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CONTENTS

No. Page

ADVERTISEMENTS 856

PART B - AN ACT

13. The International Bank for Reconstruction and Development Loan (Health, HIV/AIDS and TB Project) Act, 2011	S1
14. The International Cooperation and Development Fund Loan to Swaziland Development Finance Corporation Guarantee Act, 2011	S3
15. The International Bank for Reconstruction and Development Loan (Local Government Project) Act, 2011	S5
16. The African Development Bank Loan (Budget Support) Act, 2011.....	S7
17. The National Clearing and Settlement Systems Act, 2011.....	S9
18. The Accountants (Amendment) Act, 2011	S24
19. The Customs and Excise (Amendment) Act, 2011	S29

PART C - LEGAL NOTICE

182. The Stock Disease Regulations, 2011	S31
184. Designation of Fuel Oil Supplier and Amendment of Schedule Notice, 2011	S38

PUBLISHED BY AUTHORITY

THE NATIONAL CLEARING AND SETTLEMENT SYSTEMS ACT, 2011

(Act No. 17 of 2011)



I ASSENT

MSWATI III
King of Swaziland

26th October, 2011

AN ACT
ENTITLED

AN ACT to provide for the recognition, operation, regulation and supervision of systems for the clearing of transfer instructions between financial institutions and for matters incidental thereto.

ENACTED by the King and the Parliament of Swaziland.

ARRANGEMENT OF SECTIONS

PART I
PRELIMINARY

1. Short title and commencement
2. Interpretation

PART II
CLEARING AND SETTLEMENT SYSTEMS

3. Recognition of clearing and settlement systems
4. Constitution and rules of recognized systems to be open to inspection
5. Approval of amendments to constitution and rules of recognized systems
6. Withdrawal of recognition from clearing and settlement system
7. Establishment and operation of a clearing and settlement system by the Central Bank
8. Provision of Information
9. Control of undesirable conduct in regard to a recognized system

PART III
FINALITY OF SETTLEMENTS WITHIN A RECOGNISED SYSTEM OR IN
THE CENTRAL BANK SYSTEM

10. Finality of transfer of funds, securities and other financial instruments
11. Payments and transfers within settlement systems not subject to interdict or stay

PART IV
WINDING UP, JUDICIAL MANAGEMENT OR CURATORSHIP OF
PARTICIPANTS IN A RECOGNISED SYSTEM

12. Central Bank to be notified of winding-up, judicial management or curatorship of a participant in a recognized system
13. Winding up or judicial management of a participant in a recognized or Central Bank system not to affect finality of prior settlements
14. Rules of recognized or Central Bank systems shall be binding on liquidator, judicial manager or curator
15. Priority of certain instruments on winding up of a participant in a recognized or Central Bank system

PART V
UNRECOGNISED SYSTEMS AND PROHIBITED SETTLEMENT
INTERMEDIATION

16. Prohibition against unrecognized systems
17. Prohibition against settlement intermediation

PART VI
SETTLEMENT OF DISPUTES

18. Settlement of disputes arising out of recognized systems or settlement systems

PART VII
MISCELLANEOUS

19. Exercise of functions by Central Bank
20. Preservation of secrecy
21. Use of confidential information for personal gain
22. Evidence
23. Unpaid items due to insufficient funds
24. Computer entries
25. Imaging
26. Regulations and review of Act

27. Participants may enter into clearing and settlements arrangements

PART I
PRELIMINARY

Short Title and Commencement

1. This Act may be cited as the National Clearing and Settlement Systems Act, 2011, and shall come into force on such date as the Minister may, by Notice published in the Gazette, prescribe.

Interpretation

2. In this Act, unless the context otherwise requires-

"*bank*" means a banking institution registered in terms of the Financial Institutions Act, 2005;

"*bilateral netting*" means an arrangement to net obligations between two parties which may arise from financial contracts, transfer instructions or both;

"*Central Bank*" means the Central Bank as defined in the Central Bank of Swaziland Order, 1974;

"*Central Bank settlement system*" means a system established and operated by the Central Bank in terms of section 7 for the discharge of settlement obligations between participants in the system;

"*clearing*" means the process of transmitting, reconciling and, confirming transfer instructions regarding funds, securities or other financial instruments prior to settlement, and includes the netting of instructions and the establishment of final positions for settlement;

"*clearing system*" means a set of procedures whereby financial institutions present and exchange information relating to the transfer of funds, securities or other financial instruments to other financial institutions through a centralized system or at a single location;

"*clearing and settlement system*" means, a system that facilitates the presentation and exchange of transfer instructions regarding funds, securities or other financial instruments and the settlement of those transfer instructions between participants in the system;

"*financial institution*" means-

(a) a bank or any other financial institution which is licensed under the Financial Institutions Act, 2005; or,

(b) a non-bank financial institution as defined in the Financial Services Regulatory Authority Act, 2010;

"*funds*" means legal tender in terms of section 23 of the Central Bank of Swaziland Order, 1974, and includes a cheque, bank draft, banker's acceptance, or an instruction for the electronic movement of funds through a financial intermediary, a recognized system or Central Bank system;

"*Governor*" means the Governor of the Central Bank of Swaziland as defined in the Central Bank Order, 1974;

"*gross settlement*" means the settlement of transfer instructions on an instruction by instruction basis;

"management body" means, in relation to a recognized payment system, a body which represents participants in the system and organizes and manages their participation in the system;

"Minister" means Minister responsible for Finance;

"multilateral netting" means an arrangement among three or more parties to net their obligations which may arise from financial contracts, transfer instructions or both;

"netting" means an agreed offsetting of positions or obligations by participants in a clearing and settlement system;

"obligation" means a duty imposed by contract or law which may arise from the clearing of transfer instructions through a clearing system or the submission of a transfer instruction to a settlement system;

"payment" means a payer's transfer of a monetary claim on a party acceptable to the beneficiary;

"payment instrument" means a set of instruments, procedures and rules for the transfer of funds among system participants;

"recognized system" means a system recognized by the Central Bank that facilitates the clearing or settlement of transfer instructions regarding funds, securities or other financial instruments;

"settlement" means the act of discharging obligations by transferring funds, securities or financial instruments between two or more parties;

"settlement asset" means an asset used for the discharge of settlement obligations as specified by the rules, regulations, or customary practice for a payment system;

"settlement system" means a system used to facilitate the settlement of transfer instructions regarding payments, securities or other financial instruments;

"system" means a clearing and settlement system recognized under section 3 of this Act;

"systemic risk" means the risk that the failure of one participant in a clearing and settlement system or financial markets generally to meet its required obligations will cause other participants to be unable to meet their obligations when due;

"transfer" means the sending of funds, securities or other financial instruments, or a right relating to those funds, securities or other financial instruments from one party to another through-

- (i) the conveyance of funds or physical instruments;
- (ii) accounting entries on the books of a financial intermediary; or,
- (iii) the book-entry movement of funds or physical instruments through a recognized system or Central Bank system;

"transfer instruction" means an order or electronic message requesting the movement of funds, securities or other financial instruments or a right relating to those funds, securities or other financial instruments from one party to another.

PART II
CLEARING AND SETTLEMENT SYSTEMS

Recognition of clearing and settlement systems

3. (1) Subject to this section, the Central Bank may recognize a clearing and settlement system that has, as its objectives-

- (a) the clearing of payment instructions between financial institutions that are participants in the system, including the Central Bank;
- (b) the settling of obligations arising from the clearing of transfer instructions referred to in paragraph (a), whether by-
 - (i) netting;
 - (ii) set-offs; or,
 - (iii) gross settlement;
- (c) the final discharge of any indebtedness between participants in a clearing and settlement system which arises from the clearing or settlement of obligations referred to in paragraphs (a) and (b) through a system established by the Central Bank under section 7; and,
- (d) to the extent that they are incidental to or connected with an objective specified in paragraph (a), (b), or (c)-
 - (i) the establishment of a clearing system for the clearing of transfer instructions between all or any of the participants in the system and for the provision of services that are incidental to such clearing;
 - (ii) the provision of a forum for the consideration of matters of mutual interest concerning participants in the system;
 - (iii) acting as a medium of communication, on behalf of its participants, with the Government, the Central Bank, and other persons and authorities; and,
 - (iv) dealing with other matters of interest to its participants and fostering co-operation between them.

(2) The Central Bank may, in terms of subsection (1), recognize different clearing and settlement systems-

- (a) in respect of different classes of financial institutions; or,
- (b) for the clearing and settlement of different classes of obligations.

(3) The Central Bank shall not recognize a clearing and settlement system in terms of subsection (1) unless it is satisfied that-

- (a) only financial institutions and the Central Bank are permitted to become participants in the system;

- (b) the system fairly represents the interests of all financial institutions that are or will become participants in the system;
- (c) the Central Bank will be able adequately to monitor and regulate the system and the activities of its participants in order to ensure compliance with this Act and the Financial Institutions Act, 2005; and,
- (d) the constitution and any rules governing the system are fair, equitable and transparent and make adequate provision for-
 - (i) admitting financial institutions into the system as participants, and regulating and terminating their participation;
 - (ii) controlling its participants' use of clearing and settlement systems or operations;
 - (iii) appointing a management body or committee, representative of the participants, to organize and manage the system and the participation in it of the participants;
 - (iv) appointing any person as a system operator within the system in order to provide clearing processing services to or on behalf of participants; and,
 - (v) criteria according to which a participant may be authorized to introduce any person to provide payment services; and,
- (e) the management body has a contingency plan in support of the operational clearing and settlement system.

Constitution and rules of recognized systems to be open to inspection

4. The constitution of every recognized system and any rules governing the system, together with any amendments to that constitution and those rules, shall be kept at the-

- (a) offices of the Central Bank; and,
- (b) place of business in Swaziland of every recognized system;

and shall be open for inspection there by members of the public at all times during normal office hours.

Approval of amendments to constitution and rules of recognized systems

5. Any amendment to the constitution of a recognized system or to the rules governing the system shall not have effect until they have been approved by the Central Bank.

Withdrawal of recognition from clearing and settlement system

6. (1) Subject to subsections (2) and (3), the Central Bank may, by notice in writing to the management body of a system concerned, withdraw its recognition if the Central Bank has reasonable grounds to believe that-

- (a) the system no longer fairly represents the interests of all financial institutions that are or should become participants in the system;
- (b) the management body has contravened any provision of this Act or of the constitution of the system; or,

- (c) the manner in which the system is being conducted does not adequately protect the system against systemic risk;

and that it is in the public interest to withdraw its recognition from the system concerned.

(2) Before withdrawing its recognition from a system in terms of subsection (1), the Central Bank shall-

- (a) notify the management body of that system in writing, that it is considering doing so and of its reasons for doing so; and,
- (b) give the management body an opportunity to make representations in the matter.

(3) The Central Bank shall not withdraw its recognition from a system in terms of subsection (1) without paying due regard to any representations made by the management body of that system.

Establishment and operation of a clearing and settlement system by the Central Bank

7. (1) The Central Bank shall establish and operate its own system for the settlement of obligations among banks and recognized systems.

(2) The Central Bank may specify rules, procedures and participant requirements for the system established in terms of subsection (1), provided that no such rule, procedure or participant requirement shall be made without adequate consultation with the participants of the system.

Provision of Information

8. The management body of every recognized system and every participant in the system shall provide the Central Bank with such reports, returns and other information as the Central Bank may require regarding-

- (a) the volumes and values of transfer instructions cleared in the system;
- (b) the volumes or values of the payment obligations and settlement obligations of the participant; and,
- (c) any other information regarding the operation of the system.

Control of undesirable conduct in regard to a recognized system

9. (1) If the Central Bank has reasonable grounds to believe that a management body or a participant in a recognized system is engaging in or is about to engage in any act, omission or course of conduct which-

- (a) results or is likely to result in systemic risk; or,
- (b) prejudices or will prejudice the integrity, effectiveness or security of the system;

the Central Bank may issue a written directive requiring the management body or participant, as the case may be, to-

- (i) cease engaging in the act, omission or course of conduct concerned;
- (ii) do such things as the Central Bank may specify to remedy the situation or;

- (iii) provide the Central Bank with such information relating to the matter as may be specified in the directive.

(2) Any management body or a participant who contravenes or fails to comply with a directive issued in terms of subsection (1) commits an offence and is liable on conviction to a fine not exceeding fifty thousand Emalangeni (E50,000).

(3) If any person contravenes or fails to comply with a directive in terms of subsection (1), whether or not criminal proceedings have been or may be instituted against that person for an offence in terms of subsection (2), the Central Bank may apply to the High Court for an order directing that person to comply with the directive concerned.

(4) In an application under subsection (3), the High Court may make such orders as in its opinion will ensure proper compliance with the directive concerned.

PART III
FINALITY OF SETTLEMENTS WITHIN A RECOGNISED SYSTEM
OR IN THE CENTRAL BANK SYSTEM

Finality of transfer of funds, securities and other financial instruments

10. (1) Notwithstanding any other law, a payment or transfer which is effected in accordance with a recognized system or the Central Bank system and which is intended to settle-

- (a) the payment obligations or settlement obligations of a participant in the system pursuant to a payment or settlement instruction, as the case may be; or,
- (b) what are believed by the person making the payment or transfer to be the payment obligations or settlement obligations of a participant in the system;

shall be final and irrevocable and shall not be reversed or set aside for any reason whatsoever.

(2) Notwithstanding the provisions of subsection (1), if it subsequently appears that any amount or property so paid or transferred was not in fact due, that amount or property paid or transferred shall constitute a fresh debt owed by the payee or transferee, as the case may be, to the person who made the payment or transfer.

(3) If the Central Bank considers that the making of a payment or transfer referred to in subsection (1) is likely to result in systemic risk, the Central Bank may, by written notice to the participants-

- (a) prohibit the making of the payment or transfer, if it has not already been made; or,
- (b) set aside the payment or transfer if it has already been made;

and shall forthwith provide the participants with a written statement of the reasons for doing so.

(4) Notwithstanding the provisions of subsection (3), no such payment or transfer shall be set aside more than twenty-four hours after it has been made.

(5) Where the Central Bank has prohibited the making of a payment or transfer under subsection (3) (a), any transaction effected in contravention of the prohibition shall be void.

(6) Where the Central Bank has set aside a payment or transfer under subsection (3) (b), the payment or transfer concerned shall be void from the time it was made.

Payments and transfers within settlement systems not subject to Interdict or stay

11. Notwithstanding any other law, an interdict or other order of any court shall not operate to stay any payment or transfer which is required to be made in accordance with a recognized system or the Central Bank system and which is intended to settle-

- (a) the payment obligations or settlement obligations of a participant in the system; or,
- (b) what are believed, by the person who is required to make the payment or transfer, to be the payment obligations or settlement obligations of a participant in the system.

PART IV
WINDING UP, JUDICIAL MANAGEMENT OR CURATORSHIP OF
PARTICIPANTS IN A RECOGNISED SYSTEM

Central Bank to be notified of winding-up, judicial management or curatorship of a participant in a recognized system

12. Where a participant in a recognized system is wound up or placed under judicial management or provisional judicial management in terms of the Companies Act, 2009, the person at whose instance the winding-up order or the order placing the participant under judicial management or provisional management, as the case may be, was issued, shall lodge a copy of the order with the Central Bank.

Winding up or judicial management of a participant in a recognized or Central Bank system not to affect finality of prior settlements

13. Notwithstanding anything to the contrary in the Insolvency Act, 1955, or the Companies Act, 2009, the winding up of a participant in a recognized or Central Bank system, or the placing of such a participant under judicial management or provisional judicial management shall not affect the finality or irrevocability of any payment or transfer which became final and irrevocable in terms of section 10 before the copy of the relevant order was lodged with the Central Bank in terms of Section 12.

Rules of recognized or Central Bank systems shall be binding on liquidator, judicial manager or curator

14. Notwithstanding anything to the contrary in the Insolvency Act, 1955, or the Companies Act, 1912, where a participant in a recognized or Central Bank system-

- (a) is wound up or placed under judicial management or provisional judicial management in terms of the Companies Act, 2009; or,
- (b) is placed under curatorship in terms of the Financial Institutions Act, 2005,

any provision relating to clearing or settlement to which the participant is a party shall be binding upon the liquidator, judicial manager, provisional judicial manager or curator of the participant, as the case may be, to the extent that it applies to any payment obligation or settlement obligation which-

- (i) was determined through clearing or settlement before the issue of the winding up order or the order placing the participant under judicial management, provisional judicial management or curatorship, as the case may be; and,

- (ii) was either to be discharged or transferred on or after the issue of that order; or was overdue for settlement on the date of that order.

Priority of certain instruments on winding up of a participant in a recognized or Central Bank system

15. (1) In this section "priority transfer instruction" means a transfer issued by a participant in a recognized or Central Bank system.

(2) Notwithstanding anything to the contrary in the Insolvency Act, 1955, or the Companies Act, 2009, where a participant in a recognized or Central Bank system is wound up in terms of the Companies Act, 2009, the following items shall be paid from the estate of the participant in the following order-

- (a) undelivered transfer instructions, other than priority transfer instructions, that were drawn on the participant and cleared through the system before the making of the winding up order; and,
- (b) undelivered priority transfer instructions that were drawn on the participant and cleared through the system before the making of the winding up order;

and shall rank in preference above any other unsecured claim against the estate.

(3) No payment or transfer shall be made pursuant to subsection (2) in preference to any other claim against an estate unless a request for such payment has been made within sixty days after the making of the winding up order in regard to the participant concerned.

(4) Subsection (2) shall not be construed as permitting a transfer instruction to be satisfied in preference to any other claim against an estate, where the instruction was-

- (a) certified by the participant concerned; or,
- (b) in the case of a priority payment instruction, issued by the participant concerned with a view to giving the drawee of the instruction a preference over the other creditors of the participant.

**PART V
UNRECOGNISED SYSTEMS AND PROHIBITED SETTLEMENT
INTERMEDIATION**

Prohibition against unrecognized systems

16. (1) Any person or entity operating or participating in an unrecognized system commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand Emalangeni (E500,000) or to imprisonment for a period not exceeding five years or both fine and imprisonment.

(2) This section shall not apply to any Central Bank system.

Prohibition against settlement intermediation

17. (1) Subject to subsection (3), no person other than-

- (a) a participant in a recognized system or the Central Bank system, acting in accordance with the system's constitution or rules; or,

- (b) a person introduced by a participant in a recognized system or Central Bank system, in accordance with the provision of the constitution or rules of the system referred to in section 3 (3) (d);

shall accept a transfer instruction from any other person for the purpose of making a transfer on behalf of that other person to a third person to whom the transfer is due.

(2) Any person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding One Hundred Thousand Emalangeni (E100,000) or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.

(3) Subsection (1) shall not apply to-

- (a) a building society registered in terms of the Building Societies Act, 1962;
- (b) a post office established in terms of the Post and Telecommunications Act, 1983;
- (c) a person who is acting as the duly appointed agent of the person to whom the payment is due;
- (d) the transmission of money or transfer instructions between companies which are members of the same group of companies;
- (e) transfers undertaken on a securities exchange, central securities depository or securities settlement system; or,
- (f) any person exempted by the Central Bank in terms of subsection (4).

(4) The Central Bank may by notice in the Gazette exempt any person or class of persons from the provisions of subsection (1), if the Central Bank is satisfied that such an exemption will be in the public interest and will not cause undue risk to any recognized payment system and transfers undertaken on a securities exchange, central securities depository or securities settlement system.

(5) For the purpose of subsection (3)(d) "group of companies" means companies or other bodies corporate that are related to each other as holding company and subsidiary, or as subsidiaries of the same holding company.

PART VI SETTLEMENT OF DISPUTES

Settlement of disputes arising out of recognized systems or settlement systems

18. (1) In this section "business day" means any day other than a Saturday, Sunday or public holiday.

(2) Where-

- (a) the management body of a recognized system is aggrieved by any decision taken by the Central Bank for the purposes of this Act, including a decision to withdraw recognition from the system; or,
- (b) any participant in a recognized system or a Central Bank system is aggrieved by-

- (i) any decision taken by the Central Bank for the purposes of this Act, or,
- (ii) any decision, act or omission by the management body of a system or by another participant in the system,

the matter shall be settled in accordance with this section.

(3) The aggrieved party shall provide the Central Bank, the management body or the other participant, as the case maybe, with a written statement setting out full particulars of its grievance, and the parties shall thereupon attempt to settle the matter by consensus within seven business days.

(4) If the parties are unable to settle the matter as contemplated in subsection (3) they may attempt to settle it within a further period of ten business days by a process of mediation whereby-

- (a) the parties agree on a mediator;
- (b) the mediator familiarizes himself with the parties' respective contentions;
- (c) the mediator and all parties discuss the matter at one or more meetings attended by them all, and attempt to settle the matter by consensus; and,
- (d) the parties share the mediator's costs equally.

(5) If the parties are unable to settle the matter by consensus in terms of subsection (3) or by mediation in terms of subsection (4), the matter shall be referred to a single arbitrator, and the Arbitration Act, 1904, shall apply in respect of the matter as if the parties had entered into an arbitration agreement contemplated by that Act.

(6) Notwithstanding the provisions of subsection (5), the arbitrator shall reach a decision in the matter within one month after appointment, unless the parties agree to an extension of that period.

(7) A decision of an arbitrator in terms of subsection (6) shall be final and binding on the parties.

PART VII MISCELLANEOUS

Exercise of functions by Central Bank

19. (1) Any function of the Central Bank under this Act may be exercised on behalf of the Central Bank-

- (a) by the Governor; or,
- (b) subject to the directions of the Governor, by the Deputy Governor or any officer of the Central Bank specified by the Governor.

(2) The Governor, the Deputy Governor or an officer of the Central Bank specified in terms of subsection (1)(b), shall exercise the functions referred to in that subsection in accordance with any general directions of policy that the Board of Directors of the Central Bank may give them.

(3) This section shall not be construed as limiting the power of the Central Bank under any other law to delegate its functions.

Preservation of secrecy

20. (1) Subject to subsections (2) and (3)-

- (a) an officer or employee of the Central Bank; or,
- (b) a member or employee of a management body;

shall not disclose any information which that officer, employee or member has acquired in the performance of the functions of that officer, employee or member under this Act or the constitution or rules of any recognized system and which relates to the affairs of a particular financial institution.

(2) The Central Bank may disclose any information whose disclosure, in the opinion of the Central Bank is reasonably necessary to protect the integrity, effectiveness or security of a recognized payment or settlement system.

(3) Subsection (1) shall not apply to-

- (a) any disclosure made by the person concerned in the performance of the functions of that person under this Act or under the constitution or rules of any recognized system, or when required to do so by a court or in terms of any other enactment; or,
- (b) the disclosure of information that is generally known to members of the public or a substantial section of the public.

(4) Any person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding Ten Thousand Emalangeni (E10,000) or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.

Use of confidential information for personal gain

21. (1) Subject to subsection (2)-

- (a) an officer or employee of the Central Bank; or,
- (b) a member or employee of a management body;

who, for personal gain, makes use of any information acquired in the performance of functions under this Act or the constitution or rules of any recognized system and which relates to the affairs of a particular financial institution, commits an offence and is liable, on conviction, to-

- (i) a fine not exceeding twenty-five thousand Emalangeni (E25,000) or double the amount of his gain, whichever is the greater; or
- (ii) imprisonment for a period not exceeding five years or to both such fine and imprisonment.

(2) It shall be defence to a charge under subsection (1) for the person charged to show that the information used was generally known to members of the public or to a substantial section of the public.

Evidence

22. A document purporting to be signed by or on behalf of the Central Bank stating that any-

- (a) system is or is not a recognized system; or,
- (b) financial institution is or is not a participant in any recognized system or Central Bank system;

shall be admissible in any proceedings in any court on its production by any person, and shall be *prima facie* proof of the facts stated in that document.

Unpaid items due to insufficient funds

23. (1) Any person who knowingly draws or issues a cheque, or other payment instrument against which there are not sufficient funds in the account of that person at a financial institution on which the cheque or other payment instrument is drawn commits an offence and shall be liable on conviction to a fine not exceeding Five Hundred Emalangeni (E500) or 3 months imprisonment or to both such fine and imprisonment.

(2) A cheque or other payment instrument that is returned unpaid with the words "insufficient funds" or other words to that effect shall be *prima facie* evidence that the drawer had no funds in the account against which the cheque or other payment instrument was drawn and the burden of proof shall lie with the drawer or issuer of the cheque or other payment instrument.

Computer entries

24. Entries in ledgers, day-books, cash books and other accounts of any financial institution including the Central Bank, whether captured manually by handwriting or computerized, shall be *prima facie* evidence of the matters, transactions and accounts therein recorded, on proof being given by sworn affidavit of one of the directors, managers, or officers of such financial institution or by evidence, that such manual or computerized ledgers, day books, cash books or other account books are or have been the ordinary books of such financial institution and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such financial institution.

Imaging

25. Photographic images such as film, microfiche, or computer images of original documents such as cheques or other payment instruments, securities, certificates of deposits, account ledgers, Treasury Bills, Government Securities, shall be admissible as *prima facie* evidence of the matters or transactions of the original instrument, on proof being given on sworn affidavit.

Regulations and review of Act

26. (1) The Central Bank shall establish a Committee-

- (a) to review this Act from time to time; and,
- (b) to make recommendations to the Minister with regard to amendments and regulations to this Act which, in the opinion of the Committee, have become advisable.

(2) The Minister may, after consultation with the Committee established under subsection (1), make regulations for the better carrying out of the purposes and provisions of this Act.

Participants may enter into clearing and settlements arrangements

27. Participants in a recognised or Central Bank system may, with the approval of the Central Bank, enter into agreements, memoranda of understanding or similar arrangements with counterparts in other countries for the facilitation of the clearing and settlement of cross-country instruments.