

THE PAYMENT CLEARING AND SETTLEMENT ACT

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THE PAYMENT CLEARING AND SETTLEMENT ACT

Act
32 of 2010.[31st December, 2010.]PART I. *Preliminary*

1. This Act may be cited as the Payment Clearing and Settlement Act. Short title.

2. In this Act unless the context otherwise requires—

Interpreta-
tion.

“the Bank” means the Bank of Jamaica;

“central counter-party” means a partnership, agency, association, body corporate or other entity in a payment or securities clearing and settlement system which is interposed between the participants, and which acts as the exclusive counter-party of these entities with regard to their transfer orders;

“clearing and settlement system” or “system” means a system or arrangement for the clearing or settlement of—

(a) payment obligations or payment messages in which—

- (i) there are at least three participants, at least one of which is the Bank or a bank;
- (ii) clearing or settlement is in Jamaican currency or other currencies as determined by the Bank; and
- (iii) the payment obligations that arise from clearing within the system or arrangement are ultimately settled through adjustments to the account or accounts of one or more of the participants at the Bank;

- (b) securities and derivatives transactions, foreign exchange transactions or other transactions, where the system or arrangement also clears or settles payment obligations arising from those transactions;

“clearing house” means the entity (whether incorporated or not) that provides clearing or settlement services for a clearing and settlement system, and in relation to any particular system means the body that so services that system;

“Court” means the Supreme Court;

“designated system” means a clearing and settlement system designated under section 5(1);

“functions” includes powers and duties;

“Governor” means the Governor of the Bank;

“Minister” means the Minister responsible for finance;

“National Payments System Council” or “Council” means the body established in accordance with section 23;

“netting” means the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant either issues to or receives from, one or more participants, with the result that only a net claim can be demanded or a net obligation can be settled;

“participant” means a member of a system or a party to an arrangement that establishes a system, including its administrator;

“systemic risk” means the risk that the inability of a participant to meet its obligations in a clearing and settlement system as they become due, will—

- (a) cause other participants in the clearing and settlement system to be unable to meet their obligations as they become due; or

- (b) cause significant liquidity or credit problems that might threaten stability and confidence in the financial system;

“transfer order” means any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, settlement agent or the Bank, or any instruction which results in the assumption or discharge of a payment obligation, or any instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on register, or otherwise.

PART II. *Clearing and Settlement System Regulation*

3.—(1) The Bank is charged with responsibility for the regulation, supervision and monitoring of clearing and settlement systems.

Bank to exercise oversight functions.

(2) For the purposes of this section, the Bank shall perform such functions, implement such rules and procedures, and in general, take such steps as it deems necessary.

(3) Subject to subsection (4), the functions conferred on the Bank by this Act shall be exercised by the Governor on its behalf.

(4) The Governor may in writing authorize any of the officers of the Bank to perform any of its functions under this Act.

4.—(1) Where the Bank has reasonable grounds to believe that a clearing and settlement system exists, but the Bank requires further information in order to determine its nature or its systemic importance or any other aspect of its operation, the Bank may request a person who is a party to the system to provide the Bank with such information and documents regarding the system as the Bank may require to make the determination.

Determination as to existence of clearing and settlement system.

(2) Every person to whom a request is directed under subsection (1) shall comply with the request.

(3) Every clearing house shall, in respect of its clearing and settlement system, provide the Bank with such information and documents as the Bank may from time to time require to enable the Bank to determine whether the clearing and settlement system poses a systemic risk and, without limiting the generality of the foregoing, the clearing house shall, in respect of the clearing and settlement system, provide the Bank upon request in writing, with—

- (a) the names of its participants;
- (b) copies of its constituting documents, by-laws, resolutions, agreements, rules, procedures and other documents governing its establishment and operation;
- (c) the names of its directors, committee members and auditors;
- (d) copies of its reports, statements or other documents that are required to be filed with any government agency or regulatory body; and
- (e) copies of its financial statements.

Designation
of system.

5.—(1) The Bank may designate a clearing settlement system as a designated system if the Bank is of the opinion that—

- (a) the clearing and settlement system may be operated in such a manner as to pose systemic risk; or
- (b) the designation is necessary to protect the public interest.

(2) The Bank shall, in writing, notify the fact of the designation of a system to the clearing house of the designated system, and shall cause a copy of the instrument of designation to be published in the *Gazette*.

Settlement
rules to be
approved by
Bank.

6. A clearing house shall not commence or, as the case may be, continue its operations until it has submitted to the Bank and received its prior written approval of the by-laws, agreements, rules, procedures and guidelines governing the operations of the clearing house.

7. In exercising its powers in relation to clearing and settlement systems under this Act, the Bank shall have regard to the public interest; and in this respect, the Bank may take into consideration any or all of the following matters, namely—

Bank to have regard to public interest.

- (a) whether any system is, in the opinion of the Bank—
 - (i) financially safe for use by participants;
 - (ii) efficient;
 - (iii) not causing or contributing to systemic risk; and
- (b) such other matters as the Bank may consider to be relevant.

8. The Bank may enter into an agreement with a clearing house or a participant, or both, as the case may require, in respect of—

Agreements.

- (a) netting arrangements;
- (b) risk-sharing and risk-control mechanisms;
- (c) certainty of settlement and finality of payment;
- (d) the nature of financial arrangements among participants;
- (e) the operational systems and financial soundness of the clearing house; and
- (f) such other matters pertaining to systemic risk as may be agreed on by the parties to the agreement.

9.—(1) The Bank may act under subsection (2) where it is of the opinion that systemic risk is or is likely to be inadequately controlled, as a result of the operations or likely operations of—

Bank's directions to clearing house.

- (a) a clearing house for a designated system;
- (b) a participant in a designated system; or
- (c) a designated system.

(2) Subject to section 11, in the circumstances specified in subsection (1), the Bank may issue directions in writing to the

clearing house for the designated system requiring it, within such time as the Bank considers necessary, to—

- (a) perform such acts or have the participants perform such acts as in the opinion of the Governor are necessary to remedy the situation; and
- (b) cease and desist from engaging in the causative act, omission or course of conduct, or have the participants cease and desist from engaging in such act, omission or course of conduct.

(3) Without affecting the generality of subsection (2), directions issued to a clearing house under that subsection may not be in respect of any matter that is not directly related to its participation in the designated system.

Bank's directions to participants.

10.—(1) Where the Bank has formed an opinion under section 9 that systemic risk is being inadequately controlled, it may exercise the powers conferred upon it by subsection (2), in any case where—

- (a) the clearing house fails to comply with any directions that have been issued to it under section 9(2);
- (b) the designated system does not have a clearing house located in Jamaica; or
- (c) in the opinion of the Bank—
 - (i) the systemic risk is being inadequately controlled due to an act, omission or course of conduct by a participant with respect to its participation in the designated system; and
 - (ii) the act, omission or course of conduct is not subject to the by-laws, agreements, rules, procedures, guidelines or other documentation governing the designated system.

(2) Subject to section 11, the Bank may, in the circumstances specified in subsection (1), issue directions in writing to the participants requiring them, within such time as it considers necessary, to—

- (a) perform such acts with respect to their participation, as the Bank considers necessary to remedy the situation; and
- (b) cease and desist from engaging in certain acts, omissions or courses of conduct with respect to their participation in the designated system.

11. Directions under sections 9 and 10 shall be such as appear to the Bank to be desirable for the purpose of ensuring the stability of the clearing and settlement system in Jamaica. Directions to facilitate system stability.

12. The Bank may, in writing, determine standards to be complied with by clearing houses for designated systems or participants. Standards.

13. The Bank may do all or any of the following things in relation to a designated system and its clearing house— Bank powers.

- (a) provide a secured or unsecured guarantee of settlement by participants;
- (b) make liquidity loans to the clearing house and the central counter-party;
- (c) act as the central counter-party to the participants.

14.—(1) Notwithstanding any other provision of law—

- (a) the settlement rules of a designated system are to be regarded as valid and binding on the clearing house, its participants, a central counter-party (including the Bank, where applicable), and any action may be taken or payment made in accordance with the settlement rules;
- (b) where the settlement rules of a designated system provide for netting, the obligation of a clearing house, a participant or a central counter-party (including the Bank, where applicable) to make any payment or transfer any securities to a participant and the right of a clearing house, a participant or a central counter-party to receive payment or securities from a clearing house, a participant or a central counter-party shall be

Preservation of settlement rules, rights and remedies for collateral granted.

determined in accordance with the provisions of the settlement rules, in that regard;

- (c) where the settlement rules of a designated system provide that the settlement of a payment obligation through an entry to or a payment out of an account of a clearing house, a participant or a central counter-party at a bank or the Bank, is final and irrevocable, the entry or payment shall not be required to be reversed, repaid or set aside.

(2) An entry to or a payment out of the account of a clearing house, a participant or a central counter-party at a bank or the Bank, to settle a payment obligation in a designated system, shall not be the subject of any provision or order that operates as a stay of that activity.

(3) The rights and remedies of a clearing house, a participant, a system, a central counter-party or the Bank, in respect of collateral granted to it as security for a payment or the performance of an obligation incurred in a designated system, may not be the subject of any provision or order that operates as a stay that affects the ability of creditors to exercise rights and remedies with respect to the collateral.

(4) In this section, "settlement rules" means the rules, however established, that provide the basis on which payment obligations are calculated, netted or settled, and includes rules for the taking of action in the event that a participant is unable or likely to become unable to meet its obligations to the clearing house, a central counter-party or the other participants.

Clearing house to notify of changes and other information.

15.—(1) A clearing house for a designated system shall provide the Bank with reasonable prior notice of any significant change to be made by the clearing house in relation to its designated system, and without limiting the generality of the foregoing, such notice shall be provided in respect of any change affecting—

- (a) the constituting documents and by-laws of the clearing house;
- (b) the operation of the designated system; or

- (c) the by-laws, agreements, rules, procedures, guidelines or other documentation governing the designated system.

(2) Every such clearing house shall, forthwith after it makes any other change in relation to the designated system, provide the Bank with written notice of the change and, without limiting the generality of the foregoing, the notice shall be provided in respect of any change affecting—

- (a) the composition of a board of directors of the clearing house, due to resignation or otherwise; or
- (b) the appointed auditor of the clearing house.

(3) Where it appears to the Bank that any change made or proposed to be made by a clearing house to its by-laws, agreements, rules, procedures or guidelines is inappropriate, the Bank may—

- (a) direct the clearing house to refrain from making the change; or
- (b) require the clearing house to make any other changes as the Bank may specify.

(4) Every such clearing house shall, in respect of its designated system, provide the Bank with such information, at such times and in such form as the Bank may in writing require.

(5) The directors or other persons (however designated) responsible for the direction and management of a clearing house shall be responsible for providing the information required under this section.

16.—(1) The Bank may, for the purposes of carrying out its functions under this Act, conduct audits and inspections of a clearing house for a designated system, and every such clearing house shall, as required, assist the Bank to the extent necessary to enable the Bank to carry out an audit or inspection.

Audits and
inspections.

(2) For the purpose of obtaining evidence under oath in relation to an audit or inspection under subsection (1), the Bank has all the powers of a person appointed as a Commissioner

under the *Commissions of Enquiry Act*.

(3) Where in any case the Bank considers it expedient or necessary to do so, it may appoint an auditor or a firm of auditors for the purpose of carrying out an audit or inspection under subsection (1).

(4) The expenses, as approved by the Bank, of any audit or inspection carried out by an auditor or firm of auditors appointed under subsection (3) shall be paid by the Bank, and the amount so paid shall be repaid to the Bank by the clearing house concerned; and may be recovered by or on behalf of the Bank summarily in a Resident Magistrate's Court, without limit of amount, as a civil debt.

Cost of
regulation.

17.—(1) The Bank may annually impose a fee on a clearing house in respect of the cost to the Bank for the administration of this Act.

(2) A fee imposed under subsection (1) constitutes a debt due to the Bank and may be recovered by or on behalf of the Bank summarily in a Resident Magistrate's Court, without limit of amount, as a civil debt.

PART III. *Miscellaneous*

Other Bank
powers.

18. The Bank may do all or any of the following things in relation to a clearing and settlement system and its clearing house—

- (a) be a participant and participate in the loss-sharing mechanism;
- (b) act as a custodian of financial assets or act as a settlement agent, or both; and
- (c) accept and pay interest on deposits from the clearing house, a participant or the central counter-party.

Netting
agreements.

19.—(1) Notwithstanding anything in any law relating to bankruptcy or insolvency, or any order of a court made in respect of the administration of a reorganization, arrangement, liquidation or receivership involving insolvency, including any

law or an order of a court of a foreign jurisdiction, where in accordance with the settlement rules of a clearing and settlement system a participant is party to a netting agreement—

- (a) the participant may terminate the agreement and determine a net termination value or net settlement amount in accordance with the provisions of the agreement, and thereupon the party entitled to the net termination value or net settlement amount becomes a creditor of the party owing the net termination value or net settlement amount, for that value or amount;
- (b) the basis on which payment and delivery obligations are calculated, netted and settled shall be determined in accordance with the settlement rules and the netting agreement; and
- (c) a participant's rights or remedies in respect of any collateral that has been granted to it to secure the performance of any obligation of any other participant shall not be interfered with.

(2) In subsection (1)—

- (a) “net termination value” means the net amount obtained after setting off or otherwise netting the obligations between the parties to a netting agreement in accordance with its provisions; and
- (b) “netting agreement” means an agreement between two or more participants which provides for the netting or setting off of present or future obligations to make payments or deliveries against present or future rights to receive payments or take deliveries.

20. Notwithstanding the making of an application for judicial review of any designation under section 5 or of any direction issued under this Act, a stay of the designation or direction shall not be granted pending the final disposition of the application.

Judicial review application not to stay directions, etc.

Clearing
house not
in Jamaica.

21.—(1) Where a clearing and settlement system does not have a clearing house located in Jamaica, the Jamaican participants shall—

- (a) comply with the obligations imposed under this Act on a clearing house in respect of a clearing and settlement system; and
- (b) have all the rights conferred by this Act on a clearing house in respect of a clearing and settlement system, in the same manner and to the same extent as if the Jamaican participants were the clearing house on which those obligations and rights are imposed or conferred and, for that purpose, any action that the Bank may take in respect of a clearing house may only be taken in respect of the Jamaican participants.

(2) Where a clearing house fails to comply with the obligations imposed on it under this Act in respect of its clearing and settlement system or otherwise contravenes this Act, the participants jointly and severally are, as the case may be—

- (a) required to comply with those obligations; or
- (b) liable for otherwise contravening this Act, .

in the same manner and to the same extent as if the participants were the clearing house on which the obligations are imposed or that committed the contravention.

(3) In subsection (1), a participant is regarded as Jamaican if the participant is incorporated or formed under the laws of Jamaica.

Restriction
on disclosure
where infor-
mation not
generally
available.

22. A participant of a clearing and settlement system is not required to provide information to the Bank under this Act concerning another participant of that system if the information is not available to all the participants.

Establishment
of National
Payments
System
Council.

23.—(1) There is established, for the purposes of this Act, a National Payments System Council, which shall be an advisory body to the Bank in the exercise of its oversight functions.

(2) The members of the National Payments System Council shall be representatives of—

- (a) the Bank, whose representative shall also be the chairman of the Council;
- (b) other governmental bodies regulating or in any other way involved in the payments and financial markets;
- (c) national associations of financial institutions operating in Jamaica which are involved in payment activities or clearing and settlement of securities; and
- (d) any other entity, involved in payments activities or in the clearing and settlement of securities, as may be determined by the Bank.

(3) The Bank may issue guidelines and directions to the Council, from time to time, as it considers expedient and the Council shall comply with all such guidelines and directions.

24.—(1) Subject to subsection (2), information and documents obtained under this Act are confidential, and shall be treated accordingly.

Confidentiality.

(2) Nothing in subsection (1) prevents the Bank from disclosing any information or documents—

- (a) if the Bank is satisfied that the information or documents will be treated as confidential by the agency, body or individual to whom they are disclosed, to—
 - (i) any public body charged with the regulation of financial institutions, for purposes related to such regulation; or
 - (ii) the chief executive officer of the Jamaica Deposit Insurance Corporation or any officer of that Corporation authorized in writing by the chief executive officer;

(b) pursuant to an order of the Court.

(3) In this section “public body” means—

- (a) a Ministry, department, Executive Agency or other agency of Government;
- (b) a statutory body or authority or any Government company, that is to say, a company registered under the *Companies Act*, being a company in which the Government or an agency of the Government, by the holding of shares, is in a position to direct the policy of that company.

Protection
from liability.

25. No action lies against the Governor, the Bank, any officer, employee or director of the Bank or any person acting under the direction of the Governor, for anything done or omitted to be done in good faith in the administration or discharge of any function that is intended or authorized to be executed or performed under this Act.

Enforce-
ment.

26. If a clearing house or a participant fails to comply with a provision of this Act or a direction issued to it by the Bank in connection with any matter under this Act, or a person on whom a requirement referred to in section 16(1) is imposed fails to comply with the request, the Bank may apply to the Court for an order directing the clearing house, participant or person, as the case may be, to comply with the provision, direction or request and, on the application, the Court may so order and make any further order it thinks fit.

Offences and
penalties.

27.—(1) Every person who, without reasonable cause, contravenes any provision of this Act commits an offence and—

- (a) in the case of an individual, is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding one million dollars or to imprisonment for a term not exceeding twelve months, or to both; or
- (b) in the case of a body corporate, is liable on summary conviction in a Resident Magistrate's Court to a fine not exceeding two million dollars.

(2) Where an offence under this Act, committed by a body corporate, is proved to have been committed with the

consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, commits that offence and is liable to be proceeded against and punished accordingly.

28. The Bank may issue guidelines in respect of any matter relating to the administration or enforcement of this Act. Guidelines.

29. The Minister may, after consultation with the Bank, make regulations, subject to affirmative resolution, for giving effect to the provisions of this Act. Regulations.