



**THE REPUBLIC OF KENYA**

LAWS OF KENYA

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**KENYA DEPOSIT INSURANCE ACT**

CHAPTER 487C

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## CHAPTER 487C

## KENYA DEPOSIT INSURANCE ACT

[Date of assent: 9th May, 2012.]

[Date of commencement: By Notice.]

**An Act of Parliament to provide for the establishment of a deposit insurance system and for the receivership and liquidation of deposit taking institutions, to provide for the establishment of the Kenya Deposit Insurance Corporation and for connected purposes**

[Act No. 10 of 2012, Act No. 39 of 2013, Act No. 41 of 2013.]

## PART I – PRELIMINARY

**1. Short title and commencement**

This Act may be cited as the Kenya Deposit Insurance Act, 2012, and shall come into operation on such date as the Minister may, by notice in the *Gazette*, appoint.

**2. Interpretation**

(1) In this Act, unless the context otherwise requires—

“**associate**” has the meaning assigned to it under the Banking Act (Cap. 488);

“**Board**” means the Board of Directors constituted under section 7;

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to finance;

“**Central Bank**” means the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap. 491);

“**chairperson**” means the chairperson of the Board appointed under section 7;

“**Chief Executive Officer**” means the chief executive of the Corporation appointed under section 10;

“**company**” has the meaning assigned to it under the Companies Act (Cap. 486);

**“Corporation”** means the Kenya Deposit Insurance Corporation established under section 4;

**“deposit”** means the unpaid balance of the aggregate of deposits received or held by a member institution from or on behalf of a person in the usual course of the business of deposit taking and shall include—

- (a) a bank draft, certified cheque or other similar instrument or payment instruction, drawn or made against a deposit account for which the member institution shall be primarily liable;

- (b) a cheque entered into a payment system notwithstanding any delay or failure by the member institution in crediting the payee's account; or
- (c) any other liability or financial instrument as may be specified by the Corporation but excludes—
  - (i) a deposit that is not payable in Kenya;
  - (ii) bearer negotiable instruments of deposit;
  - (iii) any sum of money payable under a repurchase agreements;
  - (iv) interbank transactions; and
  - (v) any other liability or financial instrument as may be specified by the Corporation;

**“depositor”** means a person whose account has been or is to be credited in respect of monies constituting a deposit;

**“exclusion and transfer process”** means the process that commences when the Corporation is appointed receiver and or assumes control of a problem institution and shall consist of—

- (a) exclusion and transfer of part or total deposits and liabilities from a problem institution to another solvent and well-managed institution;
- (b) exclusion and transfer of part or total assets to the institution receiving the liabilities; and
- (c) liquidation of the residual assets and liabilities;

**“Fund”** means the Deposit Insurance Fund established by section 20;

**“institution”** means a bank, financial institution or mortgage finance company as defined in the Banking Act (Cap. 488), or a microfinance bank as defined in the Microfinance Act, 2006 (Cap. 493D), or any other deposit taking entity licensed by the Central Bank;

**“insured deposit”** means the deposit or any part of the deposit the repayment of which is insured by the Corporation under this Act;

**“lesser cost rule”** means the adoption of the lower of—

- (a) the cost to the Corporation of payment of insured deposits in liquidation of an institution; and
- (b) the cost to the Corporation in undertaking the exclusion and transfer process;

**“liabilities”** includes debts, duties and obligations of every kind, whether present or future, or whether vested or contingent;

**“officer”**, in relation to a member institution, means a person who manages an institution and includes the chief executive officer, deputy chief executive officer, chief operating officer, chief financial officer, secretary to the board of directors, treasurer, chief internal auditor, manager of a significant unit of an institution or a person with a similar level of position or responsibility;

**“person”** shall include incorporated, unincorporated and natural persons;

**“problem institution”** means any institution that places the interest of its depositors or the banking sector at risk;

**“property”** means any movable or immovable property and includes—

- (a) any right, interest, title, claim, power or privilege, whether present or future, or whether vested or contingent, in relation to any property, or which is otherwise of value;
- (b) any conveyance executed for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of property where the person executing the conveyance is the proprietor or possessor, or wherein he is entitled to a contingent right, either for the whole or part of the interest;
- (c) any security, including any stock, share, debenture, bonds, loan stocks, transferable subscription rights or warrants;
- (d) any negotiable instrument, including any bank note, bearer note, treasury bill, dividend warrant, bill of exchange, promissory note, cheque and negotiable certificate of deposit;



- (e) any mortgage or charge, whether legal or equitable, guarantee, lien or pledge, whether actual or constructive, letter of hypothecation or trust receipt, indemnity, undertaking or other means of securing payment or discharge of a debt or liability, whether present or future, or whether vested or contingent; and
- (f) any other tangible or intangible property;

**“securities”** has the meaning assigned to it by section 2 of the Capital Markets Act (Cap. 485A);

**“security”** includes a mortgage or charge, whether legal or equitable, debenture, bill of exchange, promissory note, guarantee, lien or pledge, whether actual or constructive, letter of hypothecation, indemnity, undertaking and other means of securing payment or discharge of debt or liability, whether present or future, or whether vested or contingent;

**“share”** means share in the share capital of a company and includes stock except where a distinction between stock and shares is expressed or implied;

**“subsidiary”** has the same meaning as defined under section 5 of the Companies Act; and

**“systemic risk”** means the possibility of a failure of one or more institutions which may cause severe disruptions in the financial system;

**“trust accounts”** includes monies held on account for the purpose of a trust.

(2) Despite subsection (1), until after the first election under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

[Act No. 39 of 2013, s. 2, Act No. 41 of 2013, Sch.]

### 3. Act to prevail

Where there is any conflict or inconsistency between this Act and the provisions of any other Act in matters relating to the purpose of this Act, this Act shall prevail.

## PART II – THE KENYA DEPOSIT INSURANCE CORPORATION

### 4. Establishment of the Corporation

(1) There is established a corporation to be known as the Kenya Deposit Insurance Corporation.

(2) The Corporation shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging, leasing or disposing of moveable or immovable property;
- (c) borrowing money; and
- (d) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

(3) The headquarters of the Corporation shall be in Nairobi.

**5. Objects and functions of the Corporation**

(1) The object and purpose for which the Corporation is established is to provide a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind-up any institution in respect of which the Corporation is appointed receiver or liquidator in accordance with this Act.

(2) Without prejudice to the generality of subsection (1), the Corporation shall—

- (a) levy contributions for the Fund from institutions in accordance with this Act;
- (b) hold, manage and apply the Fund in accordance with the provisions of this Act and administer the deposit insurance scheme set up under this Act;
- (c) provide incentives for sound risk management and generally promote the stability of the financial system; and
- (d) perform such other functions as may be conferred on it by this Act or any other written law.

**6. Powers of the Corporation**

The Corporation shall have all such powers as are necessary or expedient for the furtherance of its objects, the performance of its functions or the discharge of its duties and in particular, the Corporation shall have power to—

- (a) subject to the provisions of this Act, make investments and enter into any transactions necessary or desirable for the financial management of the Fund;
- (b) for the purpose of reducing or averting a risk to an institution or the financial system or a threatened loss to the Corporation—
  - (i) acquire assets of an institution under liquidation;
  - (ii) make loans or advances with security or guarantee any loan or advance provided to an institution;
  - (iii) acquire, by way of security or otherwise, capital instruments of an institution and hold and dispose off such capital instruments;

Provided that the powers of the Corporation under this paragraph shall be exercised only to avert systemic risk and with the approval of the Cabinet Secretary;

- (c) settle or compromise any claim by or against the Corporation;
- (d) guarantee, indemnify, or become liable for the payment of monies or the performance of any obligations;
- (e) mortgage, charge or create a lien to secure or guarantee the performance of its obligations;
- (f) enter into any agreement with any person in furtherance of its objects or in relation to the performance of its functions;
- (g) enter into strategic agreements with the Central Bank of Kenya or any other financial sector regulators or deposit insurers within or outside Kenya;
- (h) formulate such rules and guidelines as may be required for the purpose of carrying out its objectives;

- (i) establish such subsidiaries as it may consider necessary for the performance of its functions; and

- (j) request any information from any monetary authority, financial regulatory authority, fiscal or tax agency, or fraud investigations agency within or outside Kenya or a credit reference bureau licensed by the Central Bank where such information is reasonably required for the proper discharge of the functions of the Corporation.

[Act No. 39 of 2013, s. 3.]

## **7. Board of Directors**

(1) The Corporation shall be administered by a Board of Directors which shall consist of—

- (a) a non-executive chairperson appointed by the President on the recommendation of the Minister from amongst the members appointed under paragraph (d):

Provided that the chairperson appointed under this paragraph shall not be from the member institutions of the Corporation;

- (b) the Permanent Secretary in the Ministry for the time being responsible for matters relating to finance or his representative;
- (bb) the Attorney-General or his representative;
- (c) the Governor of the Central Bank of Kenya or his representative;
- (d) six members, not being public officers and three of whom shall be from institutions, appointed by the Cabinet Secretary in consultation with the Corporation;
- (e) the Chief Executive officer who shall be an *ex-officio* member.

(2) The Board shall appoint its own secretary.

(3) A person shall be qualified to be appointed under subsection (1)(d) if the person holds a university degree from a university recognized in Kenya and has not less than ten years' experience in—

- (a) banking;
- (b) finance;
- (c) insurance;
- (d) commerce;
- (e) law;
- (f) accounting;
- (g) economics,

or any other related discipline.

[Act No. 39 of 2013, s. 4.]

## **8. Conduct of business and affairs of the Board**

(1) The conduct and regulation of the business and affairs of the Board shall be as provided in the Schedule.

(2) Except as provided in the Schedule, the Board may regulate its own procedure.

## **9. Remuneration of Board members**

The Board shall pay its members such remuneration, fees or allowances as it may determine in consultation with the Cabinet Secretary.

## **10. Chief Executive Officer**

(1) There shall be a Chief Executive Officer who shall be competitively recruited and appointed by the Board and whose terms and conditions of service shall be determined by the Board in the instrument of appointment or otherwise in writing from time to time.

(2) No person shall qualify for appointment under this section unless such person—

- (a) has at least a degree in the field of either banking, law, finance, accounting, economics or insurance; and
- (b) has at least ten years' experience at management level.

(3) The Chief Executive Officer shall be responsible for the day to day management of the affairs and staff of the Corporation.

(4) The Chief Executive officer shall hold office for a term of three years but shall be eligible for re-appointment for one further term.

#### **11. Staff of the Corporation**

The Board may appoint such officers and other staff as are necessary for the proper discharge of its functions under this Act, upon such terms and conditions of service as it may determine.

#### **12. Delegation by the Board**

(1) The Board may, by resolution either generally or in any particular case, delegate to any committee or to any member, officer, employee or agent of the Corporation, the exercise of any of the powers or the performance of any of the functions or duties of the Board under this Act or under any other written law.

(2) The Corporation may, by instrument under its common seal, appoint a person, whether in Kenya or in a place outside Kenya, to be its attorney and the person so appointed may, subject to the terms stipulated in the instrument, do any act or execute any power or function which he is authorized by the instrument to do or execute.

(3) The Corporation may, in or outside Kenya, appoint any agent as it considers necessary or expedient, to perform any act on behalf of the Corporation.

#### **13. Protection from personal liability**

(1) No act or omission by any member of the Board or by any officer, employee, agent or servant of the Corporation shall, if the act or omission was done *bona fide* for the purposes of executing a function, power or duty under the Act render such member, officer, employee, agent or servant personally liable to any action, claim or demand whatsoever.

(2) The provisions of subsection (1) shall not relieve the Corporation of the liability to pay compensation to any person for any injury to him, his property or to any of his interests caused by the exercise of any power conferred by this Act or by failure, whether wholly or partially, of any works.

#### **14. Common seal**

(1) The common seal of the Corporation shall be kept in such custody as the Board may direct and shall not be used except on the order of the Board.

(2) The affixing of the common seal of the Corporation shall be authenticated by the signature of the chairperson and the Chief Executive Officer and any document not required by law to be made under seal and all decisions of the Board may be authenticated by the signatures of both the chairperson and the Chief Executive Officer.

(3) Notwithstanding the provisions of subsection (2), the Board shall, in the absence of either the chairperson or the Chief Executive Officer in a particular matter, nominate one member to authenticate the seal on behalf of either the chairperson or the Chief Executive Officer.

(4) The common seal of the Corporation when affixed to a document and duly authenticated shall be judicially and officially noticed and unless and until the contrary is proved, any necessary order or authorization by the Board under this section shall be presumed to have been duly given.

**15. Confidentiality**

(1) No director, officer, employee or agent of the Corporation or any person who for any reason, has access to any record, document, material or information relating to the business and affairs of the Corporation, an institution or a customer of an institution which he has acquired in the performance of his duties or the exercise of his functions, shall divulge, publish, or otherwise disclose to any person, such document, material or information unless the disclosure is required—

- (a) under any law;
- (b) for the performance of his duties or the exercise of his functions under this Act; or
- (c) when lawfully required to do so by a court of law.

(2) This section shall not apply to any document, material or information which at the time of the disclosure is, or has already been made, lawfully available to the public from any source.

(3) No person who has any document, material or information which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner whatsoever disclose the same to any other person.

(4) Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

**PART III – FINANCIAL PROVISIONS****16. Funds of the Corporation**

(1) The funds of the Corporation shall comprise of—

- (a) *deleted by Act No. 39 of 2013, s. 5;*
- (b) all monies from any other source provided for or donated or lent to the Corporation including contributions, gifts or grants from or by way of testamentary bequest by any person;
- (c) monies earned or arising from any investment of the Fund or the Corporation; and
- (d) such fees, monies or assets as may accrue to or vest in the Corporation in the course of the exercise of its powers or the performance of its functions under this Act or under any written law.

(2) Parliament may, in exigent circumstances, appropriate such funds as may be required by the Corporation for purposes of this Part.

(3) The receipts, earnings or accruals of the Fund and its balances at the close of each financial year shall not be paid into the Consolidated Fund, but shall be retained for the purposes of the Fund.

(4) If at any time the amount available in the Corporation is insufficient to meet the requirements of the Corporation, the Corporation shall transfer from the Fund, on such terms and for such period as may be determined by the Board, such amount as may be sufficient to meet the requirements of the Corporation.

[Act No. 39 of 2013, s. 5.]

**17. Financial year**

The financial year of the Corporation shall be the period of twelve months ending on the thirtieth June in each year.

**18. Annual estimates**

(1) At least three months before the commencement of each financial year, the Board shall cause to be prepared estimates of the revenue and expenditure of the Corporation for that year.

(2) The annual estimates shall make provision for all estimated expenditure of the Corporation for the financial year and in particular, the estimates shall provide for—

- (a) the payment of the salaries, allowances and other charges in respect of members and staff of the Corporation;
- (b) the payment of pensions, gratuities and other charges in respect of staff of the Corporation;
- (c) the proper maintenance of the buildings and grounds of the Corporation;
- (d) the maintenance, repair and replacement of the equipment and other property of the Corporation; and
- (e) the creation of such reserve funds to meet future or contingent liabilities in respect of retirement benefits, insurance or replacement of buildings or equipment, or in respect of such other matter as the Corporation may deem appropriate.

(3) The annual estimates of the Corporation shall be approved by the Board before the commencement of the financial year to which they relate and shall be submitted to the Minister for approval and after the Minister's approval, the Board shall not increase the annual estimates without the consent of the Minister.

**19. Accounts and audit**

(1) The Board shall cause to be kept all proper books and records of accounts of the income, expenditure and assets of the Corporation.

(2) Within a period of three months from the end of each financial year, the Board shall submit to the Auditor-General or to an auditor appointed under this section, the accounts of the Corporation together with—

- (a) a statement of the income and expenditure of the Corporation during that year; and
- (b) a balance sheet of the Corporation on the last day of that year.

(3) The accounts of the Corporation shall be audited and reported upon in accordance with the Public Audit Act, 2003 (No. 12 of 2003).

**PART IV – DEPOSIT INSURANCE FUND****20. Establishment of the Fund**

(1) There is hereby established a fund to be known as the Deposit Insurance Fund.

(2) The Fund shall vest in the Corporation and shall be administered by the Board.

(3) The Fund shall consist of—

- (a) monies, which at the commencement of this Act, exist in the Deposit Protection Fund established under the Banking Act;



- (b) monies contributed to the Fund by institutions under section 27 and any interest or penalties levied in respect of such contributions;
- (c) monies borrowed from the Central Bank of Kenya under section 21;
- (d) monies that may accrue to the Fund under subsection (4);
- (e) monies transferred from the funds of the Corporation in accordance with subsection (5);
- (f) income that may accrue to the Fund from the investments made under section 22;
- (g) monies received as subventions, grants or donations to the Fund; and
- (h) all other monies or assets which may in any manner become lawfully payable to, received by or vested in the Corporation relating to any matter incidental to its powers, duties and functions under this Act.

(4) Parliament may, in exigent circumstances, appropriate such funds as may be required by the Fund for purposes of this Part.

(5) *Deleted by Act No. 39 of 2013, s. 6.*

[Act No. 39 of 2013, s. 6.]

#### **20A. Board may fix size of Fund**

The Board may, from time to time, fix the size of the Fund sufficient to protect the interests of depositors to be made up by contributions under section 20(3).

[Act No. 39 of 2013, s. 7.]

#### **21. Borrowing by the Corporation**

(1) The Board may authorize the Corporation to borrow from the Central Bank or any other person such sum or sums of money as it may require for purposes of the Fund.

(2) The total amount outstanding at any one time on account of any advances made under subsection (1) shall not exceed twenty-five percent of the Fund.

(3) The terms and conditions of any advance under this section shall be determined by the lender and the Corporation.

[Act No. 39 of 2013, s. 8.]

#### **22. Fund investment**

The monies constituting the Fund may be invested by the Corporation in—

- (a) treasury bills, treasury bonds or other securities issued by the Government; or
- (b) any other securities and in such currencies as may be prescribed in a *Gazette* by the Cabinet Secretary from time to time.

[Act No. 39 of 2013, s. 9.]

#### **23. Application of the Fund**

The Fund shall be used to meet—

- (a) payments in respect of insured deposits;
- (b) liabilities in respect of borrowings made under section 21; and
- (c) disbursements for the whole or any part of the liability on account of other expenses incurred or to be incurred by the Corporation.

**24. Membership of the Fund**

(1) Any institution licensed by the Central Bank shall become a member of the Fund from the date it is granted the licence.

(2) Notwithstanding subsection (1), every institution which at the commencement of this Act is licensed by the Central Bank shall be deemed to be a member of the Fund.

(3) The Corporation shall cause a list of all institutions whose deposits are insured under this Act to be published in the *Gazette* annually.

**25. Cessation of membership**

(1) An institution shall automatically cease being a member of the Fund upon the—

- (a) surrender, cancellation or revocation of an institution's licence by the Central Bank; or
- (b) issue of a winding-up order against an institution; or
- (c) transfer of all deposit liabilities of an institution in Kenya to any other institution; or
- (d) appointment of a liquidator in pursuance of a resolution for an institution's voluntary winding-up; or
- (e) entry by an institution into any scheme of arrangement or compromise with its creditors or a reconstruction sanctioned by a competent authority which does not permit the acceptance of fresh deposits; or
- (f) merger or amalgamation of an institution with any other institution; or
- (g) determination by the Corporation that the affairs of an institution are being conducted in a manner detrimental to its own interests or to the interest of its depositors; or
- (h) termination under section 41 of this Act.

(2) The Corporation shall, as soon as reasonably practicable after termination of membership of an institution under subsection (1), cause the name of that institution to be published in the *Gazette* and at least two daily newspapers of nationwide circulation.

**26. Effect of cessation**

(1) Where an institution ceases to be a member of the Fund under section 25, the institution shall—

- (a) not assume, hold out or in any other way give the impression that the institution is a member of the Fund;
- (b) surrender its licence and the Corporation shall notify the institution's depositors of the termination of its membership in the prescribed manner;
- (c) not be relieved from its obligations or liabilities to the Corporation that have accrued before the cessation of its membership; and

- (d) indemnify the Corporation in the event of any payment made by the Corporation to depositors, in respect of such deposits as shall have been transferred or acquired by another institution.

(2) Where an institution is obligated to repay to a person any monies that are received or held by the institution, such monies shall be deemed not to constitute part of a deposit for the purposes of deposits insured with the Corporation if the date on which the person acquires his interest in the monies is a date subsequent to the date on which the institution ceases to be a member of the Fund.

(3) Any institution which contravenes the provisions of subsection (1) commits an offence and shall be liable to a fine not exceeding five hundred thousand shillings and to a daily penalty not exceeding ten thousand shillings for every day the contravention continues.

## **27. Contributions by institutions**

(1) An institution licensed by the Central Bank shall contribute to the Fund such annual amount, and at such times, as the Corporation may determine:

Provided the Corporation shall consider the risk profile of an institution in the determination of the contribution.

(2) The Corporation shall serve on every institution a notice specifying the amount and the period, which shall not be later than twenty-one days after the date of service of the notice, within which the amount shall be paid into the Fund.

(3) The amount of contribution to the Fund under this section shall not be less than three hundred thousand shillings nor exceed 0.4 per cent of the average of the institution's total deposit liabilities during the period of twelve months prior to the date of the notice served under subsection (2):

Provided that for institutions that have been members for less than twelve months, the amount of deposits shall be prorated for the number of months that the institutions have been in operation.

(4) Where it appears to the Corporation that the affairs of an institution are being conducted in a manner detrimental to its own interests or to the interests of its depositors, the Corporation may increase the contributions of that institution beyond the prevailing rate prescribed by the Cabinet Secretary.

(4A) In the event the Fund does not have sufficient monies to meet the tasks specified in paragraph (a) of section 23 of this Act, the Corporation shall appropriate from future contributions to set off unpaid insured deposits, and may resort to other sources of funding allowed under the Act.

(5) An institution which, for any reason, fails to pay its contribution to the Fund within the period specified in a notice issued under subsection (2) shall be liable to pay to the Corporation a penalty interest charge not exceeding one-half per cent of the unpaid amount for every day outside the notice period on which the amount remains unpaid.

(6) The Corporation shall not accept any contribution by an institution if reduced or otherwise adjusted on the basis of any claim by the institution against the Corporation.

[Act No. 39 of 2013, s. 10.]

## **28. Amount payable as protected deposit**

(1) The Corporation shall insure each deposit placed with an institution, provided that the maximum amount payable to a customer in respect of the

aggregate credit balance of any deposit accounts maintained by the customer with the institution shall not exceed one hundred thousand shillings or such higher amount as the Corporation may from time to time determine.

(2) Where a depositor owns more than one deposit account with an institution, the aggregate of those deposits shall be insured in respect of the consolidated amount to the prevailing maximum amount fixed under subsection (1).

**29. Trustee and joint accounts**

(1) Where an institution is under a lawful obligation to repay monies to a depositor who is acting as a trustee for another or as joint owner with another, and the trusteeship or joint ownership is disclosed on the records of the institution—

- (a) the deposit of the depositor as trustee or as a joint owner, shall be deemed to be a deposit separate from any deposit of that depositor acting on his own behalf or acting in another trust or joint capacity with the institution;
- (b) the deposit held in trust by the trustee for each beneficiary, shall be deemed to be a separate deposit where the trustee is acting for two or more beneficiaries; and
- (c) the deposit held in trust by a trustee for a beneficiary in an institution shall be deemed to be a deposit separate from a deposit of that beneficiary with the institution on his own behalf and shall also be deemed to be separate from any deposit held in trust by another trustee for the beneficiary in the institution.

(2) For the purposes of subsection (1)(a) and (b)—

- (a) the institution shall indicate on its records—
  - (i) for a trust account, that the account is held by the trustee for the named beneficiaries; or
  - (ii) for a joint account, the names of the individual joint owners;
- (b) the trustee shall—
  - (i) maintain detailed records as may be prescribed by the Corporation on the trust accounts;
  - (ii) submit to the institution such records as may be required by the institution from time to time under this Act; and
  - (iii) file a statutory declaration certifying the accuracy of the records submitted under sub-paragraph (b)(ii) when required by the institution;
- (c) the trustee in maintaining and submitting any record on the trust accounts required under subsection (b)(ii) shall ensure that the information given shall be true, correct and complete and shall not contain false or deceptive information and the institution shall rely on such records for the purposes of subsection (b)(iii) and the trustee shall indemnify the institution in the event of any legal proceedings relating to such records.

(3) Notwithstanding anything in subsection (1)(a), the Corporation shall not separately insure the deposits held in trust for any beneficiary if, in the opinion of the Corporation, the trust exists primarily for the purpose of obtaining or increasing deposit insurance.

(4) For the purpose of subsection (1)(a), any deposit held in trust by the same trustee for the same beneficiary shall be aggregated and be deemed to be one deposit.

(5) The disclosure made by the trustee under subsection (1)(c), where a depositor—

- (a) operates a business as a sole proprietor or a partner in a firm carrying on business as a partnership; or
- (b) carries on any professional practice, that has been disclosed as such on the records of the institution, a deposit held or placed by such business or professional practice,

shall be deemed to be separate from the deposits of the depositor on his own behalf or as trustee or joint owner.

### 30. Deposits with amalgamating institutions

(1) Where a person has deposits in two or more institutions that amalgamate and continue in operation as one institution a deposit of that person with an amalgamating institution on the day on which the amalgamated institution is formed, less any withdrawal from the deposit, shall be deemed to be and continue to be separately insured until the amalgamating institution becomes part of the amalgamated institution.

(2) Where an institution proposes to acquire the deposits of another institution or amalgamating institution, deposits of the institution or amalgamating institution, less any withdrawal continue to be insured separately until the date of acquisition.

(3) Where an institution assumes the deposits of another institution, the deposits shall be deemed to be placed with the institution that assumes them as of the day on which they are assumed.

(4) An institution shall maintain such records as may be prescribed for the purposes of this section.

(5) For the purposes of this section—

“**amalgamated institution**” means the institution formed as a result of the merger of two or more institutions; and

“**amalgamating institutions**” means any of the institutions that merges with one or more other institutions to form one institution.

### 31. Excluded liabilities

(1) Where monies are received by an institution for which the institution is under a lawful obligation to issue an instrument evidencing the receipt, other than a bank draft, certified cheque, traveller's cheque, prepaid letter of credit or money order, the monies received shall not constitute a liability unless the instrument and records of the receiving institution specify the person entitled, at the date of issue of the instrument, to the repayment of the monies.

(2) The person referred to in subsection (1) shall be deemed to be the creditor in respect of the monies unless particulars of a transfer of the instrument are entered on the records of the institution, in which case the most recent transferee shown on the records shall be deemed to be the creditor.

(3) The entry of a transfer on the records of an institution is ineffective for the purpose of subsection (2), if the entry is made subsequent to the cessation of the membership of the institution.

**32. Extent of cover**

The amount being the aggregate credit balance of any accounts maintained by the customer to an institution, less any liability of the customer to the institution, shall be an insured deposit to such extent as may be prescribed.

**33. Lodging and payment of claims**

(1) The Corporation shall make payment in respect of any insured deposit with the Corporation where it is appointed as liquidator under this Act.

(2) All payments made by the Corporation in respect of insured deposits and all associated costs shall be made from the Fund.

(3) A depositor of an institution shall, upon the institution being placed in liquidation, lodge a claim with the Corporation, in such form as may be prescribed, for payment to the depositor out of the Fund, of any insured deposit.

(4) The Corporation may, before paying any claim lodged under subsection (3), require the claimant to furnish it with such documentary proof as may be proper to show that he is entitled to payment out of the Fund.

(5) The Corporation may decline to make any payment under this section to a person who, in its opinion, had any responsibility for or may have profited directly or indirectly from the circumstances leading up to the institution being placed in liquidation.

(6) Where the Corporation is obliged to commence payments under subsection (1) in respect of any insured deposits, the Corporation shall, unless there are extraneous circumstances hindering the Corporation, within thirty days after being appointed liquidator make payment to the depositor based on the records of the institution and the opinion of the Corporation as regards entitlement of the amount claimed.

(7) The Corporation shall offset and withhold payment of such portion of the insured deposit of any depositor in an institution against any loans or debts due and owing by that depositor to the institution or against any claims for injuries or losses through negligence or other wrongdoing against any depositor who may be liable to the institution or the Corporation as a director, shareholder, officer, employee, agent or other person.

(8) The Corporation may make such advance, interim or emergency partial payments under this Part as may be prescribed.

[Act No. 39 of 2013, s. 11.]

**34. Discharge of liability**

Upon payment of insured deposits under this Part, the Corporation shall be discharged from all liabilities to the extent of the amount of the payment made.

**35. Subrogation**

(1) Where the Corporation makes a payment under this Part in respect of any deposit, the Corporation shall be subrogated, to the extent of the amount of the payment made, to all the rights and interests of the depositor and may maintain an action in respect of those rights and interests in the name of the depositor or in the name of the Corporation.

(2) Upon payment of an insured deposit, the Corporation shall be entitled to receive from the institution an amount equal to the insolvency payment paid by

the Corporation on account of its subrogation to the claims of any customer or depositor.



(3) The Corporation shall be entitled to payment of its subrogated claims under subsection (2) prior to further payment to any other depositor or creditor of the institution.

[Act No. 39 of 2013, s. 12.]

### **36. Assignment**

The Corporation may, where it deems it necessary, withhold payment to a third party in respect of any deposit with an institution until it has received an assignment in writing of all the rights and interests of the depositor in relation to the deposit.

### **37. Limitation of claims**

(1) Notwithstanding the provisions of any other written law—

- (a) a claim for payment of an insured deposit by a creditor of an institution shall not be brought after the expiry of two years from the date of publication of commencement of such payment by the Corporation; and
- (b) a claim for payment of a dividend by a creditor of an institution shall not be brought after the expiry of one year from the date of publication of commencement of such payment by the Corporation.

(2) This section shall not apply to a person who has, for reasons beyond his control and to the satisfaction of the Corporation, been unable to make his claim within the period specified under subsection (1).

(3) No action shall be taken against the Corporation in respect of the obligation of the Corporation to make payment in relation to an insured deposit unless the action is commenced within six years after the date of appointment of the Corporation as liquidator of the institution in which the deposit is held.

## **PART V – EXAMINATION OF INSTITUTIONS**

### **38. Inspection by Central Bank**

The Corporation may, at any time request the Central Bank to carry out an inspection of an institution as provided for in the Banking Act (Cap. 488) and to avail to the Corporation the information obtained from such inspection.

### **39. Special examination by the Corporation**

(1) Notwithstanding section 38, the Corporation shall have power to make any examination of any institution whenever the Corporation deems it fit that such examination is necessary to determine the condition of such institution for purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the scope of examination may include—

- (a) whether proper and adequate deposit records are maintained by an institution;
- (b) whether reports made by an institution are correct;
- (c) compliance with terms and conditions or any other requirements of membership; and
- (d) such other areas as may be deemed necessary.

(3) For purpose of this section, the officers of the Corporation or any other person appointed by the Corporation shall have powers to require an officer, auditor, agent or any other person of the institution to furnish such document, material, information or explanations as the Corporation may require.

(4) Upon an inspection under this section—

- (a) the books, accounts, and other documents required to be produced shall not, in the course of the inspection, be removed from the premises of the institution or other premises at which they are produced;
- (b) the person making the inspection may make copies of any books, accounts and other documents required for the purposes of his report.

(5) Upon completion of a special examination under this section, the Corporation shall make a report of the examination to the Central Bank.

(6) The Corporation may recover any cost of special examinations from the institution examined as a debt due and payable to the Corporation.

#### **40. Access to information**

(1) The Corporation or any person authorized in that behalf by the Corporation may, by notice in writing, require any person to furnish to the Corporation or to the authorized person, within such period as specified in the notice, all such returns or information as directed in such notice.

(2) The Corporation or any officer of the Corporation, shall not disclose to any person or use any return or information acquired under subsection (1) except for the purpose of achieving the objectives of the Corporation.

(3) The Corporation shall have access to reports of examination and any other documents relating to an institution prepared by the Central Bank and to all underlying documents and revisions of reports of examination.

(4) The Central Bank shall promptly advise the Corporation of any material changes in the deposit liabilities or any condition of an institution that may cause significant risk to the Corporation.

(5) The Corporation may from time to time require any institution to file such additional reports as the Corporation may deem necessary for purposes of this Act.

(6) The Central Bank shall provide to the Corporation—

- (a) a rating or an assessment of the safety and soundness of the institution, including its financial condition; or
- (b) any information that the Central Bank considers relevant to any matter referred to in paragraph (a).

(7) All information made available to or obtained by the Corporation in the course of any examination or exchange of information or otherwise shall be treated as confidential and used solely for the purposes of this Act and in meeting the Corporation's obligations as deposit insurer, receiver or liquidator.

(8) The Corporation shall, where necessary, submit to the Central Bank all information obtained by or produced to the Corporation, whether in the course of

conducting an examination, inspection or otherwise, regarding the business and affairs of the institution or any of its subsidiaries or associates or of any person dealing with the institution or any of its subsidiaries or associates, that relates to the safety and soundness or the operations, of the institution.

#### **41. Enforcement by the Corporation**

(1) The Corporation may recommend to the Central Bank, with reasons in writing based on information obtained from an examination of an institution, that the Central Bank takes enforcement action against an institution.

(2) If the Central Bank does not take enforcement action within a period of thirty days from the date of receipt of the recommendation made by the Corporation under subsection (1), the Corporation shall serve notice on the institution and the Central Bank of its intention to terminate membership of the institution.

(3) The Corporation shall within thirty days of issuing the notice under subsection (2), terminate the membership of that institution.

#### **42. Prompt corrective action**

The Corporation shall in consultation with the Central Bank, take prompt corrective action in accordance with this Act or any other law to resolve any problems in an institution which places the interest of its depositors or the banking sector at risk.

### **PART VI – RECEIVERSHIP, LIQUIDATION AND WINDING-UP**

#### **43. Appointment of Corporation as receiver**

(1) The Central Bank shall, whenever the circumstances require, appoint the Corporation to be the sole and exclusive receiver of any institution.

(2) The Central Bank shall appoint the Corporation as sole receiver of any institution if the Central Bank determines that—

- (a) the institution's assets are less than the institution's obligations to its creditors;
- (b) an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors, or other creditors;
- (c) there is a wilful violation of a regulatory or supervisory order;
- (d) there is a concealment of the institution's books, papers, records, or assets, or any refusal to submit the institution's books, papers, records, or affairs for inspection to any examiner or to any lawful agent of the Central Bank or the Corporation;
- (e) the institution is likely to fail to meet any financial obligation or meet its depositors' demands in the normal course of business;
- (f) the institution has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the institution to become adequately capitalized without assistance;
- (g) there is violation of any law or regulation, or an unsafe or unsound practice or condition that is likely to cause insolvency or substantial

dissipation of assets or earnings, weakening the institution's condition or otherwise seriously prejudice the interests of the institution's depositors or the Fund;

- (h) the institution is undercapitalized or significantly undercapitalized and fails to comply with requirements imposed by the Central Bank or the Corporation under section 45 or otherwise has substantially insufficient capital;
- (i) the institution has engaged in malpractices or activities contrary to the provisions of any Kenyan law or other applicable law.

#### **44. Notification of non-viability**

(1) The Central Bank shall notify the Corporation in writing where an institution has ceased, or, is likely to cease, to be viable.

(2) Upon receipt of a notification under subsection (1), the Corporation may—

(a) require the institution—

- (i) to take any action within such time as the Corporation may consider necessary or expedient;
- (ii) to stop receiving, or paying of deposits or from carrying on any of its businesses or part thereof; or
- (iii) to restructure the whole or part of its business, as may be specified by the Corporation;

(b) assume control as a receiver of the whole of the assets, liabilities, businesses and affairs of the institution; and

- (i) carry on the whole of its businesses and manage the assets, liabilities and affairs; or
- (ii) assume control of such part of its assets, liabilities, businesses and affairs including disposal of assets, and carry on such part of its business and affairs; or
- (iii) appoint any person to carry on the whole of the businesses and manage the assets, liabilities and affairs of the institution on its behalf.

(3) The terms and conditions of the person appointed under subsection (2)(b) (iii), shall—

- (a) subject to the direction under which the appointment is made, be determined by the Corporation;
- (b) be binding on the institution concerned which shall pay the costs and expenses of the Corporation or the remuneration of the person so appointed, as the case may be, out of the funds and assets of the institution.

#### **45. Submission by institutions**

(1) Where control of an institution has been assumed under section 44(2)(b)—

(a) the institution and its officers shall—

- (i) immediately submit its assets, liabilities, businesses and affairs to such control; and

- (ii) provide the Corporation and, if the control is assumed by the appointed person, to such appointed person, all such facilities as may be required to carry on the businesses and to manage the assets, liabilities and affairs, including disposal of assets, of the institution;
- (b) the Corporation or the appointed person, as the case may be, shall—
  - (i) remain in control of the assets, liabilities, businesses and affairs of the institution concerned; and
  - (ii) carry on the businesses and manage the assets, liabilities and affairs of that institution in the name and on behalf of that institution including disposal of assets until such appointment is revoked by the Corporation.

(2) Throughout the period of control of an institution, there shall be vested in the Corporation or in the appointed person, as the case may be, all the powers of the institution, and of its directors, under the constituent documents of that institution, or exercisable by the institution or its directors under any law, regardless of whether such powers are exercisable by resolution, special resolution or in any other manner.

(3) During the period of control of an institution—

- (a) no director of the institution shall, either directly or indirectly, engage in any activity in relation to the institution, except as may be required or authorized by the Corporation or the appointed person, as the case may be; and
- (b) no remuneration of whatever nature shall accrue or be payable to any director of the institution, except such as may be approved in writing by the Corporation or the appointed person as the case may be, in relation to any activity required or authorized as aforesaid by the Corporation or the appointed person, as the case may be.

(4) An exercise of the power under section 44(2)(b) shall not confer on, or vest in, the Corporation or the appointed person, as the case may be, any title to, or any beneficial interest in, any asset of the institution.

(5) Where the Corporation or the appointed person has assumed control of an institution, the Corporation or the appointed person shall—

- (a) be deemed to be acting as the agent of the institution in carrying on the businesses and managing the assets, liabilities and affairs of the institution or in carrying out any transaction relating to the institution or its assets, businesses and affairs, including disposal of assets; and
- (b) not, by reason of having assumed control of the institution or any action taken by it, be held to have assumed or incurred any obligation or liability of the institution for its own account.

(6) Any person who contravenes the provision of subsection (1) or (3) commits an offence and is liable to a fine not exceeding five hundred thousand shillings or to imprisonment not exceeding three years or to both and shall, in addition be liable to an additional fine not exceeding ten thousand shillings for every day the contravention continues.

**46. Actions against the Corporation**

(1) Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b)—

- (a) no injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control;
- (b) no creditor has any right of set-off against the institution, which for greater certainty, does not include the consolidation of accounts maintained in the normal course for the purpose of providing clearing and settlement services or other services referred to in section 48; and
- (c) no person may terminate or amend any agreement with the institution or claim an accelerated payment under any such agreement with the institution by reason only of—
  - (i) the insolvency of the institution;
  - (ii) a default, before the assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, takes effect, by the institution in the performance of its obligations under the agreement; or
  - (iii) assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, as from the date of the assumption of control of the institution.

(2) Subsection (1) shall not prevent any person who sustains losses from any action of the Corporation or the appointed person from instituting an action for damages for the losses suffered by such person.

(3) Notwithstanding any action instituted pursuant to subsection (2), the Corporation or the appointed person shall continue to exercise any or all of its powers under this Act.

**47. Prior agreement overridden**

Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under section 44(2)(b), any stipulation in any agreement entered into by the institution prior to the assumption of control shall be of no force or effect if it—

- (a) has the effect of providing for, or permitting, anything that, in substance, is contrary to section 44; or
- (b) provides, in substance, that on the insolvency of an institution or the default by an institution in the performance of an obligation, or the assumption of control, the institution ceases to have the rights to use or deal with the assets that the institution would otherwise have.

**48. Further supplies and advances**

Nothing in sections 45 and 46 shall be construed as—

- (a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased or licensed property or other valuable consideration provided after the assumption of control under section 44(2)(b);

- (b) requiring the advance of money or credit to an institution after the assumption of control;
- (c) requiring the provision to an institution, after the assumption of control under section 44(2)(b) or of any of the following services where to do so would be likely, as the case may be, in the reasonable opinion of the person providing the service, result in that person advancing money or credit to an institution after such assumption of control or appointment or give rise, after such assumption of control or appointment, to a claim of that person against an institution, namely—
  - (i) cash management services;
  - (ii) services related to the redemption of debt instruments;
  - (iii) services related to the issuance of letters of credit or guarantees;
  - (iv) cheque certification services;
  - (v) currency supply services;
  - (vi) funds transfer services and remittance order services;
  - (vii) securities delivery and settlement services;
  - (viii) charge card, credit card, debit card and payment card services;
  - (ix) automated banking and teller machine services;
  - (x) electronic funds transfer at point of sale services;
  - (xi) consignment cheque services;
  - (xii) other services similar to those referred to in subparagraphs (i) to (xi);
  - (xiii) a guarantee of liabilities in respect of any of the services referred to in subparagraphs (i) to (xiii);
  - (xiv) any service of such kind as may be prescribed.

#### **49. Financial agreements or transactions**

Nothing in section 48 shall prevent the termination of any of the following agreements or transactions in accordance with their terms or the setting-off of an amount payable of such agreements or transactions including—

- (a) a currency or interest rate swap agreement;
- (b) a spot, future, forward or other foreign exchange agreement;
- (c) a commodity swap;
- (d) a repurchase agreement;
- (e) any derivative, combination or option in respect of, or agreement similar to, an agreement or transaction referred to in paragraphs (a) to (d);
- (f) any master agreement in respect of any agreement or transaction referred to in paragraphs (a) to (d);
- (g) a guarantee of the liabilities under an agreement or transaction referred to in paragraphs (a) to (d); or
- (h) any agreement or transaction of such kind as may be prescribed.

**50. Receivership powers**

(1) The Corporation or the person appointed by the Corporation as receiver, in effecting any transaction under this Part shall not be required to—

- (a) notify or obtain the approval of shareholders or creditors of the institution in a general meeting or otherwise notwithstanding any rule of law, contract or anything in any law including the Companies Act or anything in the constituent documents of the institution; and
- (b) make a take-over offer or be required to acquire the shares of the other shareholders of the institution or its borrowers notwithstanding any rule of law, contract or anything in any law.

(2) For the purposes of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall—

- (a) be applied equally and without discrimination to all classes of creditors:

Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution;

- (b) limit the maximum rate of interest which shall accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate determined by the Central Bank under the provisions of section 39 of the Central Bank of Kenya Act or such other rate as may be prescribed by the Central Bank for the purposes of this section:

Provided that the provisions of this paragraph shall not be construed so to impose an obligation on the institution to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case;

- (c) suspend the running of time for the purposes of any law of limitation in respect of any claim by any depositor or creditor of the institution; or
- (d) cease to apply upon the termination of the Corporation's appointment whereupon the rights and obligations of the institution, its depositors and creditors shall, save to the extent provided in paragraphs (b) and (c), be the same as if there had been no declaration under the provisions of this subsection.

(3) The Corporation shall, to the extent not inconsistent with its powers and duties under this Act, have any other power conferred on or any duty related to the exercise of that power imposed on a receiver for an institution under any other written law.

(4) Where the Corporation has assumed control of an institution under section 44(2)(b), the Corporation shall have the power—

- (a) to enter into any premises of an institution and take possession and control of the assets and require any person in the premises to account for and deliver up to the Corporation or the appointed person possession and control of the assets;



- (b) subject to paragraph (c), to sell or otherwise dispose of the assets and business undertaking of the institution by private treaty or public sale or in such other manner and on such terms and conditions as the Corporation or the appointed person, deems it appropriate;
- (c) to sell or otherwise dispose of any asset that is subject to an agreement creating a security interest to any person who agrees to assume the obligation secured by the security interest;
- (d) to arrange for the assumption of all or any part of the liabilities of an institution by a person;
- (e) to carry on the business of an institution to the extent that the Corporation or the appointed person, deems it necessary or beneficial;
- (f) to sue for, defend, compromise and settle, in the name of an institution, any claim made by or against it;
- (g) in the name of an institution, to do all acts and execute all receipts and other documents and for that purpose, when necessary, use its common seal;
- (h) to do all such other things as may be necessary or incidental to the exercise of the rights, powers, privileges and immunities of the Corporation or the appointed person; or
- (i) to recover out of the assets of an institution all the costs, charges and expenses, including the remuneration, properly incurred by the Corporation or the appointed person in the exercise of powers under paragraph (a), in priority to all other claims.

(5) Where the Corporation, exercises one or more powers under this section, the Corporation shall not, by reason of the exercise of such powers, be held to have assumed or incurred any obligation or liability of the institution for its own account.

(6) Where the Corporation has assumed control or appointed a person to do so on its behalf under section 44(2)(b), the Corporation or the appointed person may, in addition to any of its rights and powers, carry out any liquidation comprising a transaction or a series of transactions that involves the sale or other disposal by the institution of all or part of its assets or the assumption by another person of all or part of its liabilities or both.

(7) In undertaking its functions under this Part, the Corporation may—

- (a) in circumstances that do not pose systemic risk, draw from the Fund to facilitate a bank resolution process under the lesser cost rule;
- (b) in circumstances that pose systemic risk and in order to minimize moral hazard and resolution costs while preserving banking services in case of an institution's failure adopt various resolution mechanisms as may be prescribed with the assistance of the Central Bank and the Government.

(8) The transfer of assets and liabilities of an institution by the Corporation under this Part shall be irrevocable and shall not require the consent of debtors, creditors or any security holders.

(9) In undertaking the exclusion and transfer process the Corporation shall rank liabilities as follows—

- (a) claims by the Corporation;

- (b) insured deposits;
- (c) staff wages;
- (d) uninsured deposits;
- (e) statutory obligations;
- (f) any other creditors.

(10) The Central Bank shall in circumstances that pose systemic risk provide technical assistance to restore the financial and economic condition of an institution.

[Act No. 39 of 2013, s. 13.]

#### **51. Autonomy of Corporation as receiver**

(1) Upon appointment as receiver pursuant to this Act, the Corporation shall not be subject to the direction or supervision of any other entity in the exercise of the Corporation's rights, powers, and privileges.

(2) Any party aggrieved by the exercise of any of the powers may apply to the High Court for orders as appropriate.

#### **52. Directors not liable for acquiescing in appointment of receiver**

The members of the board of directors of an institution shall not be liable to that institution's shareholders or creditors for acquiescing in or consenting in good faith to the appointment of the Corporation as receiver for the institution.

**53. Term of receivership**

(1) The appointment of the Corporation as receiver shall be for such period not exceeding twelve months, and may be extended by the appointing authority for a further period not exceeding six months, if such extension appears to the appointing authority to be justified.

(2) In the course of receivership, the Corporation may recommend to the Central Bank that the institution be liquidated in which case the Central Bank shall appoint the Corporation as the liquidator.

(3) *Deleted by Act No. 39 of 2013, s. 14.*

[Act No. 39 of 2013, s. 14.]

**54. Appointment of Corporation as liquidator**

(1) The Central Bank shall appoint the Corporation as the liquidator of an institution where—

- (a) a recommendation to liquidate has been made under this Act; or
- (b) in any other case—
  - (i) the institution is deemed to be unable to pay its debts; or
  - (ii) a winding-up order is made or a resolution for voluntary winding-up is passed against the institution; or
  - (iii) the institution is unable to pay sums due and payable to its depositors or creditors; or
  - (iv) the Central Bank determines that the value of the institution's assets is less than the amount of its liabilities; or
  - (v) if in the opinion of the Central Bank, the institution has engaged in malpractices or activities that are contrary to the provisions of any Kenyan or other applicable law.

(2) The appointment of the Corporation as the liquidator of an institution shall have the same effect as an appointment of a liquidator by the Court under the provisions of Part VI of the Companies Act.

(3) No liquidator of an institution shall be appointed under the provisions of the Companies Act if the Corporation has already been appointed as liquidator.

(4) No liquidator of an institution, other than the Corporation shall be appointed without approval of the High Court.

(5) The High Court shall not grant approval for the appointment of a liquidator under subsection (4), unless the Central Bank certifies that it does not intend to exercise its powers under this section.

**55. Powers of the Corporation as liquidator**

(1) Notwithstanding the provisions of any other written law, the Corporation shall, where it is appointed a liquidator, have power to—

- (a) carry on the business of an institution so far as may be necessary for the beneficial winding-up;

- (b) appoint professionals to assist it in the performance of its duties;
- (c) pay any classes of creditors in full;
- (d) make any compromise or arrangement with creditors;
- (e) compromise all calls and liabilities to call, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting between an institution and a contributory or other debtor or person apprehending liability to the institution and all questions in any way relating to the institution, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof;
- (f) set-off payment made to an insured depositor out of the Fund against any dividend subsequently determined as payable to such depositor;
- (g) recover interest payable to the institution on loans, overdrafts and other credit facilities outstanding as at the date of liquidation;
- (h) offset deposits and any other liabilities to customers against any loans or debts owed to the institution as at the date of liquidation;
- (j) invest surplus funds in the liquidation account which are not immediately required for the purpose of financing day to day operations in short-term placements in Government securities or any other securities as may from time to time be prescribed in the *Gazette* by the Minister;
- (k) sell or otherwise dispose of assets of the member institution;
- (l) hold, manage and dispose of all the assets of an institution remaining unsold at the time of winding-up;
- (m) assign the assets or liabilities of an institution or of its debtors to third parties for the benefit of the creditors and depositors of the institution;
- (n) appoint any person to execute or authenticate by a seal on behalf of any institution under liquidation, any documents on behalf of the institution; and
- (o) sue in the name of an institution in liquidation, without sanction of the Court or a committee of inspection.

(2) Any party aggrieved by the exercise of any of the powers specified herein may apply to the High Court for orders as appropriate.

(3) The Corporation shall upon appointment as liquidator open accounts in the Central Bank for the purposes of transacting the business of the institutions.

#### **56. Stay of proceedings**

(1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.

(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.

(3) No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.

#### **57. Residual payment**

(1) Subject to section 33, there shall be paid out of the assets of the institution in liquidation in priority to all other debts including uninsured deposits—

- (a) the following statutory debts—
  - (i) all taxes and local rates due from the institution at the relevant date and having become due and payable within twelve months next before that date not exceeding in the whole, one year's assessment;
  - (ii) all amounts due by the institution as the employer of any person under National Social Security Fund in respect of contributions payable during the period of twelve months immediately preceding the relevant date;
  - (iii) all Government rents not more than one year in arrears;
- (b) all proper costs, charges and expenses, including the remuneration of staff of the Corporation appointed to liquidate an institution;
- (c) all wages or salaries in respect of services rendered to the institution by any employee other than a director during four months next before the relevant date and all wages, whether payable for time or for piece work, or any workman or labourer in respect of services so rendered;
- (d) all amounts due in respect of any compensation or liability for compensation under the Work Injury Benefits Act (No. 13 of 2007), being amounts which have accrued before the relevant date.

(2) The debts in subsection (1) shall—

- (a) rank equally to be paid in full, unless the assets are insufficient to meet them, in which case the debts shall abate in equal proportions; and
- (b) so far as the assets of the institution available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the institution, and be paid accordingly out of any property comprised in or subject to that charge.

(3) In the event of a landlord distraining or having distrained on any goods or effects of the institution within six months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale of the goods or effects.

(4) Where any money is paid under any charge referred to in subsection (3), the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) For the purposes of this section—

- (a) any remuneration in respect of a period of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the institution during that period;
- (b) “**relevant date**” means—
  - (i) in the case of an institution ordered to be wound-up compulsorily, the date of the first appointment of an interim liquidator, or, if no such appointment was made, the date of the winding-up order, unless in either case the institution had commenced to be wound-up voluntarily before that date; and
  - (ii) in any case where subparagraph (i) does not apply, the date of the passing of the resolution for the winding-up of the institution.

[Act No. 39 of 2013, s. 15.]

### **58. Obligation to co-operate**

(1) In the exercise of its powers as a liquidator, the Corporation may, by notice in writing, require any person who is or has at any time been a director, managing director, secretary, principal officer, manager, officer or employee, agent, accountant or auditor of the institution or any person who has custody of any funds or other assets of the institution being liquidated to—

- (a) give to the liquidator all reasonable assistance in connection with the liquidation;
- (b) appear before the liquidator for examination concerning matters relevant to the liquidation;
- (c) produce any books or documents that relate to the affairs of the institution being liquidated.

(2) Any person who—

- (a) refuses or fails to comply with a requirement of the liquidator which is applicable to him to the extent to which he is able to comply with it; or
- (b) obstructs or hinders a liquidator in the exercise of the powers conferred under this Act; or
- (c) furnishes information or makes a false statement which he knows to be false or misleading in any material particular; or
- (d) when appearing before a liquidator for examination pursuant to such requirement, makes a statement which he knows to be false or misleading in any material particular,

commits an offence and is liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both, and shall in addition be liable to a fine not exceeding ten thousand shillings for every day the contravention continues.

### **59. Accounts and expenses on liquidation**

(1) The Corporation shall in the course of liquidation, cause to be filed with the Official Receiver a status report and statement of accounts of an institution once every six calendar months.

(2) All expenses related to the liquidation and winding-up of an institution shall be chargeable on the assets of the institution.

(3) Where in exceptional circumstances the assets of an institution under liquidation are not sufficient to meet the expenses as provided for in subsection (1), the expenses shall be chargeable on the Fund.

(4) The Corporation shall endeavour to liquidate the business of an institution in an efficient manner in order to minimize costs and undue delay that may impair dividends due to depositors, creditors and contributories and cause losses to the Corporation.

#### **60. Completion of liquidation and winding-up**

(1) Where the Corporation considers that liquidation has been substantially completed, the corporation shall cause to be published in the *Gazette* the final statement of account in respect of the institution.

(2) Any interested person shall within thirty days of the publication under subsection (1) raise objections to any matters set out in the final statement of account in respect of the institution and the Corporation shall address such objections in the manner prescribed.

(3) Subject to subsection (2), the Corporation may apply to the High Court for an order to terminate the liquidation and to wind-up the institution.

(4) The Corporation shall, upon obtaining an order under subsection (3), cause a notice to that effect to be published in the *Gazette*.

(5) Where upon completion of liquidation of an institution there are unclaimed or surplus assets including monies, such unclaimed or surplus assets or monies shall vest in the Corporation and shall be paid into the Fund.

(6) Upon completion of winding-up of an institution, the liquidator may receive payment from debtors and other entities on behalf of a wound-up institution and the amount received shall be paid into the Fund.

(7) Where upon completion of liquidation of an institution there are securities held by the institution that are not yet disposed off, the interest of the institution in those securities shall be assigned to the Corporation.

(8) The Registrar of Companies and the Registrar of Titles, and any officer or person in charge of a deeds registry, or any other relevant office, shall upon production of any relevant deed, bond, share stock, debenture or other document, make such endorsement and effect such alterations as may be necessary to record the transfer of the relevant property or asset to the Corporation.

#### **61. Corporation to act independently**

In exercising its functions under the provisions of this Part, the Corporation shall not be subject to the supervision of any person or authority.

### **PART VII – OFFENCES**

#### **62. Holding out as a member**

(1) No person shall hold himself out to be a member of the Fund or in any way represent that he is insured under this Act.

(2) Any person who contravenes the provisions of subsection (1) commits an offence and is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both and shall in addition be liable to a fine not exceeding fifty thousand shillings for every day the contravention continues.

### **63. False statements**

Any person who prepares, signs, or approves in any—

- (a) account, statement, return, report or other document required to be submitted to the Corporation under this Act that he knows or has reason to believe is false, or contains false or misleading information; or
- (b) *deleted by Act No. 39 of 2013, s. 16,*

commits an offence and is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both, and shall in addition, be liable to a fine not exceeding fifty thousand shillings for every day the contravention continues.

[Act No. 39 of 2013, s. 16.]

### **64. Failure to provide information**

Any institution that fails or neglects—

- (a) within the time specified for so doing, to provide the Corporation with any account, record, statement, return, report or other document in respect of the business or affairs of the institution that is required to be submitted to the Corporation under this Act; or
- (b) to respond, within the time specified in the notice, to a request for information or explanation in respect of the institution made by or on behalf of the Corporation under this Act,

commits an offence and is liable to a fine not exceeding five hundred thousand shillings and shall, in addition, be liable to a fine not exceeding fifty thousand shillings for every day the contravention continues.

### **65. General penalty**

Any person who commits an offence under this Act for which no penalty is provided, shall, on conviction—

- (a) in the case of a natural person, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment not exceeding a term of three years or to both; or
- (b) in any other case, be liable to a fine not exceeding one million shillings.

### **66. Offences by body corporate or by director, officer and controller**

(1) Where an offence has been committed by a body corporate under this Act, any person who at the time of the commission of the offence was—

- (a) a director, officer or controller of the body corporate; or



- (b) purporting to act as a director, officer or controller of the body corporate; or
- (c) in any manner or to any extent responsible for the carrying on of any business or for the management of any assets, liabilities or affairs of the body corporate; or
- (d) assisting in the management of any assets, liabilities or affairs of the body corporate,

commits that offence unless the person proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Where any person would be liable under this Act to any punishment or penalty for any act, omission, neglect or default, the person shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any employee or agent of his, or of the employee of such agent.

(3) Subsection (2) shall be applicable where the act, omission, neglect or default was committed by the employee or agent of the principal in the course of his employment, or by the agent when acting on behalf of the principal, or by the employee or agent of such agent in the course of his employment by such agent or otherwise on behalf of the agent.

#### **67. Assessment of penalties**

(1) Where in the opinion of the Corporation an institution fails or has failed to—

- (a) adhere to the provisions of this Act or any regulations, rules, orders, notifications, guidelines or circulars of the Corporation in respect of matters pertaining to this Act;
- (b) comply with a request for information or restricts the right of access to information by the Corporation or any person acting on behalf of the Corporation under this Act; or
- (c) maintain proper deposit records or misrepresents any information, including information on insured deposits, used as a basis for assessing member contributions,

the Corporation may, after giving the institution the right to be heard, determine and impose a penalty on the institution giving reasons for the imposition and specifying the manner in which it shall be paid.

(2) The penalty imposed under this section shall not exceed one million shillings and where the violation is not remedied a fine not exceeding fifty thousand shillings for each day the violation continues.

#### **68. Additional orders by the court**

Where a person has been convicted of an offence under this Act, the court may, in addition to any fine or term of imprisonment that may be imposed—

- (a) order such person to rectify the contravention in respect of which the person was convicted; or

- (b) order the convicted person to make a restitution to the institution or its appointed liquidator equal to the court's estimation of the amount of the monetary benefit where the court is satisfied that as a result of the commission of the offence, the convicted person acquired a monetary benefit or that, a monetary benefit accrued to the benefit of the person.

#### **69. Recovery of penalties**

- (1) All penalties recoverable by the Corporation under this Act shall be paid into and form part of the Fund.
- (2) The procedure and other matters relating to recovery of penalties levied under this Act shall be as prescribed.

### **PART VIII – MISCELLANEOUS PROVISIONS**

#### **70. Acquisition, preservation and disposal of assets**

- (1) For the purposes of this Act, the Corporation may acquire, preserve or dispose of any asset.
- (2) The Corporation, as holder of security over any property, whether as chargee, mortgagee, assignee, lien holder or otherwise and any person who acquires an asset from the Corporation, shall be entitled—
  - (a) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land in accordance with paragraph (b) including entering the land, whether by itself or by any person authorized by it, to inspect, protect, secure, maintain or repair the land; and
  - (b) to dispose of such property or any part of such property by way of public auction, private treaty or any other expedient mode of sale subject to a reserve price.

#### **71. Co-operation with other law enforcement agencies**

- (1) Where the Corporation in the course of the exercise of any of its powers, or the discharge of any of its duties or functions, under this Act or under any other law suspects any person to have committed any offence under this Act, or any other law it shall be lawful for the Corporation to give information to a police officer, or to convey any information in relation to such offence to an institution or other person affected by such offence or to any other authority or person having power to investigate or enforce the provision of the law under which the offence is suspected by the Corporation to have been committed.
- (2) The Corporation may disclose any information to any monetary authority, financial regulatory authority, fiscal or tax agency, or fraud investigations agency within or outside Kenya or a credit reference bureau licensed by the Central Bank where such information is reasonably required for the proper discharge of the functions of the Corporation or the requesting monetary authority, financial regulatory authority, fiscal or tax agency or fraud investigations agency provided that the sharing of information with entities outside Kenya shall only apply where there is a reciprocal arrangement.

(3) This section shall have full force and effect notwithstanding any inconsistency with this Act or any other law.

**72. Exemption from tax**

(1) The Corporation shall not be liable to any taxation imposed by any law in respect of income or profits.

(2) No duty shall be chargeable under the Stamp Duty Act in respect of any instrument executed by or on behalf of or in favour of the Corporation on its own behalf or where acting as liquidator for any institution in any case where the Corporation or the institution would otherwise be liable to pay such duty.

(3) In addition to subsection (2), the Minister may, by order published in the *Gazette*, specify any tax, duty, fee, rate, levy, cess or other impost as one to which the Corporation shall not be liable, and the law relating thereto shall have effect accordingly.

**73. Exemption from levy and attachment**

(1) The Corporation on its own or acting as receiver or liquidator of an institution shall be exempt from levy, attachment, garnishment, lien, foreclosure or sale.

(2) The exemptions set out in subsection (1) shall apply *mutatis mutandis* to institutions in liquidation.

**74. Regulations**

The Minister may, on the recommendation of the Corporation make regulations for the better carrying into effect of the provisions of this Act and such regulations may—

- (a) prescribe anything which under this Act may be prescribed;
- (b) provide for the determination of contributions under section 27;
- (c) provide for the records to be kept by an institution for the purposes of section 30; and
- (d) provide for the procedure for recovery of penalties recoverable by the Corporation under this Act.

**75. Repeal of sections of Cap. 488**

(1) Sections 34(2)(a), 34(3), 34(4), 34(5), 34(6), 35, 36, 37, 38, 39, 40, 41A and 42 of the Banking Act are repealed.

(2) Upon commencement of this Act, the transitional provisions set out under section 76 shall apply.

**76. Transitional provisions**

(1) The assets and liabilities of the Deposit Protection Fund Board established under section 36 of the Banking Act shall vest in the Corporation.

(2) Notwithstanding section 7, the persons who were members of the Deposit Protection Fund Board existing immediately before the commencement of this Act shall, upon commencement of this Act, become members of the Board for their unexpired term.

(3) The officers or employees of the Corporation shall be deemed to be officers or employees, who at the commencement of this Act, are on secondment from the Central Bank to the Deposit Protection Fund Board.

(4) Notwithstanding the provisions of subsection (3), within twelve months after the appointed day, the Corporation shall recruit members of staff and all persons deemed to be on secondment to the Corporation under that subsection shall be eligible for employment by the Corporation subject to—

- (a) such persons opting to remain in the service of the Corporation; and
- (b) such terms and conditions of service (not being to the disadvantage of such persons) as may be agreed by the Board.

(5) Any employee not retained by the Corporation under subsection (4) shall be redeployed to the Central Bank.

(6) Where an employee enters into an agreement with the Corporation under subsection (4), his service with the Central Bank shall be deemed to be terminated without the right to severance pay but without prejudice to all other remuneration and benefits payable upon the termination of his appointment with the Central Bank.

(7) All powers, rights, liabilities, obligations and privileges conferred upon the Deposit Protection Fund Board under any existing agreements or written law shall vest in Corporation at the commencement of this Act.

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## SCHEDULE

[Section 8.]

### PROVISIONS AS TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE BOARD

#### 1. Tenure of office

(1) The chairperson or a member of the Board other than *ex officio* members shall, subject to the provisions of this Schedule, hold office for a period of four years, on such terms and conditions as may be specified in the instrument of appointment, but shall be eligible for re-appointment for one further term.

(2) The members of the Board shall be appointed at different times so that the respective expiry dates of the members' terms of office shall fall at different times.

#### 2. Disqualification of Board members

(1) No person shall be appointed or shall remain, as a member of the Board if such person is—

- (a) a member of parliament or a councillor of a local authority; or
- (b) a director, officer, employee, or a significant shareholder of an institution except where appointed by the minister under section 7(1) (d); or
- (c) a person who holds any office or position, in a political party; or

- (d) a salaried employee of any public entity provided that this paragraph shall not apply in the case of the Permanent Secretary or the Governor of the Central Bank or their representatives; or
- (e) a director or chief executive officer or a manager of an institution which was placed under receivership or which was placed under liquidation.

### 3. Vacation of office

(1) A member other than an *ex officio* member may—

- (a) at any time resign from office by notice in writing to the Minister;
- (b) be removed from office by the Minister on recommendation of the Board if the member—
  - (i) has been absent from three consecutive meetings of the Board without its permission;
  - (ii) is adjudged bankrupt or enters into a composition or scheme of arrangement with his creditors;
  - (iii) is convicted of a corruption or economic crime or other criminal offence involving dishonesty, fraud or moral turpitude or any other criminal offence under any law punishable with imprisonment that amounts to a felony under the Laws of Kenya;
  - (iv) is of unsound mind or is incapacitated by prolonged physical or mental illness for a period exceeding six months; or
  - (v) is otherwise unable or unfit to discharge his functions.

### 4. Meetings

(1) The Board shall meet at least once in every three months.

(2) Notwithstanding subparagraph (1), the chairperson may, and upon requisition in writing by at least five members, convene a special meeting of the Board at any time for the transaction of the business of the Board.

(3) Unless three quarters of the total members of the Board otherwise agree, at least fourteen days' written notice of every meeting of the Board shall be given to every member of the Board.

(4) The quorum for the conduct of the business of the Board shall be five members, at least two of whom shall be the members referred to in section 7(1) (b), (c) or (d).

(5) The chairperson shall preside at every meeting of the Board and in his absence, the members present shall elect one of their number, from among the directors appointed under the section 7(1)(d), to preside and the person so elected shall have all the powers of the chairperson with respect to that meeting and the business transacted thereat.

(6) Unless a unanimous decision is reached, a decision on any matter before the Board shall be by a majority of the votes of the members present and voting, and in case of an equality of votes, the chairperson or the person presiding shall have a casting vote.

(7) Subject to subparagraph (4), no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.

(8) Nothing in this paragraph shall prevent the chairperson from authorizing a director to use live telephone conferencing or other appropriate communication or multimedia facilities to participate in any meeting of the Board where, prior to the meeting, the director, by notification to the chairperson, has requested for such authorization.

(9) Subject to the provisions of this Schedule, the Board may determine its own procedure and the procedure for any committee of the Board and for the attendance of other persons at its meetings and may make standing orders in respect thereof.

#### **5. Committees of the Board**

(1) The Board may establish such committees as it may deem appropriate to perform such functions and responsibilities as it may determine.

(2) The Board shall appoint the chairperson of a committee established under subparagraph (1) from amongst its members.

(3) The Board may where it deems appropriate, co-opt any person to attend the deliberations of any of its committees.

(4) All decisions by the committees appointed under subparagraph (1) shall be ratified by the Board.

#### **6. Secretary to the Board**

(1) The secretary to the Board shall be responsible to the Chief Executive Officer for—

- (a) arranging the business of the Board's meetings;
- (b) keeping records of the proceedings of the Board;
- (c) performing such other duties as the Board may direct.

(2) The Board may in the absence of the secretary appoint any member of the Board or staff of the Corporation to temporarily perform the functions of the secretary under subparagraph (1).

#### **7. Disclosure of interest**

(1) A member who has an interest in any contract, or other matter present at a meeting shall at the meeting and as soon as reasonably practicable after the commencement, disclose the fact thereof and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A member of the Board who contravenes subparagraph (1) commits an offence and is liable to a fine not exceeding two hundred thousand shillings.

**8. Contracts and instruments**

Any contract or instrument which, if entered into or executed by a person not being a body corporate, would not require to be under seal may be entered into or executed on behalf of the Board by any person generally or specially authorized by the Board for that purpose.

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