

# Newsletter



## RECENT LEGISLATIONS AFFECTING THE BANKING INDUSTRY - August 2003

### Introduction:

As a result of international pressure particularly from the United States of America, some European countries and the global ombudsman, the Financial Action Task Force (FATF) based in Paris, France, threatening to apply sanctions on Nigeria and its banks for the rising cases of fraud and sharp practices in the financial system, the Federal Government recently reinforced the country's laws in its bid to tackle the ugly trend.

We will in this newsletter examine these recent legislations and their effect on the Banking Industry.

### A. The Economic and Financial Crimes Commission [Establishment] Act 2002.

#### The Nature of the Commission

The Act establishes a body to be known as the Economic and Financial Crimes Commission (the Commission) composed of members drawn mainly from government ministries and parastatals together with four eminent Nigerians with cognate experience in finance, banking and accounting.

The primary duty of the Commission is the investigation of all financial crimes and the co-ordination and enforcement of all economic and financial crimes laws such as the Money Laundering Act 1995 as amended and the Banks And Other Financial Institutions Act 1991 as amended.

The Commission is also charged with the responsibility of identifying suspicious transactions and persons by monitoring international economic and financial crimes and tracking the movement of proceeds or properties derived from the commission of such crimes.

The Act lists Financial Crimes to include advance fee fraud [popularly known as 419 crimes], money laundering, counterfeiting and credit card scams e.t.c. while Economic Crimes is defined to include fraud, narcotic drug trafficking, bribery and corrupt malpractices, tax evasion, smuggling, foreign exchange malpractices and theft of intellectual properties e.t.c.

The Commission has the power to investigate any person whose lifestyle and assets are not justified by his sources of income. It also has extensive powers of arrest and prosecution of economic and financial crimes perpetrators.

## Liability Under the Act

The Act makes provision for the following categories of offenders;

(i) Officers of a bank or other financial institution who fail or neglect to secure compliance with the provisions of the Act or fail or neglect to secure the authenticity of any statement submitted pursuant to the provisions of the Act.

(ii) Persons involved in acts of terrorism whether as perpetrators of terrorist acts, supporters or facilitators of such acts or financiers of such acts.

*This category of offenders must have been influenced by the recent upswing in International Terrorism.*

(iii) Public Officers who in the discharge of their duty under the Act present false information to other decision making public officers.

(iv) Persons who collaborate with offenders under the Act to conceal, remove from jurisdiction, transfer to nominees or otherwise retain the proceeds of a criminal conduct or illegal act.

*This category of offenders appears to have been influenced by the need to curb the use of nominees by public officers to conceal the proceeds of corrupt enrichment.*

(i) Persons who knowingly deal in illegally acquired property.

Penalties for the various offences range from imprisonment for a term not exceeding 5 years or N50,000.00 fine or both which is applicable to bank officers, to imprisonment for life for convicted terrorists.

If properly enforced, the Act could be used to convict a wide range of persons/professionals such as Nominees/Agents, Lessees/Tenants, Buyers, Estate Agents, Lawyers and Bankers who *without lawful authority* and *with knowledge* that a property was acquired through the commission of an offence under the Act, deal in one way or the other with such a property.

The question to be addressed by the Court will be the interpretation of what constitutes *lawful authority* and *knowledge* under the Act.

## Jurisdiction & Burden of Proof

The Act confers Jurisdiction on both the Federal and State High Courts. It draws from the legal system in Singapore by allowing courts to admit as corroborating evidence for the commission of an offence under the Act, the fact that the accused person is in possession of property, which cannot be satisfactorily accounted for. *This would reduce the burden of proof especially in cases where it is difficult to trace the source of an accused person's income.*

## Penalties

Properties derived directly or indirectly through the commission of an offence under the Act are liable to forfeiture to the Federal Government. Such properties may be real or personal, situated in Nigeria or abroad and derived through the commission of an offence in Nigeria or under the laws of a foreign country, provided that in the case of the latter, such offence is punishable by imprisonment for more than one year and would constitute an offence under the Act if committed in Nigeria. This is however subject to the existence of a treaty or arrangement with such foreign country.

The Act also empowers the Federal Government to seize the passports of convicted offenders until they have served their sentence or been issued with a presidential pardon.

Even where a person accused of an offence under the Act is subsequently discharged by the Court on technical grounds, the Act provides that the property of such a person may still be liable to forfeiture.

### **The Effect of The Act On The Banking Industry**

Where a person is charged with committing an offence under the Act, and the proceeds of such an offence is traced to a bank account, the

Commission is empowered by the Act to obtain a court order freezing such an account while investigation/trial is on-going, or confiscating and paying the money in such an account into the Federal Government Consolidated Revenue Fund upon conviction of the accused person. Such a court order may also direct the Bank to release information pertaining to the account.

*It is expected that such court orders will be obtained from the state and federal high courts which are conferred with original jurisdiction to try offences under the Act, thus doing away with the previous situation where banks were served by the police with all sorts of spurious orders issued by magistrate courts under the guise of investigating advance fee fraud or money laundering crimes.*

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Failure by the Bank to pay over the contents of an account upon service of the appropriate court order is an offence under the Act punishable by a term of imprisonment of not less than 1 year and not more than 3 years without the option of fine.

The Act also makes it an offence for anybody to deal with or otherwise sell or dispose with any property or asset, which is the subject of an attachment, interim or final order. *What this means in essence is that even where such an asset/property is charged to a Bank for a credit facility, the Bank has no right to dispose of such an asset/property without the permission of the Commission.*

## Conclusion

The Act though well intended has some typographical errors which may be due to the hasty manner in which it was passed by the National Assembly. These typographical errors are confusing and require clarification.

An example is Clause 33(2), which confers certain powers on the "Chairman of the Commission Bank Examiner". This clause is confusing, as the reader is at a loss to decipher the holder of such an office.

The Commission headed by an Assistant Commissioner of Police, Nuhu Ribadu, has since swung into action with the arrest of some 419 kingpins. It will however appear from newspaper reports that the FATF is still not satisfied with the contents of the Bill and the prosecution of money laundering cases. The Senate has accordingly declared its intention to amend the Act to bring it in line with International standards.

Ultimately, the effectiveness of the Commission will depend to a large extent on its possessing the necessary will power and determination to enforce the provisions of the Act and its transparency in the discharge of its functions.

### **B. The Money Laundering [Amendment] Act 2002.**

The Money Laundering [Amendment] Act 2002 (The Amendment Act) has essentially expanded the scope of the Money Laundering Act 1995 from drug related offences to include laundering of the proceeds of crimes and illegal acts. It also provides stiffer punishment for violation of some of its provisions.

Some of the major amendments are as follows:

### **(I) Section 3**

Section 3 of the Principal Act regulates persons dealing in *over the counter exchange transactions*. The amendment to the section has now expanded the coverage to include all *financial institutions*.

Such persons or institutions are now required to identify all customers involved in any transaction involving a sum greater than \$5,000 as against the sum of \$100,000 under the Principal Act.

The identification document to be presented by such customers has been made more specific. Unlike the Principal Act which accepted any authentic photo ID, the Amendment Act makes provision for presentation of authentic international passport, valid driving licence, National ID card or other photo ID as may be prescribed by the Central Bank of Nigeria (CBN) or other appropriate regulatory authority.

A new penalty section has also been incorporated which makes failure to identify Customers or make necessary returns to the CBN within 7 days, an offence punishable on conviction with a fine of N1,000,000.00 for each day the offence persists and the revocation or withdrawal of licence as the case may be.

### **(li) Section 6**

This section, which imposes an obligation on financial institutions to be vigilant when dealing in suspicious transactions, has been expanded to include transactions whose frequency is *unjustifiable or unreasonable*

Financial institutions involved in such transactions are now obliged to forward a written report in the appropriate format not only to the CBN but also to the Securities and Exchange Commission or other appropriate regulatory authorities. A time limit of 7 days within which to report such suspicious transactions has been imposed under the Amendment Act.

Failure to comply with the provision of the section is now an offence punishable on conviction by a fine of N1,000,000.00 for each day during which the offence continues.

(iii) **Section 10**

Under the Principal Act, this section imposed an obligation on casinos and financial institutions to report to the National Drug Law Enforcement Agency (NDLEA), transactions, lodgments or transfer of funds in excess of N500,000.00 for individuals and N2,000,000.00 for corporate bodies. *Following the depreciation in the value of the Naira, this section has now been amended, increasing the reportable amounts to N1,000,000.00 for individuals and N5,000,000.00 for corporate bodies respectively.*

(iv) **Section 12**

The Principal Act gave the NDLEA wide powers to place bank accounts, telephone lines and computer systems under surveillance as well as obtain bank, financial and commercial records e.t.c.

By virtue of the Amendment Act, NDLEA is now required to obtain a Federal High Court Order authorising such surveillance.

(v) **Section 15**

A new subsection [sub-section 6] has been added to the section This sub-section makes the use of proxies/nominees to conceal the proceeds of a criminal conduct or the willful acquisition or use of properties derived through criminal conduct, an offence punishable on conviction by a term of imprisonment of not less than 5 years or a fine equivalent to 5 times the value of the proceeds of the criminal conduct or both.

(vi) **Section 23**

The interpretation section has been amended to incorporate the definition of *financial activities and over the counter exchange transactions*. *It has also widened the definition of financial institutions to include insurance institutions, hotels, supermarkets, legal practitioners e.t.c. thus bringing these institutions and persons within the ambit of the Money Laundering Act.*

**Conclusion:**

Although the passage of the Amendment Act is laudable, It remains to be seen how enforceable its provisions would be. It is questionable if the CBN and other enforcement agencies as currently structured, have the manpower to monitor and enforce the provisions of the Act over the wide gamut of financial institutions as defined in the Amendment Act.

**(C) Banks and Other Financial Institutions [Amendment] Act 2002.**

This Act further amends the Banks And Other Financial Institutions Act 1991 as amended [the Principal Act]. It is a short Act, which essentially amends only two sections of the Principal Acts

In section 3 (3), the discretion granted to the Governor of the

Central Bank of Nigeria (CBN) under the Principal Act, to grant or refuse to grant a licence with or without condition and with or without giving reasons for refusing the grant of the licence has been modified. The Amendment Act provides that after payment of the appropriate fee, the CBN Governor may issue a licence.

This amendment is confusing as the word *may is discretionary*. *If the intention of the draftsmen was to remove or limit the discretionary powers* of the CBN Governor, then the amendment has not fulfilled its purpose. Rather it has made the provision ambiguous.

Section 60 of the Principal Act has also been amended by the inclusion of a new section [Section 60B], which gives the CBN Governor, the power to freeze any bank account used to perpetuate criminal activities. The CBN Governor is however required to obtain a Federal High Court Order before freezing any such account.

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