THE POSITION OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC) ON THE MONEY LAUNDERING (PREVENTION AND PROHIBITION) BILL, 2016

INTRODUCTION

Pursuant to the meeting convened by the Senate leader with major Anti-Money Laundering and Countering the Financing of Terrorism stakeholders on 11th February 2016, wherein respective agencies and organisations present were advised to study the Money Laundering (Prevention and Prohibition) Bill, 2016 presented to the National Assembly by the President of the Federal Republic of Nigeria, and make inputs, the Economic and Financial Crimes Commission reviewed the said Bill and hereby presents its position and observed gaps.

The EFCC is the Agency charged with the responsibility for the enforcement of all Economic and Financial Crimes laws and also the designated Financial Intelligence Unit (FIU) in Nigeria. It is unarguable that the Commission is a major stakeholder in the Anti- Money Laundering/Countering the Financing of Terrorism regime. In addition, the Commission is also the co-ordinating agency for the enforcement of anti- money laundering legislation in Nigeria by virtue of Section 7 (2) (a) of the Economic and Financial Crimes Commission Establishment Act, 2004.

Before commenting on the provisions of the Bill, the EFCC wishes to make some remarks on whether the re-enactment or passing of an entirely new Anti-money laundering legislation is necessary.

The subsisting Anti-Money Laundering Legislation in Nigeria is the Money Laundering (Prohibition) Act 2011 (as amended by the Money Laundering (Prohibition) (Amendment) Act, 2012) which was drafted with due recourse to the Financial Action Task Force (FATF) Recommendations and its Interpretative Notes. Due consideration was also given to the peculiar domestic circumstances existing in Nigeria, and robust consultations were made with stakeholder agencies to ensure an efficient and effective anti-money laundering and combating the financing of terrorism (AML/CFT) regime.

The Act was further reviewed by national institutions like the Nigerian Institute of Advanced Legal Studies, and international technical partners like Inter Governmental Action Group against Money Laundering in West Africa (GIABA) and the FATF. It would be recalled that Nigeria was constrained to engage with the FATF International Cooperation Review Group (ICRG) to have our laws reviewed to meet internationally acceptable standards. Thus the Money Laundering (Prohibition) Act 2011 with its amendment in 2012 was birthed and has been affirmed by major stakeholders to have addressed the observed deficiencies in the legal regime.

Consequently, Nigeria was removed from the ICRG grey list and currently not under the ICRG process. The FATF has also accepted Nigeria's application for membership taking its AML/CFT regime into due consideration.

Paramount amongst the reasons for a re-enactment of an existing legislation are the following:

1. Where it has become obsolete in view of changed conditions and circumstances;
2. Where it has outlived its purpose or usefulness;
3. Where there are major gaps or obvious inadequacies which cannot conveniently be addressed by amendments.

It is against this backdrop that the Commission is of the opinion that the proposed Money Laundering (Prevention and Prohibition) Bill, 2016 is unnecessary; and posits that whatever perceived gaps in the existing legislation as amended are not such that cannot be addressed by an amendment.

Accordingly, the EFCC hereby presents its comments and observations on the Bill as follows:

1. **EASY ESCAPE ROUTES FOR MONEY LAUNDERERS**
   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 reasonably to have known or suspects that the property has a criminal origin. The operative phrase here is **"remove from Nigeria"** which implies that once such property is not moved outside Nigeria, then no offence is committed. This clearly creates an escape route for money launderers and provides an easy defence in the event of prosecution for offenders who limit the movement or transfer of their proceeds of crime within Nigeria.

Clause 4 (1)also makes it an offence for a person to acquire, use or have possession of any property which he knows or ought reasonably to know or suspects that such property has a criminal origin. However clause 4(2) (c) creates an exception which is to the effect that, when such a person acquires the property, uses it, or has possession of it for ***adequate consideration*** he has not committed any offence. This provision implies that once you pay the adequate price for such property, then it is not a crime even if you knew that it is the proceeds of crime. It goes without saying that in our clime what is adequate is largely subjective. It will be a herculean task for the prosecutor to prove that the purchase price of such property is not adequate. This comment also applies to section 4(3) and several other clauses in the Bill.

2. WEAKENING THE ENFORCEMENT REGIME

Several clauses in the Bill have the effect of weakening the AML/CFT 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 but has justifiable reasons for not doing so***. This provision is very open to serious abuse because violators will easily claim that they intended to make a report, or proffer reasons why they were not able to make a report when confronted with the violation. Undoubtedly, this will go a long way in weakening the enforcement regime.

Clause 12(2)(c) removes the obligation of a person to make the requisite report on knowledge or suspicion of money laundering or

that a property is of criminal origin if he has a "justifiable reason" for not doing so. It therefore makes such reporting discretionary.

3. **BOTTLE NECKS IN THE FIGHT AGAINST MONEY LAUNDERING**

Clause 5 (4)(b) of the Bill provides an exception for an ***untrained employee*** of an institution who fails to make a report of knowledge or suspicion of money laundering. It is a fundamental principle of law that ignorance of the law is not an excuse. Moreover, one should not hold himself out as being capable of doing a job without the requisite skills, knowledge and understanding of it. Otherwise, he will be held accountable to the established standards for the given profession. This clause is also contrary to FATF Recommendations 18 and the Interpretative Notes to Recommendations.

4. **CONSENT TO LEGALIZE ILLEGALITY**

The purport of Clause 9 (1) of the Bill is that consent can be given by a person authorised by the Director of the Nigerian Financial Intelligence Centre to do a "prohibited act". Moreover, what is a "prohibited act" is not defined in the Bill.

Clause 5(3) of the Bill also provides justifications for criminal liability by absolving persons who fail to disclose the commission of an offence under the Bill when they have "justifiable reason" not to do so. The Bill also does not define what amounts to "justifiable reason."

5. **FUNCTIONS OF THE ATTORNEY GENERAL IN THE BILL**

Clause 13 (1) provides: The Attorney General **may** by regulations prescribe the form and manner in which a report referred to in Clauses 5,6,11,or 12 shall be made.

Dispassionately, the phrase **"may"** gives the Attorney-General the discretion to make or not to make regulations. The effect of this is that the obligation to report will not be enforced if there are no regulations made by the Attorney-General on the manner and form

the report should be. Considering the importance of reporting in an AML regime, it will be counter-productive to leave reporting obligations to the wide discretion of the Attorney-General. This is liable to abuse if the person occupying the office of the Attorney-General at any material time is not well-intentioned. He may adjust the regulations at will to serve or protect some interests. The same applies to making of cash payments under Clause 16 of the Bill.

Moreover, Clause 19 of the Bill provides that:

> "The Attorney-General shall, by regulations made on the recommendations of the supervisory authorities, set out the prescribed amounts and the specified particulars referred to in sections 16(2) and 17(1) and 18 (1) of this Act."

This will likely create uncertainties and challenges in the enforcement and compliance processes. It is also burdensome for the prosecution who will have to look at two or more documents in order to frame charges of money laundering.

6. CHALLENGES FOR THE PROSECUTION

Clause 14 (2) of the Bill provides that Financial Institutions (FIs) and Designated Non-Financial Businesses and Professions (DNFBPs) are competent, **but not compellable**, to give evidence in criminal proceedings arising from the report which they make under the Bill. The effect is that there will be challenges in the successful prosecution of money laundering related offences.

Moreover, this clause 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 the Evidence Act and judicial authorities.

Clause 14 which seeks to provide protection for persons making reports under the Bill may stifle or jeopardize prosecution of money laundering offences in the country, although the need to protect witnesses (persons and institutions) that make reports that aid

investigation and prosecution of money laundering offences is well appreciated.

7. RETROACTIVE PROVISION

Clause 15 (4) (C) is unconstitutional as it is retroactive because it is designed to subject persons to prosecution under this Bill for offences committed before its enactment into law.

8. REFERENCE TO NON-EXISTING BODIES

Clause 17(1) refers to "Centre" which is non-existent in Nigeria. There is no agency or organisation in Nigeria known as the Nigeria Financial Intelligence Centre. All the clauses in the Bill that refer to the "Centre" are based on presumptions.

Clause.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** are not in existence in Nigeria. Clause18(5),(6) and (7)
- **Confiscated and Forfeited Asset Account** is non-existent in Nigeria. Clause.18(10)(b)
- **Proceeds of Crimes Act** is not an existing legislation in Nigeria. Clause.18(10)(b)

9. CONFLICT WITH OTHER EXISTING LEGISLATION

Clause 18 (5), (6) and (7) are in conflict with Section 7(2) of EFCC Act as they seek to divest EFCC of its powers to cause investigation into economic and financial crimes offences, and by extension attempt to transfer the statutory powers of the EFCC to an unknown and non-existent agency - **Proceeds of Crimes Recovery and Management Agency.**

10. WEAKENING OF THE "CUSTOMER DUE DILLIGENCE REGIME"

Clause 24 (1) and (2) imply 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 Customer Due Diligence(CDD). This is a fundamental flaw that runs contrary to all known FATF standards on due diligence. It will encourage money laundering and terrorism financing.

11. **CONFLICTS WITH FATF RECOMMENDATIONS**

Clause 32 (3) on SHELL BANKS states:

"...or such a longer period as may be directed by the Director-General of the Centre..."

Extending the period for termination of the relationship with a shell bank beyond fourteen days is grossly unnecessary and leaves room for abuse, compromise, negligence and creates a platform for money laundering activities. The Bill also recognizes relating with a shell bank instead of prohibiting in absolute terms its existence of shell banks as recommended by the FATF, and in line with international best practices.

12. **BUREAU FOR MONEY LAUNDERING CONTROL (BMLC)**

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 own staff and advisory board that will be responsible for the supervision of designated non-financial businesses and professions in their compliance with the provisions of the Bill and relevant regulations.

The work that the agency is to do is already being done effectively and efficiently by the Special Control Unit against Money Laundering (SCUML) (which the Bill dissolves in section 49). It has not been shown that SCUML has been ineffective to warrant it being dissolved and another agency set up to carry out its functions.

Furthermore, making the BMLC a body corporate will expose it to unnecessary litigations by persons who do not want to comply with applicable regulations under the AML. By the nature of its operations it should enjoy a substantial measure of anonymity, under another body.

Though pursuant to the Money Laundering (Prohibition) Act, 2011 (as amended) SCUML was established as a unit under the Ministry of Industry, Trade and Investment, the Economic and Financial Crimes Commission (EFCC) has been responsible for its operations and staffing which has enabled its effectiveness and efficiency. If the intention is to give it an outlook of a legal personality, then it is better to effectively, legislatively and formally place it under the EFCC.

In addition, setting up an agency as stated above will further proliferate government institutions when the government's policy is to streamline or merge existing ones in order to cut cost.

11. DEFINITION OF TERMS

Definitions of terms in the Bill appear restrictive and sometimes ambiguous. For instance Clause 27 (5) definition of politically exposed persons (PEPs) is not exhaustive. This definition falls short of internationally accepted standard as prescribed by the FATF.

Clause 50 (2) (D) ".. outside Nigeria where the alleged offender is in Nigeria and not extradited to any other country for prosecution" is unclear.

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

The definitions of "estate agent"; and "Financial Institution" are confusing, This are very key definitions that ought to be precise.

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 non-existing Centre.

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

Clause 17 (5) defines money service businesses (MSBs) in Schedule 2 in very broad terms. It 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 not defined in the Bill.

12. CROSS REFERENCES

The Bill appears complex and difficult to decipher as it is riddled with complex web of cross references.

13. CONCLUSION AND RECOMMENDATION

In the light of our highlighted observations, it is apparent that the entire Bill as constituted will likely prejudice the President's fight against corruption as it will allow money laundering to thrive in the Nigeria.

In view of the above observed deficiencies inherent in the Bill, we recommend as follows:

1. It is not advisable to pass the Bill into law.
2. The existing AML has no deficiencies that cannot conveniently be cured by an amendment.
3. In view of Nigeria's current standing in the international community on the robustness of its AML/CFT regime, it will be counter-productive to pass this Bill into law.
4. The Bill is not timely as its passage will affect Nigeria's standing in the next round of Mutual Evaluation.
5. Passing of the Bill into law at this time will affect Nigeria's application for FATF membership since Nigeria's acceptance is based on the current AML.
6. Passage of the Bill may subject Nigeria to an FATF International Cooperation Review Group process to determine it the law meets the FATF Standards, and if not Nigeria may be subjected to a complex ICRG compliance process.