

**THE NATIONAL PAYMENT SYSTEM BILL, 2011
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A Bill for

AN ACT of Parliament to make provision for the regulation and supervision of payment systems and payment service providers, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I — PRELIMINARY

Short title and commencement.

1. This Act may be cited as the National Payment System Act, 2011, and shall come into force on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation.

2. In this Act, unless the context otherwise requires—

“bank” has the meaning assigned to it in the Banking Act (Cap. 488);

“business day” means any day, other than a Sunday, a public holiday declared in accordance with the Public Holidays Act (Cap. 110), or a day declared to be a bank holiday under the Banking Act (Cap. 488), on which the institutions and the Central Bank are open to the public for carrying on business functions;

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

“Central Bank of Kenya settlement system” means a settlement system established and operated by, or under the control of, the Central Bank;

“Central Bank of Kenya settlement system participant” means—

(a) the Central Bank;

(b) a bank, an institution or a branch of a foreign institution; or

(c) a designated payment system operator, that participates in the Central Bank of Kenya settlement system.

“clear” means the exchange of payment instructions, and “clearing” shall be construed accordingly;

“clearing, netting and settlement agreements” means written agreements with regard to clearing, netting or settlement concluded between the Central Bank of Kenya settlement system participants or settlement system participants;

“designated payment instrument” means a payment instrument designated in accordance with section 6;

“designated payment system” means a payment system designated in accordance with section 3”;

“designated payment system operator” means an operator of a designated payment system”;

“designated payment system participant” means a person who is-

(a) a participant in a designated payment system; or

(b) a designated payment system operator;

“failure to settle” means the inability of a settlement system participant to meet its settlement obligations in a clearing house;

“institution” means a bank, mortgage finance company or a financial institution as defined in the Banking Act (Cap. 488), or a deposit-taking microfinance business as defined in the Microfinance Act, (No. 19 of 2006) or any other body which the Minister may, in consultation with the Central Bank, declare, by notice in the Gazette, to be an institution for the purposes of this Act;

“Minister” means the minister for the time being responsible for matters relating to finance;

“netting” means the determination of the net payment obligations between two or more settlement system participants within a payment clearing house or the determination of the net settlement obligations between two or more settlement system participants within a settlement system;

“payment clearing house” means an arrangement between two or more Central Bank settlement system participants, excluding a designated payment system operator, governing the clearing of payment instructions between those Central Bank settlement system participants;

“payment clearing house system operator” means a person, other than a designated payment system operator, who clears on behalf of any two or more Central Bank settlement system participants;

“payment instrument” means any instrument, whether tangible or intangible, that enables a person to obtain money, goods or services, or to otherwise make payment;

“payment instruction” means an instruction to a settlement system participant to transfer funds or make a payment;

“payment obligation” means an indebtedness that is owed by one settlement system participant to another as a result of the clearing of one or more payment instructions;

“payment service provider” means:-

(i) a person, company or organisation acting as provider in relation to sending, receiving, storing or processing of payments or the provision of other services in relation to payment services through any electronic system;

(ii) a person, company or organisation which owns, possesses, operates, manages or controls a public switched network for the provision of payment services; or

(iii) any other person, company or organization that processes or stores data on behalf of such payment service providers or users of such payment services;

“payment system” means a system or arrangement that enables payments to be effected between a payer and a beneficiary, or facilitates the circulation of money, and includes any instruments and procedures that relate to the system;

“payment system management body” means a body recognized by the Central Bank in accordance with section 7 ;

“person” includes any legal entity including a trust;

“settlement” means discharge of settlement obligations;

“settlement instruction” means an instruction given to a settlement system by a settlement system participant or by a payment clearing house system operator on behalf of a Central Bank settlement system participant to effect settlement of one or more payment obligations, or to discharge any other obligation of one system participant to another system participant;

“settlement obligation” means an indebtedness that is owed by one settlement system participant to another as a result of one or more settlement instructions;

“system operator” means a person, other than a designated payment system operator, authorized in terms of section 8 (2) (c) to provide services to any two or more persons in respect of payment instructions;

“settlement system” means a system established and operated by the Central Bank for the discharge of payment or settlement obligations, or the discharge of payment and settlement obligations, between system participants in that system;

“settlement system participant” means—

(a) a Central Bank of Kenya settlement system participant; or

(b) a designated payment system participant; and

“systemic risk” means the risk that failure of one or more settlement system participants, for whatever reason, to meet their payment obligations or their settlement obligations may result in any or all of the other settlement system participants being unable to meet their respective payment or settlement obligations.

PART II—PROVISIONS ON DESIGNATION

Designation of a payment system

3. (1) The Central Bank may, by notice in the Gazette, designate a payment system for the purposes of this Act, if it is of the opinion that—

- (a) the payment system poses systemic risk;
- (b) the designation is necessary to protect the interest of the public; or
- (c) such designation is in the interest of the integrity of the payment system.

(2) The notice designating a payment system under subsection (1) shall specify—

- (a) the payment system that is the subject of the designation;
- (b) the operator of the payment system that is the subject of the designation; and
- (c) any terms and conditions to which the designation may be subject.

(3) The Central Bank shall give a written notice of designation of a payment system to the operator of the payment system that is the subject of designation.

(4) The Central Bank may revoke or vary any designation made under this section by —

- (a) amending or revoking any condition to which the designation may be subject; or
- (b) making the designation subject to a new condition or conditions.

(5) In determining whether or not to revoke or vary a designation, the Central Bank may have regard to any or all of the following matters —

- (a) failure by the designated payment system to comply with any condition to which the designation may be subject;
- (b) whether or not the designated payment system has ceased to operate;
- (c) whether or not the designated payment system operator has knowingly furnished information or documents which are false or misleading in any material respect to the Central Bank in connection with the designation of the system;
- (d) whether or not it is in the public interest to revoke the designation;
- (e) any other matter that the Central Bank may deem appropriate.

(6) The revocation of a designation or the variation of the conditions to which a designation is subject shall not-

- (a) have retroactive effect;

(b) affect the validity or enforceability of the rules of the designated payment system, nor shall it affect any payment to or out of the account of a payment system participant or netting or settlement that took place, prior to the coming into effect of such revocation or variation.

(7) Revocation of designation of a payment system or variation of conditions thereof, if any, shall be by notice in the Gazette, and advice thereof shall be given in writing to the designated payment system operator.

(8) Without prejudice to Section 32 (1), an operator of a payment system shall, upon advice by the Central Bank to that effect, and within such period as the Bank may prescribe, apply for the designation of the payment system under this Act.

(9) A person who, upon receipt of advice from the Central Bank in accordance with subsection (8)-

(a) fails or refuses to apply for designation of a payment system in accordance with the advice; and

(b) continues to operate a payment system that has not been designated under this Act commits an offence.

Amendment to constitution and rules of designated

4. No amendment to the constitution of any designated payment system, or to the rules governing the system, shall have effect until they have been approved by payment system. the Central Bank.

Inspection of constitution and rules of designated payment system.

5. The constitution of every designated payment system and the rules governing the system, together with any amendment to that constitution and those rules, shall be kept at—

(a) the offices of the Central Bank; and

(b) the head office in Kenya of every participant in the system,

and shall be open for inspection by members of the public at all times during normal office hours.

Designation of payment instrument.

6. (1) The Central Bank may, by notice in the Gazette, designate a payment instrument for purposes of this Act, if the Bank is of the opinion that –

(a) the payment instrument is of widespread use as a means of making payment and may affect the payment systems of Kenya;

(b) the designation is necessary to protect the interests of the public; or

(c) such designation is in the interest of the integrity of the payment instrument.

(2) The notice designating a payment instrument under subsection (1) shall specify-

- (a) the payment instrument that is the subject of the designation;
- (b) the issuer of the payment instrument that is the subject of the designation; and
- (c) any terms and conditions to which the designation may be subject.

(3) Where a payment instrument has been Gazetted for designation, pursuant to subsection (1) and (2), the issuer of that payment instrument shall comply with such requirements as the Central Bank may specify.

(4) The Central Bank shall give a written notice of designation of a payment instrument to the issuer of the payment instrument that has been designated pursuant to section 6(1).

(5) The Central Bank may revoke or vary any designation of a payment instrument granted under section 6(1) if, in the opinion of the Central Bank, the issuer of designated payment instrument has-

- (a) contravened any of the provisions of this Act or regulations made thereunder;
- (b) contravened any restriction or condition to which the designation is subject;
- (c) failed to comply with any regulations, guidelines, circulars, notices or standards issued by the Central Bank under this Act;
- (d) made a false, incorrect or misleading statement in the documents or information submitted under subsection (3);
- (e) ceased issuing the payment instrument for a continuous period of six months;
- (f) goes into liquidation or is wound up or is otherwise dissolved;
- (g) it is in the public interest to vary or revoke the designation;
- (h) there exists any other ground which in the opinion of the Central Bank warrants variation or revocation.

(6) The Central Bank shall, before making a decision to revoke the designation under subsection (5), offer the issuer of a designated payment instrument a reasonable opportunity to make representations.

(7) The revocation of a designation or the variation of conditions to which a designation is subject shall not have retroactive effect.

(8) Revocation of designation of a payment instrument or variation of conditions thereof, if any, shall be by notice in the Gazette, and written advice thereof shall be given to the designated payment instrument issuer.

(9) Without prejudice to section 32 (1), an issuer of a payment instrument shall, upon written advice from the Central Bank to that effect, and within such period as

the Bank may prescribe, apply for the designation of the payment instrument under this Act.

(10) A person who, upon receipt of advice by the Central Bank in accordance with subsection (9) -

(a) fails or refuses to apply for designation of a payment instrument in accordance with the advice commits an offence and is liable, on conviction, to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both; and

(b) continues to issue a payment instrument that has not been designated under this Act, 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 both.

PART III—PROVISIONS RELATING TO OPERATORS

Recognition of a payment system management body.

7. (1) The Central Bank shall, upon designation of a payment system under this Act, automatically recognize the management body of such payment system.

(2) A payment system management body recognized pursuant to the provisions of this section shall be subject to the guidelines that may be issued by the Central Bank from time to time.

(3) Where a payment system management body recognised under subsection (1) oversees only one designated payment system, the recognition of the payment system management body shall stand revoked upon revocation of designation of the payment system:

Provided that, where a recognised payment system management body manages several designated payment systems, the revocation of designation of any one of the payment systems shall not affect the recognition status of the payment system management body with respect to the payment systems whose designation has not been revoked.

Objects, etc of recognized payment system management body.

8. (1) A recognised payment system management body shall manage and regulate, in relation to its members, all matters affecting payment instructions, and in connection with those objects, shall—

(a) provide a forum for the consideration of matters of policy and mutual interest concerning its members;

(b) act as a medium for communication by its members with the Government, the Central Bank, any financial or other exchange, other public bodies, authorities and officials, the news media, the general public and other private associations and institutions; and

(c) deal with and promote any other matter of interest to its members and foster co-operation among them.

(2) In addition to any other provisions, the rules of a recognised payment system management body shall empower that body—

(a) to admit members and to regulate, control and with the approval of the Central Bank terminate membership;

(b) to constitute, establish or dissolve any body, committee or forum consisting of its members and which has an impact on, interacts with, has access to or makes use of any payment, clearing or settlement systems or operations;

(c) to—

(i) recommend for approval by the Central Bank criteria subject to which any person is to be granted limited membership of the payment system management body or is to be authorized to act as a system operator or a payment clearing house system operator within a payment system; and

(ii) authorize that person to act as a system operator or payment clearing house system operator in accordance with that criteria; and

(d) to recommend for approval by the Central Bank criteria subject to and in accordance with which a member who is also a Central Bank settlement system participant may be authorized to—

(i) allow a bank, an institution or a branch of a foreign institution that is not a Central Bank settlement system participant to clear; or

(ii) clear on behalf of a bank, an institution or a branch of a foreign institution that is not a Central Bank settlement system participant:

Provided that the member shall settle payment obligations on behalf of such bank, an institution or branch of a foreign institution referred to in subparagraphs (i) and(ii).

Effecting settlement.

9. (1) Settlement shall be effected by payment of money or by means of entries passed through the Central Bank settlement system or a designated payment system.

(2) A settlement that has been effected by payment of money or by means of an entry to the credit of the account maintained by a settlement system participant in the Central Bank settlement system or a designated payment system shall be final and irrevocable.

(3) An entry to or payment out of the account of a designated payment system participant to settle a payment or settlement obligation in a designated payment system shall be final and irrevocable.

Clearing provisions.

10. (1) A person shall not clear payment instructions unless that person is—

(a) a Central Bank settlement system participant; or

(b) a bank, an institution or a branch of a foreign institution that is allowed to clear in terms of section 8 (2) (d) (i).

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable, on conviction, to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both.

Payments to third parties.

11. A person may, as a regular feature of that person's business, accept money or payment instructions from any other person for purposes of making payment on behalf of that other person to whom that payment is due, if—

(a) the first-mentioned person is the Central Bank, a bank, an institution or a branch of a foreign institution, a payment service provider or a designated payment system operator; or

(b) the first-mentioned person is the Postal Corporation of Kenya established under the Postal Corporation of Kenya Act,(No. 3 of 1998)the Kenya Post Office Savings Bank established under the Kenya Post Office Savings Bank Act (Cap. 493B), a building society established under the Building Societies Act(Cap. 489); and

(c) the money is accepted or payment is made in accordance with directives issued by the Central Bank from time to time in accordance with section 22.

Authorisation of payment service provider.

12. (1) No person shall, in Kenya conduct the business of a payment service provider except an authorized payment service provider.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall, on conviction be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.

Application for authorisation.

13. (1) A person proposing to transact the business of a payment service provider shall, before commencing such business, apply to the Bank for authorization.

(2) An application under this section shall be made in the prescribed form and shall be forwarded to the Bank together with the prescribed fee.

(3) In considering an application for authorization, the Bank may require to be satisfied as to the financial condition and history of the applicant, the character of its management, the adequacy of its capital structure and the convenience and needs of the area to be served and the public interest which will be served by granting of the authorisation.

(4) The Bank may, subject to the payment of the prescribed fee and to such conditions as it may consider necessary, grant authorization to the applicant.

(5) Where authorization has been granted under this section, the Bank may add, vary, or substitute conditions attached thereto.

(6) An authorisation issued under this section shall, unless earlier revoked, be valid for twelve months next following the date of issue:

Provided that where an application for its renewal is made under this section, the authorisation shall be deemed to continue in force until the application for renewal is determined.

Renewal of authorisation.

14. (1) An authorisation made under section 13 may on expiry be renewed for a further period of twelve months:

Provided that where an authorised payment service provider fails to commence business in Kenya within six months of the grant of authorisation, the authorized payment service provider shall, if still intending to conduct payment service business in Kenya, apply for authorization as if the first authorisation had never been granted.

(2) An application for the renewal of an authorization shall-

(a) be made in the prescribed form and forwarded to the Bank together with the prescribed fee;

(b) be lodged with the Bank at least two months prior to the expiry of the authorisation.

(3) An application for renewal of an authorization shall be considered in accordance with the provisions of section 13.

Revocation of authorisation.

15. (1) Subject to sub-section (2), the Bank may, by notice in writing to an authorised payment service provider, revoke or suspend an authorisation for such period as it may specify, if the authorised payment service provider-

(a) ceases to carry on business in Kenya or goes into liquidation or is wound up, or is otherwise dissolved;

(b) fails to comply with the provisions of this Act or any condition attached to an authorisation; or

(c) conducts business in a manner detrimental to the best interests of the public.

(2) Before revoking or suspending an authorization under this section, the Bank shall give an authorized payment service provider, not less than fourteen days notice in writing and shall consider any representations made to it in writing by the authorised payment service provider within that period.

Netting agreements and rules.

16. (1) The provisions of this section shall apply despite any provision to the contrary relating to insolvency in the Companies Act (Cap. 486), the Banking Act (Cap. 488), the Building Societies Act (Cap. 489)the Co-operative Societies Act, or the Microfinance Act, (No. 19 of 2006)

(2) If a settlement system participant is wound up or placed under statutory management, or a receiver manager or similar official is appointed to run a settlement system participant—

(a) any provision contained in a written netting agreement, the settlement system rules or clearing, netting and settlement agreements to which that settlement system participant is a party, or any netting rules and practices applicable to the settlement system participant in relation to such agreements shall be binding upon the liquidator, statutory manager or receiver manager, as the case may be, in respect of any payment or settlement obligation—

(i) which has been determined through netting prior to the issue of the winding-up order, or the appointment of the statutory manager, or receiver manager, as the case may be; and

(ii) which is to be discharged on or after the date of the winding-up order, statutory management order or the appointment of a receiver manager, as the case may be, or the discharge of which was overdue on the date of the winding-up order, receivership order or appointment of the statutory manager, as the case may be; and

(b) the liquidator, statutory manager or receiver manager shall be bound by any payment or settlement that is final and irrevocable in accordance with section 9 (2) or (3).

(3) A receiver manager or similar official appointed to run a settlement system participant shall give written notice to the Central Bank to withdraw such participant's participation in the Central Bank settlement system, in which event such settlement system participant shall no longer be entitled to clear or participate in the Central Bank settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the settlement system rules or clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements.

(4) When an application for the winding-up of a Central Bank settlement system participant is made, a copy of—

(a) the application for winding-up as filed in court; and

(b) any subsequent winding-up order, if it is granted, shall be lodged with the Central Bank as soon as practicable.

(5) Where the Central Bank settlement system participant in respect of whom an application for winding up is made is a designated payment system participant, the

Central Bank shall, as soon as practicable after having received a copy of the application for winding up in accordance with subsection (4) (a), notify the operator of the payment system.

(6) If a settlement system participant is wound up, the liquidator or similar official is bound by—

(a) any provision contained in the rules of the settlement system or in clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements; and

(b) any payment or settlement that is final and irrevocable in accordance with section 9 (2) or (3).

(7) A settlement system participant in respect of whom a copy of a winding-up order has been lodged with the Central Bank in accordance with subsection (4) shall no longer be entitled to clear or participate in any settlement system, other than for purposes of discharging payment or settlement obligations in accordance with the rules of the settlement system or clearing, netting and settlement agreements to which that settlement system participant is a party, or any rules and practices applicable to the settlement system participant in relation to such agreements.

(8) Notwithstanding any other law, a court shall not recognize or give effect to—

(a) an order of a court exercising jurisdiction under the law of insolvency in a place outside Kenya; or

(b) an act of a person appointed in a place outside Kenya to perform a function under the law of insolvency there, in so far as the making of the order or doing of the act would be prohibited under this Act for a court in Kenya, or a receiver manager or similar official, or liquidator or similar official.

PART IV—PROVISIONS ON REGULATION AND SUPERVISION

Powers and functions of the Central Bank.

17.(1) Notwithstanding subsection (2), the Central Bank shall, in the exercise of its role of formulating and implementing such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems, exercise all the powers and perform all the functions conferred and imposed on it by this Act, the Central Bank of Kenya Act (Cap. 491) and any other law.

(2) For the proper exercise of its powers and efficient performance of its functions under this Act, the Central Bank may, in writing and on such conditions as it deems necessary—

(a) delegate to any of its officers the exercise of any of its powers under this Act; or

(b) authorize any such officer to perform any of its functions under this Act.

(3) Any delegation of a power or the performance of a function under subsection (2)—

(a) shall not prevent the Central Bank from exercising that power or performing that function; and

(b) may at any time be withdrawn in writing by the Central Bank.

Prohibition of issuance of payment instruments.

18. (1) The Central Bank may, by order in the Gazette, prohibit any person from issuing or using any payment instrument if—

(a) the issuing or use of the payment instrument is detrimental to the reliable, safe, efficient and smooth operation of a national payment system; or

(b) the prohibition is in the interest of the public.

(2) The Central Bank may, in considering whether to prohibit any person from issuing or using any payment instrument under subsection (1), inspect the premises, equipment, machinery, apparatus, books or other documents, or accounts and transactions of the issuer or user of the payment instrument, upon giving reasonable written notice to the issuer or user.

(3) The Central Bank shall, before issuing an order of prohibition under subsection (1), offer the issuer or user of a payment instrument a reasonable opportunity to make representations on the impending prohibition.

Participation by the Central Bank.

19. (1) The Central Bank may do all or any of the following in relation to a designated payment system or to such payment system and its clearing house—

(a) be a participant and enforce any failure to settle arrangement;

(b) act as a custodian of a settlement participant's settlement assets or act as a settlement agent.

(c) regulate and supervise such system(s).

(2) The Central Bank may provide any additional services it considers desirable, including facilities for clearing financial effects to designated payment system participants.

Provision of information to the Central Bank.

20. (1) A person shall, upon being required to do so, provide the Central Bank with such information relating to a payment system or payment instrument, in such form and at such times as the Central Bank may prescribe.

(2) In addition to any information that is required to be provided to the Central Bank under the Banking Act (Cap. 488) relating to banks, the management of every designated payment system, and every participant in the system, shall provide the

Central Bank with such reports, returns and other information, at such times and in such form as the Central Bank may prescribe, regarding—

- (a) the volumes and values of payment instructions cleared in the system;
- (b) the volumes or values of the participant's payment obligations and settlement obligations; and
- (c) any other information regarding the operation of the system as the Central Bank may require.

(3) Subject to subsection (4), any information—

- (a) obtained by the Central Bank in accordance with subsection (1); and
- (b) identifying a Central Bank settlement system participant,

shall be confidential and shall not be disclosed by any director or officer of the Central Bank to any person, except to an officer of the Central Bank who requires that information for purposes of the execution of his duties under this Act, the Central Bank of Kenya Act (Cap. 491), the Banking Act (Cap. 488) , the Building Societies Act (Cap. 489), the Microfinance Act, (No. 19 of 2006) or the Proceeds of Crime and Anti-Money Laundering Act, (No. 9 of 2009)

(4) Notwithstanding the provisions of subsection (3), the Central Bank may disclose any information-

- (a) of which the disclosure is necessary to protect the integrity, effectiveness or security of the payment system, or if required by law to do so; or
- (b) to any monetary authority or financial regulatory authority, within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority.

(5) A person who contravenes the provisions of subsections (1), (2) or (3) commits an offence and shall be liable on conviction, to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding one year, or both.

(6) Notwithstanding the provisions of subsection (5), no duty to which-

- (a) a participant or its officers may be subject, shall be breached by reason of the disclosure in good faith, of any information under sub-section (1) and (2) in the course of the performance of its duties and no action shall lie against the participant or any of its officers on account of such disclosure;
- (b) the Central Bank or its officers may be subject, shall be breached by reason of the disclosure in good faith, of any information under sub-section (4) (a) and (b) in the course of the performance of its duties and no action shall lie against the Central Bank or any of its officers on account of such disclosure.

Settlement of disputes.

21. (1) If any Central Bank settlement system participant considers itself aggrieved by a decision taken by the Central Bank under any provision of this Act, the matter shall be deemed to constitute a dispute between that Central Bank settlement system participant and the Central Bank, which dispute shall be settled as provided in this section.

(2) The Central Bank settlement system participant concerned shall, within ninety days after the decision of the Central Bank, in writing, furnish the Central Bank with full particulars of the grievance, and thereafter the Central Bank settlement system participant and the Central Bank shall endeavour to settle the dispute within seven business days of the receipt by the Central Bank of those particulars.

(3) If the Central Bank settlement system participant and the Central Bank do not settle the dispute as provided for under subsection (2), they shall refer the dispute to mediation within a further period of ten business days.

(4) The following provisions shall apply to mediation under subsection 3—

(a) the Central Bank settlement system participant concerned and the Central Bank shall agree on a mediator;

(b) the mediator shall familiarize himself with the position held by the Central Bank settlement system participant concerned and the Central Bank, respectively;

(c) the mediator, the Central Bank settlement system participant concerned and the Central Bank shall discuss the dispute at a meeting attended by them all;

(d) the Central Bank settlement system participant concerned and the Central Bank shall, at or following such meeting, and with the aid of the mediator, attempt to settle the dispute by consensus; and

(e) the Central Bank settlement system participant concerned and the Central Bank shall share the mediator's costs in such proportion as they may agree.

(5) If the Central Bank settlement system participant concerned and the Central Bank are unable to settle the dispute by consensus in accordance with subsection (2) or (4), the dispute shall be referred—

(a) to a single arbitrator to be agreed upon by the Central Bank settlement system participant and the Central Bank; or

(b) failing such agreement, to an arbitrator appointed, at the request of the Central Bank settlement system participant or the Central Bank, by a recognised body concerned with the facilitation and promotion of the resolution of disputes by means of mediation or arbitration.

(6) An arbitrator referred to in subsection (5) shall, as far as possible, be a person appointed on account of his knowledge of the law and payment systems.

(7) The provisions of the Arbitration Act,(No. 4 of 1995) or any revisions thereof, shall apply, *mutatis mutandis*, to an arbitration undertaken in accordance with subsection (5).

(8) The decision of the arbitrator shall be final and binding on the Central Bank settlement system participant concerned and the Central Bank.

Power of Central Bank to advise and direct.

22. (1) The Central Bank may, from time to time, issue directives to any person regarding a payment system or a payment instrument on the application of the provisions of this Act.

(2) In considering whether or not to issue a directive in accordance with subsection (1), the Central Bank may have regard to any or all of the following aspects—

(a) that reasonable grounds exist to believe that any person is engaging in, or is about to engage in, any act, omission or course of conduct, with respect to the payment system or payment instrument, that results or is likely to result in systemic risk;

(b) that reasonable grounds exist to believe that any person is engaging in, or is about to engage in, any act, omission or course of conduct, that compromises or is likely to compromise the integrity, effectiveness, efficiency or security of the payment system or payment instrument;

(c) the public interest;

(d) the integrity, effectiveness, efficiency or security of the payment system or payment instrument;

(e) national financial stability;

(f) any other matter that the Central Bank may consider appropriate.

(3) The Central Bank may, in writing, over and above any directive contemplated in subsection (1), issue a directive to a person requiring the person, to—

(a) cease or refrain from engaging in the act, omission or course of conduct or perform such other acts as are necessary to remedy the situation;

(b) perform such acts as are necessary to comply with the directive or to effect the changes; or

(c) provide the Central Bank with such information and documents relating to the matter as specified in the directive.

(4) The Central Bank may cancel, in writing, any directive issued under this Act.

(5) In considering whether or not to cancel a directive in accordance with subsection (4), the Central Bank shall have regard to the factors referred to in subsection (2).

(6) A directive issued by the Central Bank shall not have any retroactive effect.

(7) Any person who neglects, refuses or fails to comply with a directive issued under subsection (1) or (3) commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding three years, or both.

(8) A person who receives a directive pursuant to the provisions of this section shall comply with the directive within such period as may be specified in the directive.

Audits and inspection.

23. (1) The Central Bank shall, for the purposes of carrying out its functions under this Act, conduct audits and inspections of a designated payment system or of an issuer of a designated payment instrument.

(2) Every designated payment system participant or the issuer of a designated payment instrument shall, as may be required by the Central Bank, assist the Central Bank to the extent necessary, to enable the Central Bank carry out an audit or inspection.

Reports.

24. The Central Bank shall prepare and submit to the Minister—

(a) such reports as the Minister may require; and

(b) such periodic reports, and at such intervals, as it considers appropriate, on the operations of every designated payment system or designated payment instrument.

PART V—MISCELLANEOUS

Utilization of assets of a designated payment system participant.

25. Despite anything to the contrary in any law relating to insolvency, any asset of a designated payment system participant which was provided prior to the issue of any order for that settlement system participant's winding-up by that participant to the Central Bank, or the designated payment system operator, as security for a loan in respect of its settlement obligations, may be utilized by the Central Bank or the designated payment system operator, as the case may be, to the extent required for the discharge of the settlement obligations of the payment system participants.

Retention of records.

26. (1) Notwithstanding anything to the contrary in any law relating to the retention of records, the Central Bank, the Central Bank settlement system participants, payment clearing house system operators and system operators, shall retain all records obtained by them during the course of the operations and administration of a payment system or the issuance of a payment instrument, for a period of seven years from the date of each particular record.

(2) The retention of records under subsection (1) may be effected by electronic means.

Use of confidential information for personal gain.

27 . (1) Subject to subsection (2), if—

(a) any officer or employee of the Central Bank; or

(b) any member or employee of a payment system management body, for his personal gain, makes use of any information which he has acquired in the performance of his functions under this Act, or under the constitution or rules of any designated payment system, and which relates to the affairs of a particular institution, he commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings, or imprisonment for a term not exceeding one year, or both.

(2) It shall be a defence to a charge under subsection (1) for the person charged to show that the information which he used was generally known to members of the public or to a substantial section of the public.

Priority of certain instruments on winding up.

28. (1) In this section, “priority payment instruction” means a money order, bank draft or similar payment instruction issued, directly or indirectly, by a participant in a designated payment system, but does not include an instrument issued by one such participant to another for the purpose of effecting a payment between them.

(2) Notwithstanding anything to the contrary in the Companies Act (Cap. 486) or any law relating to insolvency, but subject to this section, where a participant in a designated payment system is wound up under the Companies Act (Cap. 486) unpaid priority payment instructions that were drawn on the participant and cleared through the payment system before the making of the winding-up order shall be paid from the participant’s assets, and shall rank in preference above any other unsecured claim against the assets.

(3) No payment shall be made pursuant to subsection (2) in preference to any other claim against any assets unless a request for such payment has been made within sixty days after the making of the winding up order in regard to the participant concerned.

(4) Subsection (2) shall not be construed as permitting a payment instruction to be settled in preference to any other claim against any assets, where the instruction was drawn on or certified or issued by the participant concerned with a view to giving the drawee of the instruction a preference over the participant’s other creditors.

Misleading advertisements

29. (1) Any person who issues an advertisement, brochure, circular or in any way makes representations inviting any person to participate in a payment system or in the issuance and usage of a payment instrument which-

(a) falsely represents that he is designated to operate the payment system or issue the payment instrument under the provisions of this Act;

(b) falsely represents that he is recognised to manage a payment system under the provisions of this Act; or

(c) is issued contrary to the provisions of this Act,

commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding one year, or both.

(2) The Central Bank may at any time direct any person to withdraw, amend or refrain from issuing any advertisement, brochure, circular or making or desist from making any other representation relating to participation in the payment system or issuance of a payment instrument, which in its sole discretion, it considers to be misleading.

Relief from prosecution.

30. No action shall lie against the Central Bank or any of its officers or other persons appointed or authorized to perform any function under this Act, in respect of anything done or omitted to be done by him in good faith in the exercise or performance of any power, authority, or function conferred or imposed on him under this Act.

Regulations and guidelines.

31. (1) The Minister may make regulations generally for the better carrying into effect the provisions of this Act.

(2) The Central Bank may—

(a) prescribe anything which under this Act may be prescribed;

(b) subject to this Act, issue guidelines in respect of any matter relating to the administration or enforcement of this Act; and

(c) prescribe monetary fines for payment system operators, issuers of payment instruments or authorized payment service providers, which shall not exceed one million shillings.

Transition.

32. (1) Any person who, immediately before the coming into force of this Act, was—

(a) operating a system for—

(i) the clearing of payment instructions;

(ii) the netting or settlement of obligations arising from the clearing of payment instructions; or

(b) issuing a payment instrument; or

(c) conducting the business of a payment service provider.

may continue to operate the system or issue the payment instrument or conduct the business of a payment service provider for six months after the commencement of this Act, even if the system or the payment instrument has not been designated or the payment service provider has not been authorized by the Central Bank under this Act:

Provided that, after the commencement of this Act,

(a) the operator of an undesignated payment system or the issuer of an undesignated payment instrument shall, upon advice by the Central Bank, apply to the Central Bank for designation of the payment system or instrument and, if his application is declined before the six-month period has elapsed, the applicant shall cease to operate the system or issue the instrument forthwith; and

(b) the provider of an unauthorized payment service shall apply to the Central Bank for authorisation and if the application is declined before the six month period has elapsed, the provider shall cease to conduct the business of a payment service provider forthwith.

(2) A person who continues to operate an undesignated payment system, or to issue an undesignated payment instrument, after the expiry of six months from the date of commencement of this Act commits an offence and is liable, on conviction, to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both.

(3) A person who continues to provide an unauthorized payment service after the expiry of six months from the commencement of this Act commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both.

Savings.

33. An issuer of a payment instrument who is licensed under the Banking Act (Cap. 488), the Building Societies Act (Cap. 489), the Kenya Post Office Savings Bank Act(Cap. 493B), the Postal Corporation of Kenya Act,(No.3 of 1998) and the Microfinance Act,(No.19 of 2006)shall be deemed to have met the requirements under section 6(4).

MEMORANDUM OF OBJECTS AND REASONS

Clause 1 provides for the short title and commencement of the Bill.

Clause 2 provides for the interpretation of the terms used in the Bill for clarity.

Clause 3 provides for the designation by the Central Bank of Kenya of a payment system, by a notice in the Gazette, and the criteria applied to identify the systems to be designated

Clause 4 prohibits the amendment of the constitution or rules governing any designated payment systems without the approval of the Central Bank.

Clause 5 provides for the keeping of the constitution and rules governing a payment system at the offices of the Central bank and the head office of every participant in the system.

Clause 6 provides for the designation of a payment instrument by a notice in the Gazette.

Clause 7 provides for the recognition of the management body of a payment system by Central Bank upon designation.

Clause 8 provides for the functions of a recognised management body of a payment system.

Clause 9 provides for the manner of settling payments through the Central Bank settlement system or a designated payment system.

Clause 10 defines the persons allowed to clear payment instructions.

Clause 11 provides for the conditions for the acceptance of payment instructions from third parties.

Clause 12 prohibits any person, other than an authorised payment service provider, from conducting the business of a payment service provider.

Clause 13-15 provides for the process of application, renewal and revocation of authorisation to conduct the business of a payment service provider.

Clause 16 provides for the procedures relating to the insolvency of a settlement system participant and the application of the provisions of the clause despite any provision to the contrary in the Companies Act (Cap.486), Banking Act (Cap. 488), Building Societies Act (Cap. 489), the Cooperative Societies Act, 1997(No. 12 of 1997) and the Microfinance Act, 2006 (No. 19 of 2006).

Clause 17 provides the powers and functions of the Central Bank under the proposed Bill and the manner of exercising the powers.

Clause 18 empowers the Central Bank to prohibit the issuance of payment instruments in the prescribed instances.

Clause 19 provides for the extent of participation of the Central Bank in activities relating to a designated payment system and its clearing house.

Clause 20 provides for the provision, by a participant, of information relating to a payment system or payment instrument that the Central bank may require.

Clause 21 provides for the dispute settlement mechanism for disputes between the Central Bank and a settlement system participant.

Clause 22 empowers the Central Bank to issue directives relating to the application of the law relating to a payment system or payment instrument to any concerned person.

Clause 23 empowers the Central Bank to audit and inspect designated payment systems and issuers of designated payment instruments.

Clause 24 provides for the preparation and submission of reports to the Minister by the Central Bank.

Clauses 25-33 of the Bill contain miscellaneous provisions of the Bill relating to utilization of assets of a designated payment system participant, retention of records, use of confidential information for personal gain, priority of certain instruments on winding up, prohibition of misleading advertisements, relief from prosecution, Regulations and guidelines, and transition and savings.

Dated the....., 2011.

UHURU KENYATTA,
Deputy Prime Minister and Minister for Finance.