

THE FINANCIAL SERVICES AUTHORITY (FSA) BILL, 2016

(Draft version 08 – 25 April 2016)

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THE FINANCIAL SERVICES AUTHORITY BILL, 2016

A Bill for

AN ACT of Parliament to provide for the establishment of uniform norms and standards in relation to the conduct of providers of financial products and financial services, the establishment of the Financial Services Authority, the Financial Sector Ombudsman and the Financial Sector Tribunal, the promotion and maintenance of a fair and efficient financial sector in Kenya, and for connected purposes.

ENACTED by the Parliament of Kenya as follows—

PART I — PRELIMINARY

Short title and commencement

1. (1) This Act may be cited as the Financial Services Authority Act, 2016.

(2) This Act shall come into force on such date as the Cabinet Secretary may, by notice in the Gazette, appoint.

(3) The Cabinet Secretary may appoint different dates for coming into force of different provisions of this Act.

Interpretation

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

“administrative penalty” means an amount payable under section 98;

“administrative penalty order” means an order under section 98;

“Authority” means the Financial Services Authority established by section 10;

“Board” means the Board of the Authority provided for under section 16;

“Board member” means a member of the Board appointed or holding office under section 16;

“Board Secretary” means the Board Secretary for the time being appointed under section 25;

“business document” means a document held by a person in connection with carrying on a business;

“business premises” means premises, including a building or a part of a building, used by a person for carrying on a business;

“Cabinet Secretary” means the Cabinet Secretary responsible for finance;

“Capital Markets Act” means the Capital Markets Act (Cap. 485A);

“Capital Market Compensation Fund” means the fund of that name established by section 116;

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

“Central Bank of Kenya supervised entity” means, except as specified in regulations made for this definition, an entity regulated by the Central Bank of Kenya under a written law;

“Central Depositories Act” means the Central Depositories Act (Cap. 485D);

“Chairperson” means the Chairperson of the Board appointed under section 16(1)(a);

“Chief Executive Officer” means the Chief Executive Officer of the Authority appointed under section 20;

“Companies Act” means the Companies Act, 2015 (No. 17 of 2015);

“conduct rule” means a rule made under section 31;

“Compensation Fund” means a fund established by section 116;

“Compensation Fund Board” means the Board established under section 118 to manage the Compensation Fund;

“Conduct Compensation Fund” means the fund of that name established by section 116;

“Consumer Protection Act” means the Consumer Protection Act (No. 46 of 2012);

“control function” means each of the following—

- (a) the risk management function;
- (b) the compliance function;
- (c) the internal audit function; and
- (d) the actuarial function;

“dealing” in a financial product is defined in sections 4(8) to (11);

“decision-maker” means—

- (a) in relation to a reviewable decision by the Authority — the Authority;
- (b) in relation to a reviewable decision by an SRO in the exercise of powers or performance of functions that the SRO is authorised to exercise or perform — the SRO;
- (c) in relation to a reviewable decision on a claim for compensation from a Compensation Fund — the Compensation Board;
- (d) in relation to a decision referred to in paragraph (c) of the definition of “reviewable decision” in this section — the person identified in the regulations as the decision-maker;

“directive” means a directive under section 89 or under a sectoral law;

“disqualified person” means a person who—

- (a) is or has at any time been adjudged bankrupt or has entered into a composition scheme or arrangement with his or her creditors;
- (b) has been convicted or found guilty of an offence, either in the Republic or in a foreign country, being an offence—
 - (i) involving dishonesty, fraud or moral turpitude; or
 - (ii) the maximum penalty for which is or includes a term of imprisonment for six months or more;
- (c) is prohibited by or under a written law from being a director of, or taking part in the management of, a financial institution or a company, either in the Republic or in a foreign country;
- (d) is a member of the National Assembly or of a local authority;
- (e) is a director or employee of, or is engaged as an auditor for, a financial institution; or

- (f) has a direct material financial interest in a financial institution, except as a financial customer;

“eligible prudentially regulated financial institution” means—

- (a) a securities exchange and a derivatives exchange, as these are defined in the Capital Markets Act;
- (b) a central; depository as defined in the Central Depositories Act;
- (c) a clearing house as referred to in the Capital Markets Act’ in the
- (c) an insurer as defined in the Insurance Act;
- (d) a Sacco;
- (e) a prudentially regulated financial institution of a kind specified in regulations made for this definition;

“enforceable undertaking” means an undertaking described in section 84;

“*ex officio* Board member” means a Board member referred to in section 16(1)(b), (c) or (d);

“financial conduct licence” means a licence under Part IV;

“financial conglomerate” means a group (as defined in the Companies Act) designated as such under section 70;

“financial crime” includes—

- (a) an offence against this Act or a sectoral law;
- (b) engaging in conduct that amounts to—
 - (i) corruption or an economic crime as defined in the Anti-Corruption and Economic Crimes Act (Cap. 56); or
 - (ii) an offence against the Prevention of Terrorism Act (No. 30 of 2012) or the Proceeds of Crime and Anti-Money Laundering Act (Cap. 59B);

“financial customer” means a final user of a financial product or financial service;

“financial institution” means each of the following—

- (a) a financial product provider;

- (b) a financial service provider;
- (c) a person licensed or required to be licensed under a financial sector law;
- (d) a holding company in a financial conglomerate;
- (e) an institution of a kind specified in regulations made for this definition;

but not the Central Bank of Kenya or a Central Bank of Kenya supervised entity;

“financial product” has the meaning it has under section 3;

“financial product advice” has the meaning it has under section 4(3) and (4);

“financial product provider” means a person that, as a business or as part of a business, provides a financial product;

“financial sector law” means—

- (a) this Act or a sectoral law;
- (c) an instrument made or issued under this Act (including a prudential rule and a conduct rule) or under a sectoral law; and
- (d) a written law specified in regulations made for this definition;

“financial sector licence” means each of the following—

- (a) a financial conduct licence;
- (b) a written licence, registration, approval, recognition, permission, consent or any other authorisation under a sectoral law, however it is described in that law, required to provide a financial product or a financial service;

“financial service” is defined in section 4;

“financial service provider” means a person that, as a business or as part of a business, provides a financial service;

“financial year” means a period of 12 months starting on 1 July;

“fit and proper” is defined in section 6;

“foreign securities” means instruments that have the same economic effect as securities but are provided, to a person in the Republic, by a person in another country;

“FSA Fund” means the fund established by section 140;

“governing body”, in relation to a financial institution, means a person or body of persons, whether elected or not, that manages, controls, formulates the policy and strategy of the financial institution, directs its affairs or has the authority to exercise its powers and perform its functions, or has the power to control that;

“holding company” of a company (“company A”) means a company incorporated in Kenya that is a holding company of company A under the Companies Act;

“inspection” means an inspection under section 78;

“Insurance Act” means the Insurance Act (Cap. 487);

“Insurance Compensation Fund” means the fund of that name established by section 116;

“investigation” means an investigation under section 80;

“investigator” means an investigator appointed under section 79;

“key person” in relation to a financial institution, means each of the following—

- (a) a member of the governing body of the institution;
- (b) the chief executive officer or other person in charge of the institution;
- (c) a person other than a member of the governing body of the institution who makes or participates in making decisions that—
 - (i) affect the whole or a substantial part of the business of the institution; or
 - (ii) may affect significantly the financial standing of the institution;
- (d) a person other than a member of the governing body of the institution who oversees the enforcement of the policies of, or the implementation of strategies of, the institution;

- (e) the head of a control function of the institution;
- (f) the head of a function of the institution that a sectoral law requires to be performed;

“levy” means operating levy, special levy or penalty levy;

“levy payer” means a person liable to pay levy;

“licensee” means a person that holds a financial sector licence;

“Ombudsman” means the Financial Sector Ombudsman established by section 106;

“party”, in relation to proceedings in the Tribunal for review of a reviewable decision, means a party as described in section 135;

“Pensions Compensation Fund” means the fund of that name established by section 116;

“predecessor authority” means each of the following—

- (a) the Capital Markets Authority established by the Capital Markets Act;
- (b) the Insurance Regulatory Authority established by the Insurance Act;
- (c) the Retirement Benefits Authority established by the Retirement Benefits Act;
- (d) the Sacco Societies Regulatory Authority established by the Sacco Act;

“prudentially regulated financial institution” means each of the following—

- (a) an entity carrying on an activity that is required by the Capital Markets Act or the Central Depositories Act to be licensed;
- (b) an entity carrying on insurance business as defined by the Insurance Act or an activity that is required by that Act to be licensed;
- (c) a trustee of a scheme fund, or a manager, custodian or administrator of a retirement benefits scheme, as each of these is defined in the Retirement Benefits Act;
- (d) a Sacco;

- (f) an entity of a kind specified in regulations made for this definition;

“prudential rule” means a rule made under section 30;

“regulatory authority” means an authority within Kenya or in a jurisdiction outside Kenya which performs—

- (a) functions corresponding or similar to those performed by the Authority; or
- (b) functions that, in the opinion of the Authority, relate to the regulation or supervision of financial products, financial services, foreign financial products or foreign financial services;

“Retirement Benefits Act” means the Retirement Benefits Act (Cap. 197);

“reviewable decision” means each of the following—

- (a) a decision by the Authority under a financial sector law in relation to a specific person;
- (b) a decision on a claim for compensation from a Compensation Fund;
- (c) a decision of a kind prescribed by regulations for the purposes of this paragraph;

and includes—

- (d) an omission to take such a decision within a prescribed period;
- (e) an omission to take such a decision within a reasonable period, if the applicable financial sector law requires the decision to be taken but without prescribing a period;

but does not include—

- (f) a decision in relation to making a prudential rule or a conduct rule;
- (g) a decision under Part VIII or IX;
- (h) an assessment of financial sector levy issued to a specific person; or
- (i) a decision prescribed by regulations made for this paragraph;

“Sacco” has the meaning it has under the Sacco Act;

“Sacco Act” means the Sacco Societies Act (Cap. 490B);

“Sacco Compensation Fund” means the fund of that name established by section 116;

“sectoral law” means—

- (a) the Capital Markets Act;
- (b) the Central Depositories Act;
- (c) the Insurance Act;
- (d) the Retirement Benefits Act;
- (e) the Sacco Act; and
- (f) a law specified in regulations made for this definition;

“securities” has the meaning it has in the Capital Markets Act;

“significant owner” of a financial institution means a person who is a significant owner of the institution because of section 5;

“SRO” means an organisation authorised as mentioned in section 51;

“SRO rules” means rules made by an SRO under its constitution;

“Statutory Instruments Act” means the Statutory Instruments Act, 2013 (Act No 23 of 2013);

“Tribunal” means the Financial Services Tribunal established under section 124;

“Tribunal Rules” means rules made under section 130;

“unfair business practice” means conduct declared by a conduct rule to be an unfair business practice.

(4) A reference in a financial sector law, or in an instrument made or issued under a financial sector law, to compliance with financial sector laws or to compliance with a particular financial sector law includes a reference to compliance with requirements in instruments made or issued under the relevant financial sector laws.

Financial products

3. (1) Subject to this section, a financial product is a facility or arrangement through which, or through the acquisition of which, a person does one or more of the following—

- (a) makes a financial investment (see subsection (5));
- (b) manages financial risk (see subsection (6));
- (c) makes non-cash payments (see subsection (7)).

(2) The provision of credit under a credit agreement as defined in the Consumer Protection Act (No. 46 of 2012) is a financial product.

(3) Securities are financial products.

(4) A facility or arrangement with substantially the same economic effect as a facility or arrangement described in subsection (1), (2) or (3), whatever its form (for example, a form that complies with requirements under Islamic law), is a financial product.

(5) In determining whether a particular facility or arrangement is a financial product, the way in which a facility or arrangement is provided to the financial customer (for example, over the internet) shall be ignored.

(6) Subject to this section, a particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a financial product even if that facility is acquired by a particular person for some other purpose.

(7) A facility does not cease to be a financial product merely because—

- (a) the facility has been acquired by a person other than the person to whom it was originally issued; and
- (b) that person, in acquiring the facility, was not making a financial investment or managing a financial risk.

(8) For this section, a person (“the investor”) makes a financial investment if—

- (a) the investor gives money or money’s worth (the “contribution”) to another person and any of the following apply—
 - (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - (ii) the investor intends that the other person will use the contribution to generate a financial return, or other

benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor; and

(b) the investor has no day to day control over the use of the contribution to generate the return or benefit.

(9) For the purposes of this section, a person manages financial risk if the person—

(a) manages the financial consequences to himself or herself of particular circumstances happening; or

(b) avoids or limits the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

(10) For the purposes of this section, a person makes non-cash payments if the person makes payments, or causes payments to be made, otherwise than by the physical delivery of Kenyan currency in the form of notes or coins.

(11) A facility identified in regulations for this subsection as a financial product is a financial product.

(12) A facility identified in regulations for this subsection as not being a financial product is not a financial product.

Financial services

4. (1) Subject to this section, a person provides a financial service if the person—

(a) provides any of the following services in relation to a financial product—

(i) providing financial product advice;

(ii) dealing in a financial product;

(iii) making a market for a financial product;

(iv) administering or managing a financial product;

(b) engages in conduct of a kind prescribed in regulations made for the purposes of this paragraph; or

(c) administers or manages a financial service as defined in paragraph (a) or (b).

(2) A service provided in relation to a financial product or financial service, which is identified in regulations for this subsection as not being a financial service, is not a financial service.

(3) “Financial product advice” means a recommendation or a statement of opinion, or a report of either of those things, that—

- (a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or
- (b) could reasonably be regarded as being intended to have such an influence;

but does not include anything in a document of a kind prescribed by regulations made for this paragraph.

(4) To avoid doubt—

- (a) the provision of factual information (including about pricing) by itself is not financial product advice; and
- (b) advice given by a legal practitioner in a professional capacity about matters of law, legal interpretation or the application of the law to any facts is not financial product advice.

(5) The following conduct constitutes dealing in a financial product—

- (a) facilitating, managing or administering the issue of a financial product;
- (b) in relation to securities — underwriting the securities or interests;
- (c) varying a financial product;
- (d) disposing of a financial product;
- (e) arranging for a person to do any of the things mentioned in paragraphs (a) to (d).

(6) A person is not dealing in a financial product merely because the person deals in the product on his or her own account.

(7) The regulations may prescribe conduct that is taken to be, or not to be, dealing in a financial product. Regulations made for the

purposes of this subsection have effect despite anything else in this section.

(8) For this section, a person makes a market for a financial product if—

- (a) either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf; and
- (b) other persons have a reasonable expectation that they will be able to effect transactions regularly at the stated prices; and
- (c) the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of subsection (9)(a).

(9) For the purposes of this section, a financial market is a facility through which—

- (a) offers to acquire or dispose of financial products are regularly made or accepted; or
- (b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in—
 - (i) the making of offers to acquire or dispose of financial products; or
 - (ii) the acceptance of such offers.

However, the following does not constitute operating a financial market—

- (c) a person making or accepting offers or invitations to acquire or dispose of financial products on the person's own behalf, or on behalf of one party to the transaction only;
- (d) conducting treasury operations between related bodies corporate;
- (e) conducting an auction of forfeited shares;

- (f) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Significant owners

5. (1) For this Act, a person is a significant owner of a financial institution if the person, directly or indirectly, alone or together with one or more associated persons, has the ability to control or influence materially the business or strategy of the financial institution.

(2) Without limiting subsection (1), a person shall be taken to have the ability referred to in that subsection if—

- (a) the person, directly or indirectly, alone or together with one or more associated persons—
 - (i) has the power to appoint at least the prescribed proportion of the members of the governing body of the financial institution; or
 - (ii) holds a qualifying stake in the financial institution; or
- (b) the person's consent is required for the appointment of at least the prescribed proportion of the members of the governing body of the financial institution.

(3) Despite subsection (1), the Cabinet Secretary, the Central Bank of Kenya and the Authority are not, in those capacities, significant owners of a financial institution.

(4) For this section, a person holds a qualifying stake in a financial institution that is a company if —

- (a) the person, directly or indirectly, alone or together with one or more associated persons—
 - (i) holds at least the prescribed proportion of the issued shares of the financial institution;
 - (ii) has the ability to exercise or control the exercise of at least the prescribed proportion of the voting rights attached to securities of the financial institution;
 - (iii) has the ability to dispose of or direct the disposal of at least the prescribed proportion of the financial institution's securities; or
- (b) holds rights in relation to the financial institution that, if exercised, would result in an outcome described in paragraph (a).

(5) For this section, a person holds a qualifying stake in a financial institution that is a trust if the person, directly or indirectly, alone or together with one or more associated persons—

- (a) has the ability to exercise or control the exercise of at least the prescribed proportion of the votes of the trustees;
- (b) has the power to appoint at least the prescribed proportion of the trustees; or
- (c) has the power to appoint or change any beneficiaries of the trust.

(6) In this section—

“prescribed proportion”, in relation to a financial institution, means—

- (a) 25%; or
- (b) if a sectoral law prescribes a lower percentage —the lower percentage.

“Fit and proper person” requirements

6. (1) In determining for the purposes of a financial sector law whether a person is fit and proper to hold a particular position, that matters that shall be taken into account include—

- (a) the person’s probity, competence and soundness of judgment in fulfilling the responsibilities of the position;
- (b) the diligence with which the person is fulfilling or can be expected to fulfil those responsibilities;
- (c) whether the person has committed any offence (including any financial crime), irregularities or misappropriated funds of financial customers;
- (d) whether the person has contravened a written law intended to protect members of the public from loss arising out of dishonesty or incompetence, or malpractice, in connection with financial products or financial services;
- (e) whether the persons was a director or senior office of a body that provided financial products or financial services that has been liquidated in insolvency, or subject to statutory management (however described);

- (f) has engaged in conduct that, in the Authority's opinion, is fraudulent, prejudicial or otherwise improper (whether unlawful or not).

(2) Subsection (1) does not limit the provisions that a sectoral law, or a prudential rule or a conduct rule, may make about fit and proper person requirements.

Financial institutions that are bodies corporate

7. Where a financial sector law imposes an obligation to be complied with by an entity that is a body corporate, the members of the governing body of the body corporate must ensure that the obligation is complied with.

Inconsistency of laws

8. if there is an inconsistency between a provision of this Act (other than a Regulation or a statutory instrument made under this Act) and a provision of another Act that is a financial sector law, then, unless this Act expressly provides otherwise, the provision of this Act prevails.

(2) If there is an inconsistency between a provision of a Regulation or a statutory instrument made under this Act and a provision of a Regulation or a statutory instrument made under another financial sector law, then, unless this Act, the Regulation or the statutory instrument expressly provides otherwise, the provision of the Regulation or statutory instrument made under this Act prevails.

Application of Statutory Instruments Act

9. (1) The following instruments are statutory instruments for the purposes of the Statutory Instruments Act—

- (a) a prudential rule;
- (b) a conduct rule;
- (c) regulations under this Act or a financial sector law;
- (d) an instrument under a sectoral law, and specified in that law to be a statutory instrument for purposes of the Statutory Instruments Act.

(2) No other instrument under a financial sector law is a statutory instrument for the purposes of the Statutory Instruments Act.

PART II — THE FINANCIAL SERVICES AUTHORITY

Division 1 — The Authority

Establishment of the Authority

10. (1) There is established an Authority to be known as the Financial Services Authority.

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

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) having and managing its own funds including borrowing and lending money;
- (d) entering into contracts;
- (e) employing or engaging the services of persons to assist it in performing its functions and exercising its powers; and
- (f) doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

(3) Except as otherwise provided in this Act or another financial services law, the Authority shall be operationally independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

Objectives of the Authority

11. The objectives of the Authority shall be to—

- (a) promote and enhance the safety and soundness of prudentially regulated financial institutions;
- (b) enhance and support the efficiency and integrity of financial markets;
- (c) promote public confidence in and encourage the development of the financial sector;
- (d) protect financial customers by—
 - (i) promoting fair treatment of financial customers by financial institutions; and
 - (ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions; and
- (e) promote systemic stability in the financial sector; and

Functions of the
Authority

- (f) subject to paragraphs (a) to (e) —support the economic policy of the Government, including its objectives for growth and employment.

12. (1) The functions of the Authority shall be to—

- (a) regulate and supervise prudentially regulated financial institutions in accordance with this Act and the sectoral laws;
- (b) regulate and supervise, in accordance with this Act, the conduct of financial institutions;
- (c) promote, to the extent consistent with achieving the objective of the Authority, sustainable competition in the provision of financial products and financial services;
- (d) promote an appropriate degree of self-regulation in the financial sector, including through SROs;
- (e) promote awareness of the need for, and undertake and assist in providing, financial education;
- (f) promote financial inclusion, that is, that all persons have timely and fair access to appropriate, fair and affordable financial products and financial services;
- (g) advise the National Treasury on policies with respect to the financial sector including in relation to national development plans;
- (h) monitor the operation of financial sector laws and their effectiveness in achieving the objectives set out in section 11, and report to the Cabinet Secretary on those matters;
- (i) cooperate with, and provide appropriate assistance to, State organs, foreign regulatory authorities and law enforcement agencies; and
- (j) perform its functions under any other law.

Powers of the Au-
thority

13. (1) The Authority shall have all the powers necessary for the proper performance of its functions under the financial sector laws, and in particular the power to—

- (a) control, supervise and administer the assets of the Authority as will promote the achievement of the Authority's objectives in section 11;

- (b) manage the funds of the Authority, including its reserves;
 - (c) receive grants, gifts or endowments;
 - (d) establish a bank accounts;
 - (e) with the consent of the Cabinet Secretary, borrow money, mortgage or charge any of its assets ;
 - (f) engage staff, on terms and conditions, as it may consider necessary for performance of its functions, including establishing retirement benefits funds and medical funds for them and making contributions to those funds for their benefit;
 - (g) co-operate with its counterparts in other jurisdictions; and
 - (h) participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.
- (3) When performing its functions, the Authority shall—
- (a) take into account the need for a primarily pre-emptive, outcomes focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective; and
 - (b) to the extent practicable, have regard to international regulatory and supervisory standards.

Co-operation and
collaboration

14. (1) The Authority and the Central Bank of Kenya must co-operate and collaborate when performing their functions, and must for this purpose—

- (a) generally assist and support each other in pursuing their objectives;
- (b) to the extent permitted by law, inform each other about, and share information about, matters of common interest;
- (c) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges;
- (d) co-ordinate, to the extent appropriate, actions they take, including in relation to—
 - (i) licensing;
 - (ii) inspections and investigations;
 - (iii) actions to enforce laws;

- (iv) information sharing;
 - (v) recovery and resolution; and
 - (vi) reporting by financial institutions, including statutory reporting and data collection measures; and
- (e) minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities.

(2) The Authority and any other State organ that has a regulatory or supervisory function in relation to financial institutions must cooperate and collaborate when performing their functions, including by consulting each other in relation to the performance of their functions.

(3) The Authority may, in writing, request a State organ to provide information about any action that the State organ has taken or proposes to take in relation to a financial institution specified in the request. The State organ must comply with the request, but this subsection does not require or permit a State organ to do something that would contravene a law.

Memorandums of understanding

15. (1) The Authority may enter into memorandums of understanding with other organs of State in the Republic and with corresponding agencies in other countries.

(2) The validity of an action taken by the Authority is not affected by a failure to comply with this section or a memorandum of understanding.

(3) The Authority shall publish each memorandum of understanding and each amendment of a memorandum of understanding.

Division 2 — The Board

The Board

16. (1) There is established a Board for the Authority, which shall consist of—

- (a) a Chairperson, who shall be appointed by the President;
- (b) the Principal Secretary to the National Treasury;
- (c) the Governor of the Central Bank of Kenya;
- (d) the Chief Executive Officer; and
- (e) five other members, who shall be appointed by the Cabinet Secretary.

(2) In appointing the Chairperson and the Board members mentioned in paragraph (1)(e), the President and the Cabinet Secretary shall have regard to the principles of gender equity and regional balance and the need to have a mix of skills relevant to the financial sector.

(3) The Chairperson and Board members appointed under subsection (1)(e) shall be selected from persons who—

- (a) are not public officers or employees, officers or significant owners of any licensed person;
- (b) hold a bachelor's degree in law, finance, economics, commerce, actuarial science or other relevant discipline;
- (c) have at least ten years experience in top management of a public or private institution within the financial sector;
- (d) have at least five years experience as a board member;
- (e) satisfy the requirements of the relevant provisions of the Constitution and national laws in respect to National Values, Governance, Leadership, Integrity and Principles of Public Service; and
- (f) have not served as an employee of the Authority or a predecessor authority in the preceding five years.

(4) A disqualified person shall not be appointed as a Board member.

(5) A Board member (other than an *ex officio* Board member) shall hold office for a period specified in the instrument of appointment, not exceeding three years, and on terms and conditions specified in the instrument of appointment. At the end of his or her term, the Board member may be re-appointed for one further term of a period not exceeding three years.

(6) The Board members (other than *ex officio* Board members) shall be appointed at different times so that the ends of their terms fall at different times.

(7) A Board member (other than an *ex officio* Board member)—

- (a) may at any time resign from office by notice in writing to the Cabinet Secretary;
- (b) may be removed from office by the Cabinet Secretary if the member—

- (i) has been absent from three consecutive meetings of the Board without permission from the Chairperson;
 - (ii) in the case of the Chairperson — has been absent from three consecutive meetings of the Board without permission from the Cabinet Secretary;
 - (iii) is incapacitated by physical or mental illness or other cause from fulfilling the responsibilities of a Board member; or
 - (iv) conducts himself or herself in a manner not befitting a Board member; and
- (c) shall be removed from office by the Cabinet Secretary if the member becomes a disqualified person.

(8) An *ex officio* Board member other than the Chief Executive Officer may, by notice to the Chairperson, nominate a suitable alternate to attend meetings of the Board. If the *ex officio* Board member is not present at a meeting of the Board but the alternate is, the alternate has, for the meeting, all the powers and responsibilities of the *ex officio* Board member.

Functions of the Board

17. (1) The functions of the Board shall be to—

- (a) generally oversee the management and administration of the Authority;
- (b) formulate and approve strategies and plans for the Authority, including—
 - (i) the strategic priorities of the Authority;
 - (ii) regulatory strategies; and
 - (iii) operational strategies and plans;
 and monitor the implementation of those strategies and plans;
- (c) monitor the performance of the Authority and the extent to which the objectives set out in section 11 are being achieved;
- (d) any other functions conferred on the Board by a written law.

Board committees

18. (1) The Board may establish such committees as it may consider necessary for the performance of its functions.

(2) The Board may co-opt any person with appropriate knowledge and skills to sit on any committee established under subsection (1).

Board procedure

19. (1) The Board shall conduct its affairs in accordance with the provisions of the First Schedule.

(2) Except as provided in this Part and the First Schedule, the Board shall regulate its own procedure.

Division 3 —Chief Executive Officer

Chief Executive Officer

20. (1) There shall be a Chief Executive Officer for the Authority, who shall be appointed by the Board in consultation with the Cabinet Secretary and whose terms and conditions of service shall be determined by the Board in the instrument of appointment or otherwise in writing from time to time.

(2) The Chief Executive Officer shall hold office for a term of four years from the date of appointment and shall be eligible for re-appointment for one further term not exceeding four years.

(3) A person shall not be appointed as Chief Executive Officer—

- (a) unless the person has at least a relevant master's degree and membership in a professional body;
- (b) unless the person has knowledge, competence and at least ten years' experience in finance, law, accounting, economics, banking, actuarial science, insurance, cooperative practice or matters relating to capital markets, at least five years of which are in senior management;
- (c) unless the person satisfies the requirement of the relevant provisions of the Constitution in respect to National Values, Governance, Leadership, Integrity and Principles of Public Service;
- (d) if the person—
 - (i) is a director or other officer, employee or shareholder of a licensee, or in any other sector of the financial services sector, unless the person has resigned before appointment;
 - (ii) has previously been involved in the management or administration of a financial institution or a Central Bank of Kenya supervised entity that was deregis-

tered, wound up or placed under statutory management for any failure on the part of the management or the administration thereof.

(4) A disqualified person shall not be appointed as Chief Executive Officer.

(6) The Chief Executive Officer may be removed from office by the Board, in consultation with the Cabinet Secretary, on any ground on which a Board member may be removed from office under section 16.

Role of the Chief Executive Officer

21. (1) The Chief Executive Officer—

- (a) is responsible for the day-to-day management and administration of the Authority; and
- (b) subject to this Act and the sectoral laws, shall perform the functions of the Authority, including exercising the powers and carrying out the duties associated with those functions;

(2) In performing the functions of the Authority, the Chief Executive officer shall implement the policies and strategies adopted by the Board.

Delegations

22. The Chief Executive Officer may, in writing, either generally or in any particular case, delegate to any Board member or staff member or contractor of the Authority the exercise of any of the powers or the performance of any of the functions or duties of the Authority under this Act or under any other written law.

Common seal

23. (1) The common seal of the Authority shall be kept in the custody of the Chief Executive Officer.

(2) The common seal of the Authority shall be authenticated by the signatures of—

- (a) the Chief Executive Officer or the Chairperson; and
- (b) one other member authorized by the Board in that behalf or the Board Secretary.

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

Division 4—Executive Committee, Board Secretary and staff

Executive Committee

24. (1) The Board shall establish an Executive Committee comprising senior staff of the Authority selected by the Board, to advise the Chief Executive Officer.

Board Secretary

25. The Board shall appoint an individual as Secretary to the Board.

Staff

26. (1) The Authority may appoint such staff as it considers necessary for the discharge of its responsibilities and functions under this Act.

(2) Staff appointed under subsection (1) shall be remunerated at a rate determined by the Board and shall be subject to conditions of service as the Board may determine.

Liability

27. (1) No matter or thing done or omitted to be done by a member of the Board, staff or agents of the Authority in execution of the functions and objectives of the Authority shall render the member, staff, agent or any person acting on their directions personally liable to any action, claim or demand whatsoever unless the matter or thing was done or omitted in bad faith.

(2) Any expenses incurred or to be incurred by any person referred to in subsection (1) in any suit brought against that person before any court in respect of any act which is done or purported to be done by that person under this Act, or on the direction of the Authority, shall be reimbursed or met by the Authority unless the act concerned was done in bad faith.

Confidentiality

28. (1) A Board member and a staff member of the Authority shall, at all times, in the performance of a function authorized under this Act, preserve confidentiality with regard to all matters coming to the knowledge of that person in the performance of any such function.

(2) A member of the Board, staff or agent of the Authority shall not, at any time, without reasonable justification or excuse—

(a) communicate any confidential information to any person;
or

(b) permit any person to have access to any document in the possession, custody or control of the Authority.

Penalty — Kshs. [insert].

Annual and other reports

29. (1) The Authority shall, not later than 180 days after the end of each financial year, prepare an annual report of its activities during the financial year.

(2) Each annual report must report on the steps taken to co-operate and collaborate with the Central Bank of Kenya.

(3) The Authority shall submit each annual report to the Cabinet Secretary, who shall submit it to the National Assembly.

(4) The Authority shall publish a copy of each annual report.

(5) The Authority must comply with any request by the Cabinet Secretary for information about the Authority and its operations.

PART III — PRUDENTIAL AND CONDUCT RULES

Prudential rules

30. (1) The Cabinet Secretary shall, in consultation with the Authority, make rules (“prudential rules”) for or in respect of—

- (a) prudentially regulated financial institutions; and
- (b) holding companies in financial conglomerates.

(2) A prudential rule must be aimed at one or more of the following:

- (a) ensuring the safety and soundness of prudentially regulated financial institutions;
- (b) in the case of holding companies in financial conglomerates — ensuring the safety and soundness of the eligible prudentially regulated financial institutions in those conglomerates;
- (c) reducing the risk that prudentially regulated financial institutions engage in conduct that amounts to, or contributes to, financial crime; and
- (d) promoting financial sector stability.

(3) Without limiting subsection (1), a prudential rule may make provision in respect of—

- (a) financial soundness requirements, including in relation to capital adequacy, minimum liquidity and minimum asset quality;
- (b) in the case of financial conglomerates—

- (i) intra-group financial and other exposures of companies in financial conglomerates;
 - (ii) the governance and management arrangements for holding companies in financial conglomerates;
 - (iii) reporting of information about companies in financial conglomerates that are not financial institutions; and
 - (iv) reducing or managing risks to the safety and soundness of eligible prudentially regulated financial institutions in financial conglomerates arising from the other members of the financial conglomerate; and
- (c) matters that a relevant sectoral law provides may be provided for in a prudential rule.

Conduct rules

31. (1) The Cabinet Secretary shall, in consultation with the Authority, make rules make rules (“conduct rules”) for or in respect of the conduct of financial institutions in relation to the provision of financial products or financial services.

(2) A conduct rule shall be aimed at one or more of the following—

- (a) ensuring the efficiency and integrity of financial markets;
- (b) ensuring that financial institutions treat financial customers fairly;
- (c) reducing the risk that financial institutions engage in conduct that is or contributes to financial crime; and
- (d) promoting financial sector stability.

(3) Without limiting subsection (1), a conduct rule may be made on any of the following matters—

- (a) efficiency and integrity requirements for financial markets;
- (b) measures to combat abusive practices;
- (c) requirements for the fair treatment of financial customers, including in relation to—
 - (i) the promotion, marketing and distribution of, and advice in relation to, those products and services; and

(ii) the resolution of complaints and disputes concerning those products and services, including redress;

(d) the disclosure of information to financial customers.

Unfair business practices

32. (1) A conduct rule may declare specific conduct in connection with a financial product or a financial service to be an unfair business practice if the conduct—

(a) is or is likely to be materially inconsistent with the fair treatment of financial customers;

(b) is deceptive or misleading or is likely to deceive or mislead financial customers; or

(c) unfairly prejudices, or is likely to prejudice unfairly, financial customers or a category of financial customers.

(2) A financial institution that engages in conduct declared to be an unfair business practice commits an offence.

Penalty — Kshs. [insert].

Prudential rules and conduct rules —additional matters

33. (1) Without limiting section 31 or 32, a prudential rule or a conduct rule may make provision for any of the following—

(a) fit and proper person requirements in relation to financial institutions, key persons of financial institutions, significant owners of financial institutions and holding companies in financial conglomerates;

(b) governance, including in relation to—

(i) the composition, membership and operation of governing bodies of governing bodies;

(ii) identifying and managing conflicts of interest and

(c) the terms and conditions of office of (including remuneration and incentives for) members of governing bodies; and

(d) the terms and conditions of engagement of key persons;

(e) financial management, including—

(i) accounting, actuarial and auditing requirements;

(ii) risk management and internal control requirements;

- (iii) financial statements, updates on financial position, and public reporting and disclosures;
- (f) control functions;
- (g) reporting, including to the Authority;
- (h) outsourcing;
- (i) the amalgamation, merger, acquisition, disposal and dissolution of financial institutions; and
- (j) recovery, resolution and business continuity of financial institutions.

(2) A prudential rule or a conduct rule may provide for the Authority to make determinations, in accordance with the rule, for the purposes of the rule.

(3) A prudential rule or a conduct rule may make different provision for—

- (a) different categories of financial institutions or key persons; and
- (b) different circumstances.

(4) A prudential rule may amend or revoke another prudential rule.

(5) A conduct rule may amend or revoke another conduct rule.

Prudential or conduct rules requiring concurrence of or consultation with Central Bank of Kenya

34. (1) A prudential rule made under section 30(3)(b) shall not include a provision that imposes requirements on a Central Bank of Kenya supervised entity without the concurrence of the Central Bank of Kenya.

(2) A prudential rule or a conduct rule shall not include provision aimed at promoting financial sector stability unless the Central Bank of Kenya has been consulted.

PART IV — FINANCIAL CONDUCT LICENCES

Requirement for financial conduct licences

35. (1) A person shall not provide, as a business or part of a business, a financial product or a financial service except in accordance with a financial conduct licence.

(2) Subsection (1) does not require either of the following to hold a financial conduct licence—

- (a) a Central Bank of Kenya supervised entity;
- (b) an issuer of securities.

(3) A person who does not hold a financial conduct licence shall not describe or hold itself out as being so licensed.

(4) A person who does not hold a financial conduct licence to provide particular financial products or financial services shall not describe or hold itself out as being so licensed.

(5) A person shall not permit another person to identify the first person as holding a financial conduct licence, or a particular conduct licence, unless the first person is so licensed.

(6) For this section, a person whose financial conduct licence has been suspended or revoked does not hold a conduct licence.

(7) A person who contravenes a provision of this section commits an offence and is liable on conviction to a penalty [insert].

Grant of financial
conduct licences

36. (1) The Authority may, on application by a financial institution, grant the financial institution a financial conduct licence.

(2) A financial conduct licence remains in force until suspended or revoked.

Applications for fi-
nancial conduct li-
cences

37. (1) An application for a financial conduct licence shall—

- (a) be in writing and in a form approved or accepted by the Authority; and
- (b) include or be accompanied by the information and documents required in the form or by the Authority.

(2) The Authority may, by notice in writing, require an applicant for a financial conduct licence to—

- (a) give the Authority additional information or documents specified by the Authority; and
- (b) verify any information given by the applicant in connection with the application, as specified by the Authority.

The Authority need not deal further with the application until the applicant has complied with the notice.

Criteria for grant of
financial conduct li-
cences

38. (1) The matters that the Authority shall take into account in relation to an application for a financial conduct licence include—

- (a) the objectives set out in section 11;

- (b) the financial and other resources of and available to the applicant;
- (c) fit and proper person requirements applicable to the applicant and to any key person or significant owner of the applicant;
- (d) the governance and risk management arrangements of the applicant;
- (e) whether the applicant, or a key person of the applicant, has engaged in an unfair business practice or in conduct that contravenes the Consumer Protection Act; and
- (e) whether the applicant made a statement that is false or misleading, including by omission, in or in relation to the application.

(2) The Authority shall not grant a financial conduct licence to an applicant unless satisfied that—

- (a) the applicant has or has available to it sufficient financial and other resources to ensure that it will be able to comply with the requirements of financial sector laws in relation to the financial conduct licence; and
- (b) the institution, and its key persons, are fit and proper;
- (c) the applicant has effective internal mechanisms for dealing with complaints from financial customers about financial products and financial services that it provides; and
- (d) issuing the financial conduct licence to the applicant will not be contrary to the interests of financial customers generally.

Determination of applications

39. (1) The Authority must determine each application for a financial conduct licence by—

- (a) granting the application and issuing a financial conduct licence to the applicant; or
- (b) refusing the application and notifying the applicant accordingly.

(2) If the Authority has not granted an application, or notified the applicant in terms of subsection (1)(b), within the notification period for the application, it is taken to have refused the application.

(3) For subsection (2), the notification period for an application is 60 days starting in the day in which the application is lodged with the Authority. The Authority may, by notice to the applicant, extend the notification period for one further period not exceeding 60 days.

(4) In working out when the notification period expires, any period between the Authority giving the applicant a notice under section 37 and the requirements in the notice being satisfied is not to be counted.

Scope of financial
conduct licences

40. (1) A financial conduct licence may be limited—

- (a) to specified financial products or specified financial services;
- (b) to the provision of financial products or financial services to persons in a specified class, or in specified circumstances.

(2) A financial conduct licence may be subject to conditions specified in the licence.

Notification obligations
of licensees

41. (1) A person who holds a financial conduct licence shall promptly notify the Authority of any of the following—

- (a) the fact that it has contravened or is contravening, in a material way—
 - (i) a financial sector law;
 - (ii) a directive;
 - (iii) an enforceable undertaking; or
 - (iv) an order of a court made under a financial sector law;
- (b) the fact that it has become aware that information given in connection with the application for the financial conduct licence was false or misleading.

(2) Subsection (1) also applies in relation to events and circumstances that occur while the person's financial conduct licence is suspended.

Financial conduct
licences not trans-
ferable

42. A financial conduct licence is not transferable.

Varying financial
conduct licences

43. (1) The Authority may, by notice to the holder of a financial conduct licence, vary the licence if to do so will assist in achieving the objectives set out in section 11.

(2) A variation of a financial conduct licence may include—

- (a) removing or varying a condition of the licence, or adding a condition; and
- (b) changing the categories of financial products, financial services or financial customers to which the licence relates.

(3) A variation of a financial conduct licence takes effect on a date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

Suspending financial conduct licence

44. (1) The Authority may, by notice to the holder of a financial conduct licence, suspend the licence for the period specified in the notice if—

- (a) the licensee applies for suspension;
- (b) a condition of the licence has been contravened or has not been complied with in a material respect;
- (c) the licensee, or a key person of the licensee, has contravened in a material respect—
 - (i) a financial sector law;
 - (ii) a conduct rule;
 - (iii) a directive;
 - (iv) an enforceable undertaking;
 - (v) a determination of the Ombudsman;
 - (vi) a decision of the Tribunal; or
 - (vii) an order of a court made under a financial sector law;
- (d) the licensee, or a key person of the licensee, has engaged in conduct that contravenes the Consumer Protection Act or a warranty implied into an agreement by that Act;
- (e) the licensee, or a key person of the licensee, has in a foreign country contravened in a material respect a law of that country that corresponds to a financial sector law or the Consumer Protection Act;
- (f) information provided in or in relation to an application in relation to the licence was false or misleading (including by omission) in a material respect;

- (g) the suspension is necessary to prevent—
 - (i) a serious contravention of a financial sector law; or
 - (ii) financial customers of the person suffering material prejudice; or
- (h) any of the following (including any interest) are unpaid and have been unpaid for at least 30 days—
 - (i) fees or charges in respect of the financial conduct licence or another financial sector licence held by the licensee;
 - (ii) a levy or an administrative penalty payable by the licensee.

(2) The Authority may refuse to suspend a financial conduct licence under subsection (1)(a) if the suspension—

- (a) would not be in the best interests of financial customers; or
- (b) would frustrate the achievement of objectives set out in a financial sector law applicable to the licence.

(3) The Authority may at any time revoke the suspension.

(4) A suspension of a financial conduct licence takes effect on the date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

(5) The suspension of a financial conduct licence does not affect an obligation of the licensee that it has in terms of a financial sector law.

Revoking financial
conduct licences

45. (1) The Authority may, by notice to the holder of a financial conduct licence, revoke the licence—

- (a) if the licensee applies for revocation of the licence;
- (b) on any of the grounds on which it may suspend the licence, as set out in section 44(1)(b) to (h); or
- (c) if the licensee has ceased to conduct the licensed activities.

(2) Without limiting its powers, the Authority may refuse to revoke a financial conduct licence under subsection (1)(a) if the revocation—

- (a) would not be in the best interests of financial customers; or
- (b) would frustrate the achievement of objectives set out in a financial sector law applicable to the licence.

(3) Revocation of a financial conduct licence takes effect on the date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

Continuation of licensed activity despite suspension or revocation

46. (1) The Authority may, by notice to a person whose financial conduct licence has been suspended or revoked and on conditions specified in the notice, allow the licensee to carry out the licensed activity to the extent, and for the period, specified in the notice.

(2) The purpose of the notice shall be to facilitate the orderly suspension or termination of the activity.

(3) The conditions may be aimed at ensuring that financial customers of the licensee are treated fairly in relation to suspension or termination of the licensed activity

(4) Carrying out a licensed activity in accordance with the requirements of a notice under subsection (1) is not a contravention of section 35.

Procedure for varying, suspending and revoking conduct licences

47. (1) Before the Authority varies, suspends or revokes a financial conduct licence, it shall—

- (a) give the licensee notice of the proposed action and a statement of the reasons for it; and
- (b) invite the licensee to make submissions on the matter, and give it a reasonable period (which shall be at least 30 days) to do so.

(2) The Authority need not comply with subsection (1) if the licensee applied for the variation, suspension or revocation.

(3) In deciding whether to vary, suspend or revoke the licence, the Authority shall consider all submissions made under subsection (1).

(4) If the delay involved in complying, or complying fully, with subsection (1) in respect of a proposed action is likely to prejudice financial customers, prejudicially affect financial sector stability or defeat the object of the action, the Authority may take the action without having complied, or complied fully, with that subsection.

(5) If the Authority takes action without having complied, or complied fully, with subsection (1) for the reason set out in subsection (4), the Authority shall give the licensee a written statement of the reasons why that subsection was not complied with.

(6) The licensee may make submissions to the Authority within 30 days after being provided with the statement.

(7) The Authority shall consider the submissions and, as soon as practicable, notify the licensee whether the Authority proposes to amend or revoke the variation, suspension or revocation.

Disclosure of financial conduct licences

48. (1) A financial institution shall comply with the applicable requirements of a conduct rule in relation to the identification of financial conduct licences in business documentation, including advertisements and other promotional material.

(2) A financial institution shall make its financial conduct licence or a copy of its financial conduct licence available at no cost to any person on reasonable request.

Penalty — Kshs. [insert].

Licences, variations, suspensions and revocations to be published

49. The Authority shall publish each financial conduct licence, and each instrument varying, suspending or revoking a financial conduct licence.

Other provisions not limited

50. This Part does not limit any other provision of this Act, or any provision of a financial sector law, that specifies matters to be considered in relation to the grant of a financial conduct licence, or the circumstances in which a financial conduct licence may be granted, varied, suspended or revoked.

PART V — SELF-REGULATORY ORGANISATIONS

Authorising SROs to perform Authority's functions

51. (1) The Authority may, on application by an organisation, authorise the organisation to exercise specified powers, or perform specified functions, of the Authority under a financial sector law in relation to specified financial institutions or a specified class of financial institutions.

(2) An authorisation shall be in writing and shall specify—

- (a) the circumstances in which and the conditions on which the SRO may to exercise the powers or perform the functions; and

- (b) the persons (or their positions) who are to exercise the powers or perform the functions on behalf of the SRO.

(3) The Authority shall not authorise an SRO to exercise a power under Division 3 of Part X or under Part XIV.

(4) The authorisation of an organisation under this section to exercise powers or perform functions of the Authority does not prevent the Authority from exercising the powers or performing the functions.

(5) The authorisation of an organisation under this section remains in force until suspended or revoked.

Applications for
SRO authorisations

52. (1) An application for authorisation as an SRO shall—

- (a) be in writing and in a form approved or accepted by the Authority; and
- (b) include or be accompanied by the information and documents required in the form or by the Authority.

(2) The Authority may, by notice in writing, require an applicant for authorisation as an SRO to—

- (a) give the Authority additional information or documents specified by the Authority; and
- (b) verify any information given by the applicant in connection with the application, as specified by the Authority.

The Authority need not deal further with the application until the applicant has complied with the notice.

Criteria for SRO au-
thorisation

53. (1) The Authority shall not authorise an organisation as an SRO under section 51 unless satisfied that—

- (a) there is a need for the organisation to act as an SRO, or it is desirable that the organisation act as an SRO; and
- (b) the organisation's constitution is consistent with its proposed role as an SRO and is in other respects satisfactory;
- (c) the organisation's SRO rules are or will be satisfactory; and
- (d) the organisation has or has available to it sufficient financial and other resources to ensure that it will—

- (i) effectively perform the functions and exercise the powers it will be authorised to perform and exercise as an SRO; and
- (ii) comply with the requirements of financial sector laws.

(2) The matters that the Authority shall consider, in determining whether an organisation's constitution is satisfactory include the interests, rights and liabilities of the members of the organisation and of relevant financial customers.

Determination of applications for authorisation as an SRO

54. (1) The Authority must determine each application for authorisation as an SRO by—

- (a) granting the application and authorising the applicant as an SRO; or
- (b) refusing the application and notifying the applicant accordingly.

(2) If the Authority has not granted an application, or notified the applicant in terms of subsection (1)(b), within the notification period for the application, it is taken to have refused the application.

(3) For subsection (2), the notification period for an application is 60 days starting in the day in which the application is lodged with the Authority. The Authority may, by notice to the applicant, extend the notification period for one further period not exceeding 60 days.

(4) In working out when the notification period expires, any period between the Authority giving the applicant a notice under section 52 and the requirements in the notice being satisfied shall not be counted.

Varying SRO authorisations

55. (1) The Authority may, by notice to an SRO, vary the SRO's authorisation if to do so will assist in achieving the objectives set out in section 11.

(2) A variation of an SRO's authorisation may include—

- (a) removing or adding powers or functions that the SRO is authorised to exercise or perform; and
- (b) removing or varying a condition of the authorisation, or adding a condition.

(3) A variation of an SRO's authorisation takes effect on a date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

Suspending SRO
authorisations

56. (1) The Authority may, by notice to an SRO, suspend the SRO's authorisation for the period specified in the notice if—

- (a) the SRO applies for the suspension;
- (b) a condition of the SRO's authorisation has been contravened or has not been complied with in a material respect;
- (c) there is no further need for the organisation to act as an SRO, or it is no longer desirable that the organisation act as an SRO;
- (d) the SRO does not have, or is likely not to have, available to it sufficient financial and other resources to ensure that it will—
 - (i) effectively perform the functions and exercise the powers it is authorised to perform and exercise as an SRO; or
 - (ii) comply with the requirements of financial sector laws.
- (e) the SRO, or a key person of the SRO, has contravened in a material respect—
 - (i) a financial sector law;
 - (ii) a conduct rule;
 - (iii) a directive;
 - (iv) an enforceable undertaking;
 - (vi) a decision of the Tribunal; or
 - (vii) an order of a court made under a financial sector law;
- (f) information provided in or in relation to an application in relation to the authorisation was false or misleading (including by omission) in a material respect;
- (g) the suspension is necessary to prevent—
 - (i) a serious contravention of a financial sector law; or
 - (ii) financial customers suffering material prejudice; or

(h) any of the following (including any interest) are unpaid and have been unpaid for at least 30 days—

- (i) fees or charges in respect of the authorisation or another financial sector licence held by the SRO;
- (ii) a levy or an administrative penalty payable by the SRO.

(3) The Authority may at any time revoke the suspension.

(4) The suspension of an SRO's authorisation takes effect on the date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

(5) The suspension of an SRO's authorisation does not affect an obligation of the SRO that it has in terms of a financial sector law.

Revoking SRO authorisations

57. (1) The Authority may, by notice to an SRO, revoke the SRO's authorisation—

- (a) if the SRO applies for the revocation;
- (b) on any of the grounds on which it may suspend the authorisation, as set out in section 56(1)(b) to (h); or
- (c) if the SRO has ceased to act as an SRO.

(2) Revocation of an authorisation as an SRO takes effect on the date of the notice under subsection (1) or, if a later date is specified in the notice, the later date.

Continuation despite suspension or revocation

57. (1) The Authority may, by notice to a SRO whose authorisation has been suspended or revoked and on conditions specified in the notice, allow and require the SRO to continue to exercise powers and perform functions as an SRO to the extent, and for the period, specified in the notice.

(2) The purpose of the notice shall be to facilitate the orderly completion of the exercise of the powers or performance of the functions.

Procedure for varying, suspending and revoking conduct licences

58. (1) Before the Authority varies, suspends or revokes a SRO's authorisation, it shall—

- (a) give the SRO notice of the proposed action and a statement of the reasons for it; and

(b) invite the SRO to make submissions on the matter, and give it a reasonable period (which shall be at least 30 days) to do so.

(2) The Authority need not comply with subsection (1) if the SRO applied for the variation, suspension or revocation.

(3) In deciding whether to vary, suspend or revoke an authorisation, the Authority shall consider all submissions made under subsection (1).

(4) If the delay involved in complying, or complying fully, with subsection (1) in respect of a proposed action is likely to prejudice financial customers, prejudicially affect financial sector stability or defeat the object of the action, the Authority may take the action without having complied, or complied fully, with that subsection.

(5) If the Authority takes action without having complied, or complied fully, with subsection (1) for the reason set out in subsection (4), the Authority shall give the SRO a written statement of the reasons why that subsection was not complied with.

(6) The SRO may make submissions to the Authority within 30 days after being provided with the statement.

(7) The Authority shall consider the submissions and, as soon as practicable, notify the SRO whether the Authority proposes to amend or revoke the variation, suspension or revocation.

SRO authorisations, variations, suspensions and revocations to be published

59. The Authority shall publish each authorisation, and each instrument varying, suspending or revoking an authorisation.

Other provisions not limited

60. This Part does not limit any other provision of this Act, or any provision of a financial sector law, that specifies matters to be considered in relation to an authorisation, or the circumstances in which an authorisation may be granted, varied, suspended or revoked.

Amendments to SRO constitutions to be approved SROs

61. Despite anything in the Companies Act, an amendment to the constitution of an SRO is of no effect unless it has been approved by the Authority.

SRO rules

62. (1) SRO rules shall include provision authorising the SRO to suspend the operation of SRO rules, in circumstances, and for periods, specified in the rules.

(2) SRO rules and an amendment of SRO rules, are of no effect unless they have been approved by the Authority.

(3) An SRO shall not make a decision, under its rules, that is likely to affect adversely the rights of a person unless the SRO—

- (a) gave the person an opportunity to make representations about the matter and considers all submissions made by or for the person in relation to the proposed decision; or
- (b) considers, on reasonable grounds, that a delay in making the decision will prejudice a class of financial customers.

Directives to SROs

63. The Authority may give a written directive to an SRO—

- (a) requiring the SRO to give effect to a specified provision of its constitution or its rules; or
- (b) requiring the SRO to amend its constitution or its SRO rules, as specified in the directive, so as to bring it in conformity with financial sector laws.

Disciplinary action by SROs to be notified

64. If an SRO takes disciplinary action in accordance with its SRO rules against a member of the SRO, the SRO shall, as soon as practicable, notify the Authority of the matter.

Change of SRO key personnel to be notified

65. An SRO shall not change its key personnel unless—

- (a) the SRO has notified the Authority of the proposed change, including the identity of the replacement key person; and
- (b) the Authority has notified the SRO that it has no objection to the change.

Liability etc

66. No matter or thing done or omitted to be done by an SRO, or a member of the governing body or staff of an SRO, exercising powers and performing functions of the Authority that the SRO is authorised to exercise and perform under this Part shall render the SRO or the member personally liable to any action, claim or demand whatsoever unless the matter or thing was done or omitted in bad faith.

Annual reports of SROs

67. Each SRO shall, not later than 90 days after the end of each financial year, prepare and submit to the Authority and the Cabinet Secretary an annual report of its activities during the financial year.

Penalty — Kshs. [insert]

PART VI — SIGNIFICANT OWNERS OF ELIGIBLE PRUDENTIALY REGULATED FINANCIAL INSTITUTIONS

Approval to become significant owner of eligible prudentially regulated financial institution

68. (1) A person shall not enter into any of the following arrangements in respect of an eligible prudentially regulated financial institution without the approval of the Authority—

- (a) an arrangement that results, or would result, in the person, alone or together with one or more associated persons, becoming or ceasing to be a significant owner of the institution;
- (b) if the person is a significant owner of the financial institution — an arrangement that results or would result in a material increase or decrease in the extent of the ability of the person, alone or together with one or more associated persons, to control or influence the business or strategy of the institution.

Penalty—Kshs. [insert]

(2) The arrangement need not involve the acquisition of, or disposition of, shares or other interests or property.

(3) An arrangement in contravention of subsection (1) is void to the extent that it has an effect mentioned in that subsection.

(4) The Authority shall not give approval under subsection (1) in respect of a person unless satisfied that—

- (a) the person meets applicable fit and proper person requirements; and
- (b) the person's becoming a significant owner, or the arrangement, will not prejudicially affect the prudent management and the financial soundness of the prudentially regulated financial institution.

(5) This section does not affect any other law.

Notification of increase in significant owner's control of eligible prudentially regulated financial institution

69. If a person—

- (a) is a significant owner of an eligible prudentially regulated financial institution; and
- (b) enters into an arrangement in respect of the institution that results or would result in an increase in the extent of the ability of the person, alone or together with one or

more associated persons, to control or influence the business or strategy of the financial institution; and

- (c) section 68 does not require the arrangement to be approved;

the person must notify the Authority of the arrangement within 30 days after the arrangement is entered into.

Penalty—Kshs. [insert].

PART VII — FINANCIAL CONGLOMERATES

Division 1 — Designating financial conglomerates

Designation of financial conglomerates

70. (1) The Authority may, by written instrument, designate members of a group of companies as a financial conglomerate.

(2) A financial conglomerate shall include both an eligible prudentially regulated financial institution and a holding company of the institution, but need not include all the members of the group of companies.

(3) A holding company in a financial conglomerate shall not be a Central Bank of Kenya supervised entity.

(4) A purpose of a designation of members of a group of companies as a financial conglomerate shall be only to facilitate the supervision of the eligible prudentially regulated financial institution in relation to its safety and soundness (rather than its conduct).

(5) In deciding whether to designate members of a group of companies as a financial conglomerate, the Authority shall take into account at least the following—

- (a) the risk to effective prudential supervision of the eligible prudentially regulated financial institution from the structure of the group of companies;
- (b) submissions made by or for the holding company under section 71; and
- (c) any written comments made by the Central Bank of Kenya.

(6) The Authority must keep designations under this section under review.

(7) The Authority may, by notice to the holding company of a financial conglomerate—

- (a) amend the designation of the conglomerate by adding or removing group companies from the conglomerate; or
- (b) revoke the designation of the conglomerate.

(8) The Authority must publish each designation under this section, and each amendment and revocation of a designation.

Procedure for making and varying designations

71. (1) Before designating members of a group of companies as a financial conglomerate, or amending a designation, the Authority shall—

- (a) give a holding company of the eligible prudentially regulated financial institution notice of the proposed designation and a statement of the reasons why the designation is proposed; and
- (b) invite the holding company to make submissions on the matter, and give it a reasonable period to do so.

(2) The Authority shall consult the Central Bank of Kenya in connection with any proposed designation under this section.

(3) The Authority may designate members of a group of companies as a financial conglomerate without having complied, or complied fully, with subsection (1) if the delay involved in complying, or complying fully, with that subsection in respect of a proposed designation is likely to lead to material prejudice to financial customers, prejudicially affect financial stability or defeat the object of the designation.

(4) If the Authority designates members of a group of companies as a financial conglomerate without having complied, or complied fully, with subsection (1) for the reason set out in subsection (3)—

- (a) the Authority shall give the holding company of the eligible prudentially regulated financial institution a written statement of the reasons why subsection (1) was not complied with and the effect of this subsection;
- (b) the holding company may make submissions to the Authority within 30 days after being provided with the statement;
- (c) the Authority shall consider any submissions made by or for the holding company; and

- (d) the Authority shall notify the holding company, as soon as practicable, whether the Authority proposes to amend or revoke the designation.

Division 2 — Obligations in relation to financial conglomerates

Notifications by eligible prudentially regulated financial institutions

72. An eligible prudentially regulated financial institution shall, within 14 days after becoming part of a group of companies, notify the Authority of that event.

Penalty — Kshs. [insert].

Licensing requirement for holding companies in financial conglomerates

73. (1) The Authority may, by notice to a holding company in a financial conglomerate, require the holding company to hold a licence under this section so long as it is the holding company of an eligible prudentially regulated financial institution in the conglomerate.

(2) Subsection (1) does not apply if the holding company is licensed under a sectoral law.

(3) A requirement under subsection (1) may be imposed only to facilitate the Authority's proper and effective exercise of its powers in relation to the safety and soundness of the eligible prudentially regulated financial institution in the group.;

(4) A holding company that is given a notice under subsection (1) shall comply with the requirements of the notice.

Penalty — Kshs. [insert].

(5) Subject to the remaining provisions of this section, the procedure in relation to applications for licences under this section is that set out in Part V, with necessary changes.

(6) The Authority may, by notice to a holding company licensed under this section—

(a) vary the licence by varying the conditions of the licence;
or

(b) revoke the licence.

(7) The matters that the Authority shall take into account in relation to an application for a licence under this section, or in deciding whether to vary or revoke such a licence, include—

(a) the objectives set out in section 11;

- (b) fit and proper person requirements applicable to the holding company and significant owners of the holding company;
- (c) the governance and risk management arrangements of the group;
- (d) whether the holding company made a statement that is false or misleading, including by omission, in or in relation to the application.

(8) Without limiting its powers, the Authority shall not grant a licence under this section to a holding company unless satisfied that—

- (a) it is necessary to do so—
 - (i) to achieve the objective set out in subsection (2); or
 - (ii) to enhance the safety and soundness of the eligible prudentially regulated financial institution in the group; and
- (b) the holding company, and its key persons and significant owners, meet the applicable fit and proper person requirements.

Non-operating holding companies of financial conglomerate

74. (1) The Authority may, by notice to a holding company in a financial conglomerate, require that a holding company be a non-operating company.

(2) A requirement under subsection (1) may be imposed only to enable the Authority to manage more effectively risks to the safety and soundness of the eligible prudentially regulated financial institution arising from the other members of the conglomerate.

(3) A holding company that is given a notice under subsection (1) shall comply with the requirements of the notice.

Penalty — Kshs. [insert].

Obligations to provide information to holding companies

75. (1) This section applies in relation to members of a financial conglomerate if a holding company of the eligible prudentially regulated financial institution —

- (a) holds a financial sector licence or a licence under section 73; or
- (b) has been given a notice under section 73(1).

(2) Each other member of the group of companies in the financial conglomerate (including the eligible prudentially regulated financial institution) shall, on demand by the holding company, provide such information to the holding company as is needed to enable the holding company to comply with its obligations under a financial sector law.

Penalty — Kshs. [insert].

(3) Subsection (2) applies despite any restriction, under any other Act or any contract, on disclosure by the member of the group of companies in the financial conglomerate.

Approval of acquisitions and disposals

76. (1) A holding company in a financial conglomerate shall not acquire or dispose of a material asset (as defined in prudential rules made for this section) without the approval of the Authority.

Penalty — Kshs. [insert]

(2) The Authority may not give an approval under subsection (1) unless satisfied that the acquisition or disposal will not prejudicially affect the prudent management and the financial soundness of an eligible prudentially regulated financial institution within the conglomerate.

(3) An approval under subsection (1) for a particular acquisition or disposal is valid for six months.

(4) An acquisition or disposal contrary to subsection (1) is void.

PART VIII — INFORMATION GATHERING

Information gathering

77. (1) The Authority may, by written notice to any person, request the person to provide specified information or a specified document in the possession of, or under the control of, the person that is relevant to assisting the Authority to perform its functions in terms of a financial sector law.

(2) The Authority may, by written notice to a financial institution, require the institution to provide specified information or a specified document in the possession of, or under the control of, the institution that is relevant to the Authority's assessment of compliance with, or risk of contraventions by a licensed institution of—

- (a) a financial sector law;
- (b) a directive; or
- (c) an enforceable undertaking accepted by the Authority.

(3) The notice may require the information or document to be verified as specified in the notice, including by an auditor approved by the Authority.

(4) A financial institution that is given a notice under this section and fails to comply with the requirements in the notice commits an offence.

Penalty—Kshs. [insert].

PART IX — INSPECTIONS AND INVESTIGATIONS

Division 1 — Inspections

Inspections

78. (1) The Authority may, at any time during normal business hours, enter the business premises of a licensed financial institution and conduct an inspection of the institution on the premises.

(2) The purpose for which the Authority may conduct a routine on-site inspection of a licensed financial institution is to—

- (a) check compliance by the entity with financial sector laws or an enforceable undertaking accepted by the Authority;
- (b) determine the extent of the risk posed by the financial institution of contraventions of a financial sector law; and
- (c) assist the Authority in supervising the financial institution.

(3) An inspection must be conducted with strict regard to decency and good order.

(4) An official of the Authority has, when conducting an inspection on premises, the right of access to any part of the premises and to any business document on the premises, and may do any of the following—

- (a) examine, make extracts from and copy any business document in the premises;
- (b) question any person on the premises to find out information relevant to the inspection;
- (c) give the licensed institution or a person on the premises a written directive to produce to the Authority, at a time and place and in a manner specified in the directive, a specified business document that is relevant to the inspection

and is in the possession or under the control of the licensed institution;

- (d) when a business document is produced as required by a directive in terms of paragraph (c), examine, make extracts from and copy the document;
- (e) if, as a result of the inspection, the official or the Authority suspects on reasonable grounds that a contravention of a financial sector law has occurred or is likely to occur—
 - (i) give a written directive to the person apparently in charge of the premises not to remove from the premises, or conceal, destroy or otherwise interfere with, a specified business document; or
 - (ii) take possession of, and remove from the premises, a business document for the purpose of preventing another person from re-moving, concealing, destroying or otherwise interfering with the document.

(5) The Authority must ensure that the person apparently in charge of the premises is given a written receipt for any business document taken as mentioned in paragraph (4)(e)(ii).

(6) The Authority must ensure that any business document removed as contemplated in paragraph (4)(e)(ii) is returned to the licensed institution when retention of the document is no longer necessary to achieve the object of a financial sector law.

(7) The licensed institution from whose premises a document was removed as contemplated in paragraph (4)(e)(ii), or its authorised representative, may, during normal office hours and under the supervision of the Authority, examine, copy and make extracts from the document.

Division 2 — Investigations

Investigators

79. (1) The Authority may, in writing, appoint a person as an investigator and may appoint any person to assist the investigator in carrying out an investigation.

(2) The Authority must give each investigator a certificate of appointment, which must be in the possession of the investigator when an investigator exercises any power or performs a duty in terms of this Act.

(3) An investigator must produce the certificate of appointment at the request of any person in respect of whom a power is being exercised.

(4) An investigator shall return to the Authority his or her certificate of appointment as soon as practicable after ceasing to be an investigator.

Penalty — Kshs. [insert].

(5) It is a defence to a prosecution for an offence against subsection (4) that the certificate was lost through no fault of the defendant.

Investigations

80. The Authority may instruct an investigator to conduct an investigation in respect of any person if the Authority suspects that the person has contravened, may be contravening or is about to contravene, a financial sector law for.

Powers of investigators to question and require production of documents or other things

81. (1) An investigator may, for the purposes of conducting an investigation, do any of the following—

- (a) by written notice, require any person who the investigator reasonably believes may be able to provide information relevant to the investigation to appear before the investigator, at a time and place specified in the notice, to be questioned by an investigator;
- (b) by written notice, require any person who the investigator reasonably believes may be able to produce a document or item relevant to the investigation, to—
 - (i) produce the document or item to an investigator, at a time and place specified in the notice; or
 - (ii) produce the document or item to an investigator, at a time and place specified in the notice, to be questioned by an investigator about the document or item;
- (c) question a person who is complying with a notice in terms of paragraph (a) or (b)(ii);
- (d) require a person being questioned as mentioned in paragraph (c) to make an oath or affirmation, and administer such an oath or affirmation;

- (e) examine, copy or make extracts from any document or thing produced to an investigator as required in terms of this subsection;
- (f) take possession of, and retain, any document or item produced to an investigator as required in terms of this subsection; and
- (g) give a directive to a person present while the investigator is exercising powers in terms of this section, to facilitate the exercise of such powers.

(2) An investigator who takes a document or item in terms of paragraph (1)(f) must give the person producing it a written receipt.

(3) The investigator must ensure that a document or item taken in terms of paragraph (1)(f) is returned to the person who produced it when—

- (a) retention of the document or item is no longer necessary to achieve the object of the investigation; or
- (b) all proceedings arising out the investigation have been finally disposed of.

(4) A person otherwise entitled to possession of a document or item taken in terms of paragraph (1)(f), or its authorised representative, may, during normal office hours and under the supervision of the Authority, examine, copy and make extracts from the document, or inspect the item.

(5) A person being questioned in terms of this section may be assisted and represented by a legal practitioner.

Entry and search powers

82. (1) An investigator may, for the purposes of conducting an investigation, do any of the following—

- (a) enter any premises at any time with the prior consent of the person apparently in control of the premises;
- (b) enter any premises at any time without that consent and without prior notice to any person—
 - (i) if the entry is authorised by a warrant; or
 - (ii) if an investigator believes, on reasonable grounds, that the delay caused by applying for and obtaining the warrant will defeat the purpose of the search, and

believes on reasonable grounds that a warrant would be issued; and

- (c) search the premises for anything that may afford evidence of a contravention of a financial sector law;

(2) An entry or search of premises in terms of this Part must be done during the day, not the night, unless it is authorised by warrant and the warrant expressly authorises entry at night.

(3) An investigator may be accompanied and assisted during the entry and search of any premises for an investigation by a police officer or a person appointed in terms of section 80.

(4) While on premises in terms of this section, an investigator, for the purpose of conducting the investigation, has the right of access to any part of the premises and to any document or item on the premises, and may do any of the following—

- (a) open or cause to be opened any strongroom, safe, cabinet or other container in which the investigator reasonably suspects there is a document or item that may afford evidence of the contravention concerned or be relevant to the request;
- (b) examine, make extracts from and copy any document in the premises;
- (c) question any person on the premises to find out information relevant to the investigation;
- (d) require a person on the premises to produce to the investigator any document or item that is relevant to the investigation and is in the possession or under the control of the person;
- (e) require a person on the premises to operate any computer or similar system on or available through the premises to—
 - (i) search any information in or available through that system; and
 - (ii) produce a record of that information in any media that the investigator reasonably requires;
- (f) if it is not practicable or appropriate to make a requirement in terms of paragraph (e) — operate any computer

or similar system on or available through the premises for a purpose set out in that paragraph; and

- (g) take possession of, and take from the premises, a document or item that may afford evidence of the contravention concerned or be relevant to the request.

(5) An investigator, and any person assisting an investigator, may use reasonable force to exercise any power under this section.

(6) An investigator must give the person apparently in charge of the premises a written receipt for any document or item taken by the investigator under this section.

(7) An investigator must ensure that any document or item taken by the investigator as mentioned in paragraph (4)(g) is re-turned to the person when—

- (a) retention of the document or item is no longer necessary to achieve the object of the investigation; or
- (b) all proceedings arising out the investigation have been finally disposed of.

(8) A person from whose premises a document or item was taken as mentioned in paragraph (4)(g), or its authorised representative, may, during normal office hours and under the supervision of the Authority, examine, copy and make extracts from the document or item.

Warrants

83. (1) On application by an investigator, any judge or magistrate may issue a warrant for this Part authorising entry onto and search of specified premises if satisfied that—

- (a) the investigator is conducting or is about to conduct an investigation; and
- (b) there is a reasonable suspicion that a document or item relevant to the investigation is at the premises.

(2) A warrant under this section must be signed by the judge or magistrate issuing it.

(3) An investigator who enters premises under the authority of a warrant must—

- (a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place in the premises; and

- (b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant.

Division 3 — General provisions

Interference with inspections and investigations

84. (1) A person shall not intentionally or negligently interfere with or hinder the conduct of an inspection or an investigation.

(2) Subject to section 85—

- (a) a person who is given a notice or directive under this Part shall comply with the requirements in the notice or directive; and
- (b) a person who is asked a question under this Part shall answer the question fully and truthfully, to the best of the person's knowledge.

(3) A person shall not, without a lawful excuse, refuse or fail to comply with any reasonable request by an investigator in connection with the conduct of an investigation.

(4) A person shall not give an investigator any information that is false or misleading, including by omission, and is relevant to an investigation, if the person knows that the information was false or misleading, including by omission, and relevant to an investigation.

(5) If—

- (a) a person destroys or renders illegible any document; and
- (b) the person knew that the document was or was likely to be relevant to an investigation;

the person commits an offence unless an investigator or the Authority had authorised the person's action.

Penalty — Kshs. [insert].

Protections

85. (1) For the purposes of this section, an answer tends to incriminate a person if it would tend to show, and the contents of a document or information tend to incriminate a person if they tend to show, that the person has committed an offence, a contravention of a financial sector law or an offence or contravention under the law of a foreign country.

(2) A person who is questioned, or required to produce a document or information, by the Authority or an investigator under this Part may object to answering the question on the grounds that the

answer, the contents of the document or the information may tend to incriminate the person.

(3) On such an objection, the Authority or investigator may require the question to be answered or the document or information to be produced.

(4) An answer given, and a document or information produced, as required under subsection (3)—

- (a) is not admissible in evidence against the person in any proceedings for an offence or a penalty, except proceedings in respect of a contravention of this Act based on the false or misleading nature of the answer; and
- (b) must not be taken into account in determining whether or not to impose a penalty, including an administrative penalty, on the person.

(5) Before the Authority or an investigator starts to question a person in terms of this Part, if the Authority or the investigator suspects that the person has contravened a financial sector law, the Authority or the investigator must inform the person of the right to object in terms of this section.

(6) This section does not limit any right of a person.

Legal professional
privilege

86. (1) A person does not have to answer a question under this Part, or comply with a requirement under this Part to produce a document or information, to the extent that the person is entitled to claim legal professional privilege in relation to the answer, contents of the document or the information.

(2) If the person is a legal practitioner, the person is entitled and required to claim that privilege on behalf of a client of the person.

(3) This section does not limit any right of a person.

PART X — ENFORCEMENT

Division 1 — Guidance notes and interpretation rulings

Guidance notes

87. (1) The Authority may publish guidance notes on the application of a financial sector law.

(2) Guidance notes are for information, and are not binding.

Interpretation rulings

88. (1) The Authority may publish a statement (an “interpretation ruling”) regarding the interpretation or application of a financial sector law, in circumstances specified in the statement.

(2) The purpose of an interpretation ruling is to promote clarity, consistency and certainty in the interpretation and application of financial sector laws.

(3) The Authority must interpret and apply the financial sector law to which the interpretation ruling relates in accordance with the interpretation ruling.

(4) The Authority may amend or revoke an interpretation ruling if it is necessary to do so because of a judicial decision or a change in the law.

Division 2 — General enforcement powers

Directives

89. (1) The Authority may issue to a licensed financial institution a written directive requiring the financial institution to take action specified in the directive if the financial institution or a key person of the financial institution—

- (a) has contravened or is likely to contravene a financial sector law;
- (b) is involved or is likely to be involved in financial crime; or
- (c) is causing or contributing to instability in the financial system, or is likely to do so.

(3) A directive must be aimed at—

- (a) stopping the financial institution from contravening applicable financial sector laws, or reducing the risk of such contraventions;
- (b) stopping the financial institution from being involved in financial crime, and reducing the risk that it may be so involved; or
- (c) remedying the effects of a contravention of a financial sector law or the involvement in financial crime.

(4) Action that may be specified in a directive includes the following—

- (a) the financial institution ceasing providing a specific financial product or financial service;
- (b) the financial institution modifying a financial product or financial service or the terms on which it is provided;
- (c) removing a person from a specified position or function in or in relation to the financial institution;
- (d) the financial institution not paying a specified bonus or performance payment;
- (e) the financial institution ceasing to engage in specified conduct that is inconsistent with its obligations in relation to fairness to financial customers; and
- (f) the financial institution remedying the effects of a contravention of a financial sector law.

(5) Action specified in a directive must be aimed at achieving the objective of the Authority and ensuring that the key person, representative or contractor performs its function in compliance with the applicable financial sector laws.

(6) In addition to its other powers to issue a directive, if a person is engaging, or is proposing to engage, in conduct that contravenes a financial sector law, the Authority may issue a written directive to the person requiring the person to cease engaging, or not to engage, in the conduct.

(7) A directive must specify a reasonable period for compliance.

(8) The Authority may, at any time, by written notice to the person to whom it was issued, revoke a directive.

(9) A person to whom a directive has been issued shall comply with the directive.

Penalty — Kshs. [complete].

Directives to significant owners

90. (1) In addition to section 89, the Authority may issue a directive to a significant owner of a licensed financial institution, and the institution, requiring them—

- (a) to prepare and submit to the Authority a plan satisfactory to the Authority under which the significant owner will, within a period acceptable to the Authority, cease to be a significant owner of the institution; and

- (b) on the Authority's approving the plan, implementing the plan.

Directives to holding companies in financial conglomerates

91. (1) In addition to section 89, the Authority may issue a directive to a holding company in a financial conglomerate requiring the holding company—

- (a) to manage and otherwise mitigate risks to the prudent management or financial soundness of an eligible prudentially regulated financial institution in the conglomerate arising from other members of the conglomerate; or
- (b) to ensure that an eligible prudentially regulated financial institution in the conglomerate complies with a financial sector law.

(2) Requirements that a directive under subsection (1) may impose include requirements—

- (a) to prepare and submit to the Authority a plan satisfactory to the Authority under which the financial conglomerate will, within a period acceptable to the Authority, be restructured as described in the plan; and
- (b) on the Authority's approving the plan, implementing the plan.

Directives to remove key persons

92. The Authority may not issue a directive that requires the removal of a person from a specified position or function in or in relation to a financial institution unless the person—

- (a) has contravened a financial sector law;
- (b) no longer complies with applicable fit and proper person requirements; or
- (c) has been involved in financial crime.

Consultation requirements

93. (1) Before issuing a directive, the Authority shall—

- (a) give the financial institution or person to whom it is proposed to issue the directive a draft of the proposed directive and a statement of the reasons why it is proposed to issue it, including a statement of the relevant facts and circumstances; and
- (b) invite the financial institution or person to make submissions on the matter within a specified, reasonable, submission period.

(2) If the directive requires removing a person from a specified position or function in or in relation to a financial institution, the Authority must also—

- (a) give the person a draft of the proposed directive and a statement of the reasons why it is proposed to issue it, including a statement of the relevant facts and circumstances; and
- (b) invite the person to make submissions on the matter within the submission period.

(3) In deciding whether to issue the directive, the Authority shall take into account all submissions received by the end of the submission period.

(4) If the delay involved in complying, or complying fully, with subsection (1) or (2) and in respect of a proposed directive is likely to lead to prejudice to financial customers, prejudicially affect financial stability or defeat the object of the directive, the Authority may issue the directive without having complied, or complied fully, with those subsections.

(5) If the Authority issues a directive without having complied, or complied fully, with subsections (1) or (2), it shall, at the same time, give a written statement of the reasons why those subsections were not complied with to—

- (a) the person to whom it was issued; and
- (b) if subsection (2) applies — the person referred to in that subsection;

together with a statement of the effect of subsections (6) and (7).

(6) A person to whom a statement under subsection (5) is given may make submissions to the Authority within 30 days after being given the statement.

(7) The Authority must consider the submissions, and notify the person, as soon as practicable, whether the Authority proposes to revoke the directive.

Tribunal may adjust
contracts

94. (1) The Tribunal may, on application by a party to a contract with a licensed financial institution (not the financial institution), make an order relating to the effect of a directive under this Part that was given to the financial institution has had on the contract.

(2) Without limiting what the order may do, the order may require the financial institution to——

- (a) perform specified obligations under the contract; or
- (b) compensate the applicant, as specified in the order.

but may not require a person to take action that would contravene the directive.

Enforceable undertakings

95. (1) A person may give a written undertaking to the Authority conduct in relation to a matter regulated by a financial sector law, and that undertaking, upon its acceptance by the Authority, becomes enforceable by the Authority as contemplated by this Act.

(2) A written undertaking may include an undertaking to provide specified redress to financial customers.

(3) The person who gave an enforceable undertaking may, with the consent of the Authority, vary or withdraw the undertaking at any time.

(4) If a licensed financial institution that gave an enforceable undertaking breaches the undertaking, the Authority may suspend or withdraw the licence.

(5) The Authority must publish each enforceable undertaking that it accepts, and each variation or withdrawal of an enforceable undertaking.

(6) If the Tribunal is satisfied, on application by the Authority, that a person has contravened an enforceable undertaking, the Tribunal may make any one or more of the following orders——

- (a) an order directing the person to comply with the undertaking;
- (b) if the undertaking relates to a contravention of the financial sector law, an order directing the person to perform a specified act, or refrain from performing a specified act, for one or both of the following purposes——
 - (i) to remedy the effects of the contravention;
 - (ii) to ensure that the person does not contravene the undertaking again;
- (c) any incidental order.

(7) The Authority may file with the registrar of a competent court a certified copy of an order under subsection (6) if—

- (a) the order has not been complied with; and
- (b) either—
 - (i) no proceedings in a court appealing against the making of the order have been commenced by the end of the period for lodging such appeals; or
 - (ii) if such proceedings have been commenced, they have been finally disposed of.

(8) The order, on being filed, has the effect of a civil judgement, and may be enforced as if lawfully given in that court.

High Court may order compliance with financial sector laws

96. (1) The High Court may, on application by the Authority, make—

- (a) an order that a person do, or not do, a specified thing to ensure compliance with the financial sector law; and
- (b) any incidental order.

(2) The High Court may make such an order—

- (a) if it appears to the High Court that the person is engaging, or proposes to engage, in conduct contravening a financial sector law;
- (b) if the person has previously engaged in such conduct; or
- (c) if there is a danger of substantial or irreparable damage, prejudice or harm if the person engages in conduct contravening a financial sector law;

and may do so even if another remedy is available.

(3) The High Court may not require the Authority to give any undertaking as to damages in connection with the application for the order.

Debarment

97. (1) If a natural person has—

- (a) contravened a financial sector law in a material respect;
- (b) contravened in a material respect an enforceable undertaking accepted by the Authority;

- (c) attempted, or conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material respect; or
- (d) contravened in a material respect a law of a foreign country that corresponds to a financial sector law;

the Authority may make an order (a “debarment order”) prohibiting the person, for the period specified in the order, from doing one or more of the following, to the extent specified in the order—

- (e) providing, or being involved in the provision of, specified financial products or financial services, generally or in circumstances specified in the order;
- (f) acting as a key person of a financial institution; or
- (g) providing specified services to a financial institution, whether under outsourcing arrangements or otherwise.

(3) A debarment order in respect of a person takes effect from—

- (a) the date on which it is served on the person; or
- (b) if the order specifies a later date, the later date.

(4) A person who is subject to a debarment order may not engage in conduct that, directly or indirectly, contravenes the debarment order.

Penalty — Kshs. [complete]

(5) Without limiting subsection (4)—

- (a) if a person is subject to a debarment order; and
- (b) the debarred person enters into an arrangement with another person (“person B”) under which person B will engage in the conduct that directly or indirectly contravenes the debarment order; and
- (c) person B is acting on behalf of, or in accordance with the directions, instructions or wishes of, the debarred person;

both the debarred person and person B shall be taken to have committed an offence against subsection (4).

(6) A licensed financial institution that becomes aware that a debarment order has been made in respect of a person employed or engaged by the financial institution must take all reasonable steps to ensure that the debarment order is given effect to.

Penalty — Kshs. [complete]

(7) The Authority may, by order—

- (a) reduce the period of a debarment order; or
- (b) revoke a debarment order.

The Authority may do so on application by the debarred person or on its own initiative.

(8) The Authority must publish each debarment order, and each order under subsection (7), that it makes.

Division 3 — Administrative penalties

Administrative penalties

98. (1) The Authority may, by order served on a person, impose on the person an appropriate administrative penalty if the person has engaged in conduct that contravenes —

- (a) a financial sector law; or
- (b) an enforceable undertaking accepted by the Authority.

(2) In determining an appropriate administrative penalty for particular conduct—

- (a) the matters that the Authority shall have regard to include the following—
 - (i) the need to deter such conduct;
 - (ii) the degree to which the person has co-operated with the Authority in relation to the contravention; and
 - (iii) any submissions by, or on behalf of, the person; and
- (b) without limiting paragraph (a), the matters that the Authority may have regard include the following—
 - (i) the nature, duration, seriousness and extent of the contravention;
 - (ii) any loss or damage suffered by any person as a result of the conduct;

- (iii) the extent of any financial or commercial benefit to the person, or to an associated person of the person, arising from the conduct;
- (iv) whether the person has previously contravened a financial sector law;
- (v) the effect of the conduct on financial sector stability;
- (vi) the effect of the proposed penalty on financial sector stability;
- (vii) the effect of the proposed penalty on financial customers of the person;
- (viii) the extent to which the conduct was deliberate or reckless.

(3) An administrative penalty may include an amount to reimburse the Authority for reasonable costs incurred by the Authority in connection with the contravention.

(4) The Authority may not impose an administrative penalty on a person if a prosecution of the person for an offence arising out of the same set of facts has been commenced.

(5) An administrative penalty order is not a previous conviction as contemplated in [insert].

Payment

99. An amount payable in terms of an administrative penalty order is due and payable as set out in Regulations made for this Part.

Interest

100. Interest is payable in respect of the unpaid portion of the amount payable as an administrative penalty until it is fully paid.

Enforcement

101. (1) If—

- (a) the amount payable under an administrative penalty order has not been paid as required by this Part; and
- (b) either—
 - (i) no application for review of the order under this Act, or for judicial review of the order, has been lodged by the end of the period for making such applications; or
 - (ii) if such an application has been made — proceedings on the application have been finally disposed of;

the Authority may file with the registrar of a competent court a certified copy of the administrative penalty order and an affidavit as to payment.

(2) The order, on being filed, has the effect of a civil judgement for the unpaid amount of the administrative penalty, and may be enforced as if lawfully given in that court.

Application of amounts paid as administrative penalties

102. All amounts recovered by the Authority as administrative penalties must be applied—

- (a) first, to reimburse the Authority its costs and expenses reasonably and properly incurred in investigating the relevant contravention, making the order and enforcing it; and
- (b) then, by paying the balance into the Financial Sector Compensation Fund.

Administrative penalty taken into account in sentencing

103. When determining the sentence to impose on a person convicted of an offence against a financial sector law, a court shall take into account any administrative penalty order made in respect of the same facts.

Remission of administrative penalties

104. The Authority may, on application, remit all or some of an administrative penalty, and all or some of the interest payable on an administrative penalty.

Prohibition of indemnity for administrative penalties

105. (1) Except in circumstances prescribed by regulation, a person shall not undertake to indemnify or compensate another person, directly or indirectly, wholly or partly, in respect of a payment made or liability incurred by the other person in connection with an administrative penalty order imposed on the other person.

Penalty — An amount equal to twice the maximum amount payable under the indemnity.

(2) An undertaking given in contravention of subsection (1) is void.

PART XI — FINANCIAL SECTOR OMBUDSMAN

Division 1 — The Financial Sector Ombudsman

Establishment of Financial Sector Ombudsman

106. (1) There is established an organisation to be known as the Financial Sector Ombudsman.

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

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) having and managing its own funds including borrowing and lending money;
- (d) entering into contracts;
- (e) employing or engaging the services of persons to assist it in performing its functions and exercising its powers; and
- (f) doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

(3) Except as otherwise provided in this Act or another financial services law, the Ombudsman shall be operationally independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

Functions of the
Ombudsman

107. The functions of the Ombudsman are—

- (a) resolve complaints in accordance with this Part; and
- (b) any other function of the Ombudsman under a written law.

Powers of the Om-
budsman

108. The Ombudsman shall have all the powers necessary for the proper performance of its functions under the financial sector laws, and in particular the power to—

- (a) control, supervise and administer the assets of the Ombudsman as will promote the achievement of the objectives in section 11;
- (b) manage the funds of the Ombudsman, including its reserves;
- (c) receive grants, gifts or endowments;
- (d) establish a bank accounts;
- (e) with the consent of the Cabinet Secretary, borrow money, mortgage or charge any of its assets ;

- (f) engage staff, on terms and conditions, as it may consider necessary for performance of its functions, including establishing retirement benefits funds and medical funds for them and making contributions to those funds for their benefit;
- (g) co-operate with its counterparts in other jurisdictions; and
- (h) participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.

Ombudsman
Board

109. (1) There is established a Board for the Ombudsman (the “Ombudsman Board”), which shall consist of—

- (a) a Chairperson, who shall be appointed by the President;
- (b) the Chief Ombudsman; and
- (c) two other members, who shall be appointed by the Cabinet Secretary.

(2) In appointing the Chairperson and the Ombudsman Board members mentioned in subsection (1)(c), the President and the Cabinet Secretary shall have regard to the principles of gender equity and regional balance and the need to have a mix of skills relevant to the financial sector.

(3) The Chairperson and Ombudsman Board members appointed as mentioned in subsection (1)(c) shall be selected from persons who—

- (a) are not public officers or employees, officers or significant owners of any licensed person;
- (b) have at least ten years’ experience in management of a public or private institution within the financial sector;
- (c) satisfy the requirements of the relevant provisions of the Constitution and national laws in respect to National Values, Governance, Leadership, Integrity and Principles of Public Service; and
- (f) have not served as an employee of the Ombudsman in the preceding five years.

(4) A disqualified person shall not be appointed as an Ombudsman Board member.

(5) An Ombudsman Board member mentioned in subsection (1)(a) or (c) shall hold office for a period specified in the instrument

of appointment, not exceeding three years, and on terms and conditions specified in the instrument of appointment. At the end of his or her term, the member may be re-appointed for one further term of a period not exceeding three years.

(6) An Ombudsman Board member (other than an *ex officio* Ombudsman Board member)—

- (a) may at any time resign from office by notice in writing to the Cabinet Secretary;
- (b) may be removed from office by the Cabinet Secretary if the member—
 - (i) has been absent from three consecutive meetings of the Ombudsman Board without permission from the Chairperson;
 - (ii) in the case of the Chairperson — has been absent from three consecutive meetings of the Ombudsman Board without permission from the Cabinet Secretary;
 - (iii) is incapacitated by physical or mental illness or other cause from fulfilling the responsibilities of an Ombudsman Board member; or
 - (iv) conducts himself or herself in a manner not befitting an Ombudsman Board member; and
- (b) shall be removed from office by the Cabinet Secretary if the member becomes a disqualified person.

Application of certain provisions

110. Sections 18, 19 and 23 apply in relation to the Ombudsman Board in the same way as they apply to the Board.

Division 2 — Complaints about financial products and financial services

Complaints about financial products and financial services

111. (1) A financial customer may make a complaint to the Ombudsman that a financial product provider or a financial service provider (in this Division called “the provider”)—

- (a) contravened a financial sector law in relation to the provision of the financial product or financial service to the financial customer;
- (b) breached the contract for the provision of the financial product or financial service;

(c) treated the financial customer unfairly in relation to the provision of the financial product or financial service.

(2) The Ombudsman shall provide assistance to a complainant to formulate the complaint properly.

(3) The Ombudsman shall not deal with a complaint against a provider unless the financial customer had made the complaint to the provider and, after three months, the complaint has not been satisfactorily resolved.

(4) The grounds on which a complaint to the Ombudsman may be made are limited to the following—

- (a) the provider contravened a financial sector law in relation to the provision of the financial product or financial service to the financial customer;
- (b) the provider breached the contract for the provision of the financial product or financial service;
- (c) the provider treated the financial customer unfairly in relation to the provision of the financial product or financial service.

Ombudsman to mediate and make determinations

112. (1) The Ombudsman shall, on receiving a complaint, attempt to mediate the complaint.

(2) If the Ombudsman considers that it will not be efficient or effective to mediate a complaint, the Ombudsman shall make a determination resolving the complaint.

(3) A determination by the Ombudsman binds the provider.

Providers to co-operate

113. A provider shall co-operate in good faith with the Ombudsman in the exercise of the Ombudsman's powers and the performance of its functions in relation to a complaint about a financial product or financial service provided by the provider, including complying with the directions of the Ombudsman in relation to the complaint.

Ombudsman Rules

114. The Ombudsman Board may make rules, not inconsistent with this Act or the sectoral laws, with respect to complaints to which this Part applies.

PART XII — COMPENSATION

Division 1 — Compensation

Compensation for contraventions of financial sector laws

115. A person, including the Authority, who suffers loss because of a contravention of a financial sector law by another person may recover the amount of the loss by action in a court of competent jurisdiction against—

- (a) the other person; and
- (b) any person who was knowingly involved in the contravention.

Financial customers may claim compensation from Compensation Funds

116. (1) Subject to this Part, if—

- (a) a financial customer suffers loss because a licensed person—
 - (i) contravened a financial sector law in relation to the provision of the financial product or financial service to the financial customer;
 - (ii) breached the contract for the provision of the financial product or financial service;
- (b) the Compensation Funds Board is satisfied that the licensed person is insolvent; and
- (c) the loss is not an excluded loss under Regulations made for this section;

the Board may, on application by the financial customer, pay to the financial customer by way of compensation the amount calculated in accordance with the Regulations.

(2) An amount of compensation under this section is to be paid from—

- (a) if the financial product or financial service is one regulated by the Capital Markets Act or the Central Depositories Act — the Capital Markets Compensation Fund;
- (b) if the financial product or financial service is one regulated by the Insurance Act — the Insurance Compensation Fund;
- (c) if the financial product or financial service is one regulated by the Retirement Benefits Act — the Retirement Benefits Compensation Fund;

- (d) if the financial product or financial service is one regulated by the Saccos Act — the Sacco Compensation Fund;
- (e) in other cases — from the Conduct Compensation Fund.

(3) In this section, a reference to a contravention of a financial sector law includes a reference to—

- (a) a contravention of a prudential rule or a conduct rule;
- (b) a directive under, or an enforceable undertaking accepted under, a financial sector law;
- (c) a decision of a court or the Tribunal, or a determination of the Ombudsman, in relation to the financial sector law.

(2) The Regulations shall make provision with respect to claims for compensation from a Compensation Fund, including the assessment and determination of claims.

Compensation
Funds Board may
recover from li-
censed person

117. If the Compensation Funds Board makes a compensation payment to a person under this arising from a contravention of a financial sector law, or a breach of contract, by a licensed person, the amount of the payment, together with the costs incurred by the Compensation Funds Board in connection with the payment, is a debt due by the licensed person to the Compensation Funds Board and may be recovered by action in a court of appropriate jurisdiction.

Division 2 — Establishment of Compensation Funds Board

Establishment of
Compensation
Funds Board

118. (1) There is established a board to be known as the Compensation Funds Board.

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

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;
- (c) having and managing its own funds including borrowing and lending money;
- (d) entering into contracts;
- (e) employing or engaging the services of persons to assist it in performing its functions and exercising its powers; and

- (f) doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done by a body corporate.

(3) Except as otherwise provided in this Act or another financial services law, the Compensation Funds Board shall be operationally independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

Functions of the
Compensation
Funds Board

119. The functions of the Compensation Funds Board are—

- (a) resolve hold and manage the Financial Sector Compensation Funds;
- (b) to determine and make compensation payments under Division 1;
- (c) any other function of the Compensation Funds Board under a written law.

Powers of the
Compensation
Funds Board

120. (1) The Compensation Funds Board shall have all the powers necessary for the proper performance of its functions under the financial sector laws, and in particular the power to—

- (a) control, supervise and administer the assets of the Compensation Funds;
- (b) manage the funds of the Compensation Funds Board, including its reserves;
- (c) receive grants, gifts or endowments;
- (d) establish a bank accounts;
- (e) with the consent of the Cabinet Secretary, borrow money, mortgage or charge any of its assets;
- (f) engage staff, on terms and conditions, as it may consider necessary for performance of its functions, including establishing retirement benefits funds and medical funds for them and making contributions to those funds for their benefit.

Compensation
Funds Board

121. (1) The Compensation Funds Board shall consist of—

- (a) a Chairperson, who shall be appointed by the President;
- (b) the Managing Director; and

- (c) two other members, who shall be appointed by the Cabinet Secretary.

(2) In appointing the Chairperson and the Compensation Funds Board members mentioned in subsection (1)(c), the President and the Cabinet Secretary shall have regard to the principles of gender equity and regional balance and the need to have a mix of skills relevant to the financial sector.

(3) The Chairperson and Compensation Funds Board members appointed as mentioned in subsection (1)(c) shall be selected from persons who—

- (a) are not public officers or employees, officers or significant owners of any licensed person;
- (b) have at least ten years' experience in management of a public or private institution within the financial sector; and
- (e) satisfy the requirements of the relevant provisions of the Constitution and national laws in respect to National Values, Governance, Leadership, Integrity and Principles of Public Service.

(4) A disqualified person shall not be appointed as Compensation Funds Board member.

(5) A Compensation Funds Board member mentioned in subsection (1)(a) or (c) shall hold office for a period specified in the instrument of appointment, not exceeding three years, and on terms and conditions specified in the instrument of appointment. At the end of his or her term, the member may be re-appointed for one further term of a period not exceeding three years.

(6) A Compensation Funds Board member—

- (a) may at any time resign from office by notice in writing to the Cabinet Secretary;
- (b) may be removed from office by the Cabinet Secretary if the member—
 - (i) has been absent from three consecutive meetings of the Compensation Funds Board without permission from the Chairperson;
 - (ii) in the case of the Chairperson — has been absent from three consecutive meetings of the Compensation

Funds Board without permission from the Cabinet Secretary;

(iii) is incapacitated by physical or mental illness or other cause from fulfilling the responsibilities of an Compensation Funds Board member; or

(iv) conducts himself or herself in a manner not befitting an Compensation Funds Board member; and

(b) shall be removed from office by the Cabinet Secretary if the member becomes a disqualified person.

Application of certain provisions

122. Sections 18, 19 and 23 apply in relation to the Compensation Funds Board in the same way as they apply to the Board.

Regulations

123. (1) The Regulations may make provision, not inconsistent with this Act or a sectoral law, to carry this part into effect.

(2) Without limiting subsection (1), Regulations may make provision with respect to applications for compensation under this Part.

PART XIII — REVIEW OF DECISIONS

Division 1 — Establishment of Tribunal

Establishment of Tribunal

124. There is established a tribunal to be known as the Financial Sector Tribunal.

Tribunal members

125. (1) The Tribunal shall consist of the following members appointed by the Judicial Service Commission by notice in the *Gazette*—

(a) the Chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years good standing;

(b) a Vice-Chairperson, who shall be an advocate of the High Court of Kenya of not less than ten years good standing;

(c) three members with knowledge and expertise in relation to the businesses of prudentially regulated financial institution;

(d) two members, who shall have ten years' experience in finance, actuarial science, economics, banking or senior management.

(2) A disqualified person may not be appointed to, or hold office as, a Tribunal member.

(3) Unless the Tribunal member is removed or resigns, a Tribunal member holds office for five years and, subject to this Act, is eligible, on expiry of his or her term of office, to be reappointed once for a further term of five years.

(4) Tribunal members shall be appointed at different times, so that the terms of office expire at different times.

(5) A Tribunal member may resign office by giving at least 90 days written notice to the Judicial Service Commission, or a shorter period of notice that the Judicial Service Commission may accept.

(6) The Judicial Service Commission shall remove a Tribunal member from office if the member —

- (a) becomes a disqualified person; or
- (b) accepts any position or employment the holding of which would make the member ineligible to be appointed as a Tribunal member.

(7) The Judicial Service Commission may remove a Tribunal member from office if the member—

- (a) is unable to discharge the functions of office (whether arising from illness of body or mind or from any other cause); or
- (b) has failed in a material way to discharge the responsibilities of the office; or
- (c) has acted in a way that is inconsistent with continuing to hold the office.

(8) There shall be paid to the Tribunal members remuneration and allowances as the Chief Justice shall determine in writing.

Chairperson and
Vice-Chairperson

126. (1) The Chairperson shall manage the work of the Tribunal.

(2) The Vice-Chairperson shall perform the functions of the Chairperson in the absence of the Chairperson from office or if the office of Chairperson is vacant.

Secretary to Tribunal

127. The Judicial Service Commission shall appoint the Secretary to the Tribunal.

Staff for Tribunal

128. (1) The Judicial Service Commission may appoint such staff as it considers necessary for the Tribunal.

(2) Staff appointed under subsection (1) shall be remunerated at a rate determined by the Judicial Service Commission and shall be subject to conditions of service as the Judicial Service Commission may determine

Liability

129. No matter or thing done or omitted to be done by the Tribunal or a Tribunal member exercising powers under this Part shall render the Tribunal or the member personally liable to any action, claim or demand whatsoever unless the matter or thing was done or omitted in bad faith.

Tribunal Rules

130. (1) The Chief Justice may make rules, not inconsistent with the financial sector laws, in respect of the procedure to be followed in connection with proceedings in the Tribunal, and may at any time make rules amending or revoking those rules.

(2) Without limiting subsection (1), Tribunal Rules may make provision in relation to—

- (a) the way in which applications for review of reviewable decisions are to be made;
- (b) fees;
- (c) the procedure to be adopted by the Tribunal;
- (d) records to be kept by the Tribunal;
- (e) giving notice to parties; and
- (f) costs.

(3) The Tribunal Rule shall be published.

(3) Subject to the Tribunal Rules, the Civil Procedure Act (Cap. 21) shall apply to proceedings in the Tribunal as if the reviewable decision concerned were a decree of a subordinate court exercising original jurisdiction.

Division 2 — Review of decisions

Right to be informed

131. An obligation in a financial sector law to notify a person of a reviewable decision taken in relation to the person includes an obligation to notify the person of the person's right—

- (a) to request reasons for the decision; and
- (b) to have the decision reviewed under this Part.

Right to reasons for decisions

132. (1) A person affected by a reviewable decision and who has not already been given the reasons for the decision may, within 30 days

after being notified of the decision, request a statement of the reasons for the decision from the decision-maker.

(2) The decision-maker must, within 30 days after receiving the request, give the person a statement of the reasons for the decision, which must include a statement of the material facts on which the decision was based.

Applications for review of decisions

133. (1) A person aggrieved by a reviewable decision may apply to the Tribunal, in accordance with the Tribunal Rules, for a review of the decision.

(2) The application shall be made—

- (a) if the applicant requested reasons under section 132 — within 30 days after the statement of reasons was given to the person; or
- (b) otherwise — within 60 days after the person was notified of the decision.

Operation of decisions not affected

134. Neither an application for a review of a decision, nor the proceedings on the application, suspends the operation of the decision unless the Tribunal so orders.

Parties to reviews

135. (1) The parties to proceedings in the Tribunal for a review of a decision are—

- (a) the applicant for the review;
- (b) the decision-maker; and
- (c) any other person permitted by the Tribunal to be joined as a party.

(2) The Tribunal may permit a person to be joined as party to proceedings for a review on any terms it sees fit.

Proceedings on reviews

136. (1) In proceedings for review of a decision—

- (a) the procedure is, subject to the financial sector laws and the Tribunal Rules, determined by the Tribunal;
- (b) the proceedings are to be conducted with as little formality and technicality, and as expeditiously, as the requirements of the financial sector laws and a proper consideration of the matter permit; and
- (c) a party may be represented by a legal practitioner or, if the Tribunal permits, another person.

(2) The Chairperson may give directions to facilitate the conduct of proceedings.

(3) The Tribunal is not bound by the rules of evidence, but may, subject to this section, inform itself on any relevant matter in any appropriate way.

(4) The person presiding over proceedings in the Tribunal—

(a) has all the powers of the Chief Magistrate's court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.; and

(b) must administer an oath to or accept an affirmation from any person called to give evidence.

(5) A person summoned by the Tribunal to attend and give evidence or to produce specified documents, shall not, without reasonable cause—

(a) refuse or fail to attend at the time and place specified in the summons;

(b) refuse or fail to answer, to the best of his or her knowledge and belief, all questions lawfully put to him in the proceedings;

(c) if the specified documents are within the person's possession or under his or her control — refuse or fail to produce them as required by the summons.

Penalty — Kshs. [insert].

(6) The Tribunal may appoint a person with relevant special skills or knowledge to act as an assessor in an advisory capacity in a proceeding on a review.

(7) Any hearing in proceedings of the Tribunal shall be open to the public unless the Tribunal, for good cause, otherwise directs.

(8) A person giving evidence or information, or producing documents, in relation to proceedings for review of a decision has the protections and liabilities of a witness giving evidence in proceedings before the High Court.

Tribunal orders

137. (1) In proceedings on an application for review of a reviewable decision, the Tribunal may, by order—

- (a) set the decision aside;
- (b) set the decision aside and remit the matter to the decision-maker for further consideration;
- (c) in the case of a decision of any of the following kinds, also make an order setting aside the decision and substituting the decision of the Tribunal—
 - (i) a decision in relation to an administrative penalty order;
 - (ii) a decision of a kind prescribed by regulation for the purposes of this section; or
- (d) dismiss the application.

(2) The Tribunal may, in exceptional circumstances, make an order that a party to proceedings on an application for review of a decision pay some or all of the costs reasonably and properly incurred by the other party in connection with the proceedings.

(3) Subsections (1) and (2) are subject to any provision of a financial sector law that excludes, restricts or qualifies the orders that the Tribunal may make in proceedings for reconsideration of a decision.

(4) The Tribunal may, by order, summarily dismiss an application for review of a decision if the application is frivolous, vexatious or trivial.

(5) If the Tribunal members hearing an application for review of a decision are divided in opinion as to an order to be made, the opinion of the majority of those members prevails, but if they are equally divided in opinion, the opinion of the member presiding prevails.

Appeal to High
Court

138. (1) A party to proceedings on a review who is aggrieved by a decision of the Tribunal on or involving a question of law may appeal the decision to the High Court.

(2) The appeal shall be commenced within 30 days after the decision is notified to the party.

(3) In this section, “question of law” does not include a question whether there is sufficient evidence to justify a finding.

Enforcement of
Tribunal orders

139. (1) A party to proceedings on an application for review of a decision may file with the registrar of a competent court a certified copy of an order made by the Tribunal in the proceedings if—

- (a) no proceedings in relation to the making of the order have been commenced in a court by the end of the period for commencing such proceedings; or
 - (b) if such proceedings have been commenced — the proceedings have been finally disposed of.
- (2) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court.

PART IV — FINANCIAL PROVISIONS

Division 1 — FSA Fund

FSA Fund

140. (1) There is established a fund, to be known as the FSA Fund, which vests in the Authority.

(2) The purpose of the FSA Fund is defray the expenses of the Authority.

(3) The FSA Fund shall be administered and controlled by the Authority.

(4) There shall be paid into the FSA Fund—

- (a) the funds held by the General Funds of the Capital Markets Authority, the Insurance Regulatory Authority, the Sacco Societies Regulatory Authority and the Retirement Benefits Authority Fund;
- (b) amounts appropriated by Parliament;
- (c) fees and charges imposed under the financial sector laws in relation to the Authority;
- (d) amounts payable to the Authority out of the Levies Account; and
- (d) any other amount paid to or received by the Authority.

(5) There shall be paid out of the Fund all such sums of money required to defray the expenditure incurred by the Authority in the exercise, discharge and performance of its objectives, functions, powers and duties.

Investment

141. The Authority may—

- (a) place on deposit with such bank or banks as it may determine; or

- (b) otherwise invest, in accordance with Government Policy on investment and a policy approved by the Board;

any amount standing to the credit of the FSA Fund not immediately required for its purposes.

FSA financial records and reports

142. (1) The Authority shall cause to be kept proper books of accounts of the income, expenditure, assets, liabilities and all other financial transactions of the Authority.

(2) Within a period of 30 days after the end of each financial year, the Board shall prepare financial statements.

(3) Within a period of 120 days after the end of each financial year, the Board shall submit the financial statements to the Auditor-General or to an auditor appointed by the Board under the authority of the Auditor-General.

(4) The financial statements shall be audited and reported upon in accordance with the Public Audit Act, 2003.

Division 2 — Ombudsman Fund

Ombudsman Fund

143. (1) There is established a fund, to be known as the Ombudsman Fund, which vests in the Ombudsman.

(2) The purpose of the Ombudsman Fund is defray the expenses of the Ombudsman.

(3) The Ombudsman Fund shall be administered and controlled by the Ombudsman.

(3) There shall be paid into the Ombudsman Fund—

- (a) amounts appropriated by Parliament;
- (b) fees and charges imposed under the financial sector laws in relation to the Ombudsman;
- (d) amounts payable to the Ombudsman out of the Levies Account; and
- (d) any other amount paid to or received by the Ombudsman.

(4) There shall be paid out of the Ombudsman Fund all such sums of money required to defray the expenditure incurred by the Ombudsman in the exercise, discharge and performance of its objectives, functions, powers and duties.

Investment

144. (1) The Ombudsman may—

- (a) place on deposit with such bank or banks as it may determine; or
- (b) otherwise invest, in accordance with Government Policy on investment and a policy approved by the Board;

any amount standing to the credit of the Ombudsman Fund not immediately required for its purposes.

(2) The Ombudsman may—

- (a) place on deposit with such bank or banks as it may determine; or
- (b) otherwise invest, in accordance with Government Policy on investment and a policy approved by the Board;

any amount standing to the credit of the Ombudsman Fund not immediately required for its purposes.

Ombudsman financial records and reports

145. (1) The Ombudsman shall cause to be kept proper books of accounts of the income, expenditure, assets, liabilities and all other financial transactions of the Ombudsman.

(2) Within a period of 30 days after the end of each financial year, the Ombudsman shall prepare financial statements.

(3) Within a period of 120 days after the end of each financial year, the Ombudsman shall submit the financial statements to the Auditor-General or to an auditor appointed by the Ombudsman under the authority of the Auditor-General.

(4) The financial statements shall be audited and reported upon in accordance with the Public Audit Act, 2003.

Division 3 — Compensation Funds

Financial Sector Compensation Funds

146. (1) There are established five funds, to be called—

- (a) the Capital Market Compensation Fund;
- (b) the Insurance Compensation Fund;
- (c) the Pensions Compensation Fund;
- (d) the Sacco Compensation Fund; and
- (e) the Conduct Compensation Fund.

(2) The purpose of each Compensation Fund is to fund relevant compensation payments under Division 1 of Part XII.

(3) Each Fund shall be administered and controlled by the Compensation Funds Board.

Operation of Capital Market Compensation Fund

147. (1) There shall be paid into the Capital Market Compensation Fund—

- (a) amounts appropriated by Parliament;
- (b) amounts payable to the Compensation Funds Board out of the Levies Account in respect of the Capital Markets Act or the Central Depositories Act; and
- (c) any other amount paid to or received by the Compensation Funds Board for payment into the Capital Market Compensation Fund.

(2) There shall be paid out of the Capital Market Compensation Fund—

- (a) all such amounts as are required to be paid out of the Fund under Division 1 of Part XII;
- (b) a reasonable proportion of the amounts required to defray the expenditure incurred by the Compensation Funds Board in the exercise, discharge and performance of its objectives, functions, powers and duties.

Operation of the Insurance Compensation Fund

148. (1) There shall be paid into the Insurance Compensation Fund—

- (a) the amount standing to the credit of the Policyholders Compensation Fund established under Part XIX of the Insurance Act;
- (b) amounts appropriated by Parliament;
- (c) amounts payable to the Compensation Funds Board out of the Levies Account in respect of the Insurance Act; and
- (d) any other amount paid to or received by the Compensation Funds Board for payment into the Insurance Compensation Fund.

(2) There shall be paid out of the Insurance Compensation Fund—

- (a) all such amounts as are required to be paid out of the Fund under Division 1 of Part XII;
- (b) a reasonable proportion of the amounts required to defray the expenditure incurred by the Compensation Funds

Board in the exercise, discharge and performance of its objectives, functions, powers and duties.

Operation of Pensions Compensation Fund;

149. (1) There shall be paid into the Pensions Compensation Fund—

- (a) amounts appropriated by Parliament;
- (b) amounts payable to the Compensation Funds Board out of the Levies Account in respect of the Retirement Benefits Act; and
- (c) any other amount paid to or received by the Compensation Funds Board for payment into the Pensions Compensation Fund.

(2) There shall be paid out of the Pensions Compensation Fund—

- (a) all such amounts as are required to be paid out of the Fund under Division 1 of Part XII;
- (b) a reasonable proportion of the amounts required to defray the expenditure incurred by the Compensation Funds Board in the exercise, discharge and performance of its objectives, functions, powers and duties.

Operation of Sacco Compensation Fund;

150. (1) There shall be paid into the Sacco Compensation Fund—

- (a) the amount standing to the credit of the Deposit Guarantee Fund established under Part VI of the Sacco Act;
- (b) amounts appropriated by Parliament;
- (c) amounts payable to the Compensation Funds Board out of the Levies Account in respect of the Sacco Act; and
- (d) any other amount paid to or received by the Compensation Funds Board for payment into the Sacco Compensation Fund.

(2) There shall be paid out of the Saco Compensation Fund—

- (a) all such amounts as are required to be paid out of the Fund under Division 1 of Part XII;
- (b) a reasonable proportion of the amounts required to defray the expenditure incurred by the Compensation Funds Board in the exercise, discharge and performance of its objectives, functions, powers and duties.

Operation of Conduct Compensation Fund

151. (1) There shall be paid into the Conduct Compensation Fund—

- (a) amounts appropriated by Parliament;
- (b) amounts payable to the Compensation Funds Board out of the Levies Account in respect of this Act; and
- (d) any other amount paid to or received by the Compensation Funds Board for payment into the Conduct Compensation Fund.

(2) There shall be paid out of the Conduct Compensation Fund—

- (a) all such amounts as are required to be paid out of the Fund under Division 1 of Part XII;
- (b) a reasonable proportion of the amounts required to defray the expenditure incurred by the Compensation Funds Board in the exercise, discharge and performance of its objectives, functions, powers and duties.

Funds may be managed jointly

152. Despite any other law or agreement, the Compensation Funds Board are not required to manage or invest the Compensation Funds as separate funds.

Division 3 — Levies

Financial sector levy

153. (1) The Regulations shall, for each financial year, impose financial sector levy in accordance with this Act.

(2) The amount of financial sector levy imposed in respect of each of the five financial years after the commencement of this Act shall not exceed the amount of [current levy – to be defined] adjusted in accordance with the formula—

previous year levy \times (*current index* \div *previous index*)

where—

“current index”, for a financial year, means index most recently published before the start of the financial year;

“index” means [to complete – consumer price index];

“previous index” means the index as most recently published before the start of the previous financial year;

“previous year levy: means the amount of financial sector levy imposed in respect of the immediately previous financial year.

[Provision after the first 5 years to be completed]

(3) Regulations imposing financial sector levy shall identify the proportions of financial sector levy to be—

- (a) applied to fund the Ombudsman; and
- (b) paid to each of the Compensation Funds.

(4) Financial sector levy for a financial year is payable by the levy payers identified in the Regulations imposing the levy..

(5) The amount of financial sector levy payable by a levy payer in respect of a financial year is calculated in accordance with the Regulations imposing the levy.

Consultation re-
quirements

154. (1) The Cabinet Secretary shall not make Regulations under section 153 unless the Authority has published—

- (a) a draft of the Regulations;
- (b) estimates and projected estimates of income and expenditure relevant to the determination;
- (c) a notice inviting submissions in relation to the determination and stating—
 - (i) where and how submissions are to be made.
 - (ii) the period within which submissions are to be made (the “submission period”).

(2) The submission period shall be at least one month.

(3) The Cabinet Secretary shall take into account, in deciding whether to make the Regulations, all submissions made within the submission period.

Information re-
quired for assess-
ment of financial
sector levy

155. (1) The Authority may determine in writing what information a financial institution is to give the Authority to assist the Authority to work out the institution’s liability for financial sector levy for a financial year.

(2) A determination under subsection (1) may specify the way in which and time by which information is to be provided.

(3) A determination under subsection (1) comes into force—

- (a) when it is published by the Authority; or

- (b) if it provides that it is to come into effect on a later date — on the later date.

(4) A financial institution to which a determination under subsection (1) applies shall comply with the requirements of the determination.

Penalty — Kshs. [complete].

Assessment of financial sector levy

156. (1) The Authority shall issue to each levy payer for a financial year an assessment of financial sector levy payable by the levy payer.

(2) Financial sector levy is due and payable by a levy payer at the end of 30 days after the assessment of the levy is issued to the institution.

Payment of financial sector levy by instalments

157. (1) If a levy payer offers, in the way set out in the assessment notice, to pay financial sector levy by specified instalments, the Authority must, within 21 days after the offer is made —

- (a) accept the offer;
- (b) accept a modified offer; or
- (c) reject the offer;

and must notify the person accordingly.

(2) If the levy payer is not notified within the 21 days, the offer is taken to be rejected.

Penalty levy

158. (1) If a levy payer fails to pay the whole amount of financial sector levy when it is due, penalty levy is imposed, for each month during which the amount remains unpaid.

(2) Penalty levy for a month is calculated as follows:

- (a) if the amount unpaid at the beginning of the month is or is less than Kshs. [insert] — Kshs. [insert];
- (a) if the amount unpaid at the beginning of the month is more than Kshs. [insert] but less than Kshs. [insert] — Kshs. [insert];
- (c) if the amount unpaid at the beginning of the month is or is more than Kshs. [insert] — Kshs. [insert].

Waiver of financial sector levy

159. The Authority may, on application by a levy payer liable to pay financial sector levy, waive the whole or a part of the financial sector levy.

Refund of over-paid financial sector levy

160. (1) If an amount of financial sector levy has been overpaid, the amount overpaid shall be refunded by the Authority.

(2) The Authority, the Ombudsman and the Compensation Funds Board shall, in accordance with arrangements agreed between them, make adjusting payments to take account of amounts refunded under subsection (1).

Levy Account

161. (1) The Authority shall establish an account in its name with a bank licensed under the Banks Act, specially designated as the Levy Account.

(2) The Levy Account shall be an interest bearing account.

(3) The following are to be paid into the Levy Account—

- (a) amounts received by the Authority as levy;
- (b) amounts received by the Authority from the investment of money standing to the credit of the Levy Account.

(4) Money standing to the credit of the Levy Account is to be applied only for the following purposes—

- (a) to make investments authorised under this Act;
- (b) to make payments to the Authority, the Ombudsman and the Compensation Funds Board;
- (c) to repay amounts of levy that have been waived, and amounts paid into the Account in error.

Division 4 — General

Fees and charges

162. (1) The Regulations may determine fees and charges payable in respect of services rendered by the Authority and the Ombudsman in the performance of their functions under a financial sector law.

(2) Fees and charges under this section shall not be such as amount to a tax mentioned in section 114 of the Constitution.

(3) Fees in respect of services provided to a person are payable by the person when the service is provided, or at a later time as agreed to by the person to whom the amount is payable.

(4) A person to whom an amount is payable as a fee or charge may, on application by a person liable to pay the fee or charge, waive the whole or a part of the fee or charge.

Levy etc a debt

163. (1) Each of the following is a debt due to the Authority—

- (a) an amount of financial sector levy imposed on a person;
- (b) an amount of an administrative penalty payable by a person under this Act;
- (b) an amount of fees and charges imposed on a person in respect of services provided by the Authority;
- (d) an amount payable by way of interest under this Act on unpaid administrative penalty.

(2) The amount of a debt due under this section and may be recovered by action in a court of appropriate jurisdiction.

PART XV — MISCELLANEOUS PROVISIONS

Transition in

164. (1) The Cabinet Secretary shall, by notice or notices in the *Gazette*, determine periods (“transition periods”) for classes of financial institutions, or financial products or financial services, identified in the notice or notices.

(2) A transition period shall—

- (a) start no earlier than six months after the enactment of this Act; and
- (b) end no later than two years after that time;

but the Cabinet Secretary may, by further notice in the *Gazette*, extend a transition period by a further period of no more than 12 months.

(3) A person is not required to comply with this Act in relation to a class of financial institutions, or financial products or financial services, until the transition period for the class has expired, but this subsection does not prevent the Cabinet Secretary or the Authority from taking necessary action.

Exemptions generally

165. (1) The Authority may, in writing, exempt any person or class of persons from a specified provision of a financial sector law.

(2) The Authority must not do so if it considers that the exemption—

- (a) will be contrary to the public interest;
- (b) is contrary to a financial sector law; or
- (c) may otherwise prejudice the achievement of the objects of a financial sector law.

(3) The Authority must publish each exemption.

Notifications to Authority

166. (1) The Authority may determine procedures and requirements for notifications to the Authority required by this Act or another financial sector law.

(2) To be valid, a notification to the Authority must comply with those procedures and requirements.

(3) The Authority shall publish a determination under subsection (1).

Reporting to Authority

167. (1) An auditor of a licensed financial institution, or of a holding company in a financial conglomerate, shall, without delay, submit a detailed written report to the Authority, the governing body of the financial institution and, in the case of financial conglomerate, the holding company of the financial institution, about any matter relating to the business of the financial institution or a company within the conglomerate, being a matter—

- (a) of which the auditor becomes aware of in the course of performing functions and duties as auditor; and
- (b) that the auditor considers—
 - (i) is causing or is likely to cause the financial institution to be financially unsound;
 - (ii) is contravening or may contravene a financial sector law in a material respect; or
 - (iii) in the case of an auditor, that it may result in an audit not being completed or may result in a qualified or adverse opinion on accounts.

(3) Compliance, in good faith, with subsection (1) is not a contravention of a law, a breach of a contract or a breach of a code of professional conduct.

(1) A person may report to the Authority—

- (a) financial difficulties or suspected financial difficulties in a financial institution;

- (b) a contravention or suspected contravention of a financial sector law in relation to a financial institution; or
- (c) the involvement or the suspected involvement of a financial institution in financial crime.

(2) Unless the report was made in bad faith, a person who makes a report in terms of subsection (1) is not—

- (a) criminally liable for making the report; or
- (b) liable to pay compensation or damages to any person in relation to a loss caused by the report.

Information sharing arrangements

168. [to be completed]

Prohibition of victimisation

169. A person shall not subject another person to any prejudice in employment, or penalise another person in any way, on the ground that the other person made a report under section 167, even if the report was not required by law.

Penalty — Kshs. [complete]

Protected disclosures

170. Sections 167 and 169 apply in addition to, and do not limit, any other law that provides protection for persons who properly report contraventions of the law.

False or misleading information

171. (1) A person who provides to the Authority, in connection with the operation of a financial sector law, information that is false or misleading, including by omission, commits an offence.

Penalty — Kshs. [complete]

(2) A person who—

- (a) provides to the Authority, in connection with the operation of a financial sector law, information that is false or misleading, including by omission; and
- (b) knew or believed, or ought reasonably to have known or believed, that the information was false or misleading;

commits an offence.

Penalty — Kshs. [insert – higher than for subsection (1)].

Accounts and records

172. (1) A person who is required under a financial sector law to keep accounts or records commits an offence if the accounts or records do not correctly record and explain the matters, transactions, acts or operations to which they relate.

Penalty — Kshs. [insert].

(2) If—

- (a) a person is required under a financial sector law to keep accounts or records;
- (b) the accounts or records do not correctly record and explain the matters, transactions, acts or operations to which they relate; and
- (c) the person—
 - (i) knew that, or was reckless whether, the accounts or records correctly recorded and explained the matters, transactions, acts or operations to which they relate;
 - (ii) intended to deceive or mislead a financial sector regulator or an investigator; or
 - (iii) intended to hinder or obstruct a financial sector regulator, or an investigator in performing his or her duties in terms of a financial sector law;

the person commits an offence.

Penalty —Kshs [insert – higher than for subclause (1)]

False assertion of connection with Authority

173. A person who, without the consent of the Authority, applies to a company, body, business or undertaking a name or description that signifies or implies some connection between the company, body, business or undertaking and the Authority commits an offence.

Penalty— [insert].

Provisions about liability in relation to bodies corporate

174. (1) If a financial institution commits an offence against a financial sector law, each member of the governing body of the financial institution is guilty of the same offence.

(2) It is a defence to a prosecution for an offence against subsection (1) that the defendant took all reasonably practicable steps to prevent the commission of the offence.

(3) If a key person of a financial institution engages in conduct relating to the provision of financial products or financial services that amounts to a contravention of a financial sector law, the financial institution is taken also to have engaged in the conduct.

(4) It is a defence to a prosecution for an offence against subsection (3) that the financial institution took all reasonably practicable steps to prevent the conduct.

Extension of periods for compliance

175. (1) The Authority may, by determination in writing, extend any period for compliance with, or a period prescribed by, a provision of a financial sector law, other than a provision that the Authority must comply with.

(2) The Authority may do so—

- (a) on application by a person who must comply with the provision or on its own initiative; and
- (b) more than once; and
- (c) either before or after the time for compliance has passed or the period prescribed has ended.

Requirements for notification and concurrence

176. (1) An obligation of the Authority under a financial sector law to notify the Central Bank of Kenya or another State organ of a particular matter does not apply if the Central Bank of Kenya or other State organ has agreed that notification is unnecessary.

(2) If a financial sector law provides that the Authority may not take a particular action without the concurrence of the Central Bank of Kenya or another State organ, the concurrence is not required if the Central Bank of Kenya or another State organ has agreed its concurrence is unnecessary.

Certificates, records and entries in books of account admissible in evidence

177. (1) A certificate, in the form determined by, and authenticated as determined by, the Authority, that shows that, at a specified date—

- (a) a person was or was not licensed under a financial sector law;
- (b) a specified licence was or was not subject to specified conditions;
- (c) a specified licence was, at a specified time, suspended, cancelled or revoked;
- (d) a specified financial institution was at a specified time a prudentially regulated financial institution or an eligible prudentially regulated financial institution; or
- (e) specified companies formed a financial conglomerate;

is admissible as evidence of the facts and matters stated in it and, unless the contrary is established, is conclusive.

(2) In any proceedings under or in relation to a financial sector law, a business document of or held by a financial institution is admissible as evidence of the matters, transactions and accounts recorded in it.

Notices to licensees

178. (1) A notice under or relating to a financial sector law to a person who is or was licensed under the financial sector law may be served on, or given to—

- (a) the person; or
- (b) if the person cannot be found after reasonable inquiry — some other person apparently involved in the management or control of a place where the person carries or carried on the licensed activities.

(2) For the purposes of a financial sector law, service under subsection (1) is effective service.

Publication requirements

179. A requirement in a financial sector law for information or a document to be published shall be read as including a requirement for the information or document to be published on the website of the body required to publish it.

Regulations

180. (1) The Cabinet Secretary may, after consultation with the Authority, make Regulations for giving effect to this Act and any other financial sector law.

(2) Without limiting subsection (1), Regulations may—

- (a) [insert]

PART XVI — REPEALS AND TRANSITIONAL PROVISIONS

[to be reviewed]

Subsidiary legislation

181. Subject to this Act, any regulation or other instrument made or issued under the other financial sector laws shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

Licensing and registration

182. (1) A person who, immediately prior to the commencement date of this Act, was licensed, registered or approved under a financial sector law is taken to be licenced under this Act on the commencement date.

(2) Any application made to the former institutions that has not been determined prior to the commencement date is deemed to have been made to the Authority.

(3) To avoid doubt, a person is not licensed, registered or approved under the repealed Acts for the purposes of paragraph (1) if, immediately before the commencement date, the license, registration or approval, had expired and had not been renewed.

Enforcement action

183. Any enforcement action, waiver, no objection or exemption granted, taken or commenced pursuant to the Capital Markets Act the Insurance Act, the Retirement Benefits Act and the Sacco Societies Act, including directives issued, shall apply as if it was an enforcement action, waiver, no objection or exemption granted, taken or commenced by the Authority.

Registers

184. The Registers maintained pursuant to Capital Markets Act the Insurance Act, the Retirement Benefits Act and the Sacco Societies Act shall be deemed, after the commencement date, to be Registers maintained by the Financial Services Authority under this Act.

Appeals and litigation

185. (1) An appeal made to the respective Tribunals established under the financial sector laws that has not been determined before the commencement date shall be treated as if made under this Act.

(2) All litigation matters pending before a court involving the Capital Markets Authority, the Insurance Regulatory Authority, the Retirement Benefits Authority or the Sacco Societies Regulatory Authority shall be deemed, at the commencement of this Act, to be litigation involving the Authority.

MoUs and membership of associations

186. (1) (1) All memoranda of understanding signed by the Financial Sector Regulators shall be deemed, at the commencement of this Act, to be entered into by the Authority.

(2) All memberships to associations entered into by the Financial Sector Regulators before the commencement of this Act shall be deemed, at the commencement of this Act, to be entered into by the Authority.

(3) All directives issued to the Financial Sector Regulators shall be deemed, at the commencement of this Act, to be directives issued to the Authority.

Assets and liabilities

187. All the property, assets, rights and liabilities, obligations and agreements including any contracts of employment vested in, acquired, incurred or entered into by or on behalf of the Financial Sector Regulators shall be considered to be vested in or to have been acquired

by the Authority and accordingly every such right, liability, obligation or agreement may be enforced by or against the Authority.

Staff

188. (1) All persons who, before the commencement of this Act are employed by the Capital Markets Authority, the Insurance Regulatory Authority, the Retirement Benefits Authority or the Sacco Societies Regulatory Authority shall, at the commencement of this Act, be taken to be staff of the Authority and employed in accordance with this Act on terms no less favourable than their terms of employment immediately before that time..

(2) Where at the commencement of this Act any penalty has been imposed on any staff of the Capital Markets Authority, the Insurance Regulatory Authority, the Retirement Benefits Authority or the Sacco Societies Regulatory Authority in disciplinary proceedings against that staff, and the penalty has not been or remains to be served by that staff, that staff shall serve or continue to serve such penalty to its full term.

Repeals and amendments

189. The Acts identified in the Second Schedule are repealed or amended, as set out in that Schedule.

FIRST SCHEDULE — CONDUCT OF THE AFFAIRS OF THE BOARD

Meetings

1. (1) Meetings of the Board shall be held as often as may be necessary, for the performance of its functions, but not less than four times in every financial year and not more than 90 days shall elapse between the date of one meeting and the next meeting and such meetings shall be held at such places, times and days as the Chairperson may determine.

(2) The Chairperson may at any time call for a special meeting of the Board and shall convene a special meeting within seven days of the receipt of a written request for that purpose addressed to him by not less than two Members or from management.

(3) The Chairperson shall chair all the Board meetings and if the Chairperson is not present, the members present shall choose one member to chair that meeting.

(4) The quorum for a Board meeting is five Members.

(5) A member shall be regarded as being present at a meeting of the Board if that member participates in the meeting by telephone,

video conferencing or other electronic means, provided that that member is able to communicate with the other members present at the meeting.

(6) Each Board member present at a meeting of the Board, except the Chief Executive Officer, shall have one vote.

(7) Unless a unanimous decision is reached, a decision at a meeting of the Board shall be determined by a majority of votes of the Board members present who are entitled to vote and, in the event of a tie, the person chairing that meeting shall also have a casting vote.

(8) No proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.

(9) The Board Secretary shall maintain minutes of each meeting

Committees

2. (1) Subject to any other written law, the Board may establish such committees as it may consider appropriate to perform such functions and responsibilities as it may determine.

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

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

Disclosure of interests

3. (1) If a member is directly or indirectly interested in any contract, proposed contract or other matter before the Board and is present at a meeting of the Board at which the contract, proposed contract or other matter is the subject of consideration, he shall, at the meeting and as soon as reasonably practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter.

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

SECOND SCHEDULE — REPEALS AND AMENDMENTS

- To be completed at the end.