Bill for Introduction into the National Assembly—

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THE KENYA DEPOSIT INSURANCE (AMENDMENT) BILL, 2013

A Bill for

An Act of Parliament to amend the Kenya Deposit Insurance Act, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Kenya Deposit Insurance (Amendment) Act, 2013.

2. Section 2 of the Kenya Deposit Insurance Act, 2012, in this Act referred to as “the principal Act, is amended by inserting the following definitions in proper sequence—

“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 institutions;

(b) exclusion and transfer of part or total assets to the institution receiving the liabilities; and

(c) liquidation of the residual assets and liabilities.

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

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

3. Section 6 of the principal Act, 2012 is amended—

(a) in paragraph (b) by in inserting the following proviso immediately after subparagraph (iii)—

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.

(b) by in paragraph (g) by inserting the words “or deposit insurers within or outside Kenya” immediately after the word “regulators”.

4. Section 7 of the principal Act is amended—

(a) in subsection (1) -

(i) by inserting the following proviso immediately after item (a) –

“Provided that the person under this paragraph shall not be from the member institutions of the Board”.

(ii) by inserting the following immediately after paragraph (b) –

(bb) the Attorney General or his representative;

(iii) by deleting paragraph (d) and substituting therefore the following new paragraph –
(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.

(b) By inserting the following new subsection immediately after subsection (2) —

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

(a) Banking;
(b) Finance;
(c) Insurance;
(d) Commerce;
(e) Law;
(f) Accounting;
(g) Economic;
or any other related discipline.

5. Section 16 of the principal Act, is amended—

(a) in subsection (1)—

(i) by deleting paragraph (a);
(ii) in paragraph (c) by inserting the words “or the Corporation” at the end thereof;

(b) by deleting subsection (2) and replacing with the following new subsection—

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

(c) by inserting a new subsection immediately after subsection (3) as follows—
(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.

6. Section 20 of the principal Act, 2012 is amended—

(a) by deleting the word “Corporation” appearing in subsection (4) and substituting therefor word “Fund”;

(ii) by deleting subsection (5).

7. The Kenya Deposit Insurance Act is amended by inserting a new section immediately after section 20 as follows—

20A. 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 under section 20(3).

8. Section 21 of the principal Act, is amended—

(a) in subsection (1) by inserting the words “or any other person” immediately after the words “Central Bank”;

(b) by deleting sub-section (2) and substituting therefor the following new sub-section

(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 Funds.

(c) by deleting the words “Central Bank in consultation with the Cabinet Secretary”, at the end of subsection (3) and substituting therefor the words, “the lender and the Corporation”;

(d) by deleting the marginal note and substituting therefor the words “Borrowing by the Corporation.”
9. Section 22 of the principal Act, is amended by deleting item (b) replacing it as follows—

(b). any other securities and in such currencies as may be prescribed in a Gazette by the Cabinet Secretary from time to time.

10. Section 27 of the principal Act is amended by—

(a) by inserting the following proviso at the end of subsection (1)—

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

(b) by inserting the following proviso at the end of subsection (3)—

"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."

(c) by inserting the following new subsection immediately after subsection (4)—

(4A). In the event the Fund does not have sufficient monies to meet the tasks specified in section 23(a) of the 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.

11. Section 33 of the principal Act is amended—

(a) by deleting sub-section (6) and substituting therefor the following new provision—
(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.

(b) by inserting the following new sub-section immediately after subsection (7)—

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

12. Section 35 of the principal Act is amended by inserting the following new subsection immediately after subsection (2)—

(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.

13. Section 50 of the principal Act is amended by—

(a) in subsection (1) by renumbering paragraph (c) as paragraph (b) (b);

(b) by inserting the following new sub-sections immediately after subsection (6)—

(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.

14. Section 53 of the principal Act is amended by—

(a) deleting the marginal note and substituting therefor the words “Term of Receivership”.

(b) deleting subsection (2) and replacing with the following—

(2) If in the course of receivership the Corporation recommends to the Central Bank that the institution be liquidated in which event the Central Bank shall appoint the Corporation as the liquidator.

(c) deleting subsection (3).

15. Section 57 of the principal Act is amended in subsection (1) by inserting the words “including uninsured deposits” immediately after the words “in priority to all other debts” appearing at the end of the opening statement.
16. Section 63 of the principal Act is amended by—

(a) in the opening statement by deleting the words “approves or concurs” and substituting therefor the words “or approves”

(b) by deleting paragraph (b).
MEMORANDUM OF OBJECTS AND REASONS

This Bill has been submitted by the Cabinet Secretary for the National Treasury in line with proposals announced in the Budget for 2013/2014. The object of this Bill is to strengthen the regulatory framework of the Kenya Deposit Insurance Corporation. It aims at enhancing the protection of depositors' savings by conferring on the corporation, the appropriate mandate and ensuring its good corporate governance.

The Bill proposes to amend the Act to provide for the expenses of the Corporation's normal operations to be charged to the Deposit Insurance Fund and not funded by the exchequer except under exigent circumstances. It also provides for the financing of the activities of the Corporation by the Fund and also confers on the Corporation the discretion in determining the manner in which the monies constituting the Fund may be invested.

The Bill also proposes to increase the maximum amount of money that may be borrowed by the Corporation from the Central Bank of Kenya or any other lender by pegging the amount to the size of the Fund and not based on the set amount under the Act which is considered low.

The Bill proposes to amend the Act to ensure vary the requirement of the amount of annual contribution to the Fund based on the period that the institution has been licensed to ensure fairness. The Bill also enables the Corporation to call for in advance and appropriate from future contributions from member institutions under exigent circumstances.

The Bill ensures that reimbursements to depositors are made promptly by specifying the period within which such reimbursements are to be made. It also enables the Corporation to make advance or partial payments to depositors.

The Bill proposes to amend the Act to ensure that the functions of the Corporation in relation to receiverships and the bank resolution process is effective by enhancing its powers to enable it exercise various options in relation to its functions without recourse to depositors and creditors including stakeholders. It also provides for the different circumstances under which the Corporation or the Central Bank of Kenya may intervene in the operations of an institution.

This Bill is not a Bill concerning county government.
The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 18th June, 2013.

BENJAMIN LANGAT,
Chairperson.
Committee on Finance, Planning and Trade.
Section 6 of No. 12 of 2012 which it is proposed to amend—

6. 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 of such capital instruments;

(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;

(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.

Section 7 of No. 2012 which it is proposed to amend—

7. (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);

(b) the Permanent Secretary in the Ministry for the time being responsible for matters relating to finance or his representative;

(c) the Governor of the Central Bank of Kenya or his representative;

(d) five members, not being public officers, appointed by the Minister by virtue of their knowledge and possession of a minimum of ten years experience in matters relating to banking, finance, insurance, commerce, law, accountancy or economics, three of whom shall be from institutions;

(e) the Chief Executive officer who shall be an ex-officio member.

(2) The Board shall appoint its own secretary.

Section 16 of 2012 which it is proposed to amend—

16. (1) The funds* of the Corporation shall comprise of—

(a) such sums as may be granted to the Corporation by the Minister pursuant to subsection (2);
(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; 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) There shall be made to the Corporation, out of monies provided by Parliament for that purpose, grants towards the expenditure incurred by the Corporation in the exercise of its powers or the performance of its functions under this Act.

(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.

Subsection (4) and (5) of Section 20 of No. 10 of 2012 which it is proposed to amend—

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

(5) If at any time the amount available in the Fund is insufficient to meet the requirements of the Fund, the Corporation shall transfer from its funds under section 16, 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 Fund.

Section 21 of No. 10 of 2012 which it is proposed to amend—

21. (1) The Board may authorize the Corporation to borrow from the Central Bank 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 five hundred million shillings or such other sum as may be set by the Central Bank.
(3) The terms and conditions of any advance under this section shall be determined by the Central Bank in consultation with the Minister.

Section 22 of No. 10 of 2012 which it is proposed to amend—

22. 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 as may be prescribed in the Gazette by the Minister from time to time.

Section 27 of No. 2012 which it is proposed to amend—

27. (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.

(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).

(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.

(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.

Subsection (6) of Section 33 of No. 10 of 2012 which it is proposed to amend—

(6) Where the Corporation is obliged to commence payments under subsection (1) in respect of any insured deposit, the Corporation shall, as soon as practically possible after the date of appointment as liquidator, make payment to the depositor of the institution based on the records of the institution and the opinion of the Corporation as regards entitlement to the amount claimed.

Section 35 of No. 10 of 2012 which it is proposed to amend—

35. (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.

Section 50 of No. 10 of 2012 which it is proposed to amend—

50. (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
(c) 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.

Section 53 of No. 10 of 2012 which it is proposed to amend –

Termination of receivership

53. (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) Upon completion of the term of the receivership, the Corporation shall either-

(a) confirm to the Central Bank that the institution has complied with the matters that necessitated the receivership; or

(b) recommend to the Central Bank that the institution be liquidated in which event the Corporation shall be appointed as liquidator.

(3) Where the Corporation makes a decision in terms of subsection (2) (a), the management of the institution shall revert to its shareholders.
Subsection (1) of Section 57 of No. 10 of 2012 which it is proposed to amend –

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

(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, being amounts which have accrued before the relevant date.

Section 63 of No. 10 of 2012 which it is proposed to amend –

63. Any person who prepares, signs, approves or concurs 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) return that does not present accurate information required to be submitted to the Corporation under this Act,

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.