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CENTRAL DEPOSITORIES ACT

NO. 4 OF 2000

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CENTRAL DEPOSITORIES ACT

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NO. 4 OF 2000
CENTRAL DEPOSITORIES ACT

[Date of assent: 1st August, 2000.]

[Date of commencement: 1st June, 2003.]

An Act of Parliament to facilitate the establishment, operation and regulation of central depositories, to provide for the immobilisation and eventual dematerialisation of, and dealings in, securities deposited therewith in Kenya, and for connected purposes

[Act No. 4 of 2000, Act No. 2 of 2002, L.N. 51/2003, Act No. 38 of 2011, Act No. 57 of 2012.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Central Depositories Act, 2000.

2. Interpretation

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

“**access**”, in relation to a computer system, means the placing of information on that system and the retrieval of information from that system;

“**Authority**” means the Capital Markets Authority established under section 5 of the Capital Markets Authority Act (Cap. 485A);

“**bank**” has the meaning assigned to it in section 2 of the Banking Act (Cap. 488);

“**bare trustee**” means a trustee who has no beneficial interest in the subject matter of the trust;

“**bearer security**” means a security the title to which is transferable by delivery (with or without endorsement) of the certificate representing such security;

“**book-entry security**” means a security standing to the credit of a securities account which is transferable by way of book-entry in the record of depositors and includes a security in a securities account that is in suspense;

“**buying in**” means the buying effected by a securities exchange, according to the rules of the securities exchange, of securities which a seller has failed to deliver on a day fixed for settlement;

“**CDS rules**” means operational and procedural rules issued or to be issued by a central depository for the purpose of ensuring orderliness, efficiency and security in the operation of a central depository as approved by the Authority;

“central depository” means a company licensed by the Authority to—

- (a) establish and operate a system for the central handling of securities—
 - (i) where securities are deposited and held in custody by, or registered in the name of, the company or its nominee company for depositors and dealings in respect of these securities are effected by means of entries in securities accounts without the physical delivery of certificates; or
 - (ii) which permits or facilitates the settlement or registration of securities transactions or dealings in securities without the physical delivery of certificates; and
- (b) provides other facilities and services incidental thereto;

“central depository agent” means a person appointed as an agent of a central depository to carry out one or more of the services provided by that central depository;

“certificate” means any document that is, or is a document of title to, a security;

“charge” includes a pledge or a mortgage;

“CMA rules” means the rules prescribed by the Authority under this Act or under the Capital Markets Authority Act (Cap. 485A);

“computer system”, in relation to a central depository, means a computer system established by a central depository which forms part of the system for the central handling of securities and which consists of—

- (a) the central equipment comprising hardware and software associated with that hardware, located at the premises of the central depository; and
- (b) the terminals located at the premises of the users;

“dealer” means a person who carries on the business of buying, selling, dealing, trading, underwriting or retailing of securities as principal;

“dealing in securities” means making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into—

- (a) any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities; or
- (b) any agreement the purpose or intended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities;

“debt securities” means debentures, bonds, notes, or other similar instruments representing or evidencing indebtedness whether secured or otherwise;

“defaulter” means a central depository agent who is subject to any default process;

“**default process**” means actions taken by a central depository under the default rules;

“**default rules**”, means rules of a central depository that provide for the taking of action by a central depository against a defaulter;

“**dematerialisation date**”, in relation to a dematerialised security, means the date prescribed by a central depository under section 24 as being the last day on which a certificate representing such security shall be recognised as *prima facie* evidence of share ownership under the Companies Act (Cap. 486);

“**dematerialised security**” means a book-entry security which has been prescribed by the central depository under section 24, whereby the underlying physical certificate is no longer recognised as *prima facie* evidence of ownership under the Companies Act (Cap. 486), on or after the dematerialisation date;

“**depositor**” in relation to any book-entry, means a holder of a securities account;

“**eligible securities**” means any securities as defined under the Capital Markets Act that have been approved for immobilization with a central depository by the Capital Markets Authority in consultation with the Minister, including but not limited to any security which has been prescribed by a securities exchange for demobilization with a central depository under Section 13;

“**financial institution**” means a financial institution as defined under the Banking Act (Cap. 488);

“**immobilisation date**”, in relation to any eligible security, means the date specified in the notice given by a securities exchange under section 13 as being the last day on which the eligible security may be traded on the securities exchange unless such security has been deposited with the central depository;

“**immobilised security**” means a security where the underlying physical certificates have been deposited with and are held by a central depository;

“**information**” includes data recorded in a form which can be processed by equipment operating automatically in response to instructions given for a particular purpose;

“**institutional investor**” means a person whose ordinary course of business is to hold, manage or invest funds in connection with retirement benefits, insurance contracts, mortgage and saving schemes and any fund or scheme in the nature of a collective investment scheme or a unit trust;

“**issuer**”, in relation to any book-entry security, means the company, corporation, government, or body corporate or unincorporate, which issued the security, and includes any person performing the functions of a Registrar for such issuer in respect of such security;

“**listed**” means admitted to the official list of a securities exchange in Kenya and listing shall be construed accordingly;

“**listed book-entry security**” means a book-entry security listed on a securities exchange in Kenya;

“**market charge**” means a fixed or a floating charge, granted by a central depository agent to a central depository over any property which is held by or deposited with the central depository for securing liabilities, arising directly in connection with the central depository, for the settlement of a market contract;

“**market collateral**” means any property which is held by or deposited with a central depository for the purposes of securing liabilities, arising directly in connection with the central depository, for the settlement of a market contract;

“**market day**” means any day during which a securities exchange is open for business;

“**member**” in relation to—

- (a) a securities exchange, means a person who is recognised as a member of a securities exchange; and
- (b) a company, means a person who is recognised as a member of a company under the Companies Act (Cap. 486);

“**Minister**” means the Minister for the time being responsible for Finance;

“**non-bearer security**” means a security other than a bearer security;

“**notification date**” means the date on which the notice pursuant to section 13(2) is given by a securities exchange;

“**official list**”, in relation to a securities exchange in Kenya, means a list specifying all securities which have been admitted for listing on that securities exchange;

“**quoted**”, in relation to a security other than a listed security, means a security issued outside of Kenya but traded on a securities exchange;

“**record**” includes, in addition to a record in writing—

- (a) any photograph;
- (b) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced therefrom; and
- (c) any film, tape or other device in which visual images are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced therefrom, and any reference to a copy of a record includes—
 - (i) in the case of a record falling within paragraph (b) but not paragraph (c) of this definition, a transcript of the sounds or other data embodied therein;
 - (ii) in the case of a record falling within paragraph (c) but not paragraph (b) of this definition, a still reproduction of the images embodied therein, whether enlarged or not; and
 - (iii) in the case of a record falling within both paragraph (b) and paragraph (c) of this definition, the transcript of the sounds or other data embodied therein together with the still reproduction of the images embodied therein;

“record of depositors” means a record provided by a central depository to an issuer under section 36 which contains the particulars specified in subsection (3) of the said section;

“Registrar” means the Registrar of companies appointed under the Companies Act (Cap. 486) and includes any deputy or assistant Registrar of companies;

“rules” means rules, by-laws or such other instruments made by a central depository or contained in its constituent documents, which govern the activities and conduct of a central depository and its agents and other persons in relation to it;

“securities” means—

- (a) debentures or bonds issued or proposed to be issued by a government;
- (b) debentures, shares, bonds commercial paper or notes issued or proposed to be issued by a body corporate;
- (c) derivatives including futures and options contracts on securities, indices, interest or other rates, currency, futures or commodities;
- (d) any unit, interest or share offered under a collective investment scheme;
- (e) any instruments commonly known as securities but does not include—
 - (i) bills of exchange;
 - (ii) promissory notes; or
 - (iii) certificates of deposits issued by a bank or financial institution licensed under the Banking Act (Cap. 488);

“securities account” means an account established by a central depository for a depositor for the recording of book-entry securities and cash balances, in respect of dealings in such securities by the depositor;

“securities exchange” means a market, exchange, securities organization or other place at which securities are offered for sale, purchase or exchange, including any clearing, settlement or transfer services connected therewith;

“securities market” means a market, or other place at which, or a facility by means of which—

- (a) offers to sell, purchase or exchange securities are regularly made or accepted;
- (b) offers or invitations are regularly made, being offers or invitations that are intended or may reasonably be expected to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange securities; or
- (c) information is regularly provided concerning the prices at which, or the consideration for which, particular persons or particular classes of persons, propose, or may reasonably be expected to sell, purchase or exchange securities;

“selling out” means the selling effected by a securities exchange according to the rules of the securities exchange, of securities which a buyer has failed to accept and to pay for when delivered on a day fixed for the settlement;

“substantial shareholder” means a person who has a beneficial interest to or exercises the voting rights attaching to such percentage of the issued share capital of a central depository as may be prescribed by the Authority from time to time;

“user” means a central depository agent, an issuer, a securities exchange or such other person as may be prescribed by the Authority, who may be given access to a computer system of a central depository.

(2) A reference to writing shall be deemed to include any mode of representing or reproducing letters, figures or marks in a visible form.

(3) A reference to a security being deposited, or required to be deposited, with a central depository shall be construed as a reference to a deposit of or a requirement for the deposit of—

- (a) the certificate;
- (b) the instrument of transfer, if any; or
- (c) any other document representing the security,

with the central depository.

[Act No. 38 of 2011, s. 2, Act No. 57 of 2012, s. 56.]

PART II – CENTRAL DEPOSITORY

2A. Functions of the Authority

The functions of the Authority under this Act shall be to—

- (a) take such measures as are necessary to ensure that the provisions of this Act are complied with;
- (b) take necessary measures to maintain and promote fairness, efficiency, competitiveness, transparency and orderliness in the deposit of securities, and the clearance and settlement of transactions in securities, by a central depository;
- (c) licence, supervise, monitor and regulate the activities of central depositories;
- (d) set standards of competence for central depository agents;
- (e) approve the rules of central depositories;
- (f) promote, encourage and enforce proper conduct, competence and integrity of central depository agents;
- (g) counter and suppress illegal, improper or unfair practices;
- (h) make regulations for the better carrying out of the purposes and provisions of this Act; and
- (i) perform any other functions under this Act or any other legislation as may be conferred, from time to time, on the Authority.

[Act No. 38 of 2011, s. 3.]

3. Restriction on establishment of central depository

(1) No person shall establish, maintain or hold himself out as maintaining a central depository except with the prior written approval of the Authority given in accordance with section 5.

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

4. Establishment of a central depository

(1) A company incorporated under the Companies Act (Cap. 486) which proposes to operate a central depository shall apply to the Authority in writing to be licensed as such.

(2) An application under subsection (1) shall be accompanied by—

- (a) the CDS rules made by the applicant in such manner and form as the Authority may prescribe;
- (b) the prescribed fee; and
- (c) such other information as the Authority may prescribe.

(3) The Authority may require an applicant to provide such further information as it may consider necessary in relation to the application, in such form or verified in such manner as the Authority may direct.

(4) A central depository which proposes to alter any particulars submitted under this section shall seek prior approval of the Authority before making such alterations.

(5) The Authority shall, in considering an application under subsection (1), determine if the applicant is fit and proper for the purposes of this Act.

[Act No. 38 of 2011, s. 4.]

4A. Determination of fit and proper

(1) The Authority shall, in determining whether a person is fit and proper under section 4(5), consider the—

- (a) financial status or solvency of that person;
- (b) educational or other qualifications or experience of the person, having regard to the nature of the functions which, if the application is granted, the person shall perform;
- (c) status of any other regulatory licence or approval granted to the person by any other financial services regulator;
- (d) ability of the person to carry on the regulated activity competently, honestly and fairly; and
- (e) reliability of—
 - (i) in case of a natural person, that individual person; or

- (ii) in case of a company, the company, its directors, chief executive, management and any substantial shareholder of the company.

(2) Without prejudice to the generality of subsection (1), the Authority shall, in considering whether a person is fit and proper—

- (a) have regard to whether that person—
 - (i) has contravened the provision of any law, in Kenya or elsewhere, designed for the protection of members of the public against financial loss due to dishonesty or incompetence, or malpractice by persons engaged in transacting with marketable securities;
 - (ii) was a director of a licensed person which has been liquidated or is under liquidation or statutory management;
 - (iii) has taken part in any business practice which, in the opinion of the Authority, was fraudulent, prejudicial to the market or public interest, or was otherwise improper or would otherwise discredit the methods of conducting business;
 - (iv) has taken part or has been associated with any business practice which casts doubt on his competence or soundness of judgment; or
 - (v) has conducted himself in a manner likely to cast doubt on his competency and soundness of judgment;
- (b) take into account any information in the possession of the Authority, whether provided by the applicant or not, relating to—
 - (i) any person who is to be employed by, associated with, or who will be acting for or on behalf of, the applicant in a licensed activity;
 - (ii) where the applicant is a company in a group of companies—
 - (A) any other company in the same group of companies;
 - (B) any substantial shareholder or officer of the company or any company referred to in paragraph (a);
 - (C) whether the applicant has established effective internal control procedures and risk management systems to ensure its compliance with all applicable regulatory requirements; and
 - (D) the state of affairs of any other business which the person carries on or purports to carry on.

(3) For the purposes of this section, “group of companies” means any two or more companies one of which is the holding company of the other.

(4) The Authority shall give a person an opportunity to be heard before determining if that person is fit and proper for the purposes of this Act or not.

[Act No. 38 of 2011, s. 5.]

5. Grant of a licence

(1) The Authority may, in writing, subject to such conditions or restrictions as it may consider proper to impose, license a company as a central depository, if it is not contrary to public interest to do so and the Authority is satisfied that the company—

- (a) has and maintains at all times, such minimum paid-up capital as may be prescribed by the Authority from time to time;
- (b) has a board of directors constituted in accordance with such criteria as the Authority may prescribe;
- (c) shall provide, as far as is reasonably practical, fair, transparent and efficient arrangements for the deposit, registration and transfer of securities;
- (d) shall manage any risks associated with its business and operations prudently;
- (e) shall ensure the compliance of its rules by its agents;
- (f) has made sufficient central depository rules to address the matters prescribed in section 5A;
- (g) has sufficient financial and human resources and the infrastructure—
 - (i) to establish and operate a fair, transparent and efficient clearing facility;
 - (ii) to meet contingencies, including events such as technical complications occurring with an automated system or disasters and its integration with any connected trading systems; and
 - (iii) has provided adequate security arrangements.

(2) The Authority shall give a person an opportunity to be heard before declining to grant a licence.

(3) Subject to the provisions of this Act, a central depository licence shall, until it is revoked or suspended by the Authority, be valid.

[Act No. 38 of 2011, s. 6.]

5A. Rules of a central depository

- (1) A central depository shall make CDS Rules providing for—
- (a) deposit, registration and transfer of securities;
 - (b) settlement of transactions involving securities;
 - (c) the proper regulation and efficient operation of the clearing facility which it operates;
 - (d) its default process;
 - (e) the establishment of a settlement guarantee fund;
 - (f) the qualifications for appointment of central depository agents;
 - (g) the proper regulation and supervision of its agents;

- (h) the exclusion from participation as central depository agents of persons who are not fit and proper;
- (i) the expulsion, suspension or disciplining of a central depository agent;
- (j) the carrying on of the business of a central depository, having regard to the interests and protection of the investing public; and
- (k) such other matters as the Authority may direct.

(2) A central depository shall submit the rules made under subsection (1) to the Authority for approval.

(3) A licensed central depository shall not amend, vary or rescind its rules without prior approval of the Authority.

[Act No. 38 of 2011, s. 7.]

5B. Default process rules

(1) The default process rules made under section 5A(1)(d) shall provide for the actions which a central depository may take against a central depository agent that has failed, or has become unable or is likely to be unable to meet its obligations for all unsettled or open market contracts to which it is a party and shall in particular, to—

- (a) enable the settlement of all the defaulter's contracts;
- (b) provide, for the purpose of paragraph (a), such sum of money payable by or to the defaulter, in relation to each contract, if this is required after taking into account all the rights and liabilities of the defaulter under or in respect of the contracts in question;
- (c) enable all sums of money payable by or to the defaulter as determined in accordance with paragraph (b) to be aggregated or set-off to produce a net sum, if any, payable by or to the defaulter;
- (d) provide, if any, the net sum referred to in paragraph (c), is payable to the defaulter, that all property of the defaulter which is either subject to a market charge or which has been provided as market collateral shall cease to be subject to the market charge, without prejudice to any other form of charge to which it may be subject, or to be market collateral, without prejudice to its provision as any other form of collateral, as the case may be; and
- (e) provide for the certification by the central depository, of any net sum referred to in paragraph (c) payable to the defaulter, or of any further net sum referred to in paragraph (d) payable by or to the defaulter, as the case may be, or if there is no such sum, the certification by the central depository of that fact.

(2) Where a central depository commences a default process, all subsequent action taken under its rules for settlement of market contracts to which the defaulter is party, shall be treated as taken under the default rules.

[Act No. 38 of 2011, s. 7.]

5C. Net sum payable on completion of default measures

(1) This section shall apply to any net sum certified by a central depository as payable by or to a defaulter, upon the completion of default measures.

(2) Where a receiving or winding up order has been made, or a resolution for the voluntary winding up has been passed, any net sum shall be—

- (a) provable in bankruptcy or winding up proceedings; and
- (b) taken into account for the purpose of any rule of law relating to set-off.

(3) For the purposes of subsection (2), a certificate of a central depository on the amount of the net sum payable, shall be sufficient proof of the net sum payable.

[Act No. 38 of 2011, s. 7.]

5D. Central depository to prepare and submit report

(1) A central depository shall, upon completion of default measures, prepare a report containing the—

- (a) action taken against the defaulter; and
- (b) net sum, if any, certified by the central depository to be payable by or to the defaulter.

(2) A central depository shall submit a report made under subsection (1) to the

- (a) Authority;
- (b) any relevant securities exchange; and
- (c) defaulter to whom the report relates.

(3) The Authority may publish, in such manner as it may consider appropriate, the contents of a report received under subsection (2) for the attention of creditors.

(4) Upon receiving a report made under subsection (2) the defaulter shall, at the request of any creditor—

- (a) avail the report to the creditor for inspection within two days from the receipt of such request; or
- (b) supply to the creditor, on payment of a prescribed fee, all or any part of the report as requested.

[Act No. 38 of 2011, s. 7.]

6. Amendment of CDS rules

(1) The rules of an approved central depository, in so far as they have been approved by the Authority, shall not be amended, varied or rescinded without prior approval of the Authority.

(2) Where the board of directors of an approved central depository intends to amend its rules, it shall forward the proposed amendments to the Authority for approval.

(3) The Authority shall, within thirty days of receipt of a notice under subsection (2), notify the central depository of its decision regarding the proposed amendments, and where it does not approve the same, shall specify the reason for such decision.

(4) A central depository which proposes to alter any particulars already furnished to the Authority, or to make any change in its state as specified in its application under section 4, shall seek the prior approval of the Authority.

7. Power of Authority to amend CDS rules

Notwithstanding the provisions of any other written law, the Authority may from time to time, after consultation with the central depository, amend the CDS rules by written notice, specifying the amendments and the dates on which such amendments shall come into force.

8. Duties of a central depository

(1) A central depository shall—

- (a) establish and operate facilities for the handling of securities centrally;
- (b) ensure that facilities under paragraph (a) provide fair, transparent and efficient depository, clearing and settlement arrangements for securities deposited and any transactions relating to securities cleared or settled through its facilities;
- (c) ensure adequate measures to prevent and mitigate fraud or any other system manipulation mechanisms are established to—
 - (i) ensure safe custody of certificates and other documents deposited with the central depository;
 - (ii) guard against falsification of the records or accounts required to be kept or maintained under the Act; and
 - (iii) ensure a proper and efficient system for the tracing, verification, inspection, identification and recording of all transactions with the central depository;
 - (iv) seek approval for any fees proposed to be levied in respect of the services it renders; and
 - (v) ensure that the risks associated with its business and operations are managed prudently.

(2) A central depository shall, in discharging its duty under subsection (1), act in the interest of the investors and the public.

(3) A central depository shall operate its facilities and perform its duties in accordance with the rules approved by the Authority under section 5A.

(4) A central depository shall formulate and implement appropriate procedures to ensure that the agents it appoints under section 9 comply with its rules.

(5) A central depository shall, in the conduct of its business, at all times, maintain—

- (a) adequate and properly equipped premises;
- (b) competent personnel; and
- (c) automated systems with adequate capacity and facilities, security arrangements and technical support to meet contingencies or disasters, approved by the Authority.

(6) A central depository shall preserve confidentiality with regard to the information in its possession concerning its central depository agents and their customers:

Provided that such information may be disclosed to the Authority when requested to do so in writing, or upon written request of a securities exchange, for which it is a central depository, or is required to do so by any law.

(7) A central depository shall, immediately notify the Authority if it becomes aware—

- (a) of the inability of any of its central depository agents, to comply with any rule of the central depository;
- (b) of a financial irregularity or other matter which, in the opinion of the central depository, may indicate that the financial standing or integrity of a central depository agent is questionable; or
- (c) of the likelihood of a central depository agent not being able to meet its legal obligations.

(8) A central depository shall be entitled to charge such fees for its services and facilities as may be approved by the Authority.

(9) The Authority may, from time to time, prescribe such other duties to be performed by a central depository as it considers appropriate.

[Act No. 38 of 2011, s. 8.]

9. Central depository agents

(1) No person shall act or hold himself out as a central depository agent unless such person is duly appointed as such in accordance with this section.

(2) Subject to this Act, a central depository may, in writing, appoint—

- (a) any trading participant of a securities exchange for which it is its central depository; or
- (b) a non-bank subsidiary of any bank or financial institution licensed under the Banking Act (Cap. 488); or
- (c) any institutional investor; or
- (d) any body corporate of a type prescribed by the Authority, to be its central depository agent.

(3) A central depository agent appointed under this section shall perform all or any functions approved by the central depository under the CDS rules.

(4) In the performance of its functions under this Act, a central depository agent shall, when so required, produce or make available to the central depository or to the Authority, any information or document relating to a securities account.

(5) Subject to this Act, the Authority may make such rules as may be necessary to regulate the appointment of a central depository agent and the imposition of duties, obligations and sanctions on such agent.

[Act No. 38 of 2011, s. 9.]

10. Regulation of dealings in securities

(1) A central depository shall do all such things as are necessary to ensure orderly dealings in immobilised or dematerialised securities.

(2) A central depository may, in performing its function under subsection (1), give to an issuer of any security or a central depository agent directions to do a particular act or thing or to refrain from doing a particular act or thing and the issuer or central depository agent shall comply with such directions.

(3) An issuer or central depository agent who fails to comply with any direction given by a central depository under subsection (2) commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding five years, or to both.

10A. Property deposited with central depository

Where a central depository agent deposits any property as a market collateral with a central depository in accordance with its rules, no action, claim or demand, either civil or criminal, in respect of any right, title or interest in such property shall lie, or be commenced or allowed against a central depository or its nominees, notwithstanding any other provision of the law.

[Act No. 38 of 2011, s. 10.]

11. Central depository agents, issuers, etc., to comply with CDS rules

(1) Any person who is a central depository agent, an issuer, a depositor, or a user shall comply with, enforce or give effect to the CDS rules to the extent to which those rules apply to such person.

(2) For the purposes of this section, "CDS rules" includes any direction given, from time to time, by a central depository to any person pursuant to any provision of this Act.

12. Central depository to provide assistance to the Authority

(1) A central depository shall provide such assistance to the Authority as is reasonably required for the performance by the Authority of its functions and duties under this Act.

(2) The Authority shall be entitled at all reasonable times to full and free access to any part of the premises of a central depository for the purpose of ensuring compliance with this Act.

12A. Disciplinary action and review of a disciplinary action

(1) A central depository may reprimand, fine, suspend, expel or otherwise take any disciplinary action against a central depository agent in accordance with its rules.

(2) A central depository shall, within seven days of any action taken under subsection (1), notify the Authority, in writing, giving particulars including the name of the person, the reason and the nature of the action taken.

(3) The Authority may, on its own motion or on application by an aggrieved person, review any disciplinary action taken under subsection (1), and may affirm, modify or set aside the decision of a central depository after giving the central depository and the central depository agent an opportunity to be heard.

(4) Nothing in this section shall preclude the Authority, in any case where a central depository fails to act against a central depository agent, from suspending, expelling or otherwise taking disciplinary action against a central depository agent:

Provided that the Authority shall give the central depository and the central depository agent an opportunity to be heard.

(5) Any action taken by a central depository under subsection (1), shall not prejudice the power of the Authority to take such further action as it considers necessary against a central depository agent.

[Act No. 38 of 2011, s. 11.]

PART III – PROVISIONS RELATING TO IMMOBILISED SECURITIES

(A) – Immobilisation of Securities

13. Prescription of securities for immobilisation

(1) Subject to subsection (2), a securities exchange may, from time to time, after consultation with a central depository, prescribe that any security listed or quoted or proposed to be listed or quoted on the securities exchange be immobilised by depositing such security with the central depository.

(2) A securities exchange shall, in respect of securities listed or quoted on the securities exchange, give notice to the public in the manner prescribed in the CDS rules of all eligible securities prescribed by it to be immobilised with a central depository.

(3) For the purposes of this Act, the deposit by a person of any eligible security with an agent of a central depository shall be deemed to be a deposit of such security with that central depository.

14. Verification of certificates and transfer to a central depository or nominee company

(1) After the deposit by any person of a certificate representing an eligible security and the instrument of transfer in respect of that security, if any, a central depository or its agent, as the case may be, shall lodge the certificate and instrument with the issuer within the period prescribed in the CDS rules.

(2) Subject to subsection (3), the issuer shall, on receipt of the certificate and instrument, forthwith do all such acts as are necessary to register the transfer of the security in respect of such certificate in the name of the central depository or its nominee company.

(3) Without prejudice to the right of an issuer to refuse to register a transfer under any written law, the issuer shall refuse registration of the transfer under subsection (2) if—

- (a) the certificate is not a genuine certificate or is a certificate that was reported lost or destroyed; or
- (b) in relation to any such security—
 - (i) there has been a duplication in the issuance of the certificate representing that security; or
 - (ii) such certificate is a certificate issued in excess of the issued share capital of the issuer; or

- (c) it has been served with an order of a court of competent jurisdiction prohibiting any dealing in respect of the security underlying such certificate; or
- (d) any lawful order exists to the knowledge of the issuer preventing the person who deposited the certificate from dealing with any of his monies, properties or assets.

(4) Within two market days after a transfer is lodged with an issuer or within such period as may be allowed in writing by the central depository, the issuer shall, in any case other than a case referred to in subsection (3), notify the central depository agent, complete and deliver the appropriate certificate to the central depository.

(5) Section 80 of the Companies Act (Cap. 486) shall not apply in relation to any transfer required to be registered by an issuer pursuant to this section and section 15(4), but where an issuer refuses registration of such a transfer, it shall serve on the transferor and the central depository (being the transferee) a written notice giving the reasons for such refusal.

(6) Notwithstanding the provisions of section 81 of the Companies Act (Cap. 486), an instrument of transfer lodged with an issuer pursuant to subsection (1) shall be capable of registration in the name of a central depository or its nominee company if such instrument has been certified by a central depository agent instead of being executed by the central depository or its nominee company.

(7) For the purposes of this section, an eligible security shall be immobilised if it is no longer in suspense.

(8) The provisions of this section shall not apply to bearer securities.

15. Transitional provisions relating to trading of eligible securities

(1) This section shall apply to all trading in eligible securities during the period beginning on the day immediately following the notification date and ending on the immobilisation date (in this section and in section 16 referred to as “the transitional period”).

(2) A central depository or a central depository agent, as the case may be, shall accept any certificate representing an eligible security to be immobilised for the purpose of settlement of any trade on the securities exchange during the transitional period in accordance with the CDS rules.

(3) No person shall trade in any eligible security on a securities exchange without having a securities account.

(4) The provisions of sections 14(2) to 14(8) shall apply to all central depository agents and the issuers with whom the documents referred to in subsection (2) of this section have been lodged.

16. Dealer in eligible securities to hold securities account

No person shall, after the transitional period, trade or transfer any eligible security on a securities exchange unless such person holds a securities account.

17. Restriction of trade in eligible securities

(1) No person shall, after the immobilisation date, trade any eligible security on a securities exchange unless such security has been deposited with a central depository.

(2) Notwithstanding subsection (1), an eligible security may, at any time after the immobilisation date, be deposited by a depositor with the central depository subject to such additional fees, if any, as may be imposed under the CDS rules.

18. Receipt of certificates of eligible securities for safe custody

(1) A central depository may, by notice, prescribe a date following which no member of a securities exchange may receive a certificate representing an eligible security merely for safe custody.

(2) A central depository shall give notice to the public of the date prescribed in subsection (1).

19. Liability of central depository for loss, damage, etc., of certificates

(1) A central depository and its agent shall be liable to a depositor for any loss, damage or liability suffered or incurred by a depositor in respect of any disappearance, loss or destruction of any certificate deposited by the depositor with the central depository or such agent due to any wilful act, omission, neglect or default on the part of the central depository or its central depository agent.

(2) Notwithstanding subsection (1), a central depository agent shall not be liable for any loss, damage or liability suffered or incurred by any person in respect of any certificate the transfer of which is not capable of registration under section 14:

Provided that the provisions of this subsection shall not operate to relieve a central depository agent from any obligation imposed on it by the rules of a securities exchange in its capacity as a member of such securities exchange to effect any buying in, whether directly or otherwise, following a refusal to register a transfer under that section.

20. Deeming provisions

A central depository or its nominee company shall—

- (a) for the purposes of section 4 of the Capital Markets Authority Act (Cap. 485A), not be deemed to have an interest in relation to the book-entry securities which are registered in its name; and
- (b) be deemed to be a bare trustee.

(B) – *Withdrawal of Immobilised Securities*

21. Withdrawal of immobilised security

(1) Subject to section 22 and the provisions of this section, a depositor may, on application to the central depository, withdraw an immobilised security standing to the credit of his securities account.

(2) Where an application is made under this section for the withdrawal of an immobilised security which is registered in the name of a central depository or its nominee company, the central depository shall forthwith place such security under suspense and lodge with the issuer—

- (a) the certificate representing the security; and

- (b) the instrument of transfer duly executed by the central depository or its nominee company, as the case may be,

for the purpose of effecting the transfer in favour of the depositor.

(3) Notwithstanding the provisions of the Companies Act (Cap. 486), an issuer shall, within two weeks after the certificate and the instrument of transfer in respect thereof are lodged with it—

- (a) complete and hold ready for delivery to the depositor, the appropriate certificate registered in the name of such depositor and any other document in connection with the security, if any; and
- (b) unless otherwise instructed by the depositor, send or deliver the completed certificate and such other documents, if any, to the depositor.

(4) Nothing in subsection (3) shall operate to relieve a central depository or its central depository agent from any obligation imposed under any written law or under the rules of a securities exchange to notify the securities exchange of such transfer.

22. Trading of securities withdrawn from central depository

(1) No person shall trade any security withdrawn from a central depository on a securities exchange unless such security is redeposited in a central depository.

(2) A security which is redeposited with a central depository shall not be capable of being utilised to settle a transaction which took place on a securities exchange prior to the redeposit of that security.

(3) The provisions of section 14 relating to eligible securities shall apply in respect of a redeposited security.

23. Withdrawal of prescribed securities prohibited

(1) No person shall withdraw any security which is prescribed as a dematerialised security under this Act from a central depository.

(2) A securities exchange may, from time to time, after consultation with the Authority, restrict or prohibit the withdrawal of any immobilised security or class of immobilised securities which is listed or quoted for such period and in such manner as it considers appropriate.

(3) Where a securities exchange restricts or prohibits withdrawal of immobilised book-entry securities under subsection (2), the securities exchange shall—

- (a) inform the central depository of such decision; and
- (b) give notice to the public of—
- (i) the book-entry securities the withdrawal of which is restricted or prohibited; and
- (ii) the period of such restriction or prohibition.

*(C) – Dematerialisation of Securities***24. Prescription of dematerialised securities**

(1) A central depository may, from time to time, after consultation with an issuer, prescribe an immobilised security, or class of securities, as a dematerialised security in accordance with the selection process laid down under the CDS rules.

(2) Notwithstanding subsection (1), a central depository may, from time to time, after consultation with an issuer, prescribe any security proposed to be listed or quoted on a securities exchange, as a dematerialised security.

(3) Upon being notified by the central depository of the prescription under subsection (1), an issuer of a dematerialised security shall—

- (a) give notice to the public that such security shall, on the dematerialisation date, become a dematerialised security; and
- (b) do all such things as are necessary to amend its deed of establishment, trust deed, constitution or articles of association, as the case may be, to give effect and comply with this Act and CDS rules within one hundred and twenty days of the notice.

(4) A notice under subsection (3) shall identify the security to be dematerialised and shall specify a dematerialisation date, not being less than one month from the date of publication of the notice, on or before which that security shall become dematerialised.

25. Central depository to maintain official record of depositors

(1) On or after the dematerialisation date, every issuer of a security prescribed as a dematerialised security shall—

- (a) surrender the physical register of members or debenture holders, as the case may be, to the central depository; and
- (b) provide information to the central depository of any member or debenture holder who appears in the appropriate register as a holder of a certificate not already immobilised by the central depository.

(2) A central depository shall maintain an official record which shall include the name and particulars of—

- (a) every depositor with an immobilised security credited to a securities account held by such depositor; and
- (b) where the prescribed security is issued by a listed company, every member or debenture holder whose name would, save for this section, appear in the appropriate register of members or debenture holders of such company, as the case may be.

(3) Notwithstanding section 112 of the Companies Act (Cap. 486), a record of depositors maintained pursuant to subsection (2) shall—

- (a) contain information in computerised record form;
- (b) not be distinguished by any share number; and
- (c) contain such other information as may be required under the CDS rules.

(4) The provisions of this section shall not apply to any bearer security.

(5) Nothing in this section shall be construed as making the central depository an agent of the issuer for the purposes of providing registration services.

26. Issuer not to issue certificates in respect of dematerialised securities

No issuer shall, after the dematerialisation date issue any certificate in respect of a dematerialised security.

27. References to Cap. 486

(1) With effect from the dematerialisation date and notwithstanding the provisions of the Companies Act (Cap. 486) or anything in the articles of association of the issuer, a reference in respect of a dematerialised security, to—

- (a) a register of members or debenture holders including branch registers, as the case may be, maintained by a company under the Companies Act (Cap. 486), shall be deemed to be a reference to the record of depositors maintained by the central depository;
- (b) a transfer of shares or debentures from a transferee under the Companies Act (Cap. 486) shall be deemed to be a reference to a book-entry transfer performed by the central depository; and
- (c) any certificate, instrument of transfer or any movable property representing any security which is used as *prima facie* evidence of ownership of the security shall be deemed to be a reference to a statement of account issued by the central depository.

(2) The provisions of section 83 of the Companies Act (Cap. 486) shall not apply to a dematerialised security.

28. Application to collective investment schemes

(1) With effect from the dematerialisation date and notwithstanding the provisions of any other written law or any thing in a trust deed of any collective investment scheme, a reference in respect of a dematerialised security which represents an interest in a collective investment scheme, to—

- (a) a register of any collective investment scheme, shall be deemed to be a reference to the record of depositors maintained by the central depository;
- (b) a transfer of interest in a collective investment scheme from one investor to another, shall be deemed to be a reference to a book-entry transfer by the central depository; and
- (c) a certificate issued as evidence of an interest in a collective investment scheme, shall be deemed to be a reference to a statement of account issued by the central depository.

29. CMA rules in respect of dematerialised securities

The Authority may, in respect of dematerialised securities, prescribe CMA rules

- (a) to effect the replacement of physical registers with book-entry records where the dematerialised security to be prescribed is a security other than a share or debenture under the Companies Act (Cap. 486), or an interest in a collective investment scheme; and

- (b) to prescribe forms for recording the interest in securities standing to the credit of any depositor before the dematerialisation date.

PART IV – SECURITIES ACCOUNTS AND RECORDS

30. Dealer in book-entry securities to hold securities account

(1) No person shall deal in book-entry securities unless such person holds a securities account.

(2) A central depository may establish different types of securities accounts for different classes of persons or securities.

31. Issuance of statements of accounts

(1) A central depository shall issue to all depositors statements of account in respect of all book-entry securities held in custody by, or registered in the name of, the central depository or its nominee company for the depositors at such time and in such manner as may be prescribed under this Act.

(2) Notwithstanding the provisions of subsection (1), a depositor may, at any time, by written notice, require the central depository to issue to him a statement of account in respect of all or any of the book-entry securities for the time being held in custody by, or registered in the name of, the central depository or its nominee company on behalf of the depositor.

(3) A central depository shall, on receipt of a written notice under subsection (2) and upon payment of any charges which may be imposed under the CDS rules, issue to the depositor the statement of account so required.

(4) A statement of account issued under this section shall be *prima facie* evidence of the truth of the matters specified in the statement of account.

32. Duty of central depository to keep records

A central depository shall keep or cause to be kept such records and accounts, in sufficient detail, so as to show particulars of—

- (a) all transfer of book-entry securities to and from a securities account;
- (b) all moneys received or paid by a central depository, including dividends received in respect of any book-entry securities and the disbursement of such dividends to depositors;
- (c) all income received from commissions, fees, charges and other sources, and all expenses, commissions, and other payments made or paid by the central depository; and
- (d) all assets and liabilities (including contingent liabilities) of the central depository.

33. Audit of records and accounts

(1) A central depository shall, at the end of every financial year cause an audit to be conducted in respect of every record or account kept pursuant to section 32, which shall include—

- (a) a verification of the accuracy of the details shown in such records or accounts; and

(b) a stock count of all certificates held by the central depository.

(2) A central depository shall, within three months after the end of its financial year, submit to the Authority an annual report which shall include—

- (a) a copy of the report of the audit conducted under subsection (1), duly certified by the auditors;
- (b) a description of the activities undertaken by the central depository in that financial year;
- (c) the resources, including financial, technological and human resources which the central depository had available, and used, in order to ensure compliance with its obligations; and
- (d) an analysis of the extent to which the central depository considers that the activities undertaken, and resources used, have resulted in full compliance of its obligations.

(3) A central depository shall, at the end of each financial year, subject its operations to an independent audit.

(4) A central depository shall appoint an independent auditor for the purposes of subsection (3).

(5) A central depository shall inform the Authority of the appointment of an auditor under subsection (4).

(6) The auditor shall—

- (a) have a right of access, at all reasonable times, to all operational records and systems of the central depository and is entitled to require from officers of the central depository such information and explanations as the auditor considers necessary for the performance of his duties;
- (b) have a right of access at all reasonable times, to the offices, operation records and systems of all the central depository agents of that central depository;
- (c) prepare a report on the operational capabilities of the central depository system and a statement on whether, in the opinion of the auditor, the central depository system operates and performs its functions satisfactorily with regard to the duties of the central depository;
- (d) submit the report prepared under paragraph (c) to the central depository and a copy to the Authority within ninety days of his appointment.

[Act No. 38 of 2011, s. 12.]

PART V – SECURITIES TRANSACTIONS, ENTRIES AND MISCELLANEOUS

34. Evidence of book-entry security transactions

(1) Notwithstanding the provisions of any other written law, a transaction of a book-entry security by a depositor, whether accompanied by an instrument or not shall be evidenced or effected by means of an entry in the securities account of the depositor.

(2) For the purposes of this section, a transaction of a book-entry security shall include a deposit of an eligible security under section 13 and a trade or transfer of a book-entry security from a securities account to another securities account maintained by the central depository.

(3) Notwithstanding anything in the Capital Markets Authority Act (Cap. 485A), or the Stamp Duty Act (Cap. 480) or any regulations made thereunder, a transaction of a book-entry security by a depositor pursuant to subsection (1) shall be deemed to be a transaction or trade within the securities exchange.

35. Entries in securities accounts

(1) An entry in a securities account in respect of a transaction shall—

- (a) in the case of a securities account established and maintained directly by a central depository, be deemed to have been made by, or with the authority of, such central depository; and
- (b) in the case of a securities account established through, and maintained by a central depository agent on behalf of a central depository, be deemed to have been made by, or with the authority of, the central depository agent.

(2) A record of an entry in a securities account in respect of a transaction in book-entry securities shall be *prima facie* evidence of the truth of the matters so recorded.

36. Provision of record of depositors to issuer

(1) An issuer of any book-entry security may, by written notice, require a central depository to furnish it with a record of the depositors in whose securities accounts such securities are credited as at the date of the notice or at such other date as may be specified in the notice.

(2) A record of depositors required by an issuer under subsection (1) shall be issued by the central depository within the period prescribed under the CDS rules.

(3) A record of depositors issued under this section shall contain the name, identity card, passport number or company number as the case may be, nationality and such other information and particulars of the depositors as may be requested by the issuer, and a statement as to the number of the book-entry securities acquired by each depositor.

(4) The record of depositors obtained by an issuer under this section shall be available for inspection by any member of the issuer (including a depositor) without charge and by any other person on payment of such sum as may be prescribed from time to time by the central depository, in respect of each inspection.

(5) Any member of an issuer or any other person may require the issuer to furnish him with a copy of the record of depositors, or of any part thereof, but only so far as it relates to the names, addresses, and the number of securities held, on payment of such sum as may be prescribed from time to time by the central depository, in respect of every hundred words or fractional part thereof required to be copied.

(6) The copy of the record of depository, or any part thereof, required under subsection (5) shall be supplied to the person who required such copy within a period of twenty-one days or within such longer period as the Authority considers reasonable in the circumstances, commencing from the day after the date of receipt of the request by the issuer.

37. Depositor to be treated as member or debenture holder

(1) Notwithstanding the provisions of the Companies Act (Cap. 486) or any other written law governing the issuer, a depositor of any book-entry security whose name appears in the record of depositors shall be entitled to all rights, benefits, powers and privileges and be subject to all liabilities, duties and obligations in respect of, or arising from such security (whether conferred or imposed by the Companies Act (Cap. 486), or such other written law or the deed of establishment or the memorandum or articles of association of the issuer, or otherwise) as if he were a member or debenture holder registered in the appropriate register, as the case may be, maintained by the issuer of such security, pursuant to the said Act or any other written law.

(2) For the purposes of this section, “book-entry security” does not include a security specified in the securities account as being in suspense pursuant to section 43 or to any CMA rules made thereunder.

38. Prohibition of dealings in book-entry securities

No central depository shall purchase, acquire, or otherwise deal in, book-entry securities as principal other than for such purpose and in such manner as may be permitted by the Authority under CMA rules made under this Act.

39. Public offer of securities

(1) Where, pursuant to section 13 or section 24, a securities exchange or a central depository, as the case may be, prescribes any security proposed to be listed or quoted on a securities exchange to be immobilised or dematerialised with a central depository, the issuer of such security or the offeror, as the case may be, shall in the prospectus issued by such issuer or offeror in respect thereof, notify the public that the security is so prescribed.

(2) Upon completion of the allotment or allocation of such security, the issuer or offeror, as the case may be, shall forthwith confirm with the central depository the record of the successful applicants together with such particulars as may be required by the central depository for the purpose of making appropriate entries in the securities accounts of the respective applicants and shall deliver to the central depository the certificates, if any, (in such denominations as may be specified by the central depository) registered in the name of the central depository or its nominee company.

(3) For the purposes of this section, “offeror”, in relation to any security, means the person offering the security for sale.

(4) A reference to a security proposed to be listed on a securities exchange in this section shall be construed as a reference to a security which has been approved by the Authority to be listed on the securities exchange.

(5) A central depository shall open a securities account in the name of every successful applicant who does not hold such account.

40. Capitalisation, rights issues, etc.

(1) Where an issuer, in relation to any book-entry—

- (a) makes a bonus issue by way of an increase in the total issued capital, or issues securities pursuant to a rights issue or the conversion of any debt securities; or
- (b) issues securities pursuant to an exercise of any right or option to acquire securities in the share capital of the issuer,

the issuer shall notify the central depository accordingly, and deliver to the central depository—

- (i) a confirmed list of the names of the allottees for purposes of amendment of the securities accounts held by such allottees; and
- (ii) the appropriate certificates, if any, in such denominations as may be specified by the central depository registered in the name of the central depository or its nominee company.

(2) A prospective allottee shall, before acquiring any of the securities referred to in subsection (1), open a securities account in his name.

41. Underwriters to open securities accounts

A person intending to underwrite any security proposed to be listed on a securities exchange, or any rights issue in respect of any book-entry security, shall open a securities account.

42. Charging or mortgaging of securities

(1) Where a book-entry security is charged by a depositor (in this section referred to as “the chargor”) in favour of any person (in this section referred to as “the chargee”) the chargee or his nominee shall create a security interest or cause to be created such security interest in the security which is the subject of the charge, as the case may be, in accordance with this section.

(2) Except as provided in this Act or the CMA rules, no security interest may be created in book-entry securities.

(3) A security interest in book-entry securities to secure the payment of a debt or liability may be created in favour of any chargee by an instrument of charge in the form prescribed under the CDS rules executed by the chargor:

Provided that any security interest in a book-entry security subsequent to any charge, created by the chargor in favour of any other person shall be void.

(4) Upon receipt of the instrument of charge, the central depository agent shall forthwith register the instrument in a register of charges maintained by the central depository.

(5) Where a charge over a deposited security has been discharged or released, the central depository or the central depository agent, as the case may be, shall, upon receipt of a notice in writing from the chargee confirming the same, transfer the deposited security into the securities account of the chargor.

(6) This section shall not apply to floating charges:

Provided that nothing in this section shall affect the validity and operation of floating charges on book-entries created under common law.

(7) Nothing in this section shall be construed in law to require the central depository to monitor, protect, enforce or give effect to any agreement or memorandum made between the chargor and the chargee in respect of the charge, but the central depository or its central depository agent, as the case may be, may require the chargor or chargee to provide such supporting documents evidencing the charge upon creation of the security interest by way of the charge.

43. Securities in or under suspense

(1) A central depository may specify that any book-entry security in a securities account is in suspense—

- (a) where the transfer of such security in the name of the central depository or its nominee company is not registered, or is not registrable by the issuer under section 14;
- (b) where an application under section 21 for withdrawal of such security has been made by a depositor; or
- (c) in such other circumstances as may be prescribed by the central depository under the CDS rules.

(2) A central depository may specify that any book-entry security in a securities account is under suspense—

- (a) where, pursuant to an objection or investigation made in accordance with the CDS rules, there is a need for the central depository to restrict the transfer, charge or mortgage of such security; and
- (b) where, the central depository has been instructed to restrict the movement of any book-entry transfers, whether partially or otherwise, under such circumstances in accordance with the CDS rules.

43A. Default process of a central depository to take precedence over laws of insolvency

The following shall not to any extent be invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on insolvency, bankruptcy or winding up, or on the appointment of a receiver over any of the assets of that person—

- (a) a market contract;
- (b) the rules of a central depository relating to the settlement of a market contract;
- (c) any process or action taken under the rules of a central depository relating to the settlement of a market contract;
- (d) a market charge;
- (e) the default rules of a central depository; or
- (f) any default process.

[Act No. 38 of 2011, s. 13.]

PART VI –SECRECY PROVISIONS

44. Security measures

Every central depository and central depository agent shall take all reasonable measures to protect information and documents relating to the affairs of the depositors, and in particular, relating to their securities accounts, against any unauthorised access thereto by unauthorised persons.

45. Duty to maintain secrecy

(1) Except as provided in this Act, no director, officer, employee or agent of a central depository or a central depository agent, whether during his tenure of office or during his employment or thereafter, and no other person who has access by any means to any information or document whatsoever relating to the affairs of any of the depositors, and in particular, relating to their securities accounts, shall give, divulge, reveal or otherwise disclose such information or document to any person.

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

(3) A person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding five years, or to both.

46. Restrictions on disclosure of information by central depository agents

Except as provided in section 9(4) of this Act, nothing shall authorise a central depository agent which is a bank or a financial institution within the meaning of the Banking Act (Cap. 488) to reveal, or disclose any information or document to any person in contravention of that Act.

47. Permitted disclosures

Subject to the provisions of this Act, nothing in any other written law shall entitle any person to refuse to disclose any information or document—

- (a) which the depositor, his authorised agent or his personal representative, has given permission in writing to disclose;
- (b) in a case where the depositor is declared bankrupt, or, if the depositor is a corporation, the corporation is being or has been wound up, in Kenya or in any country, territory or place outside Kenya;
- (c) for the purpose of instituting or, in the course of, any civil proceedings—
 - (i) between a central depository or a central depository agent and a depositor relating to the securities account of the depositor; or
 - (ii) between a central depository or a central depository agent and two or more parties making adverse claims to securities or monies in the securities account of the depositor, where the central depository or central depository agent seeks relief by way of interpleader;

- (d) to any person duly authorised to investigate into any offence under any law, such disclosure being, in any case, limited to the securities account and affairs of the depositor suspected of the offence;
- (e) to a central depository for purposes of the compilation of the record of depositors, or any part thereof, under section 36 of this Act;
- (f) to an issuer in respect of a record of depositors issued under section 36 of this Act;
- (g) to any member of an issuer or any person in respect of a record of depositors issued under section 36;
- (h) for the purpose of enabling or assisting the Authority to exercise any power conferred on it by this Act or by any other written law;
- (i) for the purpose of enabling or assisting the Authority and the Registrar to discharge their functions under this Act;
- (j) for the purpose of enabling or assisting a securities exchange or clearing house of a securities exchange to discharge their functions;
- (k) for the purpose of enabling or assisting auditors of a central depository and central depository agents to discharge their functions;
- (l) in a summary or collection of information or statistics, framed in such a way so as not to enable the identity of any depositor, to whom the information or statistics relates, to be ascertained.

48. Regulation of access to the computer system

(1) A central depository may give access to its computer system to its central depository agents, a securities exchange (on which the book-entry securities are listed), a clearing house of such securities exchange, issuers and any other person as may be prescribed by the Authority in CMA rules.

(2) The Authority may, for the purpose of regulating access to the computer system, prescribe by CMA rules, the extent to which any user or class of users may have, or should be prohibited from having, access to such system.

(3) Any person who—

- (a) being a user, unlawfully gains access, or attempts to gain access, to a computer system of a central depository, whether by means of any device or apparatus forming part of the computer system or by any other means, beyond the extent to which he is authorised to have access by the central depository under subsection (1); or
- (b) unlawfully gains access, or attempts to gain access, to a computer system of a central depository, whether by means of any device or apparatus forming part of the computer system or by any other means; or
- (c) unlawfully interferes with, or impedes, or attempts to interfere with or impede, the operation of a computer system of a central depository,

commits an offence.

(4) A person who is guilty of an offence under this section shall, on conviction, be liable to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding ten years, or to both.

PART VII – OFFENCES AND PENALTIES

49. Falsification of records or accounts

Where a central depository or its central depository agent keeps or maintains a record or an account that is required to be kept or maintained under any of the provisions of this Act by means of a mechanical device, an electronic device, or any other device, any person who—

- (a) records or stores, by means of that device, information that he knows or ought to know to be false or misleading in a material particular;
- (b) falsifies; or
- (c) with intent to falsify, destroys or removes—
 - (i) information which is recorded or stored by means of that device;
 - (ii) information which is prepared for the purpose of being recorded or stored by means of that device;
 - (iii) information which is prepared for use in compiling records;
 - (iv) information which is prepared for use in recovering other information which is recorded or stored by means of that device;or
- (d) having a duty to record or store information by means of that device, fails to record or store such information—
 - (i) with intent to falsify, wholly or in part, any entry made, or record intended to be compiled, from the information that has been recorded or stored; or
 - (ii) knowing that the failure to so record or store the information will render false or misleading in a material particular other information so recorded or stored,

commits an offence and shall, on conviction, be liable to a fine not exceeding ten million shillings, or to imprisonment for a term not exceeding ten years, or to both.

50. Destruction, concealment, mutilation and alteration of records

A person who—

- (a) destroys, conceals, mutilates or alters any record or account required to be kept or maintained under any of the provisions of this Act; or
- (b) sends or attempts to send or conspires with any other person to send out of Kenya any such record or account,

with intent to defraud any person, or to prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power under this Act, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding five years, or to both.

51. Furnishing false or misleading information

(1) Any person who knowingly furnishes any information which is false or misleading in a material particular or recklessly furnishes any information which is false or misleading in any material particular—

- (a) for the purpose of, or in connection with, any application under this Act; or
- (b) in purported compliance with any requirement imposed on him by or under this Act,

commits an offence.

(2) Any person convicted of an offence under this section shall be liable to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding five years, or to both.

52. Offences by bodies corporate

Where an offence against this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, an executive officer or the secretary of the body corporate or was purporting to act in such capacity, shall be deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

53. General penalty

(1) A person who contravenes or fails to comply with any of the provisions of this Act or of any rules made thereunder commits an offence under this Act and, where no penalty is expressly provided, shall, on conviction, be liable to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding five years, or to both.

(2) In addition to the penalties provided in this Act, any person found guilty of an offence under this Act, shall be liable to pay compensation to any person who suffers loss as a consequence of the offence committed by the first named person.

(3) The amount of compensation for which a person is liable under subsection (2), shall be—

- (a) the amount of the loss sustained by the person claiming the compensation; or
- (b) where the loss has been occasioned on the market as a whole, an amount equal to the profit made by such person, which shall be paid into the Compensation Fund established under the Capital Markets Authority Act (Cap. 485A).

PART VIII – INVESTIGATION

54. Application of Part

Nothing, unless specifically provided for in this Part, shall authorise any investigation by the Authority into the business of a licensed person or its representatives under the Capital Markets Authority Act (Cap. 485A).

55. Power of Authority to require production of records

(1) The Authority may, at any time, if it considers that there is sufficient reason to do so, in writing—

- (a) give a direction to—
 - (i) a central depository;
 - (ii) a nominee company of a central depository;
 - (iii) a central depository agent;
 - (iv) a user; or
 - (v) a person who is or has been an officer or employee of, or an agent, or advocate and solicitor, auditor, or other person acting in any capacity for or on behalf of, a central depository, or its nominee company, or a central depository agent, or a user,

requiring the production, to the Authority, of such records or accounts as are so specified, being records and accounts relating to the business or affairs of a central depository or its nominee company, or a central depository agent, or a user or any record or account required to be kept pursuant to section 32; or

- (b) give a direction to any person requiring the production, to the Authority, of any record or account relating to the persons mentioned in subsection (1)(a)(iv) or (1)(a)(v) that are in the custody or under the control of such person:

Provided that the production of such record or account shall not be required at such times or at such places as shall interfere with the proper conduct of the normal daily business of that person.

(2) A reference in subsection (1) to a business carried on by a person shall be deemed to include a reference to a business carried on by a person as trustee.

(3) Where the Authority requires the production of any record or account under this section and a person has a *lien* on the record or account, the production of such record or account shall not prejudice the *lien*.

(4) Where the Authority exercises a power under this section to require another person to produce records or accounts and—

- (a) if the records or accounts are produced, the Authority—
 - (i) may take possession of the records or accounts and make copies of, or take extracts from, the records or accounts;
 - (ii) may require the other person or any other person who was party to the compilation of the records or accounts to make a statement providing an explanation of any of the records or accounts;

- (iii) may retain possession of the records or accounts for as long as the Authority may consider necessary; and
 - (iv) shall permit the other person, upon giving a reasonable notice and description of the records or accounts, to have access to the records or accounts which are in the possession of the Authority; or
- (b) if the records or accounts are not produced, the Authority may require the other person—
- (i) to state, to the best of his knowledge and belief, where the records or accounts may be found; and
 - (ii) to identify the person who, to the best of his knowledge and belief, last had custody of the records or accounts and to state, to the best of his knowledge and belief, where that last-mentioned person may be found.

(5) A power conferred by this section to make a requirement of a person extends, if the person is a body corporate, to making the requirement of any person who is or has been an officer of the body corporate.

(6) A person who, without lawful excuse, refuses or fails to comply with a requirement made under this section within the time stated by the Authority in writing shall be liable to a penalty of one million shillings in the first instance and in the case of a continuing offence, shall, in addition, be liable to be punished with a daily fine of one hundred thousand shillings for every day during which the offence continues after the fourteenth day from the date such person is required to comply with such requirement.

56. Power of Authority to enter and search premises, etc.

(1) Where the Authority has reasonable grounds for suspecting that an offence under this Act has been or is being committed or that there are on any particular premises any records or accounts the production of which has been required by virtue of section 55 and which have not been produced in compliance with such requirement, it may—

- (a) enter and search the premises and—
 - (i) in the case of premises occupied by a central depository or a user, inspect, examine and operate the whole or any part of the computer system; and
 - (ii) in the case of premises occupied by any other person, break open and search any cupboard, drawer, safe, box or other receptacle, and where a computer system (not being a computer system as defined in section 2 of this Act) is installed in such premises, inspect, examine and operate the whole or any part of such system; and
- (b) inspect and take possession of, or secure against interference, any records, documents or other material found in such premises which may be evidence of such offence.

(2) The powers conferred under subsection (1) are in addition to, and not in derogation of, any other powers conferred under this Act or by any other written law.

57. Obstruction

A person who—

- (a) intentionally obstructs or hinders the Authority in the exercise of its powers under section 55 or section 56; or
- (b) fails without reasonable excuse to give to the Authority such assistance as it may reasonably require,

commits an offence and shall, on conviction, be liable to a fine of five million shillings or to imprisonment for a term of five years or to both.

58. Disclosure to Authority

(1) The Authority may require a central depository or its central depository agent to disclose to the Authority, in relation to any acquisition or disposal of book-entry securities, any information including the name of the person from or through whom or on whose behalf the securities were disposed of, their securities account numbers and the entries made in such securities accounts and the nature of the instructions given to the central depository or its central depository agent in respect of such acquisition or disposal.

(2) The Authority may require a depositor to disclose to it whether such depositor acquired or disposed of the book-entry securities, as the case may be, as trustee for, or on behalf of, another person and, if he acquired or disposed of those securities as trustee for, or on behalf of, another person, to disclose the name of that other person and the nature of any instructions given to the depositor in respect of the acquisition or disposal.

(3) A person who, without reasonable excuse, fails to comply with the requirement of the Authority under subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding ten years or to both.

59. Investigation by the Authority

Where the Authority has reason to suspect that a person has committed an offence under a provision of this Act or is about to do an act that, if done, would be an offence under a provision of this Act, the Authority may make such investigation as it thinks expedient for the due administration of this Act.

59A. Emergency powers of the Authority

(1) The Authority may, where it has reason to believe that—

- (a) an emergency exists;
- (b) it is necessary or expedient to protect investors; or
- (c) it is in the interest of the public,

direct a central depository, by notice in writing, to take such action as it may consider necessary including—

- (i) altering the conditions of delivery of securities;

- (ii) fixing the settlement price for liquidation of securities;
- (iii) requiring margins or additional margins for any securities; and
- (iv) modifying or suspending any rules of a central depository.

(2) The Authority may, where a central depository fails, within a specified period, to comply with a direction given under subsection (1)—

- (a) set an emergency margin level in any securities or class of securities; or
- (b) take such other action, as the Authority considers necessary to maintain or restore fair, transparent and efficient clearing and settlement of transactions in securities.

(3) In this section, “**emergency**” means—

- (a) any act of the Government affecting securities;
- (b) any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand of securities;
- (c) a threatened or actual market manipulation; or
- (d) any other situation or practice which, in the opinion of the Authority, constitutes an emergency.

[Act No. 38 of 2011, s. 14.]

59B. Authority may issue directions to a central depository

(1) The Authority may, by notice in writing, if it considers it necessary or expedient—

- (a) to ensure fair, orderly and expeditious clearing and settlement of transactions in securities;
- (b) to ensure integrity and proper management of systemic risks in securities markets; or
- (c) in the interest of the public or for the protection of investors,

issue a general or specific direction to a central depository.

(2) Without prejudice to the generality of subsection (1), any direction issued may relate to—

- (a) clearing and settlement of securities contracts and making adjustments of a contractual obligation arising out of a securities contract;
- (b) the manner in which a central depository carries on its business; or
- (c) any other matter that the Authority may consider necessary for the proper discharge of its functions under this Act.

[Act No. 38 of 2011, s. 14.]

59C. Authority may appoint an auditor

(1) The Authority may, if it is satisfied that it is in the public interest to do so, appoint, in writing, an auditor to examine, audit, and report, either generally or in relation to any matter, on the books, accounts, records and the system of a central depository.

(2) A central depository shall meet the expenses of an auditor appointed under subsection (1).

[Act No. 38 of 2011, s. 14.]

59D. Revocation of a licence

(1) The Authority may, by notice in writing, revoke a licence granted to a central depository under this Act if a central depository—

- (a) ceases to operate the clearing facility that it had been licensed to operate;
- (b) is being wound up;
- (c) fails to comply with any requirement of this Act;
- (d) fails to comply with a direction of the Authority;
- (e) fails to provide the Authority with information when required to do so;
- (f) provides false or misleading information;
- (g) is operating in a manner that is detrimental to the public interest; or
- (h) requests the Authority to do so.

(2) For the purposes of subsection (1), a central depository shall be considered to have ceased operation if it has not operated its central depository facility for more than thirty days without the prior approval of the Authority.

(3) The Authority may permit a central depository to, on or after the date on which the revocation is to take effect, continue its operations or carry on such activities affected by the revocation as the Authority may specify for the purpose of—

- (a) winding up its operations; or
- (b) protecting the interest of the public.

(4) The Authority shall not, except where responding to a request under subsection (1)(h), revoke a central depository licence without first giving the central depository an opportunity to be heard.

(5) The Authority shall publish in the *Gazette* any licence revoked under this section.

[Act No. 38 of 2011, s. 14.]

59E. Effect of a revocation

A revocation under section 59A shall not—

- (a) avoid or affect any agreement, transaction or arrangement which was entered into before the revocation;
- (b) affect any right, obligations or liability arising under such agreement, transaction or arrangement.

[Act No. 38 of 2011, s. 14.]

60. Power of Court to make certain orders

(1) Where on the application of an aggrieved party or a central depository it appears to the High Court that a person—

- (a) has committed an offence under this Act relating to any dealing in book-entry securities;

- (b) has contravened the CDS rules; or
- (c) is about to do an act with respect to any dealing in book-entry securities that, if done, would be an offence under this Act or would be a contravention of the CDS rules,

the High Court may, without prejudice to any orders it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders—

- (i) in the case of persistent or continuing breaches of this Act, or of the CDS rules, an order restraining a person from acting as a central depository agent or from holding himself out as so acting;
- (ii) an order restraining a person from withdrawing or otherwise dealing with any book-entry securities that are specified in the order;
- (iii) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act; and
- (iv) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection.

(2) The High Court may, before making an order under subsection (1), direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

(3) Any person who fails to comply with an order made under subsection (1) commits an offence and shall, on conviction, be liable to a fine of not exceeding five million shillings, or to imprisonment for a term not exceeding five years or to both.

(4) Subsection (3) shall not affect the powers of the High Court in relation to the punishment for contempt of court.

(5) The High Court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order, upon application made to that effect.

PART VIII A – CENTRAL DEPOSITORY SETTLEMENT GUARANTEE ARRANGEMENTS

60A. Obligation to have approved settlement guarantee arrangements

A central depository shall, as a condition to its licence, subject to the approval of the Authority, establish adequate arrangements to guarantee the settlement of all transactions relating to securities through its system.

[Act No. 38 of 2011, s. 15.]

60B. Establishment of Central Depository Guarantee Fund

(1) A central depository may, in fulfilment of the requirements of section 60A, establish a Central Depository Guarantee Fund (hereinafter referred to as “the Fund”) for the settlement of trade through the central depository.

(2) The Fund shall consist of—

- (a) a variable risk based contribution, to be determined by the central depository, in consultation with the Authority, and payable by central depository agents who are involved in settlement;
- (b) all penalties and fines imposed by a central depository under this Act;
- (c) such sums of money as may accrue from interest and profits from investing moneys of the Fund;
- (d) such revenue from contributions of a central depository as its Board of Directors may, from time to time, determine; and
- (e) such other funds as the Board of the central depository may, with the approval of the Authority, determine.

[Act No. 38 of 2011, s. 15.]

60C. Management of the Fund

(1) A central depository shall manage the Fund established under section 60B as a separate fund and disclose it as such in the annual balance sheet of the central depository.

(2) A central depository shall keep proper accounts and records of the Fund and shall, in each financial year, prepare a statement of accounts showing the financial position of the Fund in its annual report.

(3) The accounts under subsection (2) shall include all sources of income and contributions to, expenses or disbursements of the Fund and any investments of the Fund.

(4) The accounts and records of the Fund shall be audited by the auditor appointed by the central depository to audit its annual accounts.

(5) The central depository shall make rules for the operation and maintenance of the Fund.

[Act No. 38 of 2011, s. 15.]

PART IX – GENERAL

61. Preservation of records and accounts

A central depository and its central depository agents shall preserve all records and accounts for a period of seven years, whether or not they cease to carry on their business before the end of the seventh year.

62. Power of Authority to compound offences

The Authority may, where it is satisfied that a person has committed an offence under this Act other than offences under sections 3(1), 9(1), 45(1), 48 and 49, compound the offence and order that person to pay such sum of money, not exceeding fifty per centum of the amount of the minimum fine, including the daily fine, if any to which he would have been liable if he had been prosecuted and convicted of the offence, as the Authority may deem fit whereupon—

- (a) if such person pays such amount to the Authority within fourteen days after the order, proceedings shall not be taken against him in relation to the offence; or

- (b) if such person does not pay the amount so ordered within fourteen days, the Authority may cause proceedings to be instituted in relation to the offence.

63. Prosecution

The Attorney-General may on the request of the Authority appoint any officer of the Authority or advocate of the High Court to be a prosecutor in respect of any offence under this Act.

[Act No. 2 of 2002, Sch.]

63A. Insurance

(1) A central depository shall, at all times, maintain an insurance policy to cover loss or damage arising from such occurrences as may be prescribed from time to time by the Authority.

(2) A central depository shall obtain and maintain, at a reasonable and competitive cost, one or more insurance policies for such amounts and coverage as may be determined by the central depository in its interests and in the interest of its depositors.

(3) The Authority or a central depository agent may inspect the insurance policies maintained under subsection (2) during business hours.

(4) A central depository shall notify the Authority and the central depository agents of any reduction in the coverage or amount of any policy of insurance it maintains.

[Act No. 38 of 2011, s. 16.]

64. Indemnity

No officer, employee or agent of the central depository shall be sued in any court for any act or matter done, or ordered to be done, or omitted to be done, by him in good faith and in the intended exercise of any power or performance of any duty, conferred or imposed on him by or under this Act.

65. CMA rules

(1) The Authority may, from time to time, make such CMA rules as may be necessary or expedient for carrying out or achieving the objects and purposes of this Act.

(2) Without prejudice to the generality of subsection (1), CMA rules may be made for—

- (a) prescribing fees to be paid in respect of any matter or thing required for the purposes of this Act;
- (b) prescribing the circumstances when a book-entry security in a securities account may be specified by a central depository as being in suspense under section 43;
- (c) regulating the appointment of central depository agents and nominee companies and the imposition of duties, obligations and sanctions on such agents and companies;
- (d) regulating the setting-up and operation of the computer system including computer terminals which form part of such system;

Central Depositories

- (e) regulating the manner in which immobilised book-entry securities shall be kept for safe custody by a central depository;
- (f) regulating the manner in which book-entry securities shall be immobilised or dematerialised by a central depository;
- (g) regulating the replacement of physical registers with book-entry records where the dematerialised security to be prescribed is a security other than a share or debenture under the Companies Act (Cap. 486) or an interest in a collective investment scheme;
- (h) prescribing other purposes for which a central depository may appoint central depository agents under section 9(2);
- (i) prescribing the types of bodies corporate which may be appointed to act as central depository and its central depository agents;
- (j) regulating the activities of, and the standards to be maintained by, a central depository and its central depository agents;
- (k) prescribing the manner in which records shall be kept and maintained by a central depository, its central depository agents and its nominee companies under this Act;
- (l) prescribing all matters relating to the maintenance of insurance, and the establishment and maintenance of compensation funds, by a central depository, its nominee companies and central depository agents for the purpose of settling claims by depositors against them;
- (m) prescribing such other persons who may have access to the computer system of a central depository;
- (n) prescribing the extent to which any user or class of users may have access to the computer system of a central depository;
- (o) matters relating to linkages between a central depository and other securities depositories established outside Kenya; and
- (p) all matters or things which by this Act are required or permitted to be prescribed or which are necessary or expedient to give effect to this Act.

(3) All rules, regulations and guidelines formulated by the Authority shall—

- (a) take into account and be consistent with the objective of promoting and maintaining an effective and efficient securities market;
- (b) be exposed to comment by stakeholders and the general public for a period of thirty days through notifications in at least two daily newspapers of national circulation and the electronic media; and
- (c) be signed by the chairman and chief executive and published in the *Gazette*.

(4) For the purposes of subsection (3)(b) stakeholders shall include listed companies, all persons licensed or approved by the Authority or financial or other institutions whose operations in the opinion of the Authority have a bearing on the development or regulation of capital markets in Kenya.

66. Reference to allottee in the Companies Act

For purposes of the application of the Companies Act (Cap. 486) in relation to any book-entry security, a reference to an allottee in that Act shall be construed as a reference to a depositor who, by virtue of section 37 of this Act, is deemed to be a member or debenture holder of the company which makes the allotment.

67. Publication of notice

Where notice is required under Part III of this Act, it shall be given in not less than three daily newspapers of national circulation, one of which shall be in Kiswahili and two in the English language, once a week for three consecutive weeks.
