

Legal Alert ? October, 2011 ? **Money Laundering (Prohibition) Act, 2011**

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Introduction:

The Money Laundering (Prohibition) Act, 2011 has repealed the Money Laundering (Prohibition) Act, 2004 by providing for, among other things, that no person or body corporate shall, except in a transaction executed through a licensed financial institution, make or accept cash payments of a sum exceeding N5,000,000 (Five Million Naira) or its equivalent in the case of an individual, or N10,000,000 (Ten Million Naira) or its equivalent in the case of a body corporate

Any Financial Institution or Designated-Financial Institution that fails to comply with the above provision by making the appropriate compliance report to the regulatory authorities commits an offence and is liable on conviction to a fine of not less than N250,000:00 (Two Hundred and Fifty Thousand Naira) for an individual and not more than N1,000,000 (One Million Naira) for a body corporate, for each day that the contravention continues unabated.

Foreign Exchange Transfers

Also, any transfer to or from a foreign country of funds or securities in excess of US\$10,000 (Ten Thousand United States Dollars) or its equivalent must be reported to the Central Bank of Nigeria ("CBN"), the Securities & Exchange Commission ("SEC") and the Economic & Financial Crimes Commission ("EFCC") within seven days from the date of the transfer transaction in question.

The Report must indicate the names and addresses of the Sender, and of the Receiver of the funds or securities.

Customs Declarations

Any transportation of cash or of any negotiable instrument in excess of US\$10,000 or its equivalent by individuals in or out of Nigeria must be declared to the Nigeria Custom Service who in turn is obligated to report such declarations to the CBN and the EFCC.

Any person who falsely declares or fails to make a declaration to the Nigeria Custom Service in pursuance of Section 12 of the Foreign Exchange (Monitoring and Miscellaneous) Act commits an offence and is liable on conviction to forfeit not less than 25% of the undeclared funds or negotiable instrument, or to a term of imprisonment of not less than two (2) years, or to both the term of imprisonment and the forfeiture of the undeclared amount.

Know Your Customers ("KYC")

All financial institutions in Nigeria with all designated non-financial institutions like Jewelers, Car and Luxury goods distributors, Chartered Accountants, Audit Firms, Tax Practitioners, Casinos, Clearing and Settlement agents, Legal Practitioners, Supermarkets, etc are required to verify the identity of their customers and update all relevant information on the customers regularly.

Financial Institutions and designated non-financial institutions are also obligated to scrutinise all on-going transactions that they undertake on behalf of their customers by ensuring that their customers' transactions are consistent with the business and risk profile of the customers.

Where the customer is a public officer entrusted with performing a prominent public function, both within and outside Nigeria, the financial institution shall put in place for such a customer, an appropriate risk management system in addition to obtaining senior management approval to maintaining any business relationship with the public officer.

Declaration of Nature of Business ? DNF

A designated non-financial institution whose business involves the one of cash transactions shall before commencing business submit to the Federal Ministry of Commerce a declaration of the nature of its business along with subsequently submitting a returns register of all its cash transactions above the limited set out in the Money Laundering (Prohibition) Act, 2011.

Also, prior to any transaction involving a sum of US\$1,000 or its equivalent, the designated non-financial institution must identify the customer by requiring him to fill a standard data form and have the customer submit copies of his or her international passport, driving license, national identity card or such other document bearing his or her photograph and or as may be prescribed by the Federal Ministry of Commerce.

A designated non-financial institution that fails to comply with the collation of data on its customers, the process that is more commonly referred to as KYC, and submit the returns requirements as above stated within seven days from the date of each relevant transaction, commits an offence and is liable on conviction to a fine of N250,000:00 (Two Hundred and Fifty Thousand Naira) for each day during which the offence continues unabated.

In addition to the above-mentioned penalty, the offending party could also suffer a suspension or a revocation or a withdrawal of his or her or its operating license by the appropriate licensing authority, and as the circumstances of the offence may demand.

Surveillance of Suspicious Transactions

Suspicious transactions of a frequent, unjustifiable or unreasonable nature, surrounded with unusual and unjustifiable complexity, and that appears to have no economic justification or lawful

objective, and that may involve financing or are inconsistent with the known pattern of the account or business relationship with a customer are required to be reported to the Economic and Financial Crimes Commission ("EFCC") within seven days of each of such transaction.

It is the responsibility of financial institutions and designated non-financial institutions to take all appropriate action to prevent the laundering of the proceeds of a crime or any illegal activity.

The Economic and Financial Crimes Commission with the Central Bank of Nigeria are authorised to, whenever they receive a report such as the one mentioned above, among other things, place a stop order not exceeding 72 hours on the account or transaction if it is suspected that such account is involved in the commission of a crime. This period could be extended where an application is made to the Federal High Court for such an extension.

The Federal High Court also has power to order that the funds and the accounts or securities referred to in the financial or designated non-financial Institution's report should be block forthwith.

Any institution that fails to comply with the above provisions commits an offence and is liable on conviction to a fine of N1,000,000:00 (One Million Naira) for each day during which the offence continues to be committed.

Exemption from Liability

The Directors, officers and employees of any financial institution or designated non-financial institution who complies with the provisions of this Act, in good faith, are not liable to having any civil or criminal proceedings brought against them by their customers for making a money laundering report.

Prohibition of Operating Anonymous Accounts

The opening and or maintaining of numbered or anonymous accounts by any person, financial institution or corporate body is prohibited by the Money Laundering (Prohibition) Act, 2011. Any individual or financial institution or corporate body that contravenes the above prohibition commits an offence and is liable on conviction to a term of imprisonment of not less than two years but not more than five years in the case of an individual offender.

Corporate and financial institution contraveners of the above prohibition are liable if convicted to a fine of not less than N10Million, and not more than N50Million, for each offence committed.

Banking Secrecy and Confidentiality

Section 13(4) of the 2011 Money Laundering (Prohibition) Act provides that "banking secrecy or the preservation of customer confidentiality shall not be invoked as a ground for 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 this Act, the Economic and Financial Crimes Commission

(Establishment, etc.) Act or any other law."

Legal Practitioners & Clients Confidentiality Communications

Section 192(1) of the Evidence Act, 2011 protects professional communication between a client and his Legal Practitioner. Professional communications that are however made in furtherance of any illegal purpose or that are of any criminal or fraudulent nature are not protected from disclosure by the Lawyer/Client confidentiality rule even after the professional engagement of the Legal Practitioner has ceased.

However, where the Client elects to be a Witness in a judicial proceeding, the communication between the Client as a Witness and his Legal Practitioner will no longer be privileged provided that the subject matter of the evidence of the client is relevant to the judicial proceedings.

The parameters of a Client and Legal Practitioner privilege was tested in the matter of *Abubakar v. Chuks* (2007) 12 SC 1 @ 15-16 where the Supreme Court considered the provisions of the repealed Section 170 of the Evidence Act, 1945 and held that the restriction on a Legal Practitioner not to disclose at any time, confidential information between him and his client except where the Legal Practitioner has the express instructions of the client to disclose such information, does not apply to confidential communication or correspondence that are already in the public domain.

Money Laundering Offences and Penalties

Any person, whether an individual or a corporate body, who converts or transfers the resources or properties directly derived from any illegal trafficking in narcotic drugs and substances, or participates in any organised criminal group or undertakes terrorist activity, or engages in terrorism financing, human trafficking, sexual exploitation, smuggling, tax evasion, bribery and corruption, or carries out environmental crimes, kidnapping and hostage taking, illegal bunkering, illegal mining, insider trading and market manipulation, especially where these crimes are committed with the aim of either concealing or disguising the illicit origin of the resources or property or concealing any person involved in these crime(s) to evade the illegal consequences of the crimes, commits an offence under the Money Laundering (Prohibition) Act, 2011.

Barring a repetition, it is also an offence for any individual or corporation or both to collaborate in concealing or disguising the genuine nature, origin, location, disposition, movement or ownership of the resources, property or rights derived directly or indirectly from the acts mentioned above. The penalty on conviction for any of the offences mentioned above is a term of imprisonment of not less than five years but not more than 10 years.

It is immaterial when imposing punishment that the various aspects of the subject matter offence were committed in different jurisdictions or in different parts of the world.

Other Money Laundering Offences

Additional Money Laundering Offences include:-

- i) Warning or in any way intimating the owner of suspected money laundering funds, of the making of any statutory report or refraining from making such a report.
- ii) Destroying or removing a register or record required to be kept under the Money Laundering (Prohibition) Act.
- iii) Making or accepting cash payments contrary to the provisions of the Money Laundering (Prohibition) Act.
- iv) Failing to report an international transfer of funds or securities.
- v) Carrying out or attempting to carry out a money laundering offence under a false identity.

The penalties, on conviction, for the above listed offences (i) to (iii) is a term of imprisonment of not less than two years but not more than three years, or a fine of N500,000 and not more than N1,000,000.

The penalty for making or accepting cash contrary to the provisions of the Money Laundering (Prohibition) Act 2011 is a forfeiture of 25% of the excess amount received or transferred.

It is also an offence to knowingly retain the proceeds of a criminal activity, or to conspire, aid and abet the commission of a money laundering offence.

Professional Ban or Suspension

Any person that is found guilty of an offence under this law may also be banned indefinitely or for a period of five years from practicing the profession which provided the opportunity for the money laundering offence to be committed.

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