

BANKING UPDATES: RECENT LANDMARK REGULATIONS, LEGISLATION AND CASE LAW AFFECTING THE BANKING AND FINANCE SECTORS

This month's newsletter contains a review of:

- The Central Bank Of Nigeria's (CBN's) letter to Other Financial Institutions (OFIs) regarding the rendition of returns in connection with anti-money laundering and combatting the financing of terrorism (AML/CFT); and
- the CBN circular clarifying items valid for foreign exchange (FX) in the Nigerian FX market; and

Importantly, this edition also highlights key provisions of the Secured Transactions in Movable Assets Act, 2017 (otherwise known as the Collateral Registry Act²); and the Credit Reporting Act, 2017.

• **LETTER TO ALL OTHER FINANCIAL INSTITUTIONS (OFIs) ON RENDITION OF RETURNS ON ANTI-MONEY LAUNDERING AND COMBATTING FINANCING OF TERRORISM (AML/CFT)**

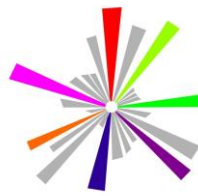
Following the CBN's observation of the general low level of rendition of AML/CFT returns by OFIs, which has hampered efforts to effectively assess and mitigate money laundering risks in the industry, the CBN pursuant to a letter dated May 2, 2017 (the "**Letter**") and referenced (**REF: OFISD/DIR/CIR/GEN/17/128**) reiterated the relevant regulatory requirements in this regard.

The Letter refers to a previous CBN circular dated August 12, 2012 and referenced (**REF: FPR/DIR/CON/BOF/01/036**) which required banks and OFIs to render AML/CFT returns in prescribed formats and at appropriate periods in line with extant AML/CFT laws and regulations. In particular, relevant provisions of the Money Laundering Prohibition Act 2011 (as amended) and the CBN AML/CFT Regulations 2013, require banks and OFIs to render various returns to the CBN and Nigeria Financial Intelligence Unit (NFIU). Some of these returns are provided in the table below:

| S/N | Nature of Return | Rendered To | Time/Frequency of Return |
|-----|---|--------------|--------------------------|
| 1. | Currency Transaction Reports (CTRs) | NFIU | Within 7 days |
| 2. | Suspicious Transaction Reports (STRs) | NFIU | Within 24 hours |
| 3. | Foreign Currency Transaction Reports (FTRs) | CBN and NFIU | Within 7 days |
| 4. | Risk Assessment Report | CBN | Monthly |
| 5. | Politically Exposed Persons (PEPs) | CBN and NFIU | Monthly |

¹ Please note that the period under review is May 2017 and these banking updates reflect guidelines, circulars, and legislation issued or otherwise reported in the month of May, 2017.

² While this is not the short title of the Act, the Secured Transactions in Movable Assets Act, 2017 is popularly also known as the Collateral Registry Act.



BANWO & IGHODALO

| | | | |
|-----|--|--------------|--|
| 6. | Annual Employee Education and Training Program | CBN and NFIU | Annually |
| 7. | Compliance with Employee Training Program | CBN and NFIU | Quarterly |
| 8. | Monitoring of Employee Conduct | CBN | Semi-annually (June and December every year) |
| 9. | Three Tiered KYC | CBN and NFIU | Quarterly |
| 10. | Testing for the adequacy of AML/CFT Compliance | CBN and NFIU | Annually |

Pursuant to the Letter, all OFIs are reminded to render returns in the manner highlighted above. Where there is no report to be filed in a given reporting period, a NIL return must be rendered.

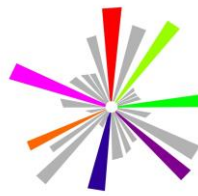
The Letter also notes that failure to render statutory returns and comply with regulatory directives will attract appropriate sanctions including revocation of the relevant institution's operating licence.

- ### CLARIFICATION ON ITEMS VALID FOR FOREIGN EXCHANGE IN THE NIGERIAN FOREIGN EXCHANGE MARKETS

In a bid to clarify the items that remain "valid for foreign exchange"³, the CBN, pursuant to a Circular dated May 17, 2017 and referenced (**REF: TED/FEM/FPC/GEN/01/007**) published a comprehensive list of items (with their corresponding Harmonized System (HS) Codes) that remain valid for foreign exchange. Some of these items are listed below:

| S/N | HS CODES OF ITEMS | DESCRIPTION OF ITEMS |
|-----|-------------------|--|
| 1. | 1516.2010.00 | Animal or Vegetable fats and oils and fractions, Hydrogenated etc. (Not including Palm Oil/Olein and Margarine) |
| 2. | 4822.1000.00 | Bobbins, spools, cops and similar supports of paper and paperboard.... Of kind used for winding textile yarn. |
| 3. | 5402.2000.00 | Synthetic filament yarn, (including synthetic monofilament)... High tenacity yarn of polyesters |
| 4. | 5407.2010.00 | Woven fabrics of synthetic filament yarn, including woven fabrics obtained from material... Polypropylene fabrics, of the type used as carpet backing. |
| 5. | 5803.0010.00 | Gauze, other than narrow fabrics of 58.06...narrow fabrics of heading 58.06 of Polypropylene, of the type used as carpet backing |
| 6. | 7002.3900.00 | Glass in balls, rods or tubes, unworked. |

³ Items that are valid for foreign exchange refer to items which may be imported with foreign currency purchased from the official foreign exchange market.



BANWO & IGHODALO

| | | |
|-----|--------------|---|
| 7. | 7017.9000.00 | Laboratory, Hygienic or pharmaceutical glassware – hygienic or pharmaceutical glassware, not specified in 70.17 (only for pharmaceutical manufacturing) |
| 8. | 7010.2000.00 | Carboys, bottles, flasks...ampoules, etc; stoppers, lids ...stoppers, lids and other closures of glass (only for pharmaceutical manufacturing) |
| 9. | 3926.9099.00 | Other articles of plastics and articles of matter (only for pharmaceutical manufacturing). |
| 10. | 8419.8900.00 | Non-domestic heating/cooling equipment; non-electric water heaters...other machinery, plant or laboratory equipment not specified (only for pharmaceutical manufacturing) |

LEGISLATIVE REVIEW

A. The Secured Transactions in Movable Assets Act 2017

The Acting President on May 30, 2017 signed into law the Secured Transactions in Movable Assets Bill, now known as the Secured Transactions in Movable Assets Act, 2017 (or the “**Collateral Registry Act**”). It is worthy of note that the security regime birthed under the Collateral Registry Act is modeled after the regime previously prescribed under the CBN Regulation No. 1, 2015 - Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (the “**Regulation**”).⁴ We note that the Collateral Registry Act is broader in scope of application considering that the applicability of the Regulation is limited to security interest taken by banks and other financial institutions which are within the regulatory purview of the CBN.⁵

Some of the key provisions of the Collateral Registry Act are as follows:

Objectives of the Collateral Registry Act

The objectives of the Collateral Registry Act are: enhancing financial inclusion in Nigeria; stimulating responsible lending to micro, small and medium enterprises; facilitating access to credit secured with movable assets⁶; facilitating perfection and realization of security; and establishing a collateral registry and providing for its operation.

Creation of Security Interest⁷

A security interest may be created by a security agreement between a grantor and a creditor. However, where a grantor acquires any asset after the coming into force of a security agreement, the security

⁴ The Regulation, being a subsidiary legislation, was made by the CBN pursuant to its powers under the Banking and Other Financial Institutions Act (“**BOFIA**”); hence, the Act essentially clothes the hitherto existing regime in respect of security interest over movable assets with a status of an Act of the Nigerian National Assembly.

⁵ Section 2 of the Collateral Registry Act provides that the Act shall apply to a person who is a creditor, borrower, or grantor under the Act; and every public registry established by any Act of National Assembly to coordinate, warehouse or oversee transactions in movable assets in Nigeria; and such registry shall be operated in a manner that creates automated interface between it and the National Collateral Registry established under the Act. The Act, however, does not apply to any right of set-off; the creation of interest in land other than account receivables; and any interest created by a transfer, assignment or mortgage in movable property governed by a law for which a registry has been established with regards to ships and aircrafts.

⁶ Pursuant to Section 63 of the Collateral Registry Act, this means “tangible or intangible property other than real property.”

⁷ See generally Section 3 and 4 of the Collateral Registry Act



interest of the creditor in respect of such asset shall take effect without further consent or act of the grantor if the asset falls under the collateral description in the security agreement; and the security agreement provides that security interest extends to grantor's present and future assets. It should be noted that a security interest in any movable asset is effective notwithstanding any agreement limiting the grantor's right to create such interest.

Also, a security interest created in a movable asset shall extend to the identifiable or traceable proceeds of the collateral, whether or not the security agreement contains a description of the proceeds.⁸

The National Collateral Registry⁹

The Collateral Registry Act establishes the National Collateral Registry (the "**Registry**") which will be located at the CBN. The Registry is to receive, register and store information about security interest in movable assets; as well as provide access to persons who may seek information on security interest registered at the Registry. The operations of the Registry will be supervised by a Registrar appointed by the CBN Governor. Searches may be conducted at the Registry for information provided in the registered financing statement deposited at the Registry, upon the payment of such fees as may be prescribed by a regulation made under the Act.¹⁰

Perfection of Security Interests in Movable Assets¹¹

The Collateral Registry Act contains robust provisions on the procedure and documentation for the registration of security interest in movable assets. Such security interest can be perfected by the registration of a financing statement¹² in respect of same at the Registry; and the mere possession of collateral does not perfect a creditor's security in respect of the collateral. It is noteworthy that the Collateral Registry Act provides that the security interest in proceeds of the collateral is perfected automatically when such proceeds arise or are acquired, provided that the proceeds are described in the financing statement or the proceeds are in form of accounts receivables, money, negotiable instruments or bank accounts. A registered financing statement is valid until: (a) the expiration of the term specified in the financing statement; or (b) it is cancelled (whichever occurs first); although the term may be renewed or extended by an amendment to the financing statement before its expiration.¹³ Very importantly, it should be noted that the provisions of the Stamp Duties Act Cap. S8. Laws of the Federation (LFN) 2004 shall not apply to any secured transactions under the Collateral Registry Act.¹⁴

Priority of a Security Interest¹⁵

The priority between perfected securities in the same collateral shall be determined by the order of registration. Furthermore, a secured creditor is allowed to transfer a secured obligation without having

⁸ Section 6 (2) of the Collateral Registry Act

⁹ See generally Section 10 of the Collateral Registry Act

¹⁰ Section 22 of the Collateral Registry Act

¹¹ See generally Section 8 and 9 of the Collateral Registry Act

¹² Pursuant to Section 63 of the Collateral Registry Act, financing statement means "the prescribed forms on which information is provided to effect a registration under this Act or any regulation made hereunder."

¹³ Section 18 of the Collateral Registry Act

¹⁴ Section 54 of the Collateral Registry Act

¹⁵ See generally Section 23 -34 of the Collateral Registry Act

to obtain the consent of the grantor or borrower notwithstanding any agreement limiting such right to transfer same. It should be noted that where the secured creditor also transfers the underlying security interest in respect of the secured obligation to another creditor, such transferred security interest shall have the same priority as it had as at the time of the transfer. A creditor may also enter into an agreement to subordinate its priority in favour of any other claimant. A financial institution's right of set-off would have priority over a perfected security interest that extends to a deposit account. It is noteworthy that a perfected security interest would have priority over the rights of an unsecured judgment creditor, unless such judgment creditor, before the perfection of the security interest, registers a financing statement; seizes the collateral; or serves a notice of its claim on the third party holding property for the debtor.

Realisation of Security Interests¹⁶

In the event of a default, a creditor may (a) exercise his rights under the Collateral Registry Act and the security agreement, or (b) resort to any appropriate judicial remedy. It should be noted that the creditor may also exercise remedies under the Companies and Allied Matters Act CAP C20, LFN 2004 including the right to appoint a receiver.

Where a creditor chooses to take possession of the collateral, the creditor shall give the borrower and the grantor a notice of the default and intention to repossess the collateral. After ten (10) days of sending the notice, a creditor may take possession of the collateral.¹⁷

A creditor may also dispose the collateral by sale, lease, license or any other form of disposal. A sale may be done via an auction, public tender, private sale, or any other method provided for in the security agreement.¹⁸

B. Credit Reporting Act 2017

The Credit Reporting Act (the "**CRA**") became effective on May 30, 2017.

Prior to the enactment of the CRA, credit bureaus were solely regulated by the regulations, guidelines, and circulars of the CBN particularly the Guidelines for the Licensing, Operation, and Regulation of Credit Bureaux and Credit Bureau Related Transactions in Nigeria 2013 (the "**Credit Bureau Guidelines**").

Pursuant to the CRA, credit bureaus are now to be regulated by both the provisions of the CRA and regulations as prescribed from time to time by the CBN.

We note that the Credit Bureau Guidelines complement the provisions of the CRA as it contains more expansive provisions on the licensing, operational and regulatory requirements for credit bureaus. Nonetheless, the CRA stipulates that unless the CBN replaces the Credit Bureau Guidelines, the Credit

¹⁶ See generally Section 39 – 50 of the Collateral Registry Act

¹⁷ The repossession may either be pursuant to judicial process or not. The repossession will be without judicial process where the grantor consented to relinquishing possession without a court order in the security agreement. Where it is without judicial process, a creditor may seek the assistance of the Nigerian Police.

¹⁸ Section 44 of the Collateral Registry Act



Bureau Guidelines shall be read in such a manner as to bring its provisions in conformity with the CRA.¹⁹

Some of the key provisions of the CRA are as follows:

Objectives of the CRA²⁰

The CRA seeks to, *inter alia*, facilitate and promote access to credit and enhance risk management in credit transactions; promote access to accurate, fair and reliable credit information and protect privacy of same; set standards and conditions for the establishment and operations of credit bureau; and facilitate credit information sharing.

Licensing and Regulation of Credit Bureaus²¹

The CRA provides that no person or company shall establish, operate or conduct business as a credit bureau in Nigeria unless they have been licensed by the CBN. Licences in this respect are granted upon satisfaction of the conditions stipulated under the CRA including due incorporation as a company in Nigeria, and such other requirements as the CBN may prescribe from time to time. The operations of a credit bureau are subject to the regulatory purview of the CBN. Accordingly, the CBN is empowered to revoke such licence granted to a credit bureau if (i) it is being wound up, (ii) ceases to carry on business in line with the terms of the licence, or (iii) fails to comply with other requirements of the CRA.

Operations of Credit Bureau²²

The CRA stipulates that a credit bureau shall perform the functions of: creating and maintaining database of credit and credit-related information; receiving, collating and compiling credit and credit-related information from credit information providers, credit information users, and such other person as the CBN may prescribe; and investigating, at the request of a credit information user, an application for credit on behalf of any person to whom an application for credit based transaction has been made.

In the performance of its functions, a credit bureau may request the Credit Reporting Management System²³ and other public registries to provide required information to the credit bureau which may be included in the credit report issued by the credit bureau to credit information users. However, a credit information user may only seek information from the credit bureau for any of the permissible purposes stipulated under the CRA including without limitation considering an application for credit by any person or considering a person's qualification to act as a guarantor for any credit; reviewing, monitoring or restructuring existing credit facilities; carrying out employment checks on employees or prospective employees.²⁴ A credit bureau is required to maintain credit information for a period of not less than six (6) years from the date such information was provided to it or if later, from the date on which it last provided such information to a credit information user; after which such information shall be archived for a further period of ten (10) years and thereafter destroyed by the credit bureau.

¹⁹ Section 25 of the CRA

²⁰ Section 1, CRA

²¹ See generally Section 2 and Part VII, CRA. The Credit Bureau Guidelines has similar provisions.

²² Section 3, CRA. The Credit Bureau Guidelines has similar provisions.

²³ This refers to the credit reporting management system operated by the CBN wherein credit information on customers of banks is stored.

²⁴ Section 7(2) of the CRA