International Journal of Law
ISSN: 2455-2194
Impact Factor: RJIF 5.12
www.lawjournals.org
Volume 4; Issue 2; March 2018; Page No. 49-58

Overview of key sections of Nigeria's money laundering (Prohibition) Act, 2012

Dr. Ibrahim Abdu Abubakar
National Drug Law Enforcement Agency, Ikoyi, Lagos, Affiliate to Ahmadu Bello University, Zaria, Nigeria

Abstract
The Act amends the Money Laundering Act, No 11 of 2011 to expand the scope of Money Laundering offences and enhance customer due diligence measures. The Act is divided into three parts namely; Provision of Money Laundering, offences and miscellaneous provisions. The sections amended by the 2012 Act include: Sections 2(5), 3, 6, 9, 10, 11, 12, 15, 16, 20, 23, 25 and the citation. This paper seeks to review some salient sections of the Money Laundering (Prohibition) Act 2011 with a view to identifying areas of possible amendment to conform to international best practices.

Keywords: overview, money, laundering, prohibition, act.

1. Introduction

A reputation as a money laundering or terrorists financing haven, alone, could cause significant adverse consequences for development in a country. Foreign financial institutions may decide to limit their transactions with institutions from money laundering havens; subject these transactions to extra scrutiny, making them more expensive; or terminate correspondence or lending relationships, altogether [1]. Even legitimate businesses and enterprises from money laundering havens may suffer from reduced access to world markets or access at a higher cost due to extra scrutiny of their ownership, organization and control systems [2].

Any country with lax enforcement of AML/CFT is less likely to receive foreign private investment for developing nations; eligibility for foreign government assistance is also likely to be severely limited [3]. The Financial Action Task Force on money laundering (FATF) maintains a list of countries that do not comply with AML/CFT requirements or that do not cooperate sufficiently in the fight against money laundering. In June 2001, the FATF placed Nigeria on its list of non-cooperative countries and territories (NCCTS) in combating money laundering [4]. Being placed on this list, gives public notice that the listed country does not have in place even minimum standards [5]. Beyond the negative impacts referred to here, individual FATF member countries could also impose specific counter-measures against a country that does not take action to remedy its AML/CFT deficiencies [6].

Nigeria has recently been suspended by the Egmont Group of financial intelligence units for her inability to enact a law which will create and ensure the independence of the financial intelligence unit. The Nigeria's Financial Intelligence Unit (NFIU) is presently a department under the Economic and Financial Crimes Commission. In a similar development the Financial Action Task Force on Money Laundering (FATF) has given Nigeria a benchmark to amend the Money laundering Act in tandem with its forty Recommendations. Also, part of the FATFs requirement is that Nigeria should pass the following laws to qualify for admittance into the FATF on money laundering; the Proceeds of Crime Act; the Mutual Legal Assistance Act, the amendment of both the EFCC and Money Laundering Acts.

1.1 Conceptual Clarifications of Key Terms

Money laundering is the processing of the proceeds of crime so as to disguise their origin [7]. Money laundering is the various procedures and methods by which criminal proceeds are disguised as legitimate funds by concealing their true origin and ownership to give the picture that they emanate from legitimate source [8].

The *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988[9] defines Money Laundering as the:

The conversion or transfer of property knowing that such property is derived from an offence for the purpose of concealing the illicit origin of the property, or assisting any person who is involved in the commission of such an offence to evade the legal consequence of his action…. It is the concealment or disguising the true nature, source, locating, disposition, and movement, rights with respect to ownership of property, knowing that such property is derived from an offence or from an act of participation in such an offence [10].

The Convention defined the offence strictly predicated upon the production, manufacture, extraction, preparation, offerings and distribution of narcotic drugs and psychotropic substances [11] only, excluding other financial crimes, hence, the *UN Convention against Transnational Organized Crime* [12] strengthened this definition by providing for dual criminality in the definition of money laundering [13]. It defined money laundering as:

1) The Conversion or transfer of property, knowing that such property is proceed of crime, for the purpose of concealing or disguising the illicit origin of the property…
2) The concealing or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is proceed of crime.

2. Nigerian Financial Intelligence Unit (NFIU)
Refers to the central unit responsible for the receiving, requesting, analyzing, and disseminating to the competent authorities disclosures of financial information concerning the suspected proceeds of crime and potential financing of terrorism [14]. Financial and designated non-financial institutions are mandated to report certain transactions that are above a threshold. For example, the Money Laundering (Prohibition) Act, 2012 mandates financial and designated non-financial institutions to report transactions above N5, 000.000 for individuals and N10, 000.000 for corporate bodies to the NFIU [15] It imposes duty on any person or body corporate to report international transfer of funds and securities in excess of US$10,000N or its equivalent to the Central Bank (CBN) and the Securities and Exchange Commission (SEC) or the Economic and Financial Crimes Commission (EFCC) [16].

2.1 Competent Authority
"Competent authority" means any agency or institution concerned with combating money laundering and terrorist financing under the Act or under any other law or regulation [17]. The authorities include: the EFCC, the NDLEA, the Office of the National Security Adviser, the CBN, SEC, NAICOM and other law enforcement agencies.

2.3 Designated Non-Financial Institutions
"Designated Non-Financial Institutions" include dealers in jewelry, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, super markets, and such other businesses as the Federal Ministry of industry may from time to time designate [18]. These businesses and professions are used by launderers and those who finance terrorism as shams or mask to avoid recognition by law enforcement agencies. To check the crimes perpetrated by these businesses and professions, the Federal Government established the Special Control Unit on Money Laundering (SCUML), operating under the Ministry of Commerce, to regularly conduct inspections.

2.4 Financial Institutions
Financial institutions include banks, body corporate, associations or group of persons, whether corporate or incorporate which carries on the business of investment and securities, a discount house, insurance institution, debt factorization and conversion firm, bureau de change, finance company, money brokerage firm, whose principal business include factoring, project financing, equipment leasing, debt administration, fund management, private ledger service, investment management, local purchase order financing, export finance, project consultancy, financial consultancy, pension fund management, and such other business as the Central Bank or other regulatory authorities may from time to time designate [19]. Most, if not all the crimes of money laundering are committed with the help of financial institutions. The crime of money laundering is done in stages, namely placement, layering and integration. Placement occurs when the launderer first introduce the fund to the financial institution. The launderer seeks the assistance of an insider who will assist him in the laundering process. Next, is the layering stage, where the launderer create complex layers of transactions, moving money from one account to another within the same bank or from one bank to another? The final stage is integration, where the launderer take over an ailing business and revive it, making it difficult for law enforcement to unravel.

2.5 Regulatory Authorities
"Regulatory Authorities" mean the Securities and Exchange Commission and the National Insurance Commission [20]. Other regulatory authorities include: the CBN and the Nigerian Deposit Insurance Corporation (NDIC). These regulatory agencies pursuant to the powers conferred in them by the Act establishing them, made regulations aimed at providing guiding principles for complying with the Money laundering Act, 2011 and the Terrorism Prevention Act, 2013.

2.6 Regulators
"Regulators" mean competent regulatory authorities responsible for ensuring compliance of Financial Institutions and Designated Non-Financial Institutions with requirements to combat money laundering and terrorist financing [21].

2.7 Suspicious Transactions
"Suspicious" means a matter which is beyond mere speculations and is based on some foundations [22]. The problem here is that suspicious transactions are defined in the context of scope. What is suspicious is not defined and financial institutions can raise the defence that they did not perceive the transaction as suspicious. Suspicious Transactions must be reported to the SEC and the EFCC within 7 days of their occurrence.

2.8 Politically Exposed Persons
While, "Politically Exposed Persons (PEPs)" includes-
(a) individuals who are or have been entrusted with prominent public function by a foreign country, for example Head of state or government, senior politicians, senior government, judicial or military officials, senior executives of State owned Corporations and important political party officials;
(b) individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of Government, senior politicians, senior government, judicial or military officials, senior executives of State owned Corporations and important political party officials; and
(c) Persons who are or have been entrusted with a prominent function by an international organization and includes members of senior management such as directors, deputy directors and members of the board or equivalent functions other than middle ranking or more junior individuals [23].

3. Overview of the Money Laundering (Prohibition) Act.
3.1 Limitation to Make or Accept Cash Payments
The *Money Laundering (Prohibition) Act, 2012* incorporated the 40 Recommendations of the FATF which provides a complete counter measures against money laundering. These measures are formulated as a means of setting standards and giving expression in national laws [24]. In domesticating these

provisions, the *Money Laundering (Prohibition) Act, 2012* (MLPA) regulated the procedure for making and accepting cash payments with a view to ensuring that certain levels of payments go through the financial institutions. This will enable monitoring of financial transactions for purposes of identifying, tracing and investigation of proceeds of crimes. The Act provides:

No person or body corporate shall, except in a transaction through a financial institution, make or accept cash payment of a sum exceeding

a. N5,000,000.00 or its equivalent, in the case of an individual; [25] or
b. N10, 000,000.00 or its equivalent in the case of a body corporate [26].

The consideration that makes for this legal stipulation is that an amount in excess of N5, 00,000.00 or N10, 000,000.00 is a huge sum of money. However, in a cash based economy like Nigeria, this consideration may not be true with big corporation to whom such amount is a chicken feed [27].

3.2 Duty to Report International Transfer of Funds

The *Money Laundering (Prohibition) Act, 2012* made it mandatory to report to the Central Bank of Nigeria (CBN) and the Securities and Exchange Commission (SEC) any transfer to or from a foreign country of funds or securities by a person or body corporate including Money Services Business of a sum exceeding $10, 000 or its equivalent within 7 days from the date of the transaction [28]. The above report shall indicate the nature and amount of the transfer, the names and addresses of the sender and the receiver of the funds or securities [29]. This Section also provides for the declaration of cash or negotiable instruments in excess of $10, 000 or its equivalent to the Nigerian Customs Service [30]. The Nigerian Customs Services shall report any declaration made under the Subsection (3) to the CBN and the Nigerian Financial Intelligence Unit (NFIU) [31]. The liability for any person who fails to declare or make a false declaration to the Nigerian Customs Service is conviction to forfeit the undeclared funds or negotiable instrument or to imprisonment of not less than 2 years or to both [32]. The consideration of fixing the amount of $10,000 is that narcotic drug traffickers and other transnational criminals generate large sums of money from their illicit business and do not want to use financial institutions to transfer or launder the funds. Rather they prefer using physical transportation of cash and bearer negotiable instruments using the airports or borders. If launderers and terrorists use the financial institutions to launder their funds, they run the risk of being identified by law enforcement agents and regulators.

3.3 Customer Due Diligence

In accordance with international standards set by the Basel Committee on Banking Supervision (Basel Committee), FATF [33] countries must ensure that their financial institutions have appropriate customer identification and due diligence procedures in place. The procedure applies to financial institutions, individuals and corporate customers alike. These rules and procedures ensure that financial institutions maintain adequate knowledge about their customers and their customers' financial activities. Customer identification requirements are also known as "know Your Customer" (KYC) rules [34], a term employed by the Basel Committee. KYC Procedures not only help financial institutions detect, deter, and prevent money laundering and terrorist financing, they also confer tangible benefits on the financial institutions, its law abiding customers and the financial system as a whole.

The *Money Laundering (Prohibition) Act 2012* makes it mandatory for financial institutions and designated non-financial to verify the identity and update all relevant information on the customer [35] before opening an account for, issuing a passbook to, entering into financing transaction with, renting a safe deposit box to, or establishing any other business relation with the customer [36], and during the course of the relationship with the costumer [37]. Financial institutions must also scrutinize all ongoing transactions undertaken throughout the duration of the relationship in order to ensure that the customer's transaction is consistent with the business and risk profile [38].

The use of the word "shall" in the section presupposes mandatory. However, what is not clear from the provision is the use of the term "its customers" as this raises the question at what stage will a person be referred to as a customer? For example, for a person to be considered as a customer of a bank, it is essential and indispensable that the person should have opened an account in the bank [39] or the person is conducting transaction on behalf of another person who has an account [40].

It is submitted that the phrase: 'its customers' ought to have been qualified to include its customers or prospective customers so as to cover both the existing and potential customers.

The identity of a customer is verified, in the case of an individual, by the customer presenting a valid original copy of an official document bearing his or her name and photograph. For example, utility bills, such as water bill and power holding corporation bills etc [41] within the previous three months.

The address of an individual customer is also verified by the customer presenting to the financial institution the original of receipts issued within the previous three months by public utilities or any other documents as the relevant regulatory authorities may from time to time approve [42]. What is not clear is whether the receipts must necessarily bear the name of the customer or of any other person's name. The likely effect of the utility bill bearing the name of the customer is that it may foreclose tenants, dependents, squatters and such others, who will find it difficult to have utility bills in their names. To achieve the objective of the law, it is necessary to expand the scope to include utility receipt issued in favour of a guardian, guarantor, or any such similar person among others. Public utilities connote services provided for the public, for example, an electricity, water or gas supply [43]. In Nigeria today, it is an onerous task to demand receipt of public utilities from even those who own residential accommodation let alone squatters. Today, the fixed telephone line is almost extinct and the common telephone facilities are GSM [44] and fixed wireless [45] which are substantially pay-as-you-go with no issuable receipt to establish evidence of particular residential address. Electricity bills are now replaced with pre-paid metering system where electricity consumer will only buy credit units and receipts are no long necessary. Water bill receipts are

similarly not a common instrument among the citizenry, because substantial reliance for water supply is through personalized boreholes and water vendors who issue no receipt.

Nonetheless, the purpose of the above requirement is if an institution has only the basic details of a customer, it will lack information that could be used to profile the specific client and to correctly identify a suspicious and unusual transaction that may be concluded by the client [46]. Customer Due Diligence violation is yet to be tested in Nigerian Courts. But in the South African case of *Kwamashu Bakery Ltd v. Standard Bank of South Africa Ltd* [47], the court held that banks are required in terms of common law to identify and verify prospective clients before opening an account [48].

A body corporate is required to provide proof of its identity by presenting its certificate of incorporation and other valid official documents attesting its existence [49]. It is submitted that though the certificate of incorporation is a proof of identity for corporate body, evidence of filing annual returns with Corporate Affairs Commission suffices.

Also, the manager, employee or assignee delegated by a body corporate to open account shall be required to produce not only documents mentioned in sub section (2), but also proof of the power of attorney granted to him in that behalf [50].

A casual customer shall comply with the provisions of subsection (2) for any manner of transaction involving a sum exceeding $1,000 or its equivalent if the total amount is known at the commencement of the transaction or as soon as it is known to exceed $1,000 or its equivalent [51].

Financial institutions or designated non-financial institutions shall seek from the customer information as to the true identity of the principal if it appears that the customer is not acting on his own account. Where the customer is a body corporate, the financial institution shall:

a. Take reasonable measures to understand the ownership and control structure of the customer; and
b. Determine the natural person who truly own or control the customer [52].

Where the customer is a public officer or Politically Exposed Person (PEP), the Financial Institution or Designated non-financial institution shall in addition to the requirements of subsection (1) and (2)

a. put in place appropriate risk management systems; and
b. Obtain senior management approval before establishing and doing any business relationship with the public officer [53].

3.4 Duties Incumbent upon Casinos

Casinos are required to verify the identity of their customers by making them present valid original documents bearing their names and addresses [54]. They are also to record all transaction in chronological order including [55] – the nature and amount involved in each transaction [56] and each customers address in a register forwarded to the Ministry for that purpose [57]. The register under subsection (1) (b) shall be preserved for at least 5 years after the last transaction recorded [58].

In *R. v. Gayadin* [59], the accused operated several illegal casinos and admitted to laundering the proceeds of the illegal gambling activity by entering into arrangements with certain people to hide the proceeds in off-shore bank accounts in the Isle of Man and Jersey. More than 11 million South African Rands were transferred to accounts in these jurisdictions. The casino operator was convicted for statutory laundering for his failure to perform the duties imposed by law. The same decision was reached in *R v. Justigar* [60].

3.5 Suspicious Transactions (STRs)

In the area of surveillance of certain transactions and mandatory disclosures by financial institutions, the Act made strict provisions aimed at preventing money laundering in Nigeria. Section 6 provides:

where a transaction involves a frequency which is unjustifiably or unreasonable; is surrounded by conditions of unusual or unjustified complexity; it appears to have no economic justification or lawful objective; or where in the opinion of the financial institution or designated non-financial institution involves terrorist financing or is inconsistent with the known transaction pattern of the account or business relationship that transaction shall be deemed to be suspicious and the financial institution shall seek information from the customer as to the origin and destination of the funds, the aim of the transaction and the identity of the beneficiary [61].

From the above provisions, it is necessary for financial institutions to be extra vigilant where transactions are unusually complex or it involves movement of huge sums of money and apparently without economic justification or lawful objective. However, in adopting the relevant provisions of the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* [62] the Act which is silent as to what will constitute "unusual or unjustified complexity." It appears that conditions of unusual or unjustified complexity could be inferred by reference to the type and nature of the transaction and apparent goal. The Conventions has provided us with a guide as to what to be on the lookout in gauging the unusual or complex nature of the transaction and the illegitimacy of its goal. The personnel of a financial or designated non-financial institution will therefore have to pay special attention for [63]:

a) Large cash exchange transactions
b) Large cash deposits and withdrawals that are not consistent with the normal course of transaction
c) Opening of an account at a branch far remote from the person domicile or workplace, or the opening of several accounts at different branches
d) The operation of an account essentially to transfer large sums to or from foreign countries, when the person's or company's activities do not appear to justify such movements.
e) The purchase or sales of security for large sums, for no obvious purpose
f) Loan requests secured by deposit certificates issued by a foreign bank or by asset that are of an unknown origin or are incompatible with a person's apparent life style
g) Depositing large amounts of money in order to have them transferred abroad by a relative
h) Clients (straw men) who carry out transactions under the obvious supervision of third parties
i) Representatives of business relationships who avoid direct personal contact with the bank

j) Clients who do not choose to use attractive credit or other bank facilities
k) A sudden increase in turnover on an account without any acceptable explanation
l) The same person opening and closing an account within a short period of time

It is impossible to describe all forms of suspicious transactions because it is unlimited in nature [64].

A financial institution or designated non-financial institution shall within 7 days after the transaction referred to in subsection (1) draw up a written report containing all relevant information together with the identity of the principal and where applicable the beneficiary or beneficiaries [65]; and send a copy of the report and action taken to the Nigerian Financial Intelligence Unit (NFIU) of the EFCC.

As soon as the NFIU gets the report from the financial institutions, it shall acknowledge it and may demand additional information if necessary [66]. The acknowledgement shall be sent to the financial institution within the time allowed and may be accompanied by a notice deferring the transaction for a period not exceeding 72 hours [67]. The chairman of EFCC and the Governor of Central Bank of Nigeria or their authorized representatives shall place a stop order not exceeding 72 hours, on any account or transaction if it is discovered to be involved in crime [68]. If the acknowledgement is not accompanied by a stop notice or where the stop notice expire and the order to block the transaction has not reached the financial or designated financial institution, it may carry out the transaction [69].

If the origin of the funds cannot be ascertained within the stoppage period of the transaction, the EFCC, or other persons or authorities duly authorized may request for an order of the Federal High Court to block the funds, accounts, or securities referred to in the report [70]. Failure to comply with subsection (1) and (2) will attract a conviction of the financial institution to pay a fine of N1,000,000 for each day during which the offence continues [71].

3.6 Preservation of Records

A financial institution or designated non-financial institution shall keep at the disposal of the authorities the record of a customer's identification for a period of at least 5 years after the closure of the account or the severance of relations with the customer [72].

Also, the record and other related information of a transaction carried out by a customer and the report provided for in section 6 of this Act shall be preserved for a period of at least 5 years after carrying out the transaction or making of the report [73].

3.7 Mandatory Disclosure by Financial Institutions

Financial institutions and designated non-financial institutions are mandated to report to the NFIU in writing within 7 days any single transaction, lodgment or transfer of funds in excess of –

a) N5,000,000 or its equivalent, in the case of an individual; or
b) N10, 000,000 or its equivalent, in the case of a body corporate.

These disclosures are generally referred to as "Currency Transactions Reports" (CTRs). Under the MLPA, financial institutions and designated non-financial institutions are mandated to report international money transfers under section 2, Suspicious Transaction Reports (STRs) under section 6 and Currency Transaction Reports (CTRs) under Section 10 of the Act to the NFIU. The NFIU is a Central national body under the EFCC responsible for receiving, analyzing and dissemination to competent authorities disclosures of financial information. It was created in fulfillment of FATF Recommendation 26.

On January 26, 2005, the NFIU sent letters to all the 89 banks directing them to start sending Currency Transaction Reports (CTRs), Suspicious Transaction Reports (CTRs), and Foreign Exchange Reports (FX). Out of the 89 banks, 74 banks and 2 discount houses started reporting to NFIU [74].

A person other than a financial institution may voluntarily give information on any transaction, lodgement or transfer of funds in excess of N1,000,000 or its equivalent in the case of an individual or N5,000,000 or its equivalent in the case of corporate body [75]. Contravention of this section shall on conviction attract a fine of not less than N250, 000 and not more than N1 million for each day the contravention continues [76].

3.8 Surveillance of Bank Accounts

The *Money Laundering (Prohibition) Act, 2012* has removed whatever remains of banking secrecy and confidentiality by providing that the EFCC, NDLEA and CBN pursuant to an order of the Federal High Court may in order to identify and locate proceeds of properties or other things related to commission of an offence- [77]

a. Place any bank account or any other account comparable to a bank account under surveillance;
b. Obtain access to any computer system; [78]
c. Obtain communication of any authority, instrument or private contract, together with all banks, commercial and financial records, when the account or computer system is used by any person suspected of taking part in a transaction involving the proceeds of a financial or other crime [79].

The NDLEA may exercise the powers under subsection (1) where it relates to identifying or locating properties, objects or proceeds of narcotic drugs or psychotropic substances [80].

Banking secrecy or preservation of customer confidentiality shall not be invoked as a ground of objecting to the measures set out in sub section (1) and (2) of this section or for refusing to be a witness to facts likely to constitute an offence under the Act or any other law [81].

The above section conflicts with the duty of secrecy or confidentiality which banks owe to their customers. More so, it is an established principle in English common law (also applicable in Nigeria) that the relationship between a bank and its customers is a contractual one, and that a bank has a legal duty arising out of this contract to protect the confidentiality of its customers financial details. The classical decision on this point was the English Court of Appeal decision in *Tournier v. National Provincial and Union Bank of England* [82] where Bankes L.J., was firmly of the view that such a duty existed and a breach of it could give rise to a claim for damages. It is worth of note that there was a re-examination of

this issue, as it pertains to international investigations in the House of Lords decision in *Re Norways Applications* [83]. It was stressed that the balance must be struck between the duty of confidentiality and that of assisting in obtaining evidence with respect to criminal conduct (abroad). This is as a result of the changes brought about by recent trends worldwide to extend cooperation in relation to crime in its many facets [84].

Another issue that may follow this section is that the Act may be opened to challenge and constitutional litigations may follow in respect of issues touching on right to privacy.

The GIABA 2011 Annual Report on AML/CFT indicated that Nigeria's AML/CFT regime did not meet international standard. Sequel to this, the National Assembly amended the *2011 Money Laundering (Prohibition) Act* by harmonizing Act No. 11 2011 and Act No. 1, 2012. This is to make comprehensive provisions to prohibit the financing of terrorism, laundering of the proceeds of crime or illegal acts, expand the scope of money laundering offences, enhance customer due diligence measures, provide appropriate penalties and expand the scope of supervising and regulating authorities to address the challenges faced in the implementation of anti-money laundering regime in Nigeria. The Act amended sub section (5) of section 2 by making a person who falsely declares or fails to make declaration to forfeit the undeclared funds or negotiable instrument [85]. This subsection replaced the former provision which provided for the forfeiture of 25% of the undeclared funds or negotiable instrument. The new Act has also added a new sub section (1) (C) to section 3 by providing that financial and designated non-financial institutions shall identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner using the relevant information data obtained from a reliable source such that the financial institution or designated non-financial institution is satisfied who the beneficial owner is [86]. Under the same section 3, the Act added two new sub sections, (section 2 and 3) on customer due diligence measures [87] and ongoing due diligence on a business relationship [88]. The customers due diligence measures to be undertaken by financial and designated non-financial institutions include:

a. Establishing business relationships [89]
b. Carrying out occasional transactions above the applicable designated threshold prescribed by relevant regulations, including transactions carried out in a single operation or in several operations that appear to be linked [90]. This provision is necessitated to preclude those who deposit funds by way of structuring from depositing funds in bits in order to beat the threshold provided by the law. This is known as "smurfing". Smurfing is categorized as a suspicious transaction which must be reported to the NFIU [91].
c. Carrying out occasional transactions that are wire transactions. This subsection shows that the requirement of customer due diligence extends to casual customers [92].
d. There is suspicion of money laundering or terrorist financing, regardless of any exempting or threshold [93].
e. The financial or designated non-financial institution has doubts about the veracity or adequacy of previously obtained customer data [94].

The ongoing due diligence introduced by the new subsection 3 includes:

a. Conduction ongoing due diligence on a business relationship [95].
b. Sanitizing transactions undertaken during the course of the relationship to ensure that the transactions are consistent with the institutions knowledge of the customer, their business and risk profile and where necessary, the source of funds [96], and
c. Ensure that the documents, data or information collected under the customer due diligence process is kept-up-date and relevant by undertaken reviews of existing records, particularly for higher risk categories of customers or business relationships [97].

3.9 Some Key Areas of Amendments under the Harmonized Act No. 11, 2011 and Act No. 1, 2012.(Money Laundering (Prohibition) Act, 2011 (as amended).

The Harmonized Act of 2011 and 2012 amended some key sections under the *2011 Money Laundering (Prohibition) Act*. The following are some of the key amendments made by the Harmonized Act:

(i) Section 3 sub section (4) of the Act provided for management of risks by financial and designated non-financial institutions. Enhanced measures are taken to manage and mitigate high risks [98]. While simplified measures are taken to manage and mitigate lower risks [99]. In the case of cross-border correspondent banking and other similar relationships, sufficient information is gathered about a respondent institution [100]. Also the respondent institutions anti-money laundering and combating the financing of terrorisms control shall be assessed [101]. Respective responsibility of each institution in this regard must be documented [102]. Also, management approval must be obtained before establishing new correspondent relationships [103]. Former sub section (8) which provided for putting in place appropriate risk management systems and obtaining senior management approval before establishing and during any business relationship with the public officer is now replaced with a new sub section 7. The new sub section replaced "public officer" with "politically exposed person"

(ii)Section 6, formerly referred to as "special surveillance on certain transactions" is now referred to as "suspicious transaction reporting" in the current section 6. Subsection (5) has been amended to read "Notwithstanding the provision of paragraph (a) of this sub section, the Chairman of the EFCC or his authorized representative shall place a stop order not exceeding 72 hours, on any account or transaction if it is discovered in the course of their duties that such accounts or transaction is suspected to be involved in any crime". In the 2011 Act, the Governor of the Central Bank or his representative can place a stop order of the transaction. But in the present Act, the CBN Governor is not included among those who can place a stop order. This power can only be exercised by the Chairman EFCC or his representative.

1) Section 9 (2) has been amended by the new Act. The Act in this sub section gave the CBN, the exclusive power to impose penalties of not less than N1, 000,000 or the suspension of license issued to financial and designated non-financial institutions. The Act did not give the court the exclusive power to impose penalties alone, the

Securities and Exchange Commission (SEC), the National Insurance Commission (NAICOM) and other relevant regulatory authorities have similar powers [104]. Also, unlike the former Act, the harmonized Act imposes penalty of N1, 000,000 for capital brokerage [105] and other financial institutions and N5, 000,000 in the case of a bank [106]. The Act also imposes the penalty of suspension of license issued to the financial institutions or designated non-financial institutions [107] for failure to comply with the provisions of subsection (i).

2) In section 11 of the Act, two additional subsections proscribing the operations of shell bank [108] in Nigeria and entering into correspondent banking relationship with shell banks [109]. Also, financial institutions must satisfy themselves that a respondent financial institution in a foreign country does not permit its account to be used by shell banks [110]. It has been observed that section 11 did not provide guideline on how to determine the suitability of correspondent bank. Also, there is no guideline in addition to the penalties imposed in the former section 11 for contravening of sections (1), (2) and (3). The new Act further imposed the prosecution of principal officers of the body corporate and the winding up and prohibition of its constitution or incorporation under any form or guise [111].
3) Section 15 of the Act has been re drafted to replace the former section. The section prohibits money laundering in Nigeria [112]. It also specified the circumstances under which a person or corporate body would be deemed to have committed the offence of money laundering. These circumstances includes: where a person or corporate body conceals or disguises, converts or transfers, removes from jurisdiction or acquires, uses, retains or takes possession or control of any property, knowingly or reasonably ought to have known that any such fund or property is, or forms part of the proceeds of an unlawful act [113]. Unlike subsection (2) of the former Act which provided that an offender shall be subjected to the penalties specified in that subsection, the new subsection (3) specifically provided for conviction to a term of not less than 7 years but not more than 14 years imprisonment for a person who contravenes subsection (2) [114]. Body corporate who violate subsection (2) are liable on conviction to a fine of not less than 100% of the funds and properties acquired as a result of the offence committed [115], or have their license withdrawn [116]. Where the offence persists or continues after conviction, the license of the body corporate may be withdrawn or revoked by the regulations [117].
4) Section 16 is also affected by the amendment. The new Act provided in subsection (f) that any person who being a director or an employee of a financial institution contravenes the provision of section 2, 3, 4, 5, 6, 7, 8, 9 of this Act commits an offence under this Act. In addition to above, sections 9, 10, 12, 13 and 14 were added [118].

Despite these bold steps by Nigeria of amending the 2011 *Money Laundering (Prohibition) Act*, it is submitted that there are still some sections needing amendments especially in the area of Customer Due Diligence, forfeiture, Know your Customer Principles, Suspicious Transaction Report, Currency Transaction Report ET. Cetera. It is against this backdrop that the National Assembly proposes the enactment of the Money Laundering Bill of 2016.

4. The Proposed Money Laundering Bill of 2016

It has been observed that the Money Laundering (Prohibition) Act 2012 is more effective and comprehensive than the proposed Money Laundering (Prohibition) (Amendment) Bill of 2016. This is because the Bill provides easy routes for launderers. According to the EFCC, the Bill provides many escape routes for money launderers. For instance Clause 2(2) makes it an offence for a person to conceal, disguise, convert, transfer or remove 'from Nigeria' any property which he knows or ought to reasonably know or suspect that the property has a criminal origin. The implication is once such property is not moved outside Nigeria, then no offence is committed. This clearly creates an escape route for money launderers by arming them with a defense in the event of prosecution.

"Clause 4 (1) also makes it an offence for a person to acquire, use or possess any property which he knows or ought reasonably to know or suspect that such property has a criminal origin. However, section 4(2) (b) makes an exception in situation where the property is acquired or used for adequate consideration. This provision implies that once you pay the full price for such property, then it is not a crime even if you knew that it is the proceeds of crime. This comment also applies to section 4(3)."

It has been observed that several clauses in the Bill will weaken the enforcement regime. "A good example is clause 2(3) which exempts a person who conceals, disguises, converts, transfers or removes from Nigeria property which he knows or suspects to have a criminal origin if he makes a report or intended to make a report or has justifiable reasons for not doing so. This will weaken the enforcement regime. "Clause 12(2) (c) removes the obligation of a person to make a report if he has "justifiable reason" which makes reporting discretionary." This is because money laundering offences are strict liability offences.

The Bill also creates unnecessary bottlenecks in the fight against money laundering. For example Section 5 (4)(b) makes an exception to an untrained employee, who fails to report a suspicious transaction not minding the fact that ignorance of the law is not an excuse.

The Bill permits a superior officer to order illegal action without defining what such action should be. It said, "The purport of section 9(1) is that consent can be given by a person authorized by the Director of the Nigerian Financial Intelligence Centre to do a prohibited act. Moreover, what is a prohibited Act is not defined by the Bill."

On the functions of the Attorney General it has been observed that clause 13 (1), which provides that the Attorney General 'may' make regulations, prescribe the form and manner in which a report is to be made. It has been observed that the phrase "may" gives the Attorney General the discretion to make or not to make regulations. This is very worrisome in the light of the importance of the reporting obligations in the regime. Given the Attorney-General's dual role as Attorney General and Minister of Justice the section gives him the room to adjust the law to suit the government in power."

On the challenges for the prosecution the Clause 14 (2) provides that Financial Institutions (FIs) and Designated

Financial Businesses and Professions (DNFBPs) are competent, but not compellable to give evidence in criminal proceedings arising from the report which they make under Bill. The resultant effect is that there would be challenges in the successful prosecution of money laundering related offences. Moreover, this provision is contrary to the provisions of the Evidence Act as the issue of competency and compellability of witnesses are settled principles of a law under evidence Act and judicial authorities.

Clause 14 which seeks to provide protection for persons making reports may likely stifle or jeopardize prosecution of money laundering offences in the country. Although the need to protect witnesses (persons and institutions) that make reports aid investigation and prosecution of money laundering offences is well appreciated.

Clause 16 (1). With regards to transactions above threshold the Act did not mention "body corporate" It only mentioned "person" thereby, absolving it of obligation to be bound by the prescribed limit and this would consequently allow money laundering to thrive. Moreover clause 16 (2) does not limit FIs and DNFIs from doing a transaction above prescribed limit but only places a duty on financial institution or DNFIs to report when transaction is done in excess of the prescribed limit within the prescribed period.

On non-existing bodies, clause 17 refers to "Centre" which is non-existent in Nigeria.

"S.18 (5), (6), (7) and (10) (b) make mention of a non-existent agency, non-existent

Legislation and non-existent government account.

Proceeds of Crimes Recovery and Management Agency is not in existence in Nigeria. The Proceeds of Crime Act is still undergoing processes of legislation before the National Assembly.

S.18 (5), (6) and (7); Confiscated and Forfeited Asset Account is non-existent in Nigeria.

S.18 (10) (b); Proceeds of Crimes Act is not an existing legislation in Nigeria.

It has been observed that section18 (5), (6) and (7) are in conflict with section 7(2) of the EFCC Act. It seeks to divest EFCC of its powers to cause investigation on economic and financial crime offences and by extension attempting to transfer statutory power to an unknown and non-existent agency – Proceeds of Crimes Recovery and Management Agency.

The Bill also, weakens the customer due diligence (CDD) regime. Clause 24 (1) and (2) implies that if a customer conducts a transaction with a Financial Institution or Designated Non-Financial Institution below the prescribed limit, the bank is not obligated to conduct CDD. This is a fundamental flaw that will encourage money laundering and terrorism financing.

It was further argued that clause 30 (2) and (3) relating to numbered and anonymous accounts

have been overtaken with the introduction of the BVN policy by the CBN. Extending the period for termination of the relationship with a bank beyond fourteen days is grossly unnecessary and leaves room for money laundering activities. The Bill also recognizes relating with a shell bank instead of prohibiting same. This is contrary to FATF Recommendations and international best practices.

"Clauses 35 to 49 of the Bill seek to establish an agency known

as the "Bureau for Money Laundering Control" which will be a body corporate, with its staff and advisory board that will be responsible for the supervision of designated businesses and professions in their compliance with the Bill and relevant regulations.

"However, the work the agency is proposed to do is already being done effectively efficiently by the Special Control Unit against Money Laundering (SCUML). Worthy of note is the fact that it has not been shown in any way that the SCUML has been ineffective in its functions to warrant its dissolution and setting up of another agency to carry out its functions."

Definitions of terms in the Bill appear restrictive and sometimes ambiguous. For instance Clause 27 (5) on definition of Politically Exposed Persons (PEPs) is not exhaustive.

This definition which falls short of internationally accepted standard as prescribed by the Clause 50 (2) (D) is unclear.

"The definitions of "account holder" "cash", "estate agent" are not exhaustive.

"The definitions of "estate agent" "Financial Institution" quite are confusing and this is a key definition that ought to be apt.

The definition of money laundering investigation in clause 13 (6) is too narrow and restrictive because investigation can be initiated by other law enforcement agencies and may not be restricted to intelligence enquiries by the Centre.

"The definition of Shell Banks is not exhaustive and does not meet the FATF standard.

"Clause 17 (5) which defines money service businesses (MSBs) in Schedule 2 in very broad

terms is not in consonance with the international standard definition of MSBs.

"The Person referred to in Clause 12 as "the person at the risk of prosecution" is defined in the Bill."

The Bill is riddled with complex web of cross references.

5. Conclusion and Way Forward

Anti-Money laundering and Counter Financing of terrorism is an important element in the fight against corruption, which is one of the main thrusts of the Government of Nigeria. Since 2013, no significant input has been added to the AML/CFT framework. As Nigeria seeks to strengthen democracy by reinforcing rule of law, there is no alternative to strengthening the mechanisms for accountability including robust ML/CFT regime.

Nigeria has recently been suspended by the Egmont Group of financial intelligence units for her inability to enact a law which will create and ensure the independence of the financial intelligence unit. The Nigeria's Financial Intelligence Unit (NFIU) is presently a department under the Economic and Financial Crimes Commission. In a similar development the Financial Action Task Force on Money Laundering (FATF) has given Nigeria a benchmark to amend the Money laundering Act in tandem with its forty Recommendations. Also, part of the FATFs requirement is that Nigeria should pass the following laws to qualify for admittance into the FATF on money laundering; the Proceeds of Crime Act; the Mutual Legal Assistance Act, the amendment of both the EFCC and Money Laundering Acts. With South Africa as a

member of the FATF and with Egypt nearer to attaining membership, the regional balance that FATF sought for may have been achieved to some extent. However, it would still be a fact that Sub-Saharan Africa is not represented and it will be a disappointment if any country will overtake Nigeria and become a member of the FATF. The second round of evaluations has already commenced and if the Nigerian system remains as it is with the strategic deficiencies mentioned earlier on Nigeria's leadership influence in AML/CFT will diminish regrettably.

6. References

1. Schott PA. Reference Guide to Anti- Money Laundering and Combating the Financing of Terrorism, the World Bank, 2004, 1.1.
2. Ibid.
3. Ibid.
4. FATF, Non cooperative Countries and Territories (NCCTS), 2001, 611.
5. Ibid.
6. Ibid.
7. This is the definition of the Financial Action Task Force (FATF). See FATF website at *http://www.oecd.org/fatf*. Accessed on the 20th June, 2013, at about 2.00 a.m.
8. Amazu, H.O. (2002) "Design of Anti-Money Laundering Compliance System: Reporting Formats and Examination of Reporting Institutions," being a paper presented at the fifth regional workshop on money laundering and other financial crimes. Organized by WAIFEM in collaboration with the US Treasury Department, p. 1.
9. The Vienna Convention of 1988.
10. Article 3(b) (I – ii) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
11. Ibid.
12. The Palermo Convention of 2000
13. Article 6, section 1(a) (i-ii) of the International Convention against Transnational Organized Crime of 2000.
14. Section 25 of the Money Laundering (Prohibition) Act, 2011 (As amended).
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. Ibid
20. Ibid.
21. Ibid.
22. Ibid.
23. Ibid.
24. The FATF 40 Recommendations requires countries to criminalize money laundering on the basis of the UN *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of1988* and the *Palermo Convention of 2000*.
25. Section 1(a) of the Money Laundering (Prohibition) Act, 2012.
26. Section 1(b).Ibid.
27. Usman, A.K. (2005) "Money Laundering and State Security in Nigeria," *ABU Zaria Law Journal*, p.179.
28. Section 2(1). Ibid.
29. Section 2(2). Ibid.
30. Section 2(3).Ibid.
31. Section 2(4). Ibid
32. Section 2(5). Ibid.
33. FATF recommendation 5.
34. Basel Customer Due Diligence for Banks.
35. Section 3(1) (a) of the Money Laundering (Prohibition) Act, 2011 (As amended).
36. Section 3(1) (a) (i). Ibid.
37. Section 3(1) (a) (ii). Ibid.
38. Section 3(1) (b).
39. *Great Western Railways Company v. London and Country Banking Co*. (1902) AC, 424; *Ademuliyi and Damuye v. A.C.B.* (1964) N.M.L.R. 137.
40. *New Nigerian Bank v. Odiase*, (1993) 8 N.W,.L.R. 235, at pp.243-4.
41. Section 3(3) of the Money Laundering (Prohibition) Act, 2011.
42. Section 3(2) (b). Ibid.
43. Oxford Advanced Learners Dictionary, sixth Edition.
44. For example MTN, Airtel, GLO, Etisalat, et cetera.
45. For example multi links, starcomms etcetera.
46. Dekoker, L. "Money Laundering Control: The South African Model*," Journal of Money Laundering Control* (2001).
47. (1995)2 S.A. 377.
48. See also *Powell V. ABSA Ltd* (1998), 2 SA 807.
49. Section 3(3) of the Money Laundering (Prohibition) Act, 2011 (As amended).
50. Section 3(4). Ibid.
51. Section 3(5). Ibid.
52. See Section 3(7) (a) and (b). Ibid.
53. Section 3(8(a) and (b). Ibid.
54. Section 4(i) (a). Ibid.
55. Section 4(1) (b). Ibid.
56. Section 4(1) (b) (i). Ibid.
57. Section 4(1) (b) (ii). Ibid.
58. Section 4(2). Ibid.
59. Case No. cc6/2000 (Durban and Coast Local Div) unreported.
60. Case No. cc6/2000 (Durban and Coast Local Div) unreported.
61. See Section 6(1)(a-d).
62. The Vienna Convention of 1988.
63. Groenhuijsen and Vander Landen in "Financial Institutions and the Penal Fight against Money Laundering," Netherlands Institute for the Banking and Stock broking Industry (NIBE), 1995.
64. Section 6(2)(a) of the Money Laundering (Prohibition) Act, 2011 (As amended).
65. Section 6(2)(b). Ibid.
66. Section 6(4). Ibid.
67. Section 6(56)(a). Ibid.
68. Section 6(5)(b). Ibid.
69. Section 6(6). Ibid.
70. Section 6(7). Ibid.
71. Section 6(9). Ibid.
72. Section 7(a). Ibid.
73. Section 7(b). Ibid.

74. NFIU Annual Report, 2005.
75. Section 10(2). Ibid.
76. Section 10(3). Ibid.
77. Section 13(1). Ibid.
78. Section 13(1)(a). Ibid.
79. Section 13(1)(b). Ibid.
80. Section 13(1)(c). Ibid.
81. Section 13(2). Ibid.
82. Section 13(4). Ibid.
83. See also FATF Recommendation 9. (1924)1 K.B. 461.
84. (1989)1 ALL E.R. 745.
85. See also the case of *Enwerem and Others v. NDLEA*, case no. FHCLCS/096/99 unreported.
86. Section 2 (5) of the Money Laundering (Prohibition) Act, 2011.
87. Section 3 (1) (c) Ibid.
88. Section 3 (c) Ibid.
89. Ibid.
90. Section 2 (a). Ibid.
91. Subsection 2 (b) Ibid.
92. Subsection 10. Ibid.
93. Section 3 Subsection 2 (c). Ibid.
94. Subsection 2 (d). Ibid.
95. Subsection 2 (e). Ibid.
96. Subsection 3 (a). Ibid.
97. Subsection (3) (b). Ibid.
98. Subsection (3) (c). Ibid.
99. Subsection (4) (a). Ibid.
100. Subsection 4 (b). Ibid.
101. Subsection (4) (C) (i). Ibid
102. Subsection (4) (C) (ii). Ibid.
103. Subsection (4) (C) (iii). Ibid
104. Subsection (4) (C) (iv). Ibid.
105. Section 9 (2). Ibid.
106. Subsection (2) (a). Ibid
107. Ibid
108. Subsection (2) (b). Ibid.
109. Section 11 (2). Ibid.
110. Subsection (3) (a). Ibid.
111. Subsection 3 (b). Ibid.
112. Subsection (4) (b). Ibid.
113. Section 15 (i). Ibid
114. Subsection (2). Ibid
115. Subsection (3). ibid
116. Subsection 3(a). Ibid.
117. Subsection 3 (b). ibid.
118. Subsection (5). Ibid.
119. Subsection (f). ibid.