

Key contacts



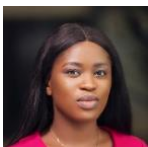
Dayo Okusami
Partner and Co-Head,
Energy and Natural Resources, Investigation,
White Collar and Compliance
dayo.okusami@templars-law.com



Dr. Jude Odinkonigbo
Counsel,
Tax, Investigation, White Collar and
Compliance
jude.odinkonigbo@templars-law.com



Lawal Kazeem
Associate,
Dispute Resolution, Investigation, White Collar
and Compliance
lawal.kazeem@templars-law.com



Elizabeth Toweh
Associate,
Finance
elizabeth.toweh@templars-law.com

The What and Why of Nigeria's Grey Listing by the Financial Action Task Force and its Implications on Businesses Operating in Nigeria

Introduction

On 24 February 2023, the Financial Action Task Force ("FATF") placed Nigeria (and South Africa) on its "Grey List". This is a term used to describe countries under increased monitoring by FATF and are actively working with the organization to address strategic deficiencies in their regimes to counter money laundering, terrorist financing, proliferation financing and have committed to swiftly resolve the identified strategic deficiencies.

FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and financing of proliferation of weapons of mass destruction. It examines jurisdictions based on their Anti-Money Laundering/Counter Financing of Terrorism and Proliferation (AML/CFT/P) deficiencies and risks, or other specific threats that they pose to the global financial system. It works with regional/national regulatory bodies to analyse their AML/CFT/P standards, procedures and sanctions and determine their appropriateness. If the FATF considers that the AML/CFT/P standards are not sufficient, it would put in place an action plan to redress the deficiencies and bring them in line with all necessary global standards.

As a control measure, the FATF publishes two lists of jurisdictions at different times in each year for affected countries to revise their AML/CFT/P screening processes accordingly. The two lists are: High-Risk Jurisdictions subject to a Call for Action ("Black List")¹ and Jurisdictions Under Increased Monitoring are required to develop effective AML/CFT/P procedures and regulations ("Grey List").

Nigeria's addition to the Grey List may have wide-ranging financial and commercial implications for businesses operating in Nigeria. Below, we provide highlights on why Nigeria was grey-listed, the financial and commercial implications and what businesses may do to minimize the risk and impact on their existing/proposed/ future operations.

¹ Currently, there are only three countries on the FATF's Black List. They are: North Korea, Iran, and Myanmar.

Nigeria as a Jurisdiction Under Increased Monitoring (Grey List)

Nigeria was first included in the FATF list of Non-Cooperative Countries and Territories ("NCCT") in 2001². Following the inclusion, Nigeria committed to actions to improve its AML/CFT/P policies – most importantly, it repealed the Money Laundering Decree of 1995 and replaced it with Money Laundering (Prohibition) Act, 2003 and just 10 months later, Nigeria replaced it with Money Laundering (Prohibition) Act, 2004. In addition, it implemented other legal and administrative measures designed to tackle corruption, economic and financial crimes – this includes the establishment of the Economic and Financial Crimes Commission ("EFCC"). In recognition of these efforts, FATF delisted Nigeria in 2006.

Regardless of the above improvement, Nigeria continued to improve its money laundering laws and the legal framework for combating the crimes of money laundering, terrorists and proliferation financings. Thus, the 2004 Act was further replaced with Money Laundering (Prevention) Act, 2011; and to further tighten the loose ends, Nigeria replaced the 2004 Act with Money Laundering (Prevention and Prohibition) Act, 2022. This is followed with the enactment of other laws – such as: Terrorism (Prevention and Prohibition) Act, 2022, Proceeds of Crimes (Recovery and Management) Act 2022 etc.

Generally, these legislations improved the predicate offences for money laundering from drugs to "any crime or illegal act"); extended certain AML/CFT/P obligations to non-bank financial institutions, the compulsory requirement of customer identification to the prohibition of payment and/or acceptance of cash in an amount exceeding ₦5,000,000 (Five Million Naira), circa USD\$10,845 (for individuals) or ₦10,000 (Ten Million Naira) circa USD\$21,700 (for corporate bodies) except the payment and/or acceptance is carried out through a financial institution. Reporting obligations are imposed on financial institution who are involved in a transfer from a foreign country of funds or securities exceeding US\$10,000 to the Central Bank of Nigeria ("CBN") and the Securities and Exchange Commission in writing within one day from the date of the transaction. Certain duties are imposed on Financial Institutions and Designated Non-Financial Businesses and Profession ("DNFBP").

The definition of the term DNFBP is extended to include all kinds of trades and businesses to cover several areas through which money could be laundered unhindered if unchecked. In particular, the operators of these businesses are conferred with the responsibility of complying the Money Laundering (Prevention and Prohibition) Act to ensure existing gaps through which money is laundered are blocked.

Nigeria and other countries at risk of being Grey Listed are given advance notice to allow for a rectification of lapses and if these are not sufficiently implemented, an addition to the Grey List is the result. When a country is grey-listed by FATF, it signifies that such a country has worrying deficiencies in its regime that sabotage the fight against money laundering, combatting of terrorism and proliferation financings. This shows that the world body does not have confidence in the money laundering, terrorism, and proliferation financing regimes of a grey-listed country – until the identified deficiencies are exhaustively addressed. The adverse implication of grey-listing a country is that it discourages foreign direct investment **and** adversely affects the reputation of that country – since the trust and confidence needed to transact businesses in such country are tainted and may subsequently wane considerably. This means that any business that insist on doing business in that country must exercise enhanced level of care and due diligence.³

² "Annual Review of Non-Cooperative Countries and Territories 2006-2007: Eighth NCCT Review" Available at <https://web.archive.org/web/20081031070853/http://www.fatf-gafi.org/dataoecd/14/11/39552632.pdf> accessed 26 April 2023.

Implications for Businesses and What they May do to Mitigate Effect of Greylisting Nigeria

International and Nigerian investors can expect more difficulty in obtaining funding for potential investments in Nigeria, as financial institutions will want additional assurance that their funds will not be invested in a company that may, for example, funnel the money to terrorist organizations (like Boko Haram which operates in Nigeria) or Politically Exposed Person (PEP) or their beneficiaries.

Investors may be asked to increase their level of due diligence into any potential acquisitions or partners in these countries, with a goal of identifying any issues of concern with the background of individuals involved in the project or the ultimate beneficial owners of a company. Small-cap investors in particular, who are usually less able to finance an enhanced due diligences needed to find this information, may find it harder to obtain funding approvals from international institutions as Nigeria is grey-listed.

In light of the impacts of grey-listing Nigeria, it is important for businesses operating in the country to implement the following:

- determine their exposures and any operational risks arising from the deficiencies in Nigeria's AML/CFT/P framework.
- (re)confirm their Know Your Customer (KYC) of all counter parties in the country including beneficial ownerships of existing partners and counter parties.
- monitor the existing AML/CFT/P requirements and (more likely than not) implement more robust AML/CFT/P compliance programs.
- conduct internal risk assessments on AML/CFT/P business risk at intervals to assess their exposure levels and
- train employees on AML/CFT/P red flags and disclosure.

What are the Next Steps for Nigeria?

As a corollary to the above positions, when a country is placed on the FATF watch list, it is an indication that it has made some commitment to resolve identified deficiencies in its AML/CFT/P frameworks and to reform its AML/CFT/P laws and regulations within an agreed timeframe. The country would thereafter work with the FATF to identify and subsequently correct the identified deficiencies in its financial systems. This may be by way of review of its existing laws, the enactment of new laws, set up of applicable regulatory agencies or through other strategic international partnerships.

Similar to Nigeria, other grey-listed jurisdictions (United Arab Emirates, Turkey, The Cayman Islands, etc) experience challenges in their financial systems such as immature AML/CFT/P monitoring frameworks, failure to enforce AML/CFT/P laws to the letter, under-resourcing of the judiciary and law enforcement branches, corruption in both public and private sectors and unclear state and private sector due diligence policies. Nevertheless, a lot of countries have already begun implementing action plans to achieve delisting. After an agreed period, the listed jurisdiction will be reassessed to determine the extent to which it has satisfied the requirements of the action plan set

³ In support of the resultant decline of businesses in affected countries, the International Monetary Fund ("IMF") reported that countries on the FATF's grey list suffer an average net loss of 7.68% of capital inflow across their borders relative to gross domestic product. See, Mizuho Kida and Simon Paetzold, "The Impact of Gray-Listing on Capital Flows: An Analysis Using Machine Learning" online: <<https://www.imf.org/en/Publications/WP/Issues/2021/05/27/The-Impact-of-Gray-Listing-on-Capital-Flows-An-Analysis-Using-Machine-Learning-50289>> last visited 21 May 2023.

forth by the FATF. If it is deemed to have implemented all administrative, legal and organizational changes, upon review, the FATF can agree to delist the country.

It must be noted however that the FATF and other authorities will continue to monitor Nigeria's AML/CFT/P efforts to ensure that they continue to operate within the required guidelines. The FATF may also routinely follow up with Nigeria to ensure compliance with the agreed AML/CFT/P standards.

Subsequent to its inclusion in the Grey List, it was agreed that Nigeria would need to implement the nine-points FATF action plan below:

- i. complete its residual ML/TF risk assessment and update its national AML/CFT/P strategy to ensure alignment with other national strategies relevant to high-risk predicate offences⁴;
- ii. enhance formal and informal international cooperation in line with ML/TF risks;
- iii. improve AML/CFT/P risk-based supervision of financial institutions ("FIs") and DNFBPs and enhance implementation of preventive measures for high-risk sectors;
- iv. ensure that competent authorities have timely access to accurate and up-to-date beneficial ownership information on legal persons and applying sanctions for breaches of beneficial ownership obligations;
- v. demonstrate an increase in the dissemination of financial intelligence by the Nigerian Financial Intelligence Unit "NFIU" and its use by other law enforcement agencies;
- vi. demonstrate a sustained increase in money laundering investigations and prosecutions in line with money laundering risks;
- vii. proactively detect violations of currency declaration obligations and apply appropriate sanctions and maintain comprehensive data on frozen, seized, confiscated, and disposed assets;
- viii. demonstrate sustained increase in investigations and prosecutions of different types of terrorism financing activities and enhance interagency cooperation on terrorism financing investigations; and
- ix. conduct risk-based and targeted outreach to non-profit organizations at risk of terrorism financing abuse and implementing risk-based monitoring for the subset of non-profit organizations at risk of TF abuse without disrupting or discouraging legitimate non-profit activities.

Conclusion

⁴ Some predicate offences include environmental crime, tax crime, cybercrime, fraud, corruption, participating in organised crime groups, human trafficking and racketeering.

To be delisted from the grey list, Nigeria needs to address the above 9-point FATF action plan which is feasible and obtainable: more than 70% of countries (including Nigeria in the past) have been removed from the Grey List since the inception of FATF⁵. In fact, since 2021, the Nigerian government has made improvements to the country's AML/CFT/P legislative frameworks and has committed to strengthening its targeted financial sanctions.⁶ Thus, there should not be any irremediable risk posed to businesses that have maintained relationship with countries listed on the FATF Grey List.

The most significant implication to a grey-listed country is really the **reputational and perceptual damages** to the country, as its effectiveness in combatting financial crimes and terrorist financing is deemed to be below the internationally accepted standards.

The FATF Grey List is not a call to business partners to cancel all relations with the affected countries. It is also not a call to enhance pre-transaction KYC and due diligence. Rather, it is a call to the affected countries to remedy the identified defects in their financial systems in order to ensure that the global financial system is protected against the risks of money laundering and terrorism financing.

Generally, it takes between two to five years for an affected country to address its deficiencies and be taken off the list. It is anticipated that Nigeria would be able to resolve the nine action points within the timeframe. However, even after it is delisted, Nigeria would still need to continue its efforts towards improving its AML/CFT/P system and combatting of financial crimes.

⁵ "Nigeria placed on FATF grey list" – Available at <https://techcabal.com/2023/02/27/nigeria-placed-on-fatf-grey-list/> accessed on 22 April 2023

⁶ "Jurisdictions under Increased Monitoring - 24 February 2023" – Available at <https://www.fatf-gafi.org/content/fatf-gafi/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-february-2023.html> accessed on 21 April 2023