

THE BANKING (AMENDMENT) ACT, 2006

No. 9 of 2006

Date of Assent: 30th December, 2006

Date of Commencement: ~~By Notice~~

AN ACT of Parliament to amend the Banking Act to provide for certain changes in the regulation of banks and financial institutions

ENACTED by the Parliament of Kenya as follows:-

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| <p>1. This Act may be cited as the Banking (Amendment) Act, 2006 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint <i>1st May, 2007</i>.</p> | <p>Short title and commencement.</p> |
| <p>2. Section 2(1) of the Banking Act is amended by inserting the following definition after the definition of "representative office" –</p> <p style="padding-left: 40px;">"significant shareholder" means a person, other than the Government or a public entity, who holds, directly or indirectly, or otherwise has a beneficial interest in, more than five per cent of the share capital of an institution;</p> | <p>Amendment of section 2 of Cap. 488.</p> |
| <p>3. Section 3 of the Banking Act is amended –</p> <p>(a) in subsection (1)(b), by deleting the word "Minister" and substituting therefor the words "Central Bank";</p> <p>(b) in subsection (1)(c), by deleting the word "Minister" and substituting therefor the words "Central Bank".</p> | <p>Amendment of section 3 of Cap. 488.</p> |
| <p>4. Section 4 of the Banking Act is amended –</p> <p>(a) in subsection (1), by deleting the words "to the Minister through the Central Bank" and substituting therefor the words "to the Central Bank";</p> | <p>Amendment of section 4 of Cap. 488.</p> |

- (b) by deleting subsection (2);
- (c) in subsection (3), by deleting the words “In addition to any other recommendations under subsection (2),”;
- (d) in subsection (5), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (e) by inserting the following new subsection after subsection (6)-

(7) If a person, other than the Government or a public entity, holds, directly or indirectly, or otherwise has a beneficial interest in, more than five per cent of the share capital of an institution or if it is proposed that such a person shall so hold or have such a beneficial interest, that person shall be deemed, for the purposes of this section, to be a person proposed to manage or control the institution.

Amendment of
section 5 of
Cap. 488.

5. Section 5 of the Banking Act is amended –

- (a) in subsection (1), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (b) in subsection (2), by deleting the word “Minister” and substituting therefor the words “Central Bank” and by deleting the word “he” each place it appears and substituting therefor the words “the Central Bank”;
- (c) in subsection (4), by deleting the words “through the Central Bank to the Minister” and substituting therefor the words “to the Central Bank”;

- (d) in subsection (6), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (e) in subsection (7), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (f) by inserting the following new subsections after subsection (7) -

(8) Any fee or other amount payable under this section shall be paid into the Consolidated Fund.

(9) An aggrieved party may appeal to the Minister from a decision of the Central Bank to refuse to renew a licence under subsection (6) or (7).

(10) A person may make an appeal under subsection (9) only within fifteen days after being notified of the refusal.

(11) The Central Bank shall be bound by the decision of the Minister on an appeal under subsection (9).

6. Section 6 of the Banking Act is amended –

Amendment of
section 6 of
Cap. 488.

- (a) in subsection (1), by deleting the word “Minister” each place it appears and substituting therefor the words “Central Bank”, by deleting the word “his” and substituting therefor the words “the Central Bank’s” and by deleting the word “him” and substituting therefor the words “the Central Bank”;

- (b) in subsection (2), by deleting the words "with the written approval of the Minister";
- (c) in subsection (3), by deleting the word "Minister" and substituting therefor the words "Central Bank".

Amendment of
section 8 of
Cap. 488.

7. Section 8 of the Banking Act is amended –

- (a) in subsection (1), by deleting the word "Minister" and substituting therefor the words "Central Bank";
- (b) in subsection (2), by deleting the word "Minister" and substituting therefor the words "Central Bank";
- (c) by inserting the following new subsections after subsection (2)-

(2A) If the opening or change for which approval has been given under subsection (1) does not occur within twelve months after the approval is given, the approval shall lapse.

(2B) Subsection (2A) shall not apply to an approval given before that subsection came into operation.

- (d) in subsection (3), by deleting the word "Minister" each place it appears and substituting therefor the words "Central Bank".

Amendment of
section 9 of
Cap. 488.

8. Section 9 of the Banking Act is amended –

- (a) in subsection (6), by deleting the word "Minister" each place it appears and substituting therefor the words "Central Bank";
- (b) in subsection (7), by deleting the word "Minister" and substituting therefor the words "Central Bank".

9. The Banking Act is amended by inserting the following new section immediately after section 9 –

Insertion of new section 9A of Cap. 488.

Directors, chief executive officers and significant shareholders to be fit and proper.

9A.(1) An institution shall ensure that no person is appointed or elected as a director or appointed as a senior officer unless the Central Bank has certified the person as a fit and proper person to manage or control the institution.

(2) A person shall ensure that the person does not become a significant shareholder of an institution unless the Central Bank has certified the person as a fit and proper person to manage or control the institution.

(3) For the purposes of certification under subsection (2), the Central Bank shall vet a significant shareholder –

- (a) when the shareholder initially becomes a significant shareholder after the commencement of this section;
- (b) when a new institution is applying for a licence to commence business under the provisions of this Act;
- (c) when new evidence becomes available to the Central Bank

indicating that an already existing significant shareholder does not fulfil the fit and proper criteria as set out in Part B of the First Schedule.

(4) A significant shareholder, upon being determined by the Central Bank as not fulfilling the fit and proper criteria as set out in Part B of the First Schedule, shall –

(a) cease to exercise all his voting rights immediately upon the institution being notified by the Central Bank in writing that the shareholder does not fulfil the fit and proper criteria as set out in Part B of the First Schedule; and

(b) reduce the holding of shares to five per cent or less of the share capital in the institution within twelve months, or such longer period as the Central Bank may determine.

(5) The Central Bank may determine that a person who already is a director or senior officer of an institution is not a fit and proper person to manage or control the institution and upon the institution being notified in writing of that determination, the person shall, if he is a director or senior officer, cease to hold office.

(6) For greater certainty, the Central Bank may, in the course of the annual renewal of a licence under section 5 of this Act, make a determination under subsection (5) of this section that a director or senior officer is not fit and proper to manage or control an institution notwithstanding any previous certification given by the Central Bank.

(7) In determining whether or not a person is a fit and proper person to manage or control an institution the Central Bank shall apply the criteria prescribed in the First Schedule to determine whether the Central Bank is satisfied as to the professional and moral suitability of the person.

(8) For the purposes of this section and of the First Schedule, "senior officer" means a person who manages or controls an institution licensed under the Act, and includes –

- (a) the chief executive officer, deputy chief executive officer, chief operating officer, chief financial officer, secretary to the board of directors, treasurer, chief internal auditor, or manager of a significant unit of an institution licensed under this Act;
- (b) a person with a similar level of position or responsibilities as a person described in paragraph (a).

10. Section 10(1) of the Banking Act is amended by deleting the words "with the written approval of the Minister".

Amendment of
section 10(1) of
Cap. 488.

11. Section 11 of the Banking Act is amended –

Amendment of
section 11 of
Cap. 488.

- (a) in subsection (1)(d), by inserting the words "or significant shareholders" after the word "officers" each place it appears;
- (b) by deleting subsection (1)(f) and substituting therefor the following new paragraph -

- (f) grant or permit to be outstanding any advances or credit facilities or give any financial guarantees or incur any other liabilities to, or in favour of, or on behalf of, a person mentioned in paragraph (c), (d) or (e) and his associates amounting in the aggregate, for that person and all his associates, to more than twenty per cent of the core capital of the institution;
- (c) by inserting the following new subsection after subsection (7) –

(8) The regulations under section 5. may govern the steps an institution is required to take to ensure that it does not, contrary to subsection (1)(f), permit to be outstanding anything described in that provision and, without limiting the generality of the foregoing, the regulations may impose time limits within which the steps must be taken.

Insertion of new section 13A of Cap. 488.

12. The Banking Act is amended by inserting a new section immediately after section 16 as follows –

Imposition of charges and payment of interest.

16A.(1) No institution shall impose any form of charges on a savings, seven day call or fixed deposits account.

(2) An institution shall, in respect of a savings account, pay interest accruing to that account as long as the minimum balance is maintained.

(3) An institution shall, in respect of a seven day call or fixed deposit account, pay interest accruing to the account on agreed contractual terms:

Provided that such interest may be forfeited where the deposit is uplifted before the maturity date.

13. Section 34(2) of the Banking Act is amended by deleting the words “with the approval of the Minister”.

Amendment of section 34(2) of Cap. 488.

14. Section 34A of the Banking Act is amended –

Amendment of section 34A of Cap. 488.

- (a) in subsection (1), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (b) in subsection (2), by deleting the word “Minister’s” and substituting therefor the words “Central Bank’s” and by deleting the words “and shall be forwarded to the Minister through the Central Bank”;
- (c) in subsection (3), by deleting the word “Minister” and substituting therefor the words “Central Bank”;
- (d) in subsection (4), by deleting the word “Minister” and substituting therefor the words “Central Bank”.

15. Section 36(8) of the Banking Act is amended by deleting the words “any member” and substituting therefor the words “the chief executive officer of the Board”.

Amendment of section 36(8) of Cap. 488.

16. Section 43 of the Banking Act is amended –

Amendment of section 43 of Cap. 488.

- (a) in subsection (1), by deleting the word “Minister” each place it appears and

substituting therefor the words “Central Bank” and by deleting the word “he” and substituting therefor the words “the Central Bank”;

- (b) by deleting subsection (2) and substituting therefor the following new subsection:-

(2) The Central Bank may require a representative office to furnish such information as the Central Bank may require at such time and in such manner as the Central Bank may direct.

- (c) in subsection (4), by deleting the word “Minister” each place it appears and substituting therefor the words “Central Bank”, by deleting the word “him” and substituting therefor the words “the Central Bank” and by deleting the word “he” and substituting therefor the words “the Central Bank”.

Insertion of new section 44A of Cap. 488.

17. The Banking Act is amended by inserting the following new section immediately after section 44 –

Limit on interest recovered on defaulted loans.

44A.(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following -

- (a) the principal owing when the loan becomes non-performing;
- (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the

principal owing when the loan becomes non-performing; and

- (c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section -

- (a) “debtor” includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;
- (b) “loan” includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and
- (c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become

non-performing before this section comes into operation:

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following -

- (a) the principal and interest owing on the day this section comes into operation; and
- (b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and
- (c) expenses incurred in the recovery of any amounts owed by the debtor.

Repeal of the
First Schedule
Cap.488

18. The Banking Act is amended by repealing the First Schedule and replacing it with the following new First Schedule –

FIRST SCHEDULE

PART A

CRITERIA FOR DETERMINING PROFESSIONAL AND MORAL SUITABILITY OF DIRECTORS AND SENIOR OFFICERS PROPOSED TO MANAGE OR CONTROL INSTITUTIONS

- (a) In order to determine, for the purposes of this Act, the professional and moral suitability of persons, proposed to be directors and senior officers of an institution, the Central Bank,

shall have regard to the following qualities, in so far as they are reasonably determinable, of the person concerned -

- (i) his possession of adequate professional credentials or experience or both for the position for which he is proposed;
 - (ii) his ability to recommend sound practices gleaned from other situations;
 - (iii) his ability provide dispassionate advice;
 - (iv) his ability to avoid conflicts of interest in his activities and commitments with other organizations;
 - (v) his ability to absent himself from decisions when he is incapable of providing objective advice.
- (b) For the purpose of and without prejudice to the generality of the provisions of paragraphs (a), the Central Bank, may have regard to the previous conduct and activities of the person concerned in business or financial matters and, in particular, to any evidence that such person-
- (i) has been convicted of the offence of fraud or any other offence of which dishonesty is an element;
 - (ii) has contravened the provisions of any law designed for the protection of members of the public against financial loss due to the dishonesty or incompetence of or malpractices by persons engaged in the provision of banking, insurance, investment or other financial services;
 - (iii) was a director or a senior officer of an institution that has been liquidated or is under liquidation or statutory management under Part VII of this Act;
 - (iv) has taken part in any business practices that, in the opinion of the Central Bank, were fraudulent,

prejudicial or otherwise improper (whether unlawful or not) or which otherwise discredited his methods of conducting business;

(v) has taken part in or been associated with any other business practices as would, or has otherwise conducted himself in such manner as to cast doubt on his competence and soundness of judgment;

Cap.489 (vi) has defaulted in the repayment of any advance or loan made to him by any institution licensed under the Act or a society licensed under the Building Societies Act for three consecutive months.

(c) The Central Bank, may request any person to furnish such additional information as may be necessary in determining the professional or moral suitability of the person as stipulated under the Act.

PART B

CRITERIA FOR DETERMINING MORAL SUITABILITY OF SIGNIFICANT SHAREHOLDERS PROPOSED TO MANAGE OR CONTROL INSTITUTIONS

(a) In order to determine, for the purposes of this Act, the moral suitability of significant shareholders of an institution, the Central Bank, shall have regard to the previous conduct and activities of the significant shareholder concerned in business or financial matters and, in particular, to any evidence that such person-

(i) has been convicted of the offence of fraud or any other offence of which dishonesty is an element;

(ii) has contravened the provisions of any law designed for the protection of members of the public against financial loss due to the dishonesty or malpractices by, persons engaged

in the provision of banking, insurance, investment or other financial services.

- (b) For the purposes of determining the moral suitability of a corporate entity, its directors and senior officers shall satisfy the criterion prescribed in paragraph (a) of Part B of this Schedule.
- (c) The Central Bank, may request any person or corporate entity to furnish such information as may be necessary in determining the moral suitability of the person as stipulated in the Act.