

SPECIAL ISSUE

Kenya Gazette Supplement No. 82 (National Assembly Bills No. 3)



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REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2013

NAIROBI, 18th June, 2013

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THE MICROFINANCE (AMENDMENT) BILL, 2013

A Bill for

An Act of Parliament to amend the Microfinance Act, 2006, and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Microfinance (Amendment) Act, 2013.

Short title.

2. Section 2 of the Microfinance Act, 2006 is amended by—

Amendment of section 2 of No. 19 of 2006.

(a) in the definition of the word “agency”, by deleting paragraph (b) and substituting therefor the following new paragraph —

(b) an entity contracted by an institution and approved by the Central Bank, or sub-contracted by such entity to provide services of the institution on behalf of the institution, in such manner as may be prescribed by the Central Bank;

(b) by inserting the following new definitions in proper alphabetical sequence —

“significantly undercapitalized” in relation to an institution, means that the institution holds less than fifty percent of the capital requirements prescribed in section 11;

“undercapitalized institution” means an institution that does not fully comply with the capital requirements prescribed in section 11.

Amendments to
section 29 of No. 19
of 2006.

3. Section 29 of the Microfinance Act, 2006 is amended by inserting new subsections immediately after subsection (6) as follows-

(7) The Central Bank may require an external auditor to undertake the following duties in addition to those provided under subsection (2) –

- (a) to submit such additional information in relation to his audit as the Central Bank may consider necessary;
- (b) to carry out any other special investigation; and
- (c) to submit a report on any of the matters referred to in paragraphs (a) and (b) above,

and the institution concerned shall remunerate the auditor in respect of the discharge by him of all or any of such additional duties.

(8) If the external auditor of an institution, in the course of the performance of his duties under this Act, is satisfied that –

- (a) there has been a serious breach of or non-compliance with the provisions of this Act, the Central Bank of Kenya Act or the regulations, guidelines or other matters prescribed by the Central Bank;
- (b) a criminal offence involving fraud or other dishonesty has been committed by the institution or any of its officers or employees;
- (c) losses have been incurred which reduce the core capital of the institution by fifty per cent or more;

- (d) serious irregularities have occurred which may jeopardize the security of depositors or creditors of the institution; or
- (e) he is unable to confirm that the claims of depositors and creditors of the institution are capable of being met out of the assets of the institution,

he shall immediately report the matter to the Central Bank.

(9) The Central Bank may arrange trilateral meetings with an institution and its auditor from time to time, to discuss matters relevant to the Central Bank's supervisory responsibilities which have arisen in the course of the statutory audit of the institution including relevant aspects of the institution's business, its accounting and control system and its annual accounts.

(10) If an external auditor of an institution fails to comply with the requirements of this Act, the Central Bank may remove him from office and appoint another person in his place.

4. Section 34 of the Microfinance Act, 2006 is amended—

Amendment to section 34 No. 19 of 2006.

(a) deleting subsection (3A) and replacing with the following—

(3A) The Deposit Protection Fund Board, institutions licensed under this Act and institutions licensed under the Banking Act shall, in the ordinary course of business and in such manner and to such extent as the Cabinet Secretary may, in regulations, prescribe, exchange such information on performing and non performing loans as may, from time to time, be specified by the Central Bank in regulation.

(b) by inserting new subsections immediately after subsection (5) as follows—

(6) Notwithstanding the provisions of this section, the Central Bank may disclose any information referred to in subsection (3) to the Deposit Protection Fund Board, any monetary authority or financial regulatory authority, fiscal or tax agency, fraud investigations agency within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting Deposit Protection Fund Board, monetary authority or financial regulatory authority, fiscal or tax agency, fraud investigations agency:

Provided that the sharing of information with institutions outside Kenya shall only apply where there is a reciprocal arrangement.

(7) No duty, to which the Central Bank, the Deposit Protection Fund Board, a credit reference bureau, an institution licensed under this Act or the Banking Act or their respective officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (3A), to or by, as the case be—

- (a) the Central Bank;
- (b) the Deposit Protection Fund Board;
- (c) an institution licensed under this Act or the Banking Act;
- (d) a credit reference bureau established under subsection (5);
- (e) any person carrying out an inspection under section 35; or
- (f) any person, authority, agency or entity referred to in subsection (6) or any other person or authority which may be authorized under any written law or otherwise to share information,

in the course of the performance of their duties and no action shall lie against the Central Bank, the Deposit Protection Fund Board, a credit this Act or reference bureau, an institution licensed under this Act or the Banking Act or the or any of its officers on account of such disclosure.

5. The Microfinance Act, 2006 is amended by inserting a new section immediately after section 36 as follows—

Insertion of new section 36A No. 19 of 2006.

Powers upon audit or inspection report.

36A. Where an external auditor's report, under section 29(8) or an inspection report under this Part reveals that an institution conducts its business in a manner contrary to the provisions of this Act, regulations or guidelines issued thereunder or in any manner detrimental to or not in the best interests of its depositors or members of the public, or that an institution is undercapitalized, the Central Bank shall take any of the following actions –

- (a) restrict, suspend or prohibit the payment of dividends by the institution;
- (b) prohibit the conversion of any profits of the institution into capital;
- (c) direct the suspension or removal of any officer involved in such conduct from the service of the institution;
- (d) require the institution to reconstitute its board of directors;
- (e) withhold branch or other corporate approval with respect to such institution;
- (f) undertake more frequent inspection of that institution;

- (g) order the institution to submit to the Central Bank, within forty-five days, a capital restoration plan to restore the institution to capital adequacy as prescribed in section 11 or in the case of issues unrelated to capital such as violations of law, a plan to resolve all deficiencies to the satisfaction of the Central Bank;
- (h) prohibit the institution from awarding any bonuses, or increments in salary, emoluments and other benefits of all directors and officers of the institution;
- (i) at the expense of an institution, appoint a person suitably qualified and competent in the opinion of the Central Bank to advise and assist the institution in designing and implementing the capital restoration plan or other corrective action plan and the person appointed shall regularly report to the Central Bank on the progress of the plan;
- (j) impose restrictions on growth of assets or liabilities of the institution as it deems fit;
- (k) restrict the rate of interest on savings and time deposits payable by the institution to such rates as the Central Bank shall determine; or
- (l) order the institution to do any or take such other actions as the Central Bank may deem necessary to rectify a capital deficiency or other weaknesses.

(a) in subsection (1), by inserting new paragraphs immediately after paragraph (d) as follows -

(e) if the institution is significantly undercapitalized; or

(f) if an institution fails to submit a capital restoration plan or a plan to resolve all deficiencies as directed under section 36B or to add more capital and the institution fails, refuses or neglects to comply with the order or to implement a plan of correction.

(b) in subsection (3), by deleting paragraph (c) and substituting therefor the following paragraph -

(c) remove any officer or employee of an institution who, in the opinion of the Central Bank, has caused or contributed to any contravention of any provision of this Act or any regulations or guidelines made thereunder, or to any deterioration in the financial stability of the institution, or has been guilty of conduct detrimental to the interests of depositors or other creditors of the institution;

(c) in subsection (4), by inserting a new paragraph after paragraph (c) as follows -

(d) enter into an agreement with the board of directors of an institution requiring the institution to rectify its deficiencies within three months:

Provided that in the case of reckless or fraudulent conduct, the Central Bank shall have discretion to enter into an agreement based on its judgment as to the efficacy of such an approach.

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 provide a framework that would enable deposit taking microfinance institutions to subcontract to suitable agents and thus enable other specialized entities undertake the identification, selection and acquiring of suitable agents for the institutions.

The Bill facilitates the sharing of credit information by imposing a requirement on the deposit taking microfinance institutions to share information on performing and non-performing loans in such manner as the Cabinet Secretary may prescribe. It also protects financial institutions including the Central Bank of Kenya, the Deposit Protection Fund Board and other fiscal or tax agencies from liability where it discloses information with another institution that requires it for the discharge of its functions.

The Bill also confers powers on the Central Bank to initiate prompt corrective action where a microfinance institution is found to have problems with the aim of identifying and dealing with such problems in a timely and progressive manner.

The Bill expands the options that would be available to the Central Bank of Kenya in relation to a microfinance institution that conducts its affairs contrary to the provisions of the Act, depending on the condition of the institution at the time of taking the action. It also expands the circumstances under which the Central Bank of Kenya may intervene in the affairs of an institution including where an institution fails to conduct its affairs in the interest of its depositors or creditors, fails to maintain the minimum core capital or has insufficient fund to cover its liabilities.

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.

Definition of agency in section 2 of No. 19 of 2006 which it is proposed to amend—

“agency” means –

- (a) an institution’s place of business operated within premises or structure owned or occupied by a third party by means of an agreement between the institution and the third party in the provision of deposit taking microfinance business; or
- (b) a third party or entity contracted by an institution and approved by the Central Bank to provide deposit-taking business on behalf of the institution in such manner as may be prescribed by the Central Bank.

Section 29 of No. 19 of 2006 which it is proposed to amend –

29. (1) An institution shall, in each year, appoint an external auditor who shall be a person qualified under section 30 and approved for appointment as such by the Central Bank.

(2) The external auditor shall audit the accounts of the institution and shall make a report on the annual balance sheet and profit and loss account to be submitted to the Central Bank.

(3) An institution shall not remove or change its external auditor except with the prior approval of the Central Bank.

(4) An external auditor shall make a report to the board of directors identifying key concerns with respect to the financial condition of the business.

(5) An external auditor shall, not less than four months after the end of each financial year, submit an audit report to the Central Bank, on the financial condition of the business.

(6) An external auditor’s reports submitted under subsection (5) shall contain information on the—

- (a) solvency of the business;
- (b) any violation of prudential standards or a condition imposed on the licence; and
- (c) any other contravention of this Act.

Section 34 of No. 19 of 2006 which it is proposed to amend—

34. (1) Subject to subsection (2), the Minister may publish in the Gazette, in whole or in part, any information furnished to him or to the Central Bank under this Act.

(2) No information shall be published under subsection (1) if it would disclose the financial affairs of any person, except with the prior consent, in writing, of that person.

(3) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties under this Act.

(3A) The Deposit Protection Fund Board and institutions and institutions licensed under the Banking Act shall, in the ordinary course of business and in such manner and to such extent as the Minister may, in regulations, prescribe, exchange such information on non performing loans as may, from time to time, be specified by the Central Bank in regulations.

(4) The Central Bank institutions licensed under this Act and institutions licensed under the Banking Act may, in the ordinary course of business, in such manner and to such extent as the Minister may, in regulations, prescribe, exchange such other information as is reasonably required for the proper discharge of their functions.

(5) Without prejudice to the provisions of subsection (4), regulations under that subsection may provide for the establishment and operation of credit reference bureaus for the purpose of collecting prescribed credit information on clients of institutions licensed under this Act and institutions licensed under the Banking Act, and disseminating the information among such institutions for use in the ordinary course of business, subject to such conditions or limitations as may be prescribed.

Section 37 of No. 19 of 2006 which it is proposed to amend -

37. (1) The Central Bank may, in accordance with this section, intervene in the affairs of an institution where –

- (a) the institution has contravened the provisions of this Act or the conditions upon which its licence was granted;

- (b) the business of the institution is being conducted in a manner detrimental to the interests of its depositors or creditors;
- (c) the institution has failed to maintain the prescribed minimum core capital;
- (d) the institution has insufficient assets to cover its liabilities.

(2) The Central Bank shall, before intervening in the affairs of an institution under subsection (1), issue the institution with a notice specifying the defaults noted in the conduct of the business and require the institution to take remedial action within such reasonable period as may be specified in the notice in order to comply with this Act.

(3) Where an institution does not comply with the notice issued under subsection (2), the Central Bank may –

- (a) direct the institution to take such steps as the Central Bank may consider necessary to rectify the default;
- (b) prohibit the receipt of any fresh deposits or limit lending operations;
- (c) remove or suspend any person responsible for the default in question from the management of the institution;
- (d) prohibit any declaration of dividends;
- (e) impose on any member of the management responsible for the default such penalty as may be prescribed; or
- (f) close^f the institution and revoke its licence.
- (g) impose any restriction or condition it may consider necessary on any arrangement between the institution and its agencies; or
- (h) direct the institution to terminate any agency arrangement.

(4) Where the Central Bank intervenes in the management of an institution, it may –

- (a) appoint a person to manage the affairs of the institution and to exercise all the powers of the institution to the exclusion of the board of directors, including the use of the corporate seal of the institution;
- (b) appoint a competent person familiar with deposit-taking business to its board of directors, to hold office as a director for a period not exceeding twelve months, who shall not be removed from office except with the prior approval of the Central Bank; and
- (c) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by an institution in favour of any officer or employee or any other person.

(5) A person appointed to manage an institution under this section shall hold office for a period not exceeding six months but the High Court may, on the application of the Central Bank, extend such period as it may deem necessary.