law governing the corporation, each corporation shall establish a general reserve fund and shall allocate thereto at the end of each financial year, one-fifth of its operating surplus for the year. Operating Surplus and General Reserve Fund.
- (2) The balance of the operating surplus shall be paid to the Consolidated Revenue Fund of the Federal Government, not later than one month following the statutory dead line for publishing each corporation's accounts.

**Comment:** This provision would help in curtailing the financial recklessness of these corporations that in the past seem to be accountable to no one. Previous audit reports had shown that some of these corporations had the habit of spending their operating surplus on frivolous projects, spending Value Added Tax and withholding taxes they collect, and sometimes outright mismanagement of funds occur.

However, an issue has arisen as to the provisions of this section relates to a corporation such as the Nigeria Deposit Insurance Corporation (NDIC). NDIC recently stated that the FRA threatens the banking system because leaving it with just 20% of its operating surplus at the end of every year will be insufficient to meet its obligations of paying deposit insurance to bank customers if the need arises. The implication of this provision is that one huge bank failure would wipe out the deposit insurance fund<sup>64</sup>.

Another issue has arisen in respect of the Central Bank of Nigeria which under its enabling law (the Central Bank of Nigeria Act 2007) has the following provisions:

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<sup>62</sup> See Wikipedia, the Free Encyclopedia.

<sup>63</sup> Section 49 (3) of the FRA.

<sup>64</sup> See the Punch Newspaper of Wednesday May 20, 2009 at page 15; "Fiscal Responsibility Act threatens economy, banks –NDIC".

5- (1) *The Bank shall-*

- (a) *In respect of each financial year, determine its operating surplus which shall be the remaining sum from its income and other receipt after meeting all expenditure as approved by the Board.*
- (b) *As approved by the Board for that year, make provision for the contribution to staff pension funds in accordance with the Pension Reform Act 2004 and for any other purpose approved by the Board.*
  
- (2) *The Bank shall establish a general reserve fund and shall allocate thereto at the end of each financial year one quarter of its operating surplus for the year.(underlining supplied)*
  
- (3) *The balance of the operating surplus shall be paid to the Federal Government.*

There appears to be a conflict - while the FRA expects one-fifth of the operating surplus to be paid to the general reserve fund, the Central Bank of Nigeria Act mandates one-quarter to be paid to the general reserve fund. Thus, under the FRA, four-fifths of the surplus goes to the Treasury while the CBN Act stipulates three-quarters for the Treasury. The two positions need to be harmonised.

**Action:** Write to the Minister or the corporations to verify whether the General Reserve Funds have been established in the scheduled corporations and if established, whether one fifth of its operating surplus had been paid in at all and on time. Verify through the Minister and Accountant General of the Federation's office if the four-fifths of the operating surplus has been paid into the Consolidated Revenue Fund on time or at all. The Legislature should be reminded to demand from the corporations, evidence of payment of four fifths of the operating surplus to the Consolidated Revenue Fund.

Civil society should consider legislative advocacy - the NDIC position should be reviewed for possible amendment of the FRA to ensure harmony with other laws.

23. (1) The Corporation's surplus shall be classified as a Federal Treasury Revenue.

- (2) Where a corporation's result is in deficit, the deficit shall be classified as the corporation's loss for the fiscal year.
  
- (4) Each corporation shall, not later than three months after the end of its financial year, cause to be prepared and published its audited

Classification  
of Corporation  
Operating  
Surplus

financial reports in accordance with such rules as may be prescribed from time to time.

**Comment:** This provision will facilitate the effectiveness of the audit function and the timeliness of the Auditor-General's report to the Legislature. The Act did not however indicate whether the means of publication should be in the mass media, a website or in book form.

**Action:** Verify from the Auditor General's office if the accounts have been prepared and published in accordance with the law. If you confirm that the law has been breached, send a reminder and follow up with reports to the FRC, the Legislature and other appropriate agencies.

24. The provisions of section 20, 21 and 22 shall cease to apply to any of the corporations from the date of its privatisation. Cessation of Application of Part IV

## **PART V – BUDGETARY EXECUTION AND ACHIEVEMENT OF TARGETS**

25. (1) The Federal Government shall cause to be drawn up in each financial year, an Annual Cash Plan which shall be prepared by the office of the Accountant-General of the Federation. Annual Cash Plan
- (2) The Annual Cash Plan shall be prepared in advance of the financial year setting out projected monthly cash flows and shall be revised periodically to reflect actual cash flows.

**Comment:** This provision will facilitate budget implementation because an Annual Cash Plan will evolve from a cash management policy and will inform actual release and disbursements to MDAs. It is hoped that the Annual Cash Plan will be informed by MDAs Annual Cash Plans, requests and demands which will be consolidated to have the overall federal Annual Cash Plan. The Annual Cash Plan should cover activities contained in the budget and the timing of activities and expenditure. It should take cognisance of procurement plans, prioritise expenditure and generally ensure proper management and disbursement of available resources, etc.

The yearly Appropriation Act may also impose other duties on the Accountant General of the Federation. For instance the 2009 Appropriation Act states in S.6 (2) as follows:

*“ The Accountant General of the Federation shall forward to the National Assembly full details of funds released to the government agencies immediately such funds are released”.*

**Action:** As soon as the budget is signed into law, confirm from the Accountant General if the Annual Cash Plan has been prepared and if not prepared, send reminders to the Accountant General and take it up with the Minister. Also, verify from the Legislature, if the full details of released funds are sent to it by the Accountant General of the Federation.

26. The Minister, shall within 30 days of the enactment of the Appropriation Act, prepare and publish a Disbursement Schedule derived from the Annual Cash Plan for the purposes of implementing the Appropriation Act. Disbursement Schedule

**Comment:** For a budget to meet its targets, there should be a systematic financing programme that takes into account the special and strategic needs of the spending agencies. Haphazard release of funds or denial of funding when a spending agency needs it most had been the bane of budget implementation. The Annual Cash Plan and the Disbursement Schedule will facilitate budget implementation by spending agencies by introducing the element of certainty and predictability in the disbursement of appropriated funds.

**Action:** After 30 days of the enactment of the Appropriation Act, check at the Ministry of Finance website if the Schedule has been posted, and verify from the Minister if the Disbursement Schedule has been prepared and if prepared, whether it has been published. If it has not been published, raise issues with the Finance and Appropriation Committees of the National Assembly for their oversight functions to be triggered. Get the media involved if there is recalcitrance.

27. (1) The sums appropriated for a specific purpose shall be used solely for the purpose specified in the Appropriation Act. Power of Minister to Approve Virement

**Comment:** A careful reading of sections 80 and 81 of the Constitution will reveal that spending without appropriation amounts to a sin against the Constitution. This section seeks to reaffirm the import of constitutional provisions. Appropriation Acts are law and are meant to be implemented by the Executive in accordance with its tenor and specific provisions. This section will help to curtail misapplication of resources. A similar provision in the 2009 Appropriation Act, S.2 (1) states that:

*“ All amounts appropriated under this Act shall be released from the Consolidated Revenue Fund of the Federation and applied only for the purpose specified in the First Schedule to this Act”.*

Consider the foregoing provisions along with Financial Regulation No. 515 requiring all accounting officers to exercise due economy and value for money in all financial transactions of their ministries. This is based on the rule that money shall not be spent merely because it has been voted.

**Action:** Peruse the quarterly budget reports to confirm if resources have been diverted to sources other than appropriated; draw the attention of the Minister and the Legislature. Further verify if economy and due care was used in incurring public expenditure.

- (2) Without prejudice to subsection (1) of this section, the Minister may in exceptional circumstances and in the overall public interest, recommend for the approval of the National Assembly virements from sub-heads under heads of account, without exceeding the amount appropriated to such heads of account.

A similar provision exists in the 2009 Appropriation Act, which states in S.3 (1) that :

*“ In the event that a need arises to vire amounts within the heads of expenditure to which sums have been appropriated under this Act, such virement shall only be effected with the prior approval of the National Assembly”.*

Further, the Corrupt Practices and Other Related Offences Act states in S. 22 (5) that:

*“Any public officer who transfers or spends any sum allocated for a particular project, or service , on another project or service, shall be guilty of an offence under this Act and on conviction be liable to one (1) year imprisonment or a fine of fifty thousand naira”.*

**Comment:** If there is the need to vary the provisions of the Appropriation Act by way of virement, then this section provides for legislative approval before such virement can become effective. However, virements are only permitted from amounts within heads of expenditure or from subheads under heads of account. A proposal for virement from education and health to roads is not within the contemplation of the foregoing cited Acts. It would therefore be unlawful and illegal for the Legislature to approve such virement. What is contemplated by the FRA is movement of funds within subheads of a head of account. An outright amendment of the Appropriation Act can only be secured through another law - not by virement.

If the Minister sends a request for virements to the National Assembly, CSOs are provided an opportunity to engage the Legislature and further canvass for a more pro-poor realignment of expenditure by providing alternative virement

plans which will better support human development and adequate standard of living.

It is imperative to recall section 3 of the Finance (Control and Management) Act<sup>65</sup> which states inter alia that the Minister shall so supervise the expenditure and finances of the Federation as to ensure that a full account is made to the Legislature and its financial control is maintained. Part of the objective of the Minister's management of federal finances is to ensure the rendering of full accounts to the Legislature.

**Action:** Peruse the quarterly budget reports to confirm if resources have been diverted to sources other than appropriated and without legislative approval; draw the attention of the Minister and the Legislature. If the virements proposed by the Minister are not acceptable, design an alternative virement framework and plan which should be properly costed from sub-heads under heads of account, without exceeding the amount appropriated to such head of account. If the virements proposed by the Minister would violate human rights, prepare a brief that will adequately point out where the flaws in the system lie. Consider reporting to the Independent Corrupt Practices Commission if violations of the Corrupt Practices and Other Related Offences Act have occurred.

- 28.** (1) Where, by the end of three months, after the enactment of the Appropriation Act, the Minister determines that the targeted revenues may be insufficient to fund the heads of expenditure in the Appropriation Act, the Minister shall, within the next 30 days of such determination, take appropriate measures to restrict further commitments and financial operations according to the criteria set in the Fiscal Risk Appendix. Power to Restrict Further Commitments
- (2) Where the targeted revenues are re-established, either in part or in full, the appropriations for which further commitments were restricted shall be restored proportionately.
- (3) The provisions of subsections (1) and (2) of this section shall not apply to statutory or constitutional expenditures.

**Comment:** The Act permits restriction of commitments by the Minister if there are insufficient funds to fund the heads of expenditure in the

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<sup>65</sup> Cap.F26, Laws of the Federation of Nigeria, 2004.

Appropriation Act and to restore them proportionally if the target revenues are re-established. The surprising thing about this section is that the restrictions do not require legislative approval while ordinary virements require such approval. Statutory and constitutional expenditures include the votes of the National Judicial Council, Niger Delta Development Commission, Universal Basic Education Fund, etc. It further includes the remuneration of the officers referred to in section 84 of the 1999 Constitution as charges upon the Consolidated Revenue Fund.

**Action:** If funds are restricted, CSOs should seek to verify whether there are actual shortfalls in revenue and the reasons for such shortfalls. Assuming the revenue framework is unduly optimistic and without empirical basis, this should inform a more realistic approach to future revenue projections. It is very important for CSOs to find if restricted revenues impact negatively on the poor, the realisation of MDGs and derogate from government's minimum core obligations to guarantee essential baskets of basic human rights for adequacy in standard of living. CSOs can consider recommending alternative expenditure realigning frameworks to the Minister. CSOs can also explore the provisions of S.35 (5) and (6) of the FRA to demand augmentation of shortfalls in revenue from the savings in excess of the reference commodity price. CSOs should consider legislative advocacy to ensure that restrictions should have the prior approval of the Legislature.

- 29.** (1) Any proposed tax expenditure shall be accompanied by an evaluation of its budgetary and financial implications in the year it becomes effective and in the three subsequent years, and shall only be approved by the Minister, if it does not adversely impair the revenue estimates in the annual budget or if it is accompanied by countervailing measures during the period mentioned in this subsection through revenue increasing measures such as tax rate raises and expansion of the tax base.
- (2) The provision of this section shall not apply to-
- (a) change in the rates of the taxes mentioned in section 163 of the Constitution; and
  - (b) debt cancellation in an amount lower than the cost of collection.
- Restriction on the Grant of Tax Relief

**Comment:** This section ensures certainty and predictability of tax revenues over the medium term. Section 163 refers to any tax or duty imposed on capital gains incomes or profits of persons other than

companies; taxes and duties on documents and transactions by way of stamp duties.

**Action:** Verify if tax measures are compliant with the above provisions. The Minister and the Finance Committees of the National Assembly can provide information for the verification.

- 30.** (1) The Minister of Finance, through the Budget Office of the Federation, shall monitor and evaluate the implementation of the Annual Budget, assess the attainment of fiscal targets and report thereon on a quarterly basis to the Fiscal Responsibility Commission and the Joint Finance Committee of the National Assembly.
- Responsibility  
of the Budget  
Office to  
Monitor and  
Report on  
Implementation
- (2) The Minister of Finance shall, cause the report prepared pursuant to subsection (1) of this section to be published in the mass and electronic media and on Ministry of Finance website, not later than 30 days after the end of each quarter.

**Comment:** In subsection one, the quarterly report to the Fiscal Responsibility Commission facilitates its monitoring of the provisions of the Act while the report to the Legislature facilitates its oversight function. In subsection two, the provision is for public access to the monitoring and evaluation report. This is a commendable development for budgetary transparency and accountability and it will reduce the information asymmetry between the Executive and Legislative arms of government and the public in fiscal matters.

Yearly Appropriation Acts can also impose other budget monitoring and reporting requirements. For instance, the 2009 Appropriation Act provides as follows in sections 9 and 10:

*S.9: All Accounting Officers of Ministries, Parastatals and Departments of Government who control heads of expenditure shall, upon the coming into effect of this Act, furnish the National Assembly on a quarterly basis with detailed information on the internally generated revenue of the agency in any form.*

*S.10: All Accounting Officers of Ministries, Parastatals and Departments of Government who control heads of expenditure shall, upon the coming into effect of this Act, furnish the National Assembly on a quarterly basis with detailed information on all foreign and domestic assistance received from any agency, person or organisation in any form”*

**Action:** 30 days after the end of each quarter, monitor the website of the Federal Ministry of Finance, mass and electronic media regularly to see if the reports have been published. Approach the FRC and Finance Committees of the National Assembly to find out if the reports have reached them at all or within the time contemplated by law. Analyse and comment on the report and ensure the analysis is sent to the FRC, the Finance Committees of the Legislature and the Minister. Ensure the analysis receives adequate publicity. If there is consistent failure to implement this provision, enforcement action under S.51 of the Act should be considered.

31. In implementing their annual budgets, States and Local Governments may adopt the provisions of this Part with such modifications as may be appropriate and necessary.
- Application of Part V to States and Local Governments

## PART VI – PUBLIC REVENUES

32. Any fund due to the Federation from any tier of government may be set off by the Federation in or towards payment or remittance of any sum due to that tier of government from the Federation.
- Forecast and Collection of Public Revenues

**Comment:** This provision makes sense if there is no prior agreed schedule for repayment. Where there is one, then such schedule should take pre-eminence.

**Action:** In the event of a complaint by a tier of government of the seizure of its funds, verify the circumstances that led to the set off and any representations made by the state. Produce and disseminate a report to determine whether the set off is in accordance with the law.

33. The Executive Arm of the Federal Government shall, at least 30 days before the deadline for the submission of its budget proposals, place, at the disposal of the National Assembly, the revenue estimates for the following year, including the net current revenue and the respective memorandum items.
- Revenue Forecast

**Comment:** This provision will facilitate the Legislature's consideration of the annual budget. Considering an expenditure estimate without the revenue estimates will be an exercise in futility. It will also reduce the information asymmetry between the Executive and the Legislative arms of government. However, the revenue estimates must be MTEF compliant.

**Action:** Verify from the Finance Committees of the National Assembly if the revenue estimates actually got to the Legislature and on time. But first confirm the deadline date for submission of budget proposals. Move the

Legislature to action if the revenue estimates are not submitted at all or on time.

- 34.** Estimated revenue shall be broken down by the Executive Arm of Government into monthly collecting targets, including, where applicable, a separate description of measures to combat tax fraud and evasion.
- Executive to  
Breakdown  
Estimated  
Revenue

**Comment:** If the Accountant General of the Federation prepares the Annual Cash Plan prior to the commencement of the financial year, the monthly collecting estimates would be easy to calculate.

## **PART VII – SAVINGS AND ASSET MANAGEMENT**

- 35.** (1) Where the reference commodity price rises above the predetermined level, the resulting excess proceeds shall be saved in accordance with the provisions of subsection (2) of this section.
- (2) The savings of each Government in the Federation in pursuance to subsection (1) of this section shall be deposited in a separate account which shall form part of the respective Governments Consolidated Revenue Fund to be maintained at the Central Bank of Nigeria by each Government.
- Savings

**Comment:** The Consolidated Revenue Fund for the Federation and the States are established by S.80 (1) and S.120 (1) of the Constitution respectively. *[All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any other Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation].* The savings in the Central Bank is now deemed to be part of the Consolidated Revenue Fund of the Federation and of States and the equivalent fund of the local governments.

By S. 4 (1) of the 2009 Appropriation Act, it is stated that:

*“The Accountant General of the Federation shall, immediately upon the coming into force of this Act, maintain a separate record for the documentation of revenue accruing to the Consolidated Revenue Fund in excess of oil price benchmark adopted in this budget”*

- (3) The Central Bank of Nigeria shall, in consultation with the Minister of Finance, the State Commissioners of Finance, and Local Governments Treasurers, invest, for and on behalf

of the Governments in the Federation, the savings of each Government and such investment can be undertaken in a consolidated manner, provided that, the shares of each Government and income due to them from the investment are clearly identified.

(4) The Central Bank of Nigeria in the discharge of its obligation under subsection (3) of this section shall, observe the limits and conditions imposed by safety and prudential considerations and the need to maintain macro-economic stability and such safety and prudential conditions are to be agreed upon with the Minister of Finance, State Commissioners of Finance, and Local Government Treasurers.

(5) No Government in the Federation shall have access to the savings made in pursuance to subsection (2) of this section, unless the reference commodity price falls below the predetermined level for a period of three consecutive months.

(6) The augmentation referred to in subsection (5) of this section shall be limited to such sums that will bring the revenue of government to the level contained in its budget estimates.

(7) Notwithstanding the provision of subsections (5) and (6) of this section and subject to agreement by Federal and State Governments in the Federation, a proportion of the savings may be appropriated in the following year for the capital projects and programmes.

**Comment:** Saving for the rainy day is a wise decision for the prudent management of the nation's resources. In the past, Nigeria had experienced boom and burst cycles in resources accruing to it. In periods of boom, expenditure rose astronomically while in lean periods, meeting basic governmental obligations became very difficult. This saving is a response to that experience.

There have been heated arguments about the constitutionality of the savings (which in popular parlance is called the "Excess Crude Account") considering the provisions of S.162 of the Constitution. The argument is that the Federation Account is a zero sum distributable account, not a savings account and as such, the savings is unconstitutional. However, if money is deposited in a separate account forming part of the Consolidated Revenue Fund of a state and investments although made in a consolidated manner clearly identify the share of each state, local and federal governments, then the argument that it has not been distributed appears untenable. The only

reasonable argument against the savings can be based on access to the funds.

S.162 of the Constitution states:

*162. – (1) The Federation shall maintain a special account to be called “the Federation Account” into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.*

*(2) The President, upon the receipt of advice from the Revenue Mobilization Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density:*

*Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the Federation Account directly from any natural resources.*

*(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and Local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.*

*(4) Any amount standing to the credit of the States in the Federation Account shall be distributed among the States on such terms and in such manner as may be prescribed by the National Assembly.*

*(5) The amount standing to the credit of local government councils in the Federation Account shall also be allocated to the States for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.*

**Action:** CSOs should await the judgement of the Supreme Court in the suit instituted by some state governments against the federal government on the legality of the “Excess Crude Account”. However, in the interim, verify that the Minister’s quarterly budget reports indicates how much accrued to the tiers of government above the reference commodity price and the current balance in the “Excess Crude Account”. Also verify that the Accountant General duly maintains the account anticipated by the 2009 Appropriation Act and updates the National Assembly on accruals. It is also imperative to verify that monies are not spent from the fund by the Federal

Government without agreement with States and Local Governments. Further, any monies disbursed from the “Excess Crude Account” can only be spent after Legislative appropriation.

Raise an alarm if any aspect of this provision is being violated; use the media and engage the National Assembly.

## PART VIII – PUBLIC EXPENDITURES

36. (1) The creation, expansion or improvement in government action which result in an expenditure increase shall be accompanied by-
- Conditions  
for Increasing  
Government  
Expenditure
- (a) an estimate of the budgetary or financial impact in the year it becomes effective and in the two subsequent years; and
- (b) a statement by the person requesting for the expenditure, stating that the increase is consistent with the Appropriation Act and the Medium-Term Expenditure Framework.
- (2) The provisions of this section shall not apply to expenditures deemed inconsequential and shall apply to States and Local Government only to the extent to which they have adopted these provisions.

**Comment:** This provision guarantees certainty and predictability in government expenditure patterns. MTEFs are made to be followed. But the section did not define the term “expenditures deemed inconsequential”. By the above provisions, the 2007 recommendations of the Revenue Mobilisation and Fiscal Allocation Commission for remuneration increases to political officers should have undergone this compliance test because it appears that issues of sustainability of payments only come to the fore when demand for enhanced remuneration is made by organised labour.

**Action:** Confirm if expansion and improvement in government expenditure is in accordance with the trajectory of the MTEF and accompanied by its budgetary and financial impact over a two year period. This may require sectoral expertise to compare the implications of such expansion to the overall MTEF trajectory. Get the report to Minister and the Legislature.

37. The granting of any advantage or increase of remuneration, the creation of posts or alteration of career structures and admission of personnel on any account by bodies and entities including foundations established and maintained by the Federal Government shall only be effected if, there is a prior budgetary allocation sufficient to cover the estimated expenditure.

Conditions for  
Increasing  
Personnel  
Expenditure

**Comment:** The implication of this provision is that only annual budgets or supplementary appropriations can support remuneration increase, admission of new personnel, etc. The products of collective bargaining agreements between government and labour have to wait for the inclusion of the results of the agreement in the budget. The provision is in line with S.27 (1) of this Act which states that the sums appropriated for a specific purpose shall be used solely for the purpose specified in the Appropriation Act.

The multiplicity of special advisers and assistants to the President also has to come under focus here. Although the Constitution in section 151 stated that the number of such advisers and their remuneration shall be determined by the Legislature, it appears that there are too many of them. At the state level, these positions are clearly abused.

**Action:** During the budget preparation stage, undertake advocacy in collaboration with the requisite interest groups to ensure that agreed increases in personnel expenditure are reflected in the budget. Monitor disbursement of funds through the Minister's quarterly reports and information from the Finance Committees of the Legislature to determine whether personnel expenditure is incurred outside these rules. Move the Legislature to curtail and set limits to the number of advisers and assistants to be engaged by the President.

38. All contracts with regards to the execution of annual budget; shall comply with the rules and guidelines on-

All Contracts  
to Comply  
with Rules  
and  
Guidelines

(a) procurement and award of contracts;  
and

(b) due process and certification of  
contract.

**Comments:** Procurement and award of contracts and due process certification are governed by the provisions of the Public Procurement Act 2007 and rules and regulations made from time to time by the Bureau of Public Procurement subject to the approval of the National Council on Public Procurement. Two provisions of the Corrupt Practices and Other Related Offences Act should be considered as a guide to action: They are S.22 (3) and (4)

*(3) Any public officer who in the course of his official duties, inflates the price of any goods or services above the prevailing market price or professional standards shall be guilty of an offence under this Act and on conviction be liable to seven (7) years imprisonment and a fine of one million naira.*

*(4) Any public officer who in the discharge of his official duties awards or signs any contract, without budget provision, approval and cash backing, shall be guilty of an offence under this Act and on conviction be liable to three (3) years imprisonment and a fine of one hundred thousand naira..*

The Financial Regulations also contains provisions on proper exercise of public procurement<sup>66</sup>. Treasury Circulars issued from time to time by the Office of the Accountant General of the Federation also emphasise the need for due process, value for money and meticulously following the Public Procurement Act in government commerce<sup>67</sup>. Further information on the management of public procurement in Nigeria are available at [www.bpp.gov.ng](http://www.bpp.gov.ng) which is the website of the Bureau of Public Procurement.

**Action:** Monitoring public procurements is an entirely different dimension of public expenditure management work of civil society. See the procurement monitoring checklist developed by Centre for Social Justice for the National Procurement Watch Platform at [www.censoj.com](http://www.censoj.com). This section of the FRA can be used as a basis to challenge procurements in violation of the Public Procurement Act and other laws and regulations through the locus standi conferred in S. 51 of the FRA.

**39.** Any violation of the requirements in sections 36, 37 and 38 shall be an offence.

Effect of  
Violation of  
Public  
Expenditure  
Rules

**Comment:** The declaration of violations of sections 36, 37 and 38 as an offence without specifying penalties is novel in our statutory jurisprudence. Effectively, no one can be sanctioned for the violation in accordance with S.36 (12) of the Constitution to the effect that no one shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.

**Action:** Undertake legislative advocacy for the amendment of the Act to make provisions for requisite sanctions.

**40.** In incurring public expenditure, States and Local Governments may adopt the provisions of this part with

Application of  
Part VIII to  
States and  
Local  
Governments

<sup>66</sup> Financial Regulations Nos. 804 (ii) and 513 i.e. no payment vouchers should be raised or cheques issued in respect of contracts yet to be executed.

<sup>67</sup> See Treasury Circular No. TRY/A7&B7/2008 on the Closure of Year 2008 Accounts.

such modifications as may be appropriate and necessary.

## PART IX – DEBT AND INDEBTENDNESS

41. (1) The framework for debt management during the financial year shall be based on the following rules-

Framework  
for Debt  
Management

- (a) Government at all tiers shall only borrow for capital expenditure and human development, provided that such borrowing shall be on concessional terms with low interest rate and with a reasonably long amortization period subject to the approval of the appropriate legislative body where necessary; and

**Comment:** It is instructive to state that “Borrowing” has been defined in the interpretative section of the Act to mean any financial obligation arising from - any loan including principal, interest, fees of such loan; the deferred payment for property, goods or services; bonds, debentures, notes or similar instruments; letters of credit and reimbursement obligations in respect thereto; trade or banker’s acceptances; capitalised amount of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased; agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and a conditional sale agreement, capital lease or other title retention agreement.

“Concessional terms” is defined in the interpretative section to mean that the terms of the loan must be at an interest rate not exceeding 3 percent. From available information, with the exception of facilities from international development agencies like the World Bank which do not *stricto sensu* have interest rates but service charges, no Nigerian bank loan, bond or any other facility can come at 3 percent interest rate. Essentially, this provision bars governments from borrowing from Nigeria banks.

In the past, the executive incurred debts through loans without prior legislative approval. Nigeria had to pay back over \$18 billion in the proverbial debt forgiveness scheme. Odious loans with onerous conditionalities were surreptitiously incurred and the resulting debts mortgaged the future of generations yet unborn. This provision seeks to curb that practice. Consideration of borrowing and the conditionalities by the Legislature will allow for a more dispassionate consideration of the issues and possible popular input to the decision making process.

Reasonably long period of amortization may depend on the circumstance of the borrowing but if the example of facilities from the World Bank is taken into consideration, this may run into at least ten years.

**Action:** Prepare and send a letter to the Central Bank of Nigeria urging it to use banking supervision to ensure that the FRA is implemented in the sense that lending to the public sector has been barred by the FRA. Also prepare and send a letter to the managing director of all banks explaining the provisions of the Act and informing them that lending in contravention of the Act is unlawful and will result into their inability to recover such illegally loaned sums.

Verify if proposals for borrowing meets the stipulations of the above section. Intervene in the Legislature with a brief or memorandum if there is sufficient information to buttress that the proposed borrowing does not meet the conditions of Act. Report findings to the FRC and any other relevant agency and involve the media. Consider a lawsuit if there is no other means of stopping the Executive and or the Legislature from violating the Act.

- (c) Government shall ensure that the level of public debt as a proportion of national income is held at a sustainable level as prescribed by the National Assembly from time to time on the advice of the Minister.

**Comment:** What is a sustainable level of debt when compared to national income? The qualification is that sustainability shall be determined by government meeting the thresholds set by the National Assembly on the advice of the Minister. The Debt Management Office states as follows<sup>68</sup>:

*International best practice for overall debt sustainability in low income countries recommends external debt stock to GDP ratio of not more than 30 percent. Given Nigeria's economic conditions, the need to avoid a relapse into debt unsustainability, as well as the need for the country's increasing emphasis on domestic borrowing and the development of the domestic debt market, an external debt stock to GDP ratio of 20 percent is recommended,..Therefore the recommended total public debt/GDP ratio for the medium term, i.e. 3-5 years is 45 percent.*

Best practices from the Stability and Growth Pact, a part of the Maastricht Treaty declares that there should be a limit of 60% of the public debt to GDP ratio. However, considering Nigeria's history and poor fiscal management practices, we cannot set our public debt GDP ratio within the Maastricht Treaty limit of 60%; Nigeria's ratio should be lower and has been

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<sup>68</sup> External Borrowing Guidelines 2008-2012 at page 3.

stated by the Debt Management Office to be not more than 45% of the nation's Gross Domestic Product<sup>69</sup>. The current national debt portfolio is a little less than 12% of GDP.

**Action:** Verify that approved limits are not exceeded and if exceeded or a proposal to exceed arises, draw the attention of the Finance Minister, the Legislature, the lender, borrower and the FRC to the (proposed) infractions.

- (2) Notwithstanding the provisions of subsection 1(a) of this section and subject to the approval of the National Assembly, the Federal Government may borrow from the capital market.

**Comment:** Borrowing from the capital market for long term funds alleviates the obvious debarring of governments from bank borrowing. The Investments and Securities Act (ISA) 2007, No. 29, provides for borrowing by raising of internal loans through the issuance of securities in the form of Registered Bonds or Promissory Notes by States, Local Governments and other Government Agencies<sup>70</sup>. Section 222 of ISA defines the bodies to which ISA provisions apply, to include:

- ❖ State Governments and the Federal Capital Territory, Abuja
- ❖ Local Governments
- ❖ Any Statutory body established by the Law of a State or Local Government
- ❖ Any company which is wholly or partly owned by a State or Local Government

The provisions of the Act include the following:

- ❖ The total amount of loans outstanding at any particular time including the proposed loan shall not exceed 50% of the actual revenue of the body concerned for the preceding 12 months;
- ❖ Any internal loan to be raised from the Capital Market must conform to the requirements of ISA and as may from time to time be directed by the Securities and Exchange Commission (SEC);
- ❖ Before any application is made for contracting a loan from the Capital Market, such a body making the application must obtain the Approved Resolution of the State House of Assembly and the State

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<sup>69</sup> As at the end of April 2009, the nation's total debt portfolio stood at N2.855 trillion with local debts at N2.3 trillion which represents 81% of the entire portfolio while the external debt of N545 billion or \$3.7 billion represents 19% of the total debt portfolio. The federal government accounts for 60% of current external debts while states account for 40%. Lagos, Kaduna and Cross River have the highest debts of \$270.7million, \$109.1million and \$99.3 million respectively.

<sup>70</sup> These comments are lifted from DMOs Guidelines on Sub-national Borrowing.

Executive Council in the case of States and Local Governments;  
and,

- ❖ All applications to raise funds from the Capital Market shall, amongst other documents, be accompanied by an original copy of an Irrevocable Letter of Authority giving the Accountant-General of the Federation the authority to deduct at source from the statutory allocation due to the body, in the event of default by the body in meeting its payment obligations under the terms of the loan and the relevant Trust Deed.

Other required documentations under the ISA include:

- ❖ Duly completed Form SEC 6;
- ❖ Copies of resolution of the State Legislative Assembly authorising the Issue;
- ❖ A resolution on and gazette by the State Executive Council containing particulars of the proposed Issue;
- ❖ Audited accounts of the State for the preceding five (5) years;
- ❖ Draft prospectus, abridged particulars of the prospectus and the Trust Deed;
- ❖ Vending Agreement, i.e. mandate/engagement letter, appointing the Issuing House/ Underwriter to the Issue;
- ❖ Underwriting Agreement between the State and the Issuing House;
- ❖ Reporting Accountant's report on the audited financial statements and the financial forecast;
- ❖ Schedule of claims and litigations involving the State;
- ❖ Bridging loan agreement (if any);
- ❖ Material contracts of the State;
- ❖ Letters of consent of all the professional parties to the Issue;
- ❖ Letter of confirmation from the Accountant-General of the Federation of receipt of the Irrevocable Letter of Authority to deduct the principal and interest from the statutory allocation of the State;
- ❖ Feasibility report of the proposed project to be financed with the loan;
- ❖ Brief profile of key personnel of the Issuer, including members of the Executive arm of the issuer, Accountant-General, Auditor-General, Permanent Secretaries, etc.;
- ❖ Any other document/information as may be required; and,
- ❖ The particulars of each loan to be raised pursuant to this Act shall be published in the Gazette or any other official document by the body raising the loan and shall include all the terms of the security.

- (3) Non-compliance with the provisions of this section shall make the action taken an offence.

**Comment:** An offence is created without a penalty. S. 36 (12) of the Constitution states that subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation, or instrument under the provisions of a law.

**Action:** Opportunity for CSO legislative advocacy to match offences with requisite sanctions has crystallized.

42. (1) The President shall, within 90 days from the commencement of this Act and with advice from Minister of Finance subject to approval of National Assembly, set overall limits for the amounts of consolidated debt of the Federal, State and Local Governments pursuant to the provisions of items 7 and 50 of Part I of the Second Schedule to the Constitution and the limits and conditions approved by the National Assembly, shall be consistent with the rules set in this Act and with the fiscal policy objectives in the Medium-Term Fiscal Framework.

Limits on Consolidated Debt of Federal, State and Local Governments

**Comments:** Compare this provision with the provisions of S.41 (1) (b) because the consolidated debt limitation is linked with the sustainability of the debt. "Consolidated debt" as defined in the interpretative section means the aggregate of the outstanding financial obligations of Government including those of its parastatals and agencies at any point in time arising from borrowed money including principal, interest, fees of such borrowed money; the deferred payment for property, goods or services; bonds, debentures, notes or similar instruments; letters of credit and reimbursement obligations with respect thereto; Guarantees; Trade or banker's acceptances; Capitalized amounts of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased; agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and a conditional sale agreement, capital lease or other title retention agreement.

Second Schedule Part 1 is the Exclusive Legislative List reserved solely for the legislative competence of the National Assembly to the exclusion of states. Item 7 is on borrowing of moneys within or outside Nigeria for the

purposes of the Federation or of any State. Item 50 deals with public debt of the Federation.

**Action:** It has been over 90 days since the FRA came into force, confirm at the DMO if the President on the advice of the Minister subject to legislative approval has set the overall limits for all tiers of government. If the President has not performed this duty, engage in advocacy to move him to perform the duty. Verify through the FRC reports if the tiers of government are complying with the consolidated debt limitations. Consider naming and shaming of violators of the provisions.

- (2) Outstanding judgment debts not paid shall be considered part of the consolidated debts for the purposes of application of the respective limits set in pursuance of this section.

**Comment:** This is good for the rule of law and enforcement of court judgements against the government.

- (3) For the purpose of verifying compliance with the limits specified pursuant to this section, the Commission shall, at the end of each quarter, determine the amount of the consolidated debt of each tier of government.
- (4) The Commission shall publish, on a quarterly basis, a list of the Governments in the Federation that have exceeded the limits of consolidated debt, indicating the amount by which the limit was exceeded.
- (5) Where at the end of any quarter, the consolidated debt of the Federal, State or Local Governments exceeds the respective limits; it shall be brought within the limit not later than the end of the three subsequent quarters with a minimum of 25 percent reduction in the first quarter.
- (6) Violators of the limits specified pursuant to this section shall-
  - (a) be prohibited from borrowing from internal or external sources, except for the refinancing of existing debts; and
  - (b) bring the debt within the established limit by restricting funding commitments accordingly.

- (7) Where non-compliance with the limit specified pursuant to this section persists after the time limited by subsection (5) of this section, the affected Government shall also be prohibited from receiving grants from any other Government in the Federation.

**Comment:** The foregoing provisions if properly implemented will introduce sanity into the borrowing and debt situation in many States of the Federation. Up till date, the FRC is yet to publish any report meaning that it has not started work on this aspect of the law.

**Action:** CSOs can embark on naming and shaming, media campaigns to point out the dangers of disobeying the laws to the populace of the affected tier of government, and opening a *book or register of fiscal infamy* for governments that defy the laws. Enforcement action under section 51 can be considered as a last resort.

- (8) Whenever the fundamentals of the proposals referred to in this section are changed due to economic instability or change in monetary or exchange policies, the President shall submit to the National Assembly a request for a review of the current limits.

43. (1) Servicing of external debts shall be the direct responsibility of the Government that incurred the debt.

Servicing of  
External Debt

- (2) The cost of servicing Federal Government guaranteed loans shall be deducted at source from the share of the debtor Government from the Federation Account.

## PART X – BORROWING

44. (1) Any Government in the Federation or its agencies and corporations desirous of borrowing shall, specify the purpose for which the borrowing is intended and present a cost-benefit analysis, detailing the economic and social benefits of the purpose to which the intended borrowing is to be applied.

Condition of  
Borrowing and  
Verification of  
Compliance  
with Limits

**Comment:** “Cost-benefit-analysis” is defined in the interpretative section to mean an analysis that compares the cost of undertaking a service,

project or programme with the benefits that citizens are likely to derive from it.

Stating in an Appropriation Bill, which is subsequently passed by the Legislature and assented to by the President that part of the budget revenue would be sourced from borrowing without specifying which activities and projects the borrowing would be applied to would not satisfy the provisions of the above section. This is because it is a general statement of intent to borrow which does not specify the purpose of borrowing. And because of its general nature, the Executive does not submit a cost benefit analysis for the approval of the Legislature. During budget approval or after legislative approval of the general deficit financing by borrowing, the Executive needs to present specific projects and their respective cost benefit analysis for the approval of the Legislature.

**Action:** CSOs can consider drawing up a parallel cost benefit analysis if the official CBA is unnecessarily skewed to advance government's interest in borrowing. Other issues relating to the environment, gender, development and general social concerns can be brought to bear in the parallel CBA and the decision whether the investment of the proposed loan will be beneficial to the society. Pertinent questions to ask in the analysis of the official CBA will include; Who will benefit from this project and in what way? Who are the likely losers or will suffer losses based on project implementation and in what way will they incur the loss? Are there any mitigation strategies for those who will suffer losses?

Further, CSOs need to verify during legislative budget approval and immediately after the passage of the budget whether the executive presented specific projects with cost benefit analysis for the approval of the Legislature. Thereafter, they can be monitoring on a quarterly basis whether approvals are being sought by the Executive from the Legislature. Interventions for or against specific approval requests can be done by CSOs during public hearings or by lobby or general advocacy campaigns in the Legislature, the media, etc.

- (2) Without prejudice to subsection (1) of this section, each borrowing shall comply with the following conditions-
  - (a) the existence of prior authorisation in the Appropriation or other Act or Law for the purpose for which the borrowing is to be utilised; and
  - (b) the proceeds of such borrowing shall solely be applied towards long-term capital expenditures.

Further, the Debt Management Office Sub-national Borrowing Guidelines states as follows on borrowing from commercial banks by the Federal, States and Local Governments:

*Without prejudice to the provisions of the Nigerian Constitution, all banks and financial institutions requiring to lend money to the Federal, State and Local Governments or any of their agencies, shall obtain the prior approval of the Minister of Finance in accordance with section 24 of the DMO Act, 2003, and the Fiscal Responsibility Act, and shall state the purpose of borrowing and the tenor. The monthly debt service ratio of a sub-national, which includes the commercial bank loan being contemplated, should not exceed 40% of its monthly Federation Allocation of the preceding 12 months.*

*All commercial banks lending to a sub-national must make a provision (currently 10%) on all such loans in line with the Prudential Guidelines of the Central bank of Nigeria.*

*Sub-nationals should immediately upon contracting a commercial bank loan, furnish the DMO with details of the loan. The lending bank should furnish the DMO and the borrowing sub-national DMD (where in existence), on a periodic basis with reports on various stages of drawdown on the facility and utilisation of same by the borrower.*

**Comment:** Essentially, legislative approval of borrowing and its terms is in consonance with legislative appropriation powers. However, what is required is prior legislative approval, not an approval after the fact of borrowing. Also, the bank or financial institution needs the prior approval of the Minister of Finance to extend the loan to the government<sup>71</sup>. Further, the last sub-section of the FRA, rules out borrowing for recurrent purposes. Thus, any loan commitment that is neither approved in the Appropriation Act or any other law known to Nigeria's constitutional and statutory jurisprudence is illegal. The FRA is clear that what is required is the prior authorisation of the Legislature and not for the Executive to tie the hand of the legislature by committing Nigeria or a State Government to new loans and thereafter seek legislative ratification of the illegal commitment.

However, tying the debt service ratio to 40% of the monthly Federation Allocation for the past 12 months makes sense to the extent that states are dependent on Federation Allocation. It makes no sense to a state like Lagos which derives N14 billion out of its N18 billion monthly revenue from internally generated revenue while only N4 billion comes from the Federation Allocation. It would have been better if the rules state it as 40% of the entire revenue of the state.

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<sup>71</sup> Section 24 of the DMO Act.

**Action:** Verify that the borrowing is not for recurrent expenditure and ensure that borrowing is undertaken with prior legislative and ministerial approval. Confirm if the debt service ratio including the commercial loan contemplated exceeds 40% of the monthly Federation Allocation for the preceding 12 months. Draw the attention of the Legislature, the Finance Minister, etc to defaults and non observance of the Act.

- (3) Nothing in this section shall be construed to authorize borrowing in excess of the limits set out in section 44 of this Act.
- (4) The Commission shall verify on a quarterly basis, compliance with the limits and conditions for borrowing by each Government in the Federation.
- (5) Without prejudice to the specified responsibilities of the National Assembly and Central Bank of Nigeria, the Debt Management Office shall maintain comprehensive, reliable and current electronic database of internal and external public debts, guaranteeing public access to the information.

**Comment:** The provision for the maintenance of a comprehensive and reliable database of debts and public access to the information is a positive development. It will help civil society to intervene to guarantee that the borrowing limits are respected. Access to information is vital to any intervention on these provisions.

**Action:** CSOs should take advantage of information on the databases to make their works accurate and based on up to date and reliable data. If the DMO has not established the comprehensive and reliable database, advocacy should be geared towards ensuring that it is established and the public have access to it.

45. (1) All banks and financial institutions shall request and obtain proof of compliance with the provisions of this Part before lending to any Government in the Federation.
- (2) Lending by banks and financial institutions in contravention of this Part shall be unlawful.

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**Comment:** Banks and financial institutions are under a positive legal obligation to ensure that there is compliance with the provisions of this Act before lending. The word used to qualify “unlawful” is “shall” which implies that it is mandatory (not discretionary) for banks to apply the provisions of this section. Banks are under obligation to request and obtain proof of

compliance with this Act before lending. It is also a directive to the courts to ensure the voiding of contractual obligations entered into in violation of the provision. When banks lend without following the provisions of this Act, the transaction is unlawful. What is the legal status of an unlawful lending transaction? Can the bank recover the loan from the debtor? The term “unlawful” has been defined as contrary to, prohibited or unauthorized by law; acting contrary and in defiance to the law. When the term is applied to agreements and the like, it denotes that they are ineffectual in law because they involve acts that cannot be recognized as grounds for legal rights because they are against public policy<sup>72</sup>.

In *Sodipo v Lemminkainen*<sup>73</sup>, the Supreme Court held that a contract expressly or implicitly prohibited by statute is illegal and the courts cannot enforce illegality. Professor Sagay in *Nigerian Law of Contract* states that where a statute prohibits or bans the making of certain types of contracts, such contracts when made are illegal and void at law<sup>74</sup>. The legal maxim is *ex turpi causa, non-oritur actio* meaning that a cause of action in law does not arise from a base cause. If the agreement of the parties is to subvert the provisions of the FRA, then the maxim will apply. Furthermore, parties to an agreement regulated by statute are expected to contract within the framework and contemplation of the statute.

The law has also been stated as follows:

*It is the law that a contract is illegal if the consideration or the promise involved doing something illegal or contrary to public policy or if the intention of the parties in making the contract is thereby to promote something which is illegal and contrary to public policy; and an illegal contract is void and cannot be the foundation of any legal right*<sup>75</sup>.

*Where the subject matter of the promise is illegal or where the consideration or any part of it is illegal, the contract is illegal*<sup>76</sup>

Ordinarily, only parties to a contract have the *locus standi* to enforce or repudiate its terms. This is based on the concept of privity of contract<sup>77</sup>. In *Chuba Ikpeazu v ACB*<sup>78</sup>, it was held that a contract cannot be enforced by a person who is not a party to it; even if the contract was made for his benefit and purports to give him a right to sue on it. However, by virtue of section 51, any person can seek a declaration that a loan transaction is

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<sup>72</sup> Blacks Law Dictionary, Centennial Edition, at page 1536.

<sup>73</sup> (1985) 2 N.S.C.C., 1102 at 1114., 1115

<sup>74</sup> 1993, pages 300-316.

<sup>75</sup> Brett M.R in *Herman v Jeuchner* (1885) 15 Q.B.D. 561.

<sup>76</sup> Halsbury's Laws of England, 3<sup>rd</sup> Edition, Volume 8, page 126 at paragraph 218.

<sup>77</sup> See *Negbenebor v Negbenebor* (1971) 7 N.S.C.C. 200 at 205, *Dunlop Pneumatic Tyre Co v Selfridge* (1915) AC 847, 853

<sup>78</sup> (1965) N.M.L.R. 374.

unlawful and ask the court to prohibit a state or a bank from consummating the transaction or claiming rights under it<sup>79</sup>. This position can further be justified under the equitable doctrine propounded in *Roberston v Wait*<sup>80</sup> and *Lloyd's v Harper*<sup>81</sup> to the effect that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on a third party. Government under the social contract is a trust and governments act on behalf of the entire population and as such, every one has an interest in the enforcement of laws, the rule of law and its due process.

**Action:** First, CSOs have a duty to disseminate the provisions of this section to all banks and financial institutions. This can be done through letters to the respective managing directors and branch heads. Workshops and seminars can also be organised where the management of financial institutions are invited to participate.

Second, if the transaction has been concluded and the loan has been given and the debtor is paying back, CSOs should document the terms of the loan transaction and use that as a basis for legal action to stop possible deductions from the allocations of the tier of government through rendering nugatory the irrevocable standing orders at the Central Bank of Nigeria. However, if information becomes available before the borrowing is completed, use it as a basis to abort the transaction by engaging both the State Government and the bank. Consider the legal option if the parties prove recalcitrant. Publicising the findings in the media and forwarding the report to the FRC are also imperative. CSOs can also move the Central Bank of Nigeria to use banking supervision for the enforcement of the provisions of the Act.

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| <p><b>46.</b> (1) The Central Bank of Nigeria in its relations with Government agencies and parastatals shall be subject to the following prohibitions:</p>              | <p>Prohibition<br/>Against CBN in<br/>its Relation with<br/>Government<br/>Agencies and<br/>Parastatals</p> |
| <p>(a) purchasing fresh issues of government securities on the date of its primary issue in the market except in circumstances under subsection (2) of this section;</p> |   |
| <p>(b) exchanging on a temporary basis, the debt securities of any Government in the Federation for federal public debt securities and forward purchase or sale of</p>   |   |

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<sup>79</sup> See Kalu Onuoha in *Understanding the Fiscal Responsibility Act* being a paper presented at the Centre for Social Justice's FRA Capacity Building Workshop, Kaduna, June 2009 .

<sup>80</sup> (1853) 8 Exch.229.

<sup>81</sup> (1880) 16 Ch.D 290

such securities when the final result is similar to an exchange; or

(c) granting guarantees on behalf of any Government in the Federation.

(2) The Central Bank of Nigeria may only underwrite securities issued by the Federal Government, which are rolled-over to refinance maturing securities.

(3) The underwriting permitted under subsection (2) of this section shall be offset through a public auction at market-determined rate.

**47.** (1) Subject to the provisions of this Part, the Minister may with the approval of the Federal Executive Council, grant guarantees on behalf of any Government in the Federation.

Power of the  
Minister to  
Grant  
Guarantees

(2) Any guarantee granted by the Minister shall be conditional upon the provision of a counter-guarantee in an amount equal to or higher than the guarantee obligation, provided that, there are no overdue obligations from the requesting Government in the Federation to the guarantor and its controlled corporations and such guarantee shall also be in compliance with the following-

(a) counter-guarantee shall only be accepted from State or Local Governments; and

(b) the counter-guarantee required by the Federal Government from State or Local Government or by States from Local Government, may consist in the appropriation of tax revenue directly collected and resulting from statutory transfers and the guarantor shall be authorised to retain such revenue and use the respective amount to repay overdue debts.

(3) In the case of foreign currency borrowing, Federal Government guarantee shall be a requirement and no State, Local Government

or Federal Agency shall, on its own borrow externally.

The provisions of the DMO Act on Federal Government Guarantee also need to be reproduced hereunder<sup>82</sup>:

*(1) The Federal Government may, subject to the provisions of this section, guarantee external loans.*

*(2) A guarantee agreement for external loans shall be executed on behalf of the Federal Government by the Minister or any other person designated by him in writing.*

*(3) The Minister shall not guarantee any external loans except the terms and conditions of the loan shall have been laid before the National Assembly and approved by its resolution.*

*(4) Where any money is due to be paid by the Federal or a State Government in satisfaction of any obligation arising from a borrowing or a guarantee by the Minister, that money shall be deemed to be a charge on the Consolidated Revenue Fund of the Federation or the Consolidated Revenue Fund of the State, as the case may be.*

Further, the DMO Act provides on the terms and conditions for loans and guarantees as follows<sup>83</sup>:

*(1) The National Assembly may by resolution approve, from time to time, standard terms and conditions for the negotiation and acceptance of external loans and issuance of guarantees.*

*(2) Where the National Assembly has approved the terms and conditions under subsection (1) of this section, any agreement entered into by the Federal Government shall come into operation without further reference to the National Assembly; where the terms and conditions are in conformity with the approval.*

*(3) Notwithstanding the provisions of subsection (2) of this section, the National Assembly may by a resolution request that a particular agreement shall be brought before it for further approval.*

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<sup>82</sup> Section 22 of the DMO Act.

<sup>83</sup> Section 27 of the DMO Act.

*(4) No agreement in respect of which the approval of the National Assembly is requested shall come into operation without such approval.*

*(5) An approval shall be deemed granted if after 30 days the approval has not been formally communicated to the Minister.*

**Comment:** These provisions are in accordance with items 7 and 50 of the Exclusive Legislative List of the Constitution.

**Action:** If any borrowing or an attempt at borrowing contravenes these sections, consider a court action under S.51 of the Act, media exposure of the defaulting tiers of government and engage the FRC and the National and State Assemblies involved.

(4) Any guarantee provided in excess of the debts limits set pursuant to section 44(1) of this Act shall be an offence.

**Comment:** An offence is provided in subsection (4) without a penalty. Does this section intend to criminalise the action of the Minister?

**Action:** CSOs should engage in legislative advocacy to fill the gap in the law by providing penalties for the offence.

## **PART XI – TRANSPARENCY AND ACCOUNTABILITY**

**48.** (1) The Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances.

Fiscal  
Transparency

(2) The National Assembly shall ensure transparency during the preparation and discussion of the Medium-Term Expenditure Framework, Annual Budget and the Appropriation Bill.

**Comment:** Access to information is a pre-condition for informed participation and contribution to national fiscal dialogue. The Federal Government's obligation for conducting its fiscal affairs in a transparent manner involving full and timely disclosure and wide publication is a step in the right direction. The National Assembly also has similar obligation in the consideration of the MTEF and annual budget. The word used to

describe the obligation of the Federal Government and the Legislature is “shall” which imports a binding duty.

**Action:** CSOs should demand fiscal information at every step of the fiscal process. Engage constructively and cultivate relationships in the Ministry of Finance, Budget Office of the Federation, the Appropriation and Finances Committee of the National Assembly, the FRC, etc. This would ensure easy access to fiscal information. Use the media to make a case on the need for enhanced access to information.

49. (1) The Federal Government shall publish their audited accounts not later than six months following the end of the financial year. Publication of Audited Accounts
- (2) The Federal Government shall, not later than two years following the commencement of this Act and thereafter, not later than 7 months following the end of each financial year, consolidate and publish in the mass media, its audited accounts for the previous year.
- (3) The publication of general standards for the consolidation of public accounts shall be the responsibility of the office of the Accountant-General of the Federation.

**Comment:** Publication of accounts promotes transparency and accountability and should be encouraged. It will also facilitate the exposure of corruption and policies that are hindering national development and create room for ameliorative action to be taken.

**Action:** Follow up and ensure that timelines are met and where there is derogation, send reminders to the Auditor General for the Federation, Accountant General, the FRC, Minister of Finance and the Legislature.

50. The Federal Government through its budget office shall within 30 days after the end of each quarter, publish a summarized report on budget execution in such form as may be prescribed by the Fiscal Responsibility Commission and not later than 6 months after the end of the financial year, a consolidated budget execution report showing implementation against physical and financial performance targets shall be published by the Minister of Finance for submission to the National Assembly and dissemination to the public. Publication of a Summarized Report on Budget Execution

**Comment:** This provision further enhances accountability and transparency in public expenditure management.

**Action:** Verify that the FRC has designed the format for reporting and if it has not done so, prepare a draft reporting format and present same to FRC. If the Minister is reporting, confirm that the report comes in on time.

## PART XII – ENFORCEMENT

51. A person shall have legal capacity to enforce the provisions of this Act by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest. Enforcement

**Comment:** An analysis of the principal words and clauses in this section is imperative<sup>84</sup>. Section 18 (1) of the Interpretation Act<sup>85</sup> defines persons to include body of persons corporate or unincorporated. The principal units to which the law ascribes juristic personality are human beings, incorporated companies, corporation sole with perpetual succession, trade unions, partnerships and friendly societies. Even infants and persons of unsound mind are not denied juristic personality as they may still institute actions through their next friend<sup>86</sup>. Unincorporated associations may commence suits through their representatives.

Legal capacity as it relates to this section is a legal qualification, competency, power or fitness to institute proceedings in a court of law and this is usually referred to as *locus standi*. It is a right of a party to seek redress or assert a right enforceable at law<sup>87</sup>. To a great extent, it is grounded in the constitutional provision in section 6 (6) (b) to wit; *the judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.*

The standard practice in our courts has been to ask petitioners to show personal and particular interests to ground his locus in the suit. Thus, the petitioner's legal rights and obligations must have been affected or threatened before he can approach the courts with his prayers. This has been the position in a long list of decided cases including *Senator Adesanya the President of Nigeria*<sup>88</sup>, *J.S. Olawoyin v Attorney General, Northern Region*<sup>89</sup>. Essentially, decided cases affirm that a person has no

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<sup>84</sup> These comments borrow heavily from portions of *Understanding the Fiscal Responsibility Act* by Kalu Onuoha, *supra*.

<sup>85</sup> Cap. 123, Laws of the Federation, 2004.

<sup>86</sup> See Order 12 Rule 10 of the Federal High Court Rules 2000.

<sup>87</sup> See Blacks Law Dictionary, *supra*.

<sup>88</sup> Led by *Adesanya v The President* (1981) N.S.C.C., Vol. 12, 146.

<sup>89</sup> (1961) N.N.L.R. 84.

locus standi in an action to enforce a duty owed to the public. In an action to assert a public right or to enforce the performance of a public duty, it is only the Attorney General of the Federation or of a State who in law has locus standi<sup>90</sup>. However, the courts have also leaned against undue restrictive interpretation of locus standi as in *Chief Gani Fawehinmi v Akilu & Anor*<sup>91</sup>, *Adediran v Interland Transport Ltd*<sup>92</sup>, *Fawehinmi v President Federal Republic of Nigeria*<sup>93</sup>.

However, this section qualifies legal capacity with the words “without having to show any special or particular interest”. This effectively limits the strict application of the locus standi principle because the FRA has expressly conferred locus standi on all Nigerians. Further, the remedies in section 51 include prerogative orders. These prerogative orders are mandamus, certiorari and prohibition. Mandamus lies to compel the performance of a public duty. Certiorari lies to quash the decision of an administrative body or order of an inferior tribunal in violation of the due process of law. Prohibitions seeks to prohibit an action or omission that will breach the rules of natural justice, promote fraud, collusions, excess of jurisdiction, error of law, etc. Other remedies will include declarations, injunctions and damages, etc.

**Action:** Use the provisions of this section as a last resort to enforce the provisions of the Act if other methods prove futile and do not yield the desired results.

### PART XIII – MISCELLANEOUS PROVISIONS

- |   |   |
|---|---|
| <p><b>52.</b> Government securities, provided that, they are duly listed on the stock exchange, may be offered as collateral to guarantee loans or other financial transactions under the law for their economic value as defined by the Minister.</p>  | <p>Government Securities as Collateral to Guarantee Loans</p>               |
| <p><b>53.</b> The proceeds derived from the sale or transfer of public properties and rights over public assets shall not be used to finance recurrent and debt expenditure, provided that, such proceeds may be used to liquidate existing liabilities directly charged against such properties or assets.</p> | <p>Restriction on Utilisation of Proceeds of Sale of Public Assets, etc</p> |

**Comment:** “Recurrent Expenditure” as defined in the interpretation section means normal overhead and administrative expenses and personnel cost including salaries, emoluments and other benefits for employees. But the

<sup>90</sup> *Pierce v Superior Court*, 96 ALR 1020; *Gouriet v Union of Post Office Workers* (1978) A.C. 435.

<sup>91</sup> (1987) 4 N.W.L.R. (Pt. 67) 797 S.C

<sup>92</sup> (1991) 9 N.W.L.R. (Pt. 214) 155.

<sup>93</sup> (2007) 14 N.W.L.R (Pt.1054) 275

challenge is how to disaggregate public revenues that enter the Consolidated Revenue Fund basket to ensure that revenues realised from the sale or transfer of assets is not used for recurrent expenditure. The only possible solution is to earmark the revenues and detail them for specific capital projects.

- 54.** The Federal Government may provide technical and financial assistance to States and Local Governments that adopt similar fiscal responsibility legislation along the same lines as this Act for the modernization of their respective tax, financial and assets administration.
- Technical and Financial Assistance to States and Local

**Comments:** Considering the quantum of resources at the disposal of the Federal Government, it makes eminent sense to assist States and Local Governments to improve their fiscal governance. It is one economy despite the multiplicity of States and Local Governments.

**Action:** CSOs should lobby for the establishment of a challenge fund by the Federal Government to encourage fiscally responsible States and Local Governments to access money for developmental purposes. The benchmarking exercise for States introduced by the Obasanjo administration should be continued with some modifications.

- 55.** The President shall, in addition to any other power, conferred on him under this Act, make regulations generally for the purposes of carrying into effect the provisions of this Act.
- Power of the President to Make Regulations

#### **PART XIV – INTERPRETATION**

- 56.** In this Act-
- “Appropriation Act” means an Act or Law passed by the National or State Assembly or Local Government authorizing spending from the Consolidated Revenue Fund and includes a Supplementary Appropriation Act or Law;
- “Appropriation Bill” means the Bill referred to in section 59 of the Constitution of the Federal Republic of Nigeria, 1999;
- “Arms of Government” means the Executive, Legislature and Judiciary;
- “Borrowing” means any financial obligation arising from-
- Interpretation

- (i) any loan including principal, interest, fees of such loan,
- (ii) the deferred payment for property, goods or services,
- (iii) bonds, debentures, notes or similar instruments,
- (iv) letters of credit and reimbursement obligations with respect thereto,
- (v) trade or banker's acceptances,
- (vi) capitalized amount of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased,
- (vii) agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and
- (viii) a conditional sale agreement, capital lease or other title retention agreement;

“Budget Call Circular” means a circular-

- (i) requesting the submission in a prescribed form, of the revenue and expenditure estimate of ministries, extra-ministerial departments, and other executing agencies of Government for the next financial year; and
- (ii) giving detailed guidelines and instructions on the preparation of the estimates and expenditure in a manner consistent with the medium term development priorities set out in the Medium-Term Expenditure Framework;

“Capital Expenditure” means spending on an asset that lasts for more than one financial year and expenses associated with the acquisition of such assets;

“Concessional Term” means the terms of the loan must be at an interest rate not exceeding 3 percent;

“Consolidated debt” means the aggregate of the outstanding financial obligations of Government including those of its Parastatals and agencies at any point in time arising from-

(i) borrowed money including principal, interest, fees of such borrowed money,

(ii) the deferred payment for property, goods or services,

(iii) bonds, debentures, notes or similar instruments,

(iv) letters of credit and reimbursement obligations with respect thereto,

(v) Guarantees,

(vi) Trade or banker’s acceptances,

(vii) Capitalized amounts of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased,

(viii) agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and

(ix) a conditional sale agreement, capital lease or other title retention agreement;

“Cost-benefit-analysis” means an analysis that compares the cost of undertaking a service, project or programme with the benefits that citizens are likely to derive from it;

“Fiscal Risk Appendix” An explanatory attachment that provides a set of indicators that can be used to measure local fiscal risks;

“Fiscal Risk Target” provides numerical target of each risk indicator with which a fiscal entity will be considered fiscally healthy.

“Financial Year” has the meaning ascribed in the Constitution;

“Fiscal Policy Objectives” means the goals set by Government for attainment of set targets for a given period;

“Government Owned Company” means a statutory corporation, Government agency and a company in which Government has controlling interest;

“Medium-Term Expenditure Framework” means the document referred to and the content of which is prescribed in section 11 of this Act;

“Minister” means the Minister charged with the responsibility for finance;

“Net debt” means the consolidated debt less what is owed to Government, its Parastatals and agencies at any point in time;

“President” means the President of the Federal Republic of Nigeria;

“Public Debt Securities” means public debt represented by securities issued by the Federal Government (including those of the Central Bank of Nigeria), the States and Local Governments;

“Public Expenditure” means outlays other than those resulting into debt reduction;

“Public Revenue” means all moneys received by a Government in the Federation;

“Quarter” means one quarter of a financial year and quarterly shall be construed accordingly;

“Recurrent Expenditure” means normal overhead and administrative expenses and personnel cost including salaries, emoluments and other benefits for employees;

“Reference Commodity Price” means such price as may be determined by the President subject to the approval of the National Assembly;

“Refinancing of debt securities” means issuance of securities to repay the existing debt;

“State Financial Institution” means any financial institution in which one or more state government has controlling shares;

“State” shall be construed to include the Federal Capital Territory;

“Tax expenditure projections” means the projected amount expected to be utilized in the granting tax relief or tax holiday;

“Tax revenue projections” means the projected collectible tax or revenue within a particular planning period; and

“Tiers of Government” means the Federal, State and Local Governments;

**57.** This Act may be cited as the Fiscal Responsibility Act, 2007.

Citation

**SCHEDULE            Section 21**

**LIST    OF    CORPORATIONS,    AGENCIES    AND  
GOVERNMENT-OWNED COMPANIES**

1. Nigerian National Petroleum Corporation
2. Nigeria Deposit Insurance Corporation
3. Bureau of Public Enterprises
4. National Agency for Science and Engineering Infrastructure
5. Nigerian Social Insurance Trust Fund
6. Corporate Affairs Commission
7. National Clearing and Forwarding Agency
8. Nigeria Unity Line
9. Nigerian Airspace Management Agency
10. Nigerian Shippers Council
11. National Maritime Authority
12. Raw Material Research and Development Council
13. Nigerian Civil Aviation Authority
14. National Sugar Development Council
15. Nigerian Postal Service
16. Nigerian Ports Authority
17. Federal Airport Authority of Nigeria
18. Nigeria Mining Corporation
19. Nigeria Re-insurance
20. Nigerdock Nigeria Plc
21. Securities and Exchange Commission
22. National Insurance Corporation of Nigeria
23. Nigeria Re-insurance Corporation
24. Nigerian Telecommunication
25. National Automotive Council
26. Nigerian Tourism Development Corporation
27. National Communication Commission
28. National Agency for Food & Drug Administration & Control
29. Nigerian Customs Service
30. Federal Inland Revenue Service
31. Central Bank of Nigeria.

Any other corporation, agency or government-owned company that may be included by the Minister through a local notice.

# **APPENDIX ONE**

## **FISCAL RESPONSIBILITY MONITORING CHECKLIST**

### **1. Introduction**

**a).** Monitor's Name:

**b).** Monitor's Organisation:

**c).** Monitor's Address (include Telephone, Email and Fax):

### **2. Fiscal Responsibility Commission (FRC)**

**a).** Has the FRC been established?      Yes [ ]      No [ ]

**b).** If the answer to paragraph (a) is in the affirmative, who are the members of the FRC and which constituencies do they represent?

**c).** Were there any investigations of violations by the FRC during the period under review?    Yes [ ]      No [ ]

**d).** If the answer to the above is in the affirmative, what was the result of the investigation(s)?    Give details

**e).** What other activities did the FRC embark upon during the period under review? Give details

**f).** Did the Attorney General embark on any follow up action to the work of the FRC? Give details

**g).** Did the FRC submit its annual report to the Legislature by 30<sup>th</sup> June of the year?    Yes [ ]    No [ ]

**h).** If the answer is in the affirmative, give details of the contents of the FRC Report.

### **3. Medium Term Expenditure Framework (MTEF)**

**a).** At what time did the preparation of the MTEF start and end?

**b).** When was the MTEF laid before the National Assembly?

**c).** Did the legislature approve the MTEF?    Yes [ ]    No [ ]

**d)** Was the legislative approval with, or without modifications? Yes [ ]  
No [ ]

- e).** If the legislative approval came with modifications, give details of the modification (s)?
- f).** Give a summary of the contents of the MTEF
- g).** Did the MTEF contain:
- (i)** A Macroeconomic Framework? Yes [ ] No [ ]
  - (ii)** A Fiscal Strategy Paper? Yes [ ] No [ ]
  - (iii)** A Consolidated Debt Statement? Yes [ ] No [ ]
  - (iv)** Statement of Contingent Liabilities and Quasi Fiscal Activities  
Yes [ ] No [ ]
- h).** Describe the contents of the Macroeconomic Framework
- i).** Describe the contents of the Fiscal Strategy Paper
- j).** Describe the contents of the Expenditure and Revenue Framework
- k).** Describe the contents of the Consolidated Debt Statement
- l).** What is the Aggregate Expenditure Ceiling contained in the MTEF?
- m).** Are the MTEF's projections balanced, in surplus or deficit?
- n).** If there is a deficit, what is the percentage of the deficit compared to the Gross Domestic Product?
- o).** Did the government respect the Aggregate Expenditure Ceiling in budget formulation and implementation? Yes [ ] No [ ]
- p).** If the answer is in the negative, what reasons were offered by government for exceeding the ceiling?
- q).** Which officer of government anchored the preparation of the MTEF?
- r).** Were there consultations on any issue(s) or matter(s) related to the MTEF? Yes [ ] No [ ]
- (i).** Macroeconomic framework? Yes [ ] No [ ]
  - (ii).** Fiscal Strategy Paper? Yes [ ] No [ ]
  - (iii).** Revenue and Expenditure Framework? Yes [ ] No [ ]
  - (iv).** Strategic economic, social and developmental priorities of government? Yes [ ] No [ ]
  - (v).** Other matters?

s). Were the consultations open to the public and the media? Yes [ ] No [ ]

t). Which stakeholder groups made inputs into the MTEF?

u). When was the MTEF presented to the Federal Executive Council?

v). Was the MTEF published in a Gazette or by any other means? Yes [ ]  
No [ ]

w). Did the President make any adjustments to the MTEF? Yes [ ] No [ ]

x). If the answer to (w) above is in the affirmative, what were the reasons informing the adjustments?

#### 4. The Annual Budget

a). Was the MTEF the basis for the preparation of the annual budget?  
Yes [ ] No [ ]

b). Were the sectoral and compositional distribution of estimates in the budget bill consistent with the MTEF? Yes [ ] No [ ]

c) Was the annual budget accompanied by the following:

(i) the underlying revenue and expenditure profile for the next two years? Yes [ ] No [ ]

(ii) report setting out actual and budgeted revenue and expenditure and detailed analysis of performance of the budget for the 18 months up to June of the preceding financial year? Yes [ ] No [ ]

(iii) the revenue framework broken down into monthly collection targets prepared on the basis of the predetermined Reference Commodity Price as contained in MTEF? Yes [ ] No [ ]

(iv) measures on cost, cost control and evaluation of results of programmes financed with budgetary resources? Yes [ ] No [ ]

(v) a Fiscal Target Appendix derived from the underlying MTEF setting out the following targets for that financial year-

(i) target inflation rate? Yes [ ] No [ ]

(ii) target fiscal account balances? Yes [ ] No [ ]

(iii) any other development target deemed appropriate?  
Yes [ ] No [ ] and

(vi) a Fiscal Risk Appendix evaluating the fiscal and other related risks to the annual budget and specifying measures to be taken to offset the occurrence of such risks? Yes [ ] No [ ]

**5. Budgetary Planning Of Corporations And Other Related Agencies**  
(provide explanations where necessary)

**a).** Have government corporations and agencies prepared and submitted their 3 years estimates of revenue and expenditure? Yes [ ] No [ ]

**b).** Did government corporations and agencies submit their annual budget derived from the estimates to the Minister of Finance? Yes [ ] No [ ]

**c).** Did government corporations and agencies submit their projected operating surplus to the Minister of Finance? Yes [ ] No [ ]

**d).** Did the Minister of Finance submit the documentation referred to in (a), (b), and (c) above as an attachment to the Appropriation Bill to the National Assembly? Yes [ ] No [ ]

**e).** Did government corporations and agencies establish a General Reserve Fund? Yes [ ] No [ ]

**f).** Did government corporations and agencies pay four fifths of their operating surplus to the Consolidated Revenue Fund in the preceding financial year? Yes [ ] No [ ]

**g).** Did government corporations and agencies publish their audited financial reports within three months of the end of their financial year?

Yes [ ] No [ ]

List the corporations and give details.

**6. Budget Execution And Achievement Of Targets**

**a)** Did the Accountant General prepare the Annual Cash Plan for the year  
Yes [ ] No [ ]

**b).** Did the Minister prepare and publish a Disbursement Schedule derived from the Annual Cash Plan for the implementation of the Appropriation Act?  
Yes [ ] No [ ]

**c)** Was the Disbursement Schedule published within 30 days of the enactment of the Annual Budget? Yes [ ] No [ ]

**d)** Were sums appropriated for a specific purpose used for another purpose without legislative approval? Yes [ ] No [ ] Give details

**e)** Did the Minister of Finance restrict budgetary commitments based on the insufficiency of targeted revenues? Yes [ ] No [ ]

**f)** Did the restrictions apply to constitutional or statutory expenditure? Yes  
[ ] No [ ]

**g)** Were target revenues re-established? Yes [ ] No [ ]

**h)** If the answer to (g) above is in the affirmative, were the commitments proportionately restored? Yes [ ] No [ ]

**i)** Did the Minister of Finance and the Budget Office of the Federation prepare quarterly reports on budget implementation? Yes [ ] No [ ]

**j)** If the answer to (i) above is in the affirmative, have the reports been submitted to the Fiscal Responsibility Commission and the Joint Finance Committee of the National Assembly? Yes [ ] No [ ]

**k)** Did the Minister of Finance publish the quarterly reports in the mass and electronic media and on the website of the Ministry of Finance? Yes [ ] No [ ] Give details if necessary

**l)** Were the quarterly reports in (k) above published within 30 days from the end of the quarter? Yes [ ] No [ ]

## **7. Public Revenue**

**a).** Did the executive place at the disposal of the Legislature at least 30 days before the deadline for the submission of its budget proposals, the revenue estimates of the following year including the net current revenue and the respective memorandum items? Yes [ ] No [ ]

**b).** Did the Executive break down the revenue estimates into monthly collection targets? Yes [ ] No [ ]

## **8. Savings And Asset Management**

**a).** Did the Reference Commodity Price rise above the predetermined level during the reporting period? Yes [ ] No [ ]

**b).** What happened to the sums in excess of the predetermined price?

**c).** If they were saved, what reason informed the savings? Give details. If they were shared, what reason informed the sharing? Give details

## **9. Debts And Borrowing**

**a).** Has the limits of consolidated debt for the three tiers of government been set by the President, on the advice of the Minister of Finance and approved by the Legislature? Yes [ ] No [ ]

**b).** Are the limits on consolidated debt as set in (a) above consistent with the fiscal policy objectives of the MTEF? Yes [ ] No [ ] Give details if found necessary.

**c)** Based on the prescription of the National Assembly and Debt Management Office's documentation, is the level of public debt as a

percentage of national income sustainable? Yes [ ] No [ ] Give reasons for your answer

**d).** Has any new loans or indebtedness been incurred during the reporting period Yes [ ] No [ ]

**e).** If the answer to the above is in the affirmative, was the borrowing:

**(i)** for capital expenditure and human development? Yes [ ] No [ ]

**(ii)** on concessional terms with low interest rates Yes [ ] No [ ]

**(iii)** on a reasonably long amortisation period Yes [ ] No [ ]

**(iv)** subject to prior legislative approval in a law indicating the purpose for which the borrowing is to be utilised? Yes [ ] No [ ]

**(v)** supported by a cost-benefit analysis detailing the economic and social purpose for which the intended borrowing is to be applied? Yes [ ] No [ ]

**f)** Did the Fiscal Responsibility Commission verify and publish the list of Governments in the Federation that have exceeded the limits of consolidated debt and indicating the amount by which the limit was exceeded? Yes [ ] No [ ]

**g)** What action(s) had been taken by specific governments that violated the limits of consolidated debt to come in conformity with the Act's provisions? Give details

**h)** What steps did the Fiscal Responsibility Commission take to ensure that persistent violators are brought to book?

**i)** Did the Central Bank of Nigeria in its relationship with government agencies and parastatals (provide details and reasons for action where necessary)

**(i)** purchase fresh issues of government securities on the date of its primary issue in the market except in circumstances where the securities are rolled-over to refinance maturing securities? Yes [ ] No [ ]

**(ii)** exchange on a temporary basis, the debt securities of any Government in the Federation for federal public debt securities and forward purchase or sale of such securities when the final result is similar to an exchange? Yes [ ] No [ ]

**(iii)** grant guarantees on behalf of any Government in the Federation? Yes [ ] No [ ]

## **10. Transparency And Accountability**

a) Did the Legislature ensure transparency during the discussion of the MTEF and Appropriation Bill? Yes [ ] No [ ]

Give reasons for your answer

b). Did the Federal Government publish its audited accounts within six months from the end of the financial year? Yes [ ] No [ ]

c) Did the Federal Government publish a consolidated budget execution report within 6 months from the end of the financial year? Yes [ ] No [ ]

d). Did the Federal Government ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances? Yes [ ] No [ ]

Give reasons and details for your answers.

## **11. Enforcement**

Were there any legal action(s) to enforce the provisions of the Act?

Yes [ ] No [ ] Give details.

## **12. Further Information**

Use extra sheets of paper for further comments and issues not covered by this Checklist but which you consider relevant to the achievement of the objectives of the Act.

Date

Signature

# **APPENDIX TWO**

## **FISCAL RESPONSIBILITY ACT 2007**

### **ARRANGEMENT OF SECTIONS**

#### **Sections:**

#### **PART I – ESTABLISHMENT, FUNCTIONS, POWERS OF THE FISCAL RESPONSIBILITY COMMISSION.**

- 58. Establishment of the Fiscal Responsibility Commission
- 59. Responsibility, powers and functions of the Commission
- 60. Functions of the Commission
- 61. Establishment of a Fund for the Commission
- 62. Composition of the Commission
- 63. Tenure of Office
- 64. Powers of the Commission
- 65. Cessation of membership
- 66. Emoluments etc of members
- 67. Submission of annual report of the Commission

#### **PART II – THE MEDIUM – TERM EXPENDITURE FRAMEWORK**

- 68. Medium-Term Expenditure Framework
- 69. Aggregate Expenditure Ceiling
- 70. Preparation of a Medium-Term Expenditure Framework
- 71. Time limit for presentation of Medium-Term Expenditure Framework to Federal Executive Council.
- 72. Publication of Medium-Term Expenditure Framework in the Gazette
- 73. Adjustment to the Medium-Term Expenditure Framework
- 74. Assistance to States and Local Governments.

#### **PART III – THE ANNUAL BUDGET**

- 75. Annual Budget to be derived from Medium-Term Expenditure Framework
- 76. Annual Budget to be accompanied by certain documents
- 77. Application of Part III to States and Local Governments

#### **PART IV – BUDGET PLANNING OF CORPORATIONS AND OTHER RELATED AGENCIES**

- 78. Preparation of estimate of revenue and expenditure by Corporation etc.
- 79. Operating surplus and general reserve fund
- 80. Classification of corporation operating surplus

81. Cessation of application of Part IV

## **PART V – BUDGET EXECUTION AND ACHIEVEMENT OF TARGETS**

- 82. Annual Cash Plan
- 83. Disbursement Schedule
- 84. Power of Minister to approve virement
- 85. Power to restrict further commitments
- 86. Restriction on the grant of tax relief
- 87. Responsibility of the budget office to monitor and report on implementation
- 88. Application of Part V to States and Local Governments

## **PART VI – PUBLIC REVENUES**

- 89. Forecast and collection of public revenues
- 90. Revenue forecast
- 91. Executive to breakdown estimated revenue.

## **PART VII – SAVINGS AND ASSET MANAGEMENT**

- 92. Savings

## **PART VIII – PUBLIC EXPENDITURE**

- 93. Condition for increasing government expenditure
- 94. Condition for increasing personnel expenditure
- 95. All contracts to comply with rules and guidelines
- 96. Effect of violation of public expenditure rules
- 97. Application of Part VIII to States and Local Governments.

## **PART IX – DEBT AND INDEBTEDNESS**

- 98. Framework for debt management
- 99. Limit on consolidated debt of Federal, State and Local Governments
- 100. Servicing of external debt.

## **PART X - BORROWING**

- 101. Conditions for borrowing and verification of compliance with limit
- 102. Lending by financial institutions
- 103. Prohibition against CBN in its relation with Government agencies and parastatals
- 104. Power of the Minister to grant guarantees.

## **PART XI – TRANSPARENCY AND ACCOUNTABILITY**

- 105. Fiscal transparency
- 106. Publication of audited accounts by all arms of Government
- 107. Publication of summarized report on budget execution.

**PART XII - ENFORCEMENT**

- 108. Enforcement

**PART XIII – MISCELLANEOUS PROVISIONS**

- 109. Government securities as collateral to guarantee loans
- 110. Restriction on utilization of proceeds of sale of public assets etc
- 111. Technical and financial assistance to States and Local Governments
- 112. Power of President to make regulations.

**PART XIV - INTERPRETATION**

- 113. Interpretation
- 114. Citation.

## FISCAL RESPONSIBILITY ACT, 2007

AN ACT TO PROVIDE FOR PRUDENT MANAGEMENT OF THE NATION'S RESOURCES, ENSURE LONG-TERM MACRO-ECONOMIC STABILITY OF THE NATIONAL ECONOMY, SECURE GREATER ACCOUNTABILITY AND TRANSPARENCY IN FISCAL OPERATIONS WITHIN A MEDIUM TERM FISCAL POLICY FRAMEWORK, AND THE ESTABLISHMENT OF THE FISCAL RESPONSIBILITY COMMISSION TO ENSURE THE PROMOTION AND ENFORCEMENT OF THE NATION'S ECONOMIC OBJECTIVES; AND FOR RELATED MATTERS.

[July 30 2007]

Commencement

ENACTED by the National Assembly of the Federal Republic of Nigeria\_\_\_

### **PART I – ESTABLISHMENT, FUNCTIONS AND POWERS OF THE FISCAL RESPONSIBILITY COMMISSION**

Establishment of the Fiscal Responsibility Commission

2. (1) There shall be established, a body to be known as the Fiscal Responsibility Commission (“in this Act referred to as the Commission”).
  - (2) The Commission shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.
3. (1) For the purpose of performing its functions under this Act, the Commission shall have power to –
  - (a) compel any person or government institution to disclose information relating to public revenues and expenditure; and
  - (b) Cause an investigation into whether any person has violated any provisions of this Act.
- (3) If the Commission is satisfied that such a person has committed any punishable offence under this Act or violated any provisions of this Act, the

Responsibility, powers and functions of the Commission

Commission shall forward a report of the investigation to the Attorney-General of the Federation for possible prosecution.

4. (1) The Commission shall-

Functions of the Commission

- (a) monitor and enforce the provision of this Act and by so doing, promote the economic objectives contained in section 16 of the Constitution;
- (b) disseminate such standard practices including international good practice that will result in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters;
- (c) undertake fiscal and financial studies, analysis and diagnosis and disseminate the result to the general public;
- (d) make rules for carrying out its functions under this Act; and
- (e) perform other function consistent with the promotion of the objectives of this Act.

(4) The Commission shall be independent in the performance of its functions.

(5) The provision of Public Officers Protection Act shall apply to the members of the Commission in the discharge of their functions under this Act.

5. (1) The Commission shall establish and maintain a Fund from which shall be defrayed all expenditure incurred by the Commission.

Establishment of a Fund for the Commission

(2) There shall be credited to the Fund established pursuant to subsection (1) of this section, the budgetary allocation from the Federal Government and grants from any other source.

6. (1) The Commission shall consist of –

Composition of the Commission

- (a) a chairman, who shall be the Chief Executive and accounting officer of the Commission;
- (b) one member representing-

- (iv) the organized private sector,
- (v) Civil Society engaged in causes relating to probity, transparency and good governance,
- (vi) Organized labour;

(c) a representative of the Federal Ministry of Finance of a level not below the rank of a Director; and

(d) one member to represent each of the following six geopolitical zones of the country, that is: North-Central, North-East, North-West, South-East, South-West and South-South.

(5) All members of the Commission shall be persons of proven integrity and must possess appropriate qualifications with not less than 10 years cognate post qualification experience.

(6) The Chairman and other members of the Commission other than ex-officio members shall be appointed by the President subject to confirmation by the Senate.

(7) The Chairman and members representing the six geo-political zones shall be full time members.

7. The Chairman and members of the Commission shall hold office for a single term of 5 years. Tenure of office

8. The Commission shall have power to- Powers of the Commission

(a) formulate and provide general policy guidelines for the discharge of the functions of the Commission;

(b) superintend the implementation of the policies of the Commission;

(c) appoint for the Commission, such numbers of employees as may in the opinion of the Commission be expedient and necessary for the proper and efficient performance of the functions of the Commission;

- (d) determine the terms and conditions of service in the Commission, including disciplinary measures for the employees of the Commission
- (e) fix the remuneration, allowances and benefits of the employees of the commission as approved by the Salaries and Wages Commission;
- (f) do other things, which in its opinion are necessary to ensure the efficient performance of the functions of the Commission; and
- (g) regulate its proceedings and make standing orders with respect to the holding of its meetings, notices to be given, the keeping of minutes of its proceedings and such other matters as the Commission may, from time to time, determine.

**9.** (1) Notwithstanding the provisions of section 5 (2) of this Act, a member of the Commission shall cease to hold office if-

Cessation of membership

- (a) he becomes bankrupt or makes a compromise with his creditors;
- (b) he is convicted of a felony or any offence involving dishonesty, corruption or fraud;
- (c) he becomes incapable of carrying out the functions of the office either by reason of an infirmity of mind or body;
- (d) the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office and the President removes him from office;
- (e) he has been found guilty of violation of the code of conduct or serious misconduct in relation to his duties;
- (f) he resigns his appointment by a notice under his hand, addressed to the President; or

(g) in the case of a person who becomes a member by virtue of the office he occupies, he ceases to hold such office for whatever reason.

(2) Where a vacancy occurs in the membership of the Commission, it shall be filled by the appointment of a successor to hold office for the remainder of the term of office of his predecessor, provided that the successor shall represent the same interest as his predecessor.

10. (1) There shall be paid to the Chairman of the Commission such salaries, allowances and benefits as the Revenue Mobilisation Allocation and Fiscal Commission may from time to time approve.

Emoluments, etc  
of members

(2) There shall be paid to other members of the Commission such sitting allowances and benefits as may be determined by the Revenue Mobilisation Allocation and Fiscal Commission from time to time.

11. The Commission shall prepare and submit to the National Assembly not later than 30<sup>th</sup> June in each financial year; a report of its activities including all cases of contravention investigated during the preceding financial year, and shall include in the report a copy of its audited accounts for the preceding financial year.

Submission of annual  
report of the  
Commission

## **PART II – THE MEDIUM-TERM EXPENDITURE FRAMEWORK**

12. (1) The Federal Government after consultation with the States shall-

Medium-Term  
Expenditure  
Framework

(a) not later than six months from the commencement of this Act, cause to be prepared and laid before the National Assembly, for their consideration a Medium-Term Expenditure Framework for the next three financial years; and

(b) thereafter, not later than four months before the commencement of the next financial year, cause to be prepared a Medium-Term Expenditure Framework for the next three financial years.

(5) The framework so laid shall be considered for approval with such modifications if any, as the

National Assembly finds appropriate by a resolution of each House of the National Assembly.

- (6) The Medium-Term Expenditure Framework shall contain-
- (a) a Macro-economic Framework setting out the macro-economic projections, for the next three financial years, the underlying assumptions for those projections and an evaluation and analysis of the macroeconomic projections for the preceding three financial years;
  - (b) a Fiscal Strategy Paper setting out-
    - (i) the Federal Government's medium-term financial objectives,
    - (ii) the policies of the Federal Government for the medium-term relating to taxation, recurrent (non-debt) expenditure, debt expenditure, capital expenditure, borrowings and other liabilities, lending and investment,
    - (iii) the strategic, economic, social and developmental priorities of the Federal Government for the next three financial years,
    - (iv) an explanation of how the financial objectives, strategic, economic, social and developmental priorities and fiscal measures set out pursuant to sub-paragraphs (i), (ii) and (iii) of this paragraph relate to the economic objectives set out in section 16 of the Constitution;
  - (c) an expenditure and revenue framework setting out-
    - (i) estimates of aggregate revenues for the Federation for each financial year in the next three financial years, based on the predetermined Commodity Reference Price adopted and tax revenue projections;

- (ii) aggregate expenditure projection for the Federation for each financial year in the next three financial years,
- (iii) aggregate tax expenditure floor for the Federation for each financial year in the next three financial years, and
- (iv) minimum capital expenditure floor for the Federation for each financial year in the next three years;

Provided that, the estimates and expenditures provided under paragraph (d) of this subsection shall be-

- (i) based on reliable and consistent data certified in accordance with section 13(2) (b) of this Act,
- (ii) targeted at achieving the macro-economic projection set out in subsection (2) (a) of this section,
- (iii) consistent with and derive from the underlying assumptions contained in the macro-economic framework, the objectives, policies, strategic priorities and explanations in the Fiscal Strategy paper;

(d) a Consolidated Debt Statement setting out and describing the fiscal significance of the debt liability of the Federal Government and measures to reduce any such liability; and

(e) statement describing the nature and fiscal significance of contingent liabilities and quasi-fiscal activities and measures to offset the crystallization of such liabilities.

**13. The estimates of-**

(1) aggregate expenditure and the aggregate amount appropriated by the National Assembly for each financial year shall not be more than the estimated aggregate revenue plus a deficit, not exceeding three percent of the

Aggregate  
expenditure  
ceiling

estimated Gross Domestic Product or any sustainable percentage as may be determined by the National Assembly for each financial year.

(2) aggregate expenditure for a financial year may exceed the ceiling imposed by the provisions of subsection (1) of this section, if in the opinion of the President there is a clear and present threat to national security or sovereignty of the Federal Republic of Nigeria.

**14.**

(1) The Minister shall be responsible for the preparation of the Medium-Term Expenditure Framework.

Preparation of  
the Medium-  
Term  
Expenditure  
Framework

(2) In preparing the draft Medium-Term Expenditure Framework, the Minister-

(a) may hold public consultation, on the Macroeconomic Framework, the Fiscal Strategy Paper, the Revenue and Expenditure Framework, the strategic, economic, social and developmental priorities of government, and such other matters as the Minister deems necessary;

Provided that, such consultations shall be open to the public, the press and any citizen or authorized representatives of any organization, group of citizens, who may attend and be heard on any subject matter properly in view;

(b) shall seek inputs from the-

- (i) National Planning Commission,
- (ii) Joint Planning Board,
- (iii) National Commission on Development Planning,
- (iv) National Economic Commission,
- (v) National Assembly,
- (vi) Central Bank of Nigeria,
- (vii) National Bureau of Statistics,
- (viii) Revenue Mobilization Allocation and Fiscal Commission,

- (ix) any other relevant statutory body as the Minister may determine; and
- (c) shall consider and reflect as may be deemed appropriate the input of the bodies and persons referred to in subsection (a) and (b) of this section.

- |            |   |  |
|------------|---|--|
| <b>15.</b> | <p>(1) The Minister shall before the end of the second quarter of each financial year, present the Medium-Term Expenditure Framework to the Federal Executive Council for consideration and endorsement.</p> <p>(2) The Medium-Term Expenditure Framework as endorsed by the Federal Executive Council shall take effect upon approval by a resolution of each house of the National Assembly.</p>                                  | <p>Time limit for presentation of Medium-Term Expenditure Framework to Federal Executive Council</p> |
| <b>16.</b> | <p>The Medium-Term Expenditure Framework as approved by the National Assembly shall be published in the Gazette.</p>  | <p>Publication of Medium-Term Expenditure Framework in the Gazette</p>                               |
| <b>17.</b> | <p>(1) Subject to subsection (2) of this section, the President may cause adjustment to be made to a Medium-Term Expenditure Framework.</p> <p>(2) Any adjustment to a Medium-Term Expenditure Framework shall be limited to-</p> <ul style="list-style-type: none"> <li>(a) the correction of manifest error; and</li> <li>(b) changes in the fiscal indicators, which in the opinion of the President are significant.</li> </ul> | <p>Adjustments to the Medium-Term Expenditure Framework</p>  |
| <b>18.</b> | <p>States and Local Governments which so desire shall be assisted by the Federal Government to manage their fiscal affairs within the Medium-Term Framework.</p>  | <p>Assistant to States and Local Governments</p>   |

**PART III – THE ANNUAL BUDGET**

- |            |  |  |
|------------|--|--|
| <b>19.</b> | <p>Notwithstanding anything to the contrary contained in this Act or any other law, the Medium-term Expenditure Framework shall-</p> | <p>Annual budget to be derived from Medium-Term Expenditure Framework.</p> |
|------------|--|--|

- (1) be the basis for the preparation of the estimates of revenue and expenditure required to be prepared and laid before the National Assembly under section 81 (1) of the Constitution.
- (2) The sectoral and compositional distribution of the estimates of expenditure referred to in subsection (1) of this section shall be consistent with the medium-term developmental priorities set out in the Medium-Term Expenditure Framework.

**20.** The estimates of revenue and expenditure (in this Act referred to as the “Annual Budget”) shall be accompanied by-

- (a) a copy of the underlying revenue and expenditure profile for the next two years;
- (b) a report setting out actual and budgeted revenue and expenditure and detailed analysis of the performance of the budget for the 18 months up to June of the preceding financial year;
- (c) a revenue framework broken down into monthly collection targets prepared on the basis of the predetermined Reference Commodity Price as contained in Medium-Term Expenditure Framework.
- (d) measures on cost, cost control and evaluation of results of programmes financed with budgetary resources;
- (e) a Fiscal Target Appendix derived from the underlying Medium-Term Expenditure Framework setting out the following targets for that financial year-
  - (i) target inflation rate,
  - (ii) target fiscal account balances,
  - (iii) any other development target deemed appropriate; and
- (f) a Fiscal Risk Appendix evaluating the fiscal and other related risks to the annual budget and specifying measures to be taken to offset the occurrence of such risks.

Annual budget to be accompanied by certain documents

Application of Part III to States and Local Governments.

21. In preparing their annual budget, States and Local Governments may adopt the provisions of this Part with such modification as may be appropriate and necessary.

**PART IV – BUDGETARY PLANNING OF CORPORATIONS AND OTHER RELATED AGENCIES**

22. (1) The Government corporations and agencies and government owned companies listed in the Schedule to this Act (in this Act referred to as “the Corporations”) shall, not later than 6 months from the commencement of this Act and for every three financial years thereafter and not later than the end of the second quarter of every year, cause to be prepared and submitted to the Minister their Schedule estimates of revenue and expenditure for the next three financial years.
- Preparation of estimates of revenue and expenditure by corporations, etc
- (2) Each of the bodies referred to in subsection (1) of this section shall submit to the Minister not later than the end of August in each financial year-
- Schedule
- (a) an annual budget derived from the estimates submitted in pursuance of subsection (1) of this section; and
- (b) projected operating surplus which shall be prepared in line with acceptable accounting practices.
- (3) The Minister shall cause the estimates submitted in pursuance of subsection (2) of this section to be attached as part of the draft Appropriation Bill to be submitted to the National Assembly.
23. (1) Notwithstanding the provisions of any written law governing the corporation, each corporation shall establish a general reserve fund and shall allocate thereto at the end of each financial year, one-fifth of its operating surplus for the year.
- Operating surplus and general reserve fund.
- (2) The balance of the operating surplus shall be paid to the Consolidated Revenue Fund of the Federal Government, not later than one month following the statutory dead line for publishing each corporation’s accounts.
24. (1) The Corporation’s surplus shall be classified as a Federal Treasury Revenue.
- Classification of corporation operating surplus

- (2) Where a corporation's result is in deficit, the deficit shall be classified as the corporation's loss for the fiscal year.
- (3) Each corporation shall, not later than three months after the end of its financial year, cause to be prepared and published its audited financial reports in accordance with such rules as may be prescribed from time to time.

**25.** The provisions of section 20, 21 and 22 shall cease to apply to any of the corporations from the date of its privatization.

Cessation of application of Part IV

**PART V – BUDGETARY EXECUTION AND ACHIEVEMENT OF TARGETS**

**26. (1)** The Federal Government shall cause to be drawn up in each financial year, an Annual Cash Plan which shall be prepared by the office of the Accountant-General of the Federation.

Annual Cash Plan

- (2) The Annual Cash Plan shall be prepared in advance of the financial year setting out projected monthly cash flows and shall be revised periodically to reflect actual cash flows.

**27.** The Minister, shall within 30 days of the enactment of the Appropriation Act, prepare and publish a Disbursement Schedule derived from the Annual Cash Plan for the purposes of implementing the Appropriation Act.

Disbursement Schedule

**28. (1)** The sums appropriated for a specific purpose shall be used solely for the purpose specified in the Appropriation Act.

Power of Minister to approve virement

- (2) Without prejudice to subsection (1) of this section, the Minister may in exceptional circumstances and in the overall public interest, recommend for the approval of the National Assembly virements from sub-heads under heads of account, without exceeding the amount appropriated to such head account.

**29. (1)** Where, by the end of three months, after the enactment of the Appropriation Act, the Minister determines that the targeted revenues may be insufficient to fund the heads of

Power to restrict further commitments

expenditure in the Appropriation Act, the Minister shall, within the next 30 days of such determination, take appropriate measures to restrict further commitments and financial operations according to the criteria set in the Fiscal Risk Appendix.

(2) Where the targeted revenues are re-established, either in part or in full, the appropriations for which further commitments were restricted shall be restored proportionately.

(3) The provisions of subsections (1) and (2) of this section shall not apply to statutory or constitutional expenditure.

**30.** (1) Any proposed tax expenditure shall be accompanied by an evaluation of its budgetary and financial implications in the year it becomes effective and in the three subsequent years, and shall only be approved by the Minister, if it does not adversely impair the revenue estimates in the annual budget or if it is accompanied by countervailing measures during the period mentioned in this subsection through revenue increasing measures such as tax rate raises and expansion of the tax base.

Restriction on the grant of tax relief

(2) The provisions of this section shall not apply to-

(a) change in the rates of the taxes mentioned in section 163 of the Constitution; and

(b) debt cancellation in an amount lower than the cost of collection.

**31.** (1) The Minister of Finance, through the Budget Office of the Federation, shall monitor and evaluate the implementation of the Annual Budget, assess the attainment of fiscal targets and report thereon on a quarterly basis to the Fiscal Responsibility Commission and the Joint Finance Committee of the National Assembly.

Responsibility of the budget office to monitor and report on implementation

(2) The Minister of Finance shall, cause the report prepared pursuant to subsection (1) of this section to be published in the mass and electronic media and on Ministry of Finance website, not later than 30 days after the end of each quarter.

**32.** In implementing their annual budgets, States and Local Governments may adopt the provisions of this Part with such modifications as may be appropriate and necessary.

Application of Part V to States and Local Governments

## PART VI – PUBLIC REVENUES

33. Any fund due to the Federation from any tier of government may be set off by the Federation in or towards payment or remittance of any sum due to that tier of government from the Federation. Forecast and collection of public revenues
34. The Executive Arm of the Federal Government shall, at least 30 days before the deadline for the submission of its budget proposals, place, at the disposal of the National Assembly, the revenue estimates for the following year, including the net current revenue and the respective memorandum items. Revenue Forecast
35. Estimated revenue shall be broken down by the Executive Arm of Government into monthly collecting targets, including, where applicable, a separate description of measures to combat tax fraud and evasion. Executive to breakdown estimated revenue

## PART VII – SAVINGS AND ASSET MANAGEMENT

36. (1) Where the reference commodity price rises above the predetermined level, the resulting excess proceeds shall be saved in accordance with the provisions of subsection (2) of this section. Savings
- (2) The savings of each Government in the Federation in pursuance to subsection (1) of this section shall be deposited in a separate account which shall form part of the respective Governments Consolidated Revenue Fund to be maintained at the Central Bank of Nigeria by each Government.
- (3) The Central Bank of Nigeria shall, in consultation with the Minister of Finance, the State Commissioners of Finance, and Local Governments Treasurers, invest, for and on behalf of the Governments in the Federation, the savings of each Government and such investment can be undertaken in a consolidated manner, provided that, the shares of each Government and income due to them from the investment are clearly identified.
- (7) The Central Bank of Nigeria in the discharge of its obligation under subsection (3) of this section shall, observe the limits and conditions imposed by safety

and prudential considerations and the need to maintain macro-economic stability and such safety and prudential conditions are to be agreed upon with the Minister of Finance, State Commissioners of Finance, and Local Government Treasurers.

- (8) No Government in the Federation shall have access to the savings made in pursuance to subsection (2) of this section, unless the reference commodity price falls below the predetermined level for a period of three consecutive months.
- (9) The augmentation referred to in subsection (5) of this section shall be limited to such sums that will bring the revenue of government to the level contained in its budget estimates.
- (10) Notwithstanding the provision of subsections (5) and (6) of this section and subject to agreement by Federal and State Governments in the Federation, a proportion of the savings may be appropriated in the following year for the capital projects and programmes.

#### **PART VIII – PUBLIC EXPENDITURES**

- 37.** (1) The creation, expansion or improvement in government action which result in an expenditure increase shall be accompanied by-
  - (a) an estimate of the budgetary or financial impact in the year it becomes effective and in the two subsequent years; and
  - (b) a statement by the person requesting for the expenditure, stating that the increase is consistent with the Appropriation Act and the Medium-Term Expenditure Framework.
- (6) The provisions of this section shall not apply to expenditures deemed inconsequential and shall apply to States and Local Government only to the extent to which they have adopted these provisions.

Conditions for increasing government expenditure

- 38.** The granting of any advantage or increase of remuneration, the creation of posts or alteration of career structures and

Conditions for increasing personnel expenditure

admission of personnel on any account by bodies and entities including foundations established and maintained by the Federal Government shall only be effected if, there is a prior budgetary allocation sufficient to cover the estimated expenditure.

- 39.** All contracts with regards to the execution of annual budget; shall comply with the rules and guidelines on-
- (a) procurement and award of contracts; and
  - (b) due process and certification of contract.
- 40.** Any violation of the requirements in sections 36, 37 and 38 shall be an offence.
- 41.** In incurring public expenditure, States and Local Governments may adopt the provisions of this part with such modifications as may be appropriate and necessary.
- All contracts to comply with rules and guidelines
- Effect of violation of public expenditure rules
- Application of Part VIII to States and Local Governments

#### **PART IX – DEBT AND INDEBTENDNESS**

- 42. (1)** The framework for debt management during the financial year shall be based on the following rules-
- (a) Government at all tiers shall only borrow for capital expenditure and human development, provided that such borrowing shall be on concessional terms with low interest rate and with a reasonably long amortization period subject to the approval of the appropriate legislative body where necessary; and
  - (b) Government shall ensure that the level of public debt as a proportion of national income is held at a sustainable level as prescribed by the National Assembly from time to time on the advice of the Minister.
- (9) Notwithstanding the provisions of subsection 1(a) of this section and subject to the approval of the National Assembly, the Federal Government may borrow from the capital market.
- Framework for Debt Management

- (10) Non-compliance with the provisions of this section shall make the action taken an offence.

**43. (1)**

The President shall, within 90 days from the commencement of this Act and with advice from Minister of Finance subject to approval of National Assembly, set overall limits for the amounts of consolidated debt of the Federal, State and Local Governments pursuant to the provisions of items 7 and 50 of Part I of the Second Schedule to the Constitution and the limits and conditions approved by the National Assembly, shall be consistent with the rules set in this Act and with the fiscal policy objectives in the Medium-Term Fiscal Framework.

Limits on consolidated debt of Federal, State and Local Governments

- (2) Outstanding judgment debts not paid shall be considered part of the consolidated debts for the purposes of application of the respective limits set in pursuance of this section.
- (3) For the purpose of verifying compliance with the limits specified pursuant to this section, the Commission shall, at the end of each quarter, determine the amount of the consolidated debt of each tier of government.
- (11) The Commission shall publish, on a quarterly basis, a list of the Governments in the Federation that have exceeded the limits of consolidated debt, indicating the amount by which the limit was exceeded.
- (12) Where at the end of any quarter, the consolidated debt of the Federal, State or Local Governments exceeds the respective limits; it shall be brought within the limit not later than the end of the three subsequent quarters with a minimum of 25 percent reduction in the first quarter.
- (13) Violators of the limits specified pursuant to this section shall-
  - (a) be prohibited from borrowing from internal or external sources, except for the refinancing of existing debts; and

(b) bring the debt within the established limit by restricting funding commitments accordingly.

(14) Where non-compliance with the limit specified pursuant to this section persists after the time limited by subsection (5) of this section, the affected Government shall also be prohibited from receiving grants from any other Government in the Federation.

(15) Whenever the fundamentals of the proposals referred to in this section are changed due to economic instability or change in monetary or exchange policies, the President shall submit to the National Assembly a request for a review of the current limits.

44. (1) Servicing of external debts shall be the direct responsibility of the Government that incurred the debt.

Servicing of external debt

(2) The cost of servicing Federal Government guaranteed loans shall be deducted at source from the share of the debtor Government from the Federation Account.

#### **PART X – BORROWING**

45. (1) Any Government in the Federation or its agencies and corporations desirous of borrowing shall, specify the purpose for which the borrowing is intended and present a cost-benefit analysis, detailing the economic and social benefits of the purpose to which the intended borrowing is to be applied.

Condition of borrowing and verification of compliance with limits

(2) Without prejudice to subsection (1) of this section, each borrowing shall comply with the following conditions-

(a) the existence of prior authorization in the Appropriation or other Act or Law for the

purpose for which the borrowing is to be utilized; and

(b) the proceeds of such borrowing shall solely be applied towards long-term capital expenditures.

(7) Nothing in this section shall be construed to authorize borrowing in excess of the limits set out in section 44 of this Act.

(8) The Commission shall verify on a quarterly basis, compliance with the limits and conditions for borrowing by each Government in the Federation.

(9) Without prejudice to the specified responsibilities of the National Assembly and Central Bank of Nigeria, the Debt Management Office shall maintain comprehensive, reliable and current electronic database of internal and external public debts, guaranteeing public access to the information.

**46. (1)** All banks and financial institutions shall request and obtain proof of compliance with the provisions of this Part before lending to any Government in the Federation.

Lending by financial institutions

(2) Lending by banks and financial institutions in contravention of this Part shall be unlawful.

**47. (1)** The Central Bank of Nigeria in its relations with Government agencies and parastatals shall be subject to the following prohibitions-

Prohibition against CBN in its relation with Government agencies and parastatals

(a) purchasing fresh issues of government securities on the date of its primary issue in the market except in circumstances under subsection (2) of this section;

(b) exchanging on a temporary basis, the debt securities of any Government in the Federation for federal public debt securities and forward purchase or sale of such securities when the final result is similar to an exchange; or

(c) granting guarantees on behalf of any Government in the Federation.

- (5) The Central Bank of Nigeria may only underwrite securities issued by the Federal Government, which are rolled-over to refinance maturing securities.
  - (6) The underwriting permitted under subsection (2) of this section shall be offset through a public auction at market-determined rate.
- 48. (1)** Subject to the provisions of this Part, the Minister may with the approval of the Federal Executive Council, grant guarantees on behalf of any Government in the Federation.
- Power of the  
Minister to grant  
guarantees
- (2) Any guarantee granted by the Minister shall be conditional upon the provision of a counter-guarantee in an amount equal to or higher than the guarantee obligation, provided that, there are no overdue obligations from the requesting Government in the Federation to the guarantor and its controlled corporations and such guarantee shall also be in compliance with the following-
    - (a) counter-guarantee shall only be accepted from State or Local Governments; and
    - (b) the counter-guarantee required by the Federal Government from State or Local Government or by States from Local Government, may consist in the appropriation of tax revenue directly collected and resulting from statutory transfers and the guarantor shall be authorized to retain such revenue and use the respective amount to repay overdue debts.
  - (3) In the case of foreign currency borrowing, Federal Government guarantee shall be a requirement and no State, Local Government or Federal Agency shall, on its own borrow externally.
  - (4) Any guarantee provided in excess of the debts limits set pursuant to section 44(1) of this Act shall be an offence.

## **PART XI – TRANSPARENCY AND ACCOUNTABILITY**

49. (1) The Federal Government shall ensure that its fiscal and financial affairs are conducted in a transparent manner and accordingly ensure full and timely disclosure and wide publication of all transactions and decisions involving public revenues and expenditures and their implications for its finances. Fiscal transparency
- (2) The National Assembly shall ensure transparency during the preparation and discussion of the Medium-Term Expenditure Framework, Annual Budget and the Appropriation Bill.
50. (1) The Federal Government shall publish their audited accounts not later than six months following the end of the financial year. Publication of audited accounts
- (2) The Federal Government shall, not later than two years following the commencement of this Act and thereafter, not later than 7 months following the end of each financial year, consolidate and publish in the mass media, its audited accounts for the previous year.
- (3) The publication of general standards for the consolidation of public accounts shall be the responsibility of the office of the Accountant-General of the Federation.
51. The Federal Government through its budget office shall within 30 days after the end of each quarter, publish a summarized report on budget execution in such form as may be prescribed by the Fiscal Responsibility Commission and not later than 6 months after the end of the financial year, a consolidated budget execution report showing implementation against physical and financial performance targets shall be published by the Minister of Finance for submission to the National Assembly and dissemination to the public. Publication of a summarized report on budget execution

## PART XII – ENFORCEMENT

52. A person shall have legal capacity to enforce the provisions of this Act by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest. Enforcement

## PART XIII – MISCELLANEOUS PROVISIONS

Government securities as collateral to guarantee loans

53. Government securities, provided that, they are duly listed on the stock exchange, may be offered as collateral to guarantee loans or other financial transactions under the law for their economic value as defined by the Minister.
54. The proceeds derived from the sale or transfer of public properties and rights over public assets shall not be used to finance recurrent and debt expenditure, provided that, such proceeds may be used to liquidate existing liabilities directly charged against such properties or assets. Restriction on utilization of proceeds of sale of public assets, etc
55. The Federal Government may provide technical and financial assistance to States and Local Governments that adopt similar fiscal responsibility legislation along the same lines as this Act for the modernization of their respective tax, financial and assets administration. Technical and financial assistance to States and Local Governments
56. The President shall, in addition to any other power, conferred on him under this Act, make regulations generally for the purposes of carrying into effect the provisions of this Act. Power of the President to make regulations

#### PART XIV – INTERPRETATION

57. In this Act-
- “*Appropriation Act*” means an Act or Law passed by the National or State Assembly or Local Government authorizing spending from the Consolidated Revenue Fund and includes a Supplementary Appropriation Act or Law; Interpretation
- “*Appropriation Bill*” means the Bill referred to in section 59 of the Constitution of the Federal Republic of Nigeria, 1999;
- “*Arms of Government*” means the Executive, Legislature and Judiciary;
- “*Borrowing*” means any financial obligation arising from-
- (i) any loan including principal, interest, fees of such loan,
  - (ii) the deferred payment for property, goods or services,

- (iii) bonds, debentures, notes or similar instruments,
- (iv) letters of credit and reimbursement obligations with respect thereto,
- (v) trade or banker's acceptances,
- (vi) capitalized amount of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased,
- (vii) agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and
- (viii) a conditional sale agreement, capital lease or other title retention agreement;

*"Budget Call Circular"* means a circular-

- (i) requesting the submission in a prescribed form, of the revenue and expenditure estimate of ministries, extra-ministerial departments, and other executing agencies of Government for the next financial year; and
- (ii) giving detailed guidelines and instructions on the preparation of the estimates and expenditure in a manner consistent with the medium term development priorities set out in the Medium-Term Expenditure Framework;

*"Capital Expenditure"* means spending on an asset that lasts for more than one

financial year and expenses associated with the acquisition of such assets;

“*Concessional Term*” means the terms of the loan must be at an interest rate not exceeding 3 percent;

“*Consolidated debt*” means the aggregate of the outstanding financial obligations of Government including those of its Parastatals and agencies at any point in time arising from-

- (i) borrowed money including principal, interest, fees of such borrowed money,
- (ii) the deferred payment for property, goods or services,
- (iii) bonds, debentures, notes or similar instruments,
- (iv) letters of credit and reimbursement obligations with respect thereto,
- (v) Guarantees,
- (vi) Trade or banker’s acceptances,
- (vii) Capitalized amounts of obligations under leases entered into primarily as a method of raising financing or of financing the acquisition of the asset leased,
- (viii) agreements providing for swaps, ceiling rates, ceiling and floor rates, contingent participation or other hedging mechanisms with respect to the payment of interest or the convertibility of currency and

- (ix) a conditional sale agreement, capital lease or other title retention agreement;

*“Cost-benefit-analysis”* means an analysis that compares the cost of undertaking a service, project or programme with the benefits that citizens are likely to derive from it;

*“Fiscal Risk Appendix”* An explanatory attachment that provides a set of indicators that can be used to measure local fiscal risks;

*“Fiscal Risk Target”* provides numerical target of each risk indicator with which a fiscal entity will be considered fiscally healthy.

*“Financial Year”* has the meaning ascribed in the Constitution;

*“Fiscal Policy Objectives”* means the goals set by Government for attainment of set targets for a given period;

*“Government Owned Company”* means a statutory corporation, Government agency and a company in which Government has controlling interest;

*“Medium-Term Expenditure Framework”* means the document referred to and the content of which is prescribed in section 11 of this Act;

*“Minister”* means the Minister charged with the responsibility for finance;

*“Net debt”* means the consolidated debt less what is owed to Government, its Parastatals and agencies at any point in time;

*“President”* means the President of the Federal Republic of Nigeria;

*“Public Debt Securities”* means public debt represented by securities issued by the Federal Government (including those of the Central Bank of Nigeria), the States and Local Governments;

*“Public Expenditure”* means outlays other than those resulting into debt reduction;

*“Public Revenue”* all moneys received by a Government in the Federation;

*“Quarter”* means one quarter of a financial year and quarterly shall be construed accordingly;

*“Recurrent Expenditure”* means normal overhead and administrative expenses and personnel cost including salaries, emoluments and other benefits for employees;

*“Reference Commodity Price”* means such price as may be determined by the President subject to the approval of the National Assembly;

*“Refinancing of debt securities”* means issuance of securities to repay the existing debt;

*“State Financial Institution”* means any financial institution in which one or more state government has controlling shares;

*“State”* shall be construed to include the Federal Capital Territory;

*“Tax expenditure projections”* means the projected amount expected to be utilized in the granting of tax relief or tax holiday;

*“Tax revenue projections”* means the projected collectible tax or revenue within a particular planning period; and

*“Tiers of Government”* means the Federal, State and Local Governments;

**58.** This Act may be cited as the Fiscal Responsibility Act, 2007.

Citation

## **SCHEDULE**

## **Section 21**

### **LIST OF CORPORATIONS, AGENCIES AND GOVERNMENT-OWNED COMPANIES**

32. Nigerian National Petroleum Corporation
33. Nigeria Deposit Insurance Corporation
34. Bureau of Public Enterprises
35. National Agency for Science and Engineering Infrastructure
36. Nigerian Social Insurance Trust Fund
37. Corporate Affairs Commission
38. National Clearing and Forwarding Agency
39. Nigeria Unity Line
40. Nigerian Airspace Management Agency
41. Nigerian Shippers Council
42. National Maritime Authority
43. Raw Material Research and Development Council
44. Nigerian Civil Aviation Authority
45. National Sugar Development Council
46. Nigerian Postal Service
47. Nigerian Ports Authority
48. Federal Airport Authority of Nigeria
49. Nigeria Mining Corporation
50. Nigeria Re-insurance
51. Nigerdock Nigeria Plc
52. Securities and Exchange Commission
53. National Insurance Corporation of Nigeria
54. Nigeria Re-insurance Corporation
55. Nigerian Telecommunication
56. National Automotive Council
57. Nigerian Tourism Development Corporation
58. National Communication Commission
59. National Agency for Food & Drug Administration & Control
60. Nigerian Customs Service
61. Federal Inland Revenue Service
62. Central Bank of Nigeria.

Any other corporation, agency or government-owned company that may be included by the Minister through a local notice.