



**WORKING PAPER**  
**ON**  
**MONEY LAUNDERING LEGISLATION:**  
**REFORM OF THE FOREIGN EXCHANGE**  
**(MONITORING AND MISCELLANEOUS PROVISIONS)**  
**ACT, CAP. F 34,**  
**LAWS OF THE FEDERATION OF NIGERIA, 2004.**

NIGERIAN LAW REFORM COMMISSION  
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# **NIGERIAN LAW REFORM COMMISSION**

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# **PART**

## **A**

# **INTRODUCTION**

## INTRODUCTION

1. Foreign Exchange is the system of exchanging the money of one country for that of another country.<sup>1</sup> It could as well mean payment for international transactions. It is made up of convertible currencies that are generally accepted for the settlement of international trade and other external obligations. Such currencies include those of the group of seven (G7) industrialized countries comprising the United States Dollar, British Pounds Sterling, Deutsche Mark, Japanese Yen, French France, Italian Lira and Canadian Dollar.<sup>2</sup>
2. In the Nigerian context, it could refer to the price of the Nigerian local currency, the Naira, relative to other world currencies standardized to their relative weight to the United States Dollars, the Pounds or Euros. The three basic macroeconomic prices are the Interest Rate, the Inflation Rate, and the exchange Rate- the IIE algorithm. Theory has it that these prices are co-linear. In a situation where currency failure and recession are present, the exchange rate becomes a major driver of the two prices. These will determine what the country will have in its reserve.
3. The National Reserve (NR) is the aggregate of the foreign currency denominated balance of the nation's net-worth, usually denominated in the United States Dollars. It is made up of the Central Bank of Nigeria's (CBN) own Reserves and the Government's Reserves. The CBN's Reserves is the United States Dollars stock represented by its domestic Naira proportions, in line with approved executive instruments. Government's Reserve on the other hand is the component of the external national earnings that is not yet monetized. The CBN's Reserve constitutes the main source of foreign exchange funding of the foreign exchange market amongst other numerous foreign exchange income earners available to the CBN.

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<sup>1</sup>Oxford Advanced Learner's Dictionary, 7<sup>th</sup> edition at p.582

<sup>2</sup>Mohammed A. Zubairu 'An Evaluation Of Foreign Exchange Management In A Depressed Economy (A Case Study Of Nigeria)' A Project Submitted to the Postgraduate School, Ahmadu Bello University Zaria, in Partial fulfillment of the requirements for the award of the degree of Master of Business Administration (M.B.A). Department of Business Administration, Faculty of Administration, Ahmadu Bello University, Zaria. September, 1998

4. Generally, because no country exists in a state of autarky, trade must go on with other countries and earnings must accrue to avert entropy. Hence the resource capacity of any country resides in the ability to sell to other countries and receive value over and above what it pays. This is why foreign currency earning is very crucial. Hence local currency is printed to represent only the quantum at agreed rates, which is already earned in goods and services delivered to other countries.<sup>3</sup>
5. A Foreign Exchange Market is the medium of interaction between the sellers and buyers of foreign exchange in a bid to negotiate a mutually acceptable price for the settlement of international transactions. The objectives of such a market include the provision of an avenue for the exchange of national currencies and the creation of an effective mechanism for the allocation of foreign exchange.
6. Exchange rate is a price at which a currency is regulated in the market, which varies from time to time. Some factors which cause variation in the exchange rate are government policy, interaction of demand and supply, activities of Nigerian Stock Exchange (NSE), international Trade Oil glut and recession.
7. Foreign Exchange Control is defined by "Encyclopaedia Britannica" as governmental restrictions on private transactions in foreign exchange. It is also defined as types of controls that governments put in place to ban or restrict the amount of foreign currency or local currency that is allowed to be traded or purchased.
8. Essentially, the main aim of exchange control, as deduced from most systems where exchange controls are in place, is to prevent or redress an adverse balance of payments, by limiting foreign purchases to an amount not in excess of foreign Exchange receipts.
9. At the International level Foreign Exchange Control is recognised in Article 14 of Articles of Agreement of the International Monetary Fund (IMF) as a strategy

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<sup>3</sup>Dr Owolabi "Specific Questions Arising From Foreign Exchange(Monitoring and Miscellaneous Provisions) Act" a memo submitted to Nigerian Law Reform Commission on reform of the Act.

usually adopted by countries with transitional economies and in particular, the ones with the weaker economies

10. Unless the policy framework and management of Foreign Exchange is properly articulated in terms of its revenue generation and expenditure a country runs the risk of balance of trade or balance of payment problems.
11. However, in order that a country may optimize the advantage of international trade, it should be imperative for that country to institute appropriate foreign exchange policy and management i.e. Foreign Exchange Control
12. In Nigeria, the need to regulate and/or control foreign exchange has become more urgent following the major economic problems which the country has faced since the beginning of the 1980s. Among these problems have been the rising external debt burden and the increasing inability to finance the imported critical productive sectors.
13. In times past, Nigeria had adopted a very stringent approach to the regulation of the foreign exchange market<sup>4</sup> but with the enactment of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act<sup>5</sup>, the atmosphere in the foreign exchange market became more relaxed.

### **The Pre-Foreign Exchange Monitoring and Miscellaneous Provision Act, 1995**

14. The evolution of the foreign exchange market in Nigeria up to its present state was influenced by a number of factors such as the changing pattern of international trade, institutional changes in the economy and structural shifts in production. Before the establishment of the Central Bank of Nigeria (CBN) in 1958 and the enactment of the Exchange Control Act of 1962, foreign exchange was earned by the private sector and held in balances abroad by commercial banks which acted as

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<sup>4</sup>The Exchange Control (Anti – Sabotage) Act (ECA), the Foreign Currency(Domiciliary Account), and the Second-Tier Foreign Exchange Market Act. These enactments were all repealed by the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act.

<sup>5</sup>Cap F34 LFN 2004.

agents for local exporters. During this period, agricultural exports contributed the bulk of foreign exchange receipts. The fact that the Nigerian pound was tied to the British pound sterling at par, with easy convertibility, delayed the development of an active foreign exchange market.

15. However, with the establishment of the CBN and the subsequent centralisation of foreign exchange authority in the Bank, the need to develop a local foreign exchange market became paramount.
16. The increased export of crude oil in the early 1970s, following the sharp rise in its prices, enhanced official foreign exchange receipts. The foreign exchange market experienced a boom during this period and the management of foreign exchange resources became necessary to ensure that shortages did not arise.
17. However, it was not until 1982 that comprehensive exchange controls were applied as a result of the foreign exchange crisis that set in that year. The increasing demand for foreign exchange at a time when the supply was shrinking encouraged the development of a flourishing parallel market for foreign exchange.
18. The exchange control system was unable to evolve an appropriate mechanism for foreign exchange allocation in consonance with the goal of internal balance. This led to the introduction of the Second-tier Foreign Exchange Market (SFEM) in September, 1986. Under SFEM, the determination of the Naira exchange rate and allocation of foreign exchange were based on market forces. To enlarge the scope of the Foreign Exchange Market Bureaux de Change were introduced in 1989 for dealing in privately sourced foreign exchange.
19. As a result of volatility in rates, further reforms were introduced in the Foreign Exchange Market in 1994. These included the formal pegging of the naira exchange rate, the centralisation of foreign exchange in the CBN, the restriction of Bureaux de Change to buy foreign exchange as agents of the CBN, the reaffirmation of the illegality of the parallel market and the discontinuation of open accounts and bills for collection as means of payments sectors.

20. The Foreign Exchange Market was liberalised in 1995 with the introduction of an Autonomous Foreign Exchange Market (AFEM) for the sale of foreign exchange to end-users by the CBN through selected authorised dealers at market determined exchange rate. In addition, Bureaux de Change were once more accorded the status of authorized buyers and sellers of foreign exchange. The Foreign Exchange Market was further liberalized in October, 1999 with the introduction of an Inter-bank Foreign Exchange Market (IFEM)<sup>6</sup>.

### **Post Foreign Exchange Control in Nigeria**

21. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act liberalized the exchange control regime of Nigeria so that it became easier to import capital and repatriate profits. The Act created an autonomous foreign exchange market for transactions with end users through authorized dealers (such as banks). The Act specifically makes provision for the transferability of capital in any convertible currency without any conditions. The transfer must be made through an authorized dealer; the authorized dealer must check supporting documents and tax clearance certificates before making the transfer to ensure that the applicant is not laundering the money.
22. The foregoing has however changed in recent times as the Central Bank of Nigeria (CBN) in addressing the depreciation cum devaluation of Nigeria's currency alongside the recent blow struck on the Nigerian economy by the dwindling price of crude oil, has adopted very stringent measures in regulating foreign exchange dealings in Nigeria.
23. This might be as a result of the fact that post 1999 i.e. after the 1999 Nigerian Constitution; the CBN would seem to have read too much into section 1(2) of the Foreign Exchange Act, which gave it power to issue guidelines for "matters as may be deemed appropriate for the effective operation of the market".

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<sup>6</sup><http://www.cbn.gov.ng/IntOps/FXMarket.asp> accessed on 21th October 2016.

24. Section 16 of the Central Bank Act empowers the CBN to devise a suitable mechanism for determining the exchange rate of the Naira. Section 9 of the Foreign Exchange Act on the other hand provides that the rate in the market shall be determined by market forces. These two provisions appear to be in conflict. This has however, been addressed by section 37(2) of the Foreign Exchange Act which states that the provisions of the Foreign Exchange Act shall prevail over the provision of any other law that is inconsistent with the Foreign Exchange Act.
25. In most cases, difficult times bring out the effectiveness or weakness in a law. The current economic recession in Nigeria has brought to question the effectiveness of the foreign exchange law in Nigeria. An examination of the Act and its operations reveal lapses in the law which this reform seeks to address. The Act makes it difficult for foreign exchange transactions in Nigeria to be regulated. For instance, the Act-
- a. is narrow in scope and did not provide for objectives;
  - b. allows foreign currency purchased from the market to be repatriated from Nigeria without restriction;
  - c. allows foreign currency in excess of five thousand dollars to be imported or exported subject to declaration for statistics reasons only; and
  - d. prohibits the seizure, forfeiture or expropriation of imported money by the government without providing for exceptions.
26. Again, the Act does not provide for sufficient safeguard to ensure the integrity of the process in the market. For instance the Act did not provide for audit of the foreign exchange transactions, no conditions for appointment or revocation of authorised dealers and buyers, Minister's power to reinstate an authorised dealer or buyer whose appointment is revoked by CBN. Furthermore, the Act should prohibit and punish monopoly, hoarding and insider trading in the market, and set time limit within which foreign currency could remain in private hands.

27. It is in consideration of these challenges and other issues that the Nigerian Law Reform Commission in pursuance of its mandate under section 5 of its establishment law<sup>7</sup> and in line with the economic reforms of the government decided to embark on this reform exercise with a view to making proposals to reform the Foreign Exchange Act in order to inter-alia check money laundering and strengthen the Nigerian economy.

### **Objectives**

28. The objectives of this reform exercise include –
- a. To forestall money laundering by strengthening the legal framework for the regulation, monitoring, supervision and implementation of foreign exchange transactions in Nigeria.
  - b. To enhance the development of the national economy through a well coordinated foreign exchange regime.
  - c. To ensure transparency, accountability and integrity of the process in foreign exchange transactions in Nigeria.
  - d. To ensure that appropriate measures are put in place to strengthen the value of the national currency while ensuring the liberalisation of foreign exchange transactions in Nigeria.

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<sup>7</sup>Nigerian Law Reform Commission Act, Cap.N118, Laws of the Federation of Nigeria 2004.

**PART**

**B**

**OVERVIEW OF THE ACT**

## OVERVIEW OF THE ACT

29. **Section 1** of the Act establishes the Autonomous Foreign Exchange Market where transactions in foreign exchange shall be conducted, and gives the Central Bank of Nigeria (CBN) the power to issue guidelines from time to time to regulate the procedures for transactions in the market subject to the approval of the Minister.
  30. **Section 2** provides for instruments of transactions in the market which includes any convertible foreign currency such as as foreign bank notes, foreign coins, travellers' cheques, bank drafts, etc and such other instruments as may be determined by CBN.
  31. **Section 3** provides for non-disclosure of sources of imported foreign currency by any person executing a transaction in the market except as required under any enactment or law.
  32. **Section 4** provides for sources of foreign currency that may be sold in the market such as foreign currency provided by CBN, tourist into Nigeria, imported for direct investment in Nigeria, in domiciliary accounts maintained in authorized banks in Nigeria, held or imported by Nigerian citizens returning from abroad, held by foreign nationals resident in Nigeria, etc.
  33. **Section 5** provides for the appointment of authorized dealers and buyers in the market by the CBN subject to such terms and conditions as the CBN may specify in the letter of appointment.
  34. **Section 6** provides for revocation of appointment of any authorized dealer or buyer by the CBN if it has reason to believe that such revocation is for national interest. Although, appeal could be made to the Minister within 28 days of the receipt of the letter of revocation by the aggrieved person, and the Minister may reverse or affirm the decision of the CBN where there are circumstances to so hold.
- Section 7** provides for persons that could carry out transactions in the market. These include the public, authorized dealers and buyers, and the transactions are conducted as prescribed from time to time by the CBN.

35. **Section 8** provides for supervision and monitoring of the market by the CBN to ensure efficient performance and the Minister may also issue directives as may seem appropriate and consistent with the Act for the efficient operation of the market.
36. **Section 9** provides that the rate of exchange at the market shall be as mutually agreed by the parties (the applicant purchaser and the authorized dealer or buyer).
37. **Section 10** provides for the transactions permitted in the market, that is, any transaction adequately supported by appropriate documentation shall be an eligible transaction in the market unless such transaction is prohibited by law.
38. **Sections 11** provides for transactions not permitted by the Act. These transactions include goods and services or items that are absolutely prohibited by any enactment or laws.
39. **Section 12** provides for the importation and exportation of foreign currencies requiring the declaration of any amount in excess of \$5,000.
40. **Section 13** provides for the manner in which purchased foreign currency can be repatriated from Nigeria.
41. **Section 14** provides for the exportation of the Naira as Nigeria's legal Tender. The section prohibits the exportation of the Naira except with permission of the Central Bank of Nigeria.
42. **Section 15** provides for the investment of foreign currencies and capital imported into Nigeria in various forms whether in enterprises or securities as the case may be. The section further provides for channels through which the imported foreign currencies can be invested and the method through which such currencies can be transferred and the period within which an authorised dealer can act after the importation of the currencies. The section further provides for the furnishing of the Central Bank with information about the importation by the authorised dealer.
43. **Section 16** provides for the submission of returns by an authorised dealer and buyer appointed under the Act to the Central Bank in a particular form as may be directed by the Central Bank. The section further makes it an offence for failure to

submit such returns as at when due and it is punishable under the Central Bank Act and Banks and other Financial Institutions Act (BOFIA)

44. **Section 17** provides for the operation of foreign currency Domiciliary Account. The section provides for who is to open such account, the type of foreign currencies (Pounds, Dollar, Yen, etc). The section further allows a person to open more than one account.
45. **Section 18** provides for the payment of interest by a bank where such account is domiciled. It also provides for the way and manner the bank can deal with such deposit in terms of business transaction.
46. **Section 19** provides for opening of foreign currencies domiciliary account by exporters of goods, which shall include petroleum products. Such account may contain the entire proceeds of the export business.
47. **Section 20** provides for the supervisory and monitoring power of the Central Bank in relation to transactions under Part II of the Act.
48. **Section 21** deals with the importation and exportation of foreign currency in cash. It provides that where a person imports foreign currency in excess of Ten thousand US dollars or its equivalent in cash and deposit same in a domiciliary account with an authorized dealer, he shall only make cash withdrawals from the account. Also such foreign currency imported in cash shall only be exportable from Nigeria in cash. Lastly, the section prohibits any authorized dealer from facilitating the withdrawal of such foreign currency by any means other than by cash.
49. **Section 22** deals with payments for certain goods. It prohibits the purchase in Nigeria of landed properties, securities, motor cars including other vehicles of any description whatsoever with cash whether in foreign currency or not. It goes further to provide that such payment shall be made by means of bank transfers of cheques drawn on banks in Nigeria only.
50. **Section 23** deals with special surveillance of certain transactions. The section authorizes the Central Bank of Nigeria to access at all reasonable times the offices, registers, books of accounts and documents relating to accounts maintained with

an authorized dealer to confirm compliance with the provisions of the Part II of the Act.

51. **Section 24** deals with maintenance and preservation of records by authorised dealers at least seven years after the last entry in it.
52. **Section 25** deals with duty to report International transfer of funds. It mandates an authorized dealer to notify the Central Bank of any cash transfer to or from a foreign country of a sum more than \$10,000 or its equivalent for the purpose of determining and monitoring the flow of foreign currencies into Nigeria. It also mandates the Central Bank to furnish returns on such transactions to the Minister on quarterly basis.
53. **Section 26** provides for dealings in securities. It empowers any person whether resident in or outside Nigeria, whether or not a citizen of Nigeria to deal in, invest in, acquire or dispose of, create or transfer any interest in securities and other money markets instruments whether denominated in foreign currencies in Nigeria or not. Such investment may be securities traded on the Nigerian Capital Market or by private placements in Nigeria.
54. **Section 27** provides for export of goods and services. It allows for export of goods and services from Nigeria which are not prohibited by law and the payment could be made by means of letter of credit or any other internationally acceptable mode for payment and the amount should represent a fair return for the goods or services.
55. **Section 28** deals with the duty to collect debts. The section empowers the agency of government responsible for collection of duties in respect foreign exchange transactions to do so promptly unless where the Minister directs otherwise. The section also absolves such agency from liability for carrying out their duties and the Minister may also assign to the Accountant-General power to demand and receive foreign currency or payment.
56. **Section 29** creates offences in relation to Part I of the Act. Punishment to the offences created in the section in the case of an individual is five years

imprisonment or to a fine of five times the amount of foreign currency involved and in the case of a body corporate, to a fine of ten times the amount of foreign currency involved. Also all the assets, moveable or immovable of a person convicted under the section shall be forfeited to the Federal Government. If the person convicted under the section is an authorized dealer, the Central Bank shall revoke his appointment. Finally, the foreign currency involved shall be forfeited to the Federal Government.

57. **Section 30** creates offences in respect of Part II of the Act. The section makes it an offence to- sell foreign currency to an unauthorized dealer, forge or mutilate any passbook for foreign exchange transaction with intention to defraud, and to convert illegally the proceeds of any domiciliary account maintained. The punishment for the offences amongst others include, forfeiture of the foreign currency with the associated assets to the federal government, wounding up of the company and revocation of license of the authorised dealer concerned.

58. **Section 31** provides for where an offence has been committed by a body corporate under the Act, that the persons who were officers of the body corporate is deemed to be guilty of the offence and liable to punishment as prescribe in the Act, unless the officer proves that the offence was committed without his consent or connivance and that he had exercised due diligence with regard to the nature of his functions.

59. **Section 32** refers to foreign currency that is seized based on a contravention of the Act. Where such seizure occurs, the foreign currency is lodged in a blocked account with the central bank. If after three years no action is brought by whom such foreign currency was seized, the Minister shall direct the Central Bank to transfer such money into the Consolidated Revenue Fund.

60. **Section 33** provides for where there is a seizure of foreign currency for any reason connected with the contravention of the Act, the foreign currency shall be lodged in a blocked account with the Central bank.

61. **Section 34** provides for the court with jurisdiction to try offences under the Act.

62. **Sections 35 and 36** provide for the scope and application of the Act.
63. **Section 37** modifies existing legislation that relates to foreign exchange and provides that any law inconsistent with it is to the extent of its inconsistency void.
64. **Section 38** provides for the list of existing legislations repealed by the enactment of Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995. The Section also states that all documents or order made under the provision of the repealed Acts remains valid as though made under the current Forex Act.
65. **Section 39** empowers the Minister to make such transitional provisions as are necessary or expedient for full effect of the Act.
66. **Section 40** empowers the Minister of Finance in consultation with the Central Bank to make regulations as may be required for carrying into effect the intendment of this Act.
67. **Section 41** is the interpretation section.
68. **Section 42** is the short title.

**PART**

**C**

**DEFECTS IN THE ACT AND  
RECOMMENDATIONS FOR  
REFORM**

## DEFECTS IN THE ACT AND RECOMMENDATIONS FOR REFORM

### Section 1: Establishment of the Autonomous Foreign Exchange Market

69. Section 1 of the Act establishes the Autonomous Foreign Exchange Market and gives the CBN power to issue guidelines from time to time to regulate the procedures for transactions in the market subject to the approval of the Minister. The section did not provide for objectives. This could make supervision and monitoring difficult because without a predetermined goal there will be no clear policy direction of what the law seeks to achieve. In India for instance, the Foreign Exchange Management Act, 1999 declares in the long title that the objective of the foreign exchange law is to facilitate external trade and payments and for promotion of orderly development and maintenance of foreign exchange market in India.
70. Similarly, in Malaysia, the objective of the foreign exchange administration is to maintain liberal rules which are prudential measures to support the overall macroeconomic objectives of maintaining monetary and financial stability, enhance the competitiveness of the economy through the creation of a more supportive and facilitative environment for trade, business and investment activities.<sup>8</sup>

### Recommendation

71. Section 1 of the Act should be amended to provide for objectives.

### Section 2: Instruments of Transactions in the Market

72. Under section 2 (2) (e) of the Act, telegraphic transfer is recognized as an instrument of transaction. It is suggested that the term "electronic" transfer should be added so as to broaden the spectrum of making it IT friendly in line with modern practices.

<sup>8</sup><http://www.bnm.gov.my/index.php?lang=en&ch=en>, accessed on 19<sup>th</sup> August, 2016.

## **Recommendation**

73. The word "electronic" should be added to Section 2 (2) (e) of the Act.

## **Section 4: Sources of Foreign Currency in the Market**

74. Section 4 of the Act provides for sources of foreign currency in the market. However, the section did not provide for one of the surest and reliable source of foreign currency into the country; that is, foreign currency sent by Nigerians resident abroad to their relations and friends. There may not be an accurate figure of the number of Nigerians in the Diaspora, but the fact remains that returns or remittances made to relatives and friends from Nigerians all over the world could be huge and cannot just be hidden under anonymous sources. Even though, the Minister under paragraph (L) of section 4 may specify by order other sources of foreign currency, there is no such order in force to date.
75. Also, there are foreigners who send foreign currencies to their relations, families, children and friends in Nigeria. This source of foreign exchange is not captured in section 4 of the Act.
76. There is need to include these sources in the list of sources of foreign currency listed in section 4 of the Act.

## **Recommendation**

77. Section 4 of the Act should be amended to provide for foreign currencies sent by Nigerians resident abroad and non Nigerians to their relations, families and friends in Nigeria.

## **Section 5: Appointment of Authorised Dealers and Authorised Buyers**

78. Section 5(1) of the Act provides for appointment of authorized dealers and buyers without specifying the conditions for such appointment. The subsection merely provides that the CBN may appoint any bank or non-banking corporate

