

Borrowers and Lenders Bill, 2020

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Pre-Agreement Disclosure

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BILL

ENTITLED
BORROWERS AND LENDERS ACT, 2020

AN ACT to establish a Collateral Registry, to provide a legal framework for the registration and enforcement of security interests in collateral, to establish an order of priority of security interests, generally to provide for credit agreements, and to regulate transactions between borrowers and lenders and provide for related matters.

PASSED by Parliament and assented to by the President:

Application, Creation of Security Interest and Credit Agreement

Application with respect to security interest

1. (1) This Act applies to a security interest other than a security interest mentioned in subsection (3), and includes
 - (a) a credit agreement that provides for a security interest in property;

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- (*l*) the creation of a security interest, the effectiveness of a security interest against third parties and priority of a security interest in tangible property that is located in this country;
 - (*c*) security interest in which the tangible property is of a type ordinarily used in more than one country if the borrower is located in this country;
 - (*a*) the creation of a security interest, the effectiveness against third parties and priority of a security interest in intangible property, if the borrower is located in this country;
 - (*ε*) issues relating to the enforcement of a security interest in intangible property if the borrower is located in this country;
 - (*υ*) issues relating to the enforcement of a security interest in intangible property if the enforcement takes place in this country;
 - (*g*) the creation, effectiveness against third parties and priority of a security interest in a deposit account if a bank, specialised deposit-taking institution or other financial institution that maintains the relevant deposit account has a place of business in this country;
 - (*h*) the creation of security interest, effectiveness of registration against third parties in proceeds arising from the disposition of collateral by a borrower if this Act governs the security interest in the original collateral;
 - (*i*) the effectiveness against third parties, priority and enforcement of security interests in fixtures created under the Mortgages Act, 1972 (NRCD 96) or the Home Mortgage Finance Act, 2008 (Act 770); and
 - (*υ*) the effectiveness against third parties, priority and enforcement of mortgages and other interests in immovable property, including a transfer of rental payments and a right to payment that arises in connection with an interest in immovable property created under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).
- (2) For the purposes of this section, a borrower is located in this country if the borrower

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- (a) is ordinarily resident in Ghana;
- (b) has a place of business in this country; or
- (c) has a place of business in more than one country, but the principal office of the borrower is in this country.

(3) This Act does not apply to

- (a) a security interest in
 - (i) a ship as defined in section 481 of the Ghana Shipping Act, 2003, (Act 645); or an aircraft as defined in paragraph 4.1.1.2 of Part 4 of the Schedule to the Ghana Civil Aviation (Safety) Regulations, 2011 (L.I 2000);
 - (ii) payment rights arising under or from financial contracts governed by netting agreements as determined by the Bank of Ghana;
 - (iii) assignment of wages and salaries;
 - (iv) pension and other similar benefits as provided in the National Pensions Act, 2008 (Act 766) and other applicable legislation;
 - (v) a contract of annuity or life insurance policy;
 - (vi) deposited securities as defined in section 60 of the Central Securities Depository Act, 2007 (Act 733); and
 - (vii) a transfer of a right to damages in tort not related to commercial activity; and
- (b) a lender that is subject to the supervision of the Bank where the loan amount advanced by the lender under the credit agreement is less than an amount of five hundred Ghana Cedis or an amount determined by the Bank periodically and published in the *Gazette* and in two daily newspapers of national circulation.

(4) Despite subparagraph (iv) of paragraph (a) of subsection (3), this Act shall apply where a security interest is created in accordance with subsection (2) of section 103 of the National Pensions Act, 2008 (Act 766).

(5) Nothing in this Act affects the right of a lender to exercise the right of set-off.

Application with respect to other credit agreements

2. (1) For the purpose of credit agreements other than credit agreements under section (1), this Act applies to

- (a) a credit agreement whether or not the lender or borrower
 - (i) resides or has the principal office within the country;
 - (ii) is an institution that belongs to the Republic;
 - (iii) is an entity controlled by an institution that belongs to the Republic; or
 - (iv) is an entity created by an enactment;
- (b) the rights or duties of a borrower or lender before the execution of a credit agreement; and
- (c) every transaction, act or omission under a credit agreement.

(2) This Act does not affect a right that a consumer may have under an enactment that offers consumer protection.

Creation of security interest

3. (1) A security interest is created by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction, identity of the person who has title to the collateral or whether the secured party has title to the collateral.

(2) Despite subsection (1), this Act does not apply to a security interest in a deposited Warehouse Receipt as provided for under the Securities Industry Act, 2015 (Act 929).

Credit agreement

4. (1) An agreement is a credit agreement if

- (a) the agreement provides for or is a combination of the following:
 - (i) a credit facility;
 - (ii) a credit transaction; or
 - (iii) a credit guarantee ; or
- (b) the agreement relates to a transaction that creates a security interest in a property to secure an obligation present or future, determined or determinable.

(2) For purposes of subsection (1), an agreement provides for a credit facility if in that agreement

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- (a) the lender undertakes to lend a stipulated amount to
 - (i) the borrower; or
 - (ii) another person on behalf of the borrower, within a specified period or at specified intervals agreed on by the lender and the borrower; or
- (b) the lender undertakes to
 - (i) defer the obligation of the borrower to repay a stipulated amount lent by the lender to the borrower; or
 - (ii) send a bill to the borrower periodically in respect of a stipulated amount, whether or not the amount is a loan or a fee

whether or not an interest is payable to the lender in respect of the arrangements.

(3) For purposes of subsection (1), a credit transaction includes an agreement that provides for

- (a) a pawn transaction;
- (b) an installment agreement;
- (c) a chattel mortgage;
- (d) a finance lease;
- (e) hire purchase;
- (f) a sale with reservation of title; and
- (g) an outright assignment of accounts receivable.

(4) An agreement provides for

- (a) a credit guarantee if in that agreement a third party promises to satisfy on demand by the party to whom the guarantee is made, an obligation of the borrower regarding a credit facility or credit transaction to which this Act applies; or
- (b) a secured credit guarantee if in that agreement a third party promises to satisfy on demand by the party to whom the guarantee is made, an obligation of the borrower in a credit agreement to which this Act applies, and in addition, creates a security interest in property to secure the performance of its promise.

(5) A court may invalidate a credit agreement as fraudulent, where the parties to the agreement, with intent to defraud a third party, are not dealing at arm's length.

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Effectiveness of a Security Interest between the Lender and Borrower and Collateral Description

Execution of a credit agreement

5. A credit agreement that creates a security interest in property shall be executed in writing, and the credit agreement shall consist of one or more tangible documents or electronic records which taken together, establish the intent of the parties.

Security interest between the borrower and lender

6. (1) Despite section 23, a security interest created by a credit agreement, is effective between the parties to the agreement without registration under this Act, but the right of the lender to enforce the security interest is subject to the rights of any other lender or person entitled to priority under this Act.

(2) A credit agreement shall identify

- (a) the lender;
- (b) the borrower;
- (c) the collateral; and
- (d) the secured obligation.

(3) A security interest in property that the borrower acquires after the borrower has entered into a credit agreement shall become effective without a written consent of the borrower or any further act of the borrower

- (a) when the borrower acquires rights to the property; and
- (b) if the property falls under the collateral description in the credit agreement.

(4) A borrower shall provide a written consent for the security interest to extend to consumer goods acquired after a credit agreement has been entered into.

Non-transfer of title

7. A security interest in property shall not operate as a transfer of title in the property from the borrower to the lender.

Sufficient description of collateral

8. (1) A credit agreement shall contain a description of the collateral that reasonably identifies the property to be provided as collateral.

(2) For the purposes of this section, the description of the collateral may be generic or specific.

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(3) For the purpose of this section, a description in the form of the expression- “all inventory”, “all receivables” or “all movable property”- of the borrower is sufficient.

(4) Despite anything to the contrary in this section, the description of an immovable property shall be specific.

Sufficient description of secured obligations

9. A credit agreement may describe secured obligations generically, including by a reference to a maximum amount for which the security interest may be enforced.

Automatic extension of security interest

10. (1) After a security interest is created and becomes effective between the lender and borrower, it shall automatically extend to any identifiable proceeds of the collateral whether or not the credit agreement contains a description of the proceeds as provided in this Act.

(2) Where proceeds in the form of money or funds credited to a bank account are commingled with other assets of the same kind,

- (a) the security interest extends to the commingled assets, notwithstanding that the proceeds have ceased to be identifiable;
- (b) the security interest in the commingled assets is limited to the amount of the proceeds immediately before they were commingled; and
- (c) if at any time after the commingling, the amount of the commingled money or of the balance credited to the bank account is less than the amount of the proceeds immediately before they were commingled, the security interest in the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time when the security interest is claimed.

Contractual limitations on the creation of a security interest in account receivables

11. (1) A security interest in an account receivable is effective as between the borrower and the lender and as against the debtor of the account receivable notwithstanding any agreement that in any way limits the right of the borrower to create a security interest.

(2) A party to an agreement may not avoid the contract giving rise to the account receivable or the credit agreement on the sole ground of the breach of that agreement, or raise against the lender any claim it may have as a result of the breach against the borrower.

(3) Nothing in this section affects any obligation or liability of the borrower for breach of the agreement referred to in subsection (1).

Contractual limitations on the creation of a security interest in deposit accounts

12. Where a borrower creates a security interest in a deposit account that security interest is effective notwithstanding an agreement between the borrower and a bank or specialised deposit-taking institution that limits the right of the borrower to create that security interest in that deposit account.

Contractual limitations on the creation of a security interest in intellectual property

13. A security interest in a tangible property with respect to which intellectual property is used, does not extend to the intellectual property and a security interest in the intellectual property does not extend to the tangible property.

Effectiveness of a Security Interest against Third Parties

Achieving third-party effectiveness

14. (1) A security interest is effective against third parties when the security interest has been created and registered under this Act.

(2) A security interest shall continue to be effective against third parties for as long as the registration of the security interest has not been discharged or the duration of the security interest has not lapsed.

Extension of a security interest to proceeds

15. (1) Except as otherwise provided in this Act, a security interest in collateral which is effective against third parties shall

- (a) continue where the collateral has been disposed of, unless the lender has authorised the disposition; and
- (b) extend to the proceeds.

(2) If a lender enforces the security interest against both the collateral and the proceeds, the realisation of the security interest is limited to the value of the collateral at the date of the disposition that gave rise to the proceeds.

Security interest with respect to proceeds

16. (1) A security interest with respect to proceeds shall continue to be effective against third parties where

- (a) the security interest in the original collateral has, by registration, been made effective against third parties; and
- (b) the proceeds are
 - (i) of a kind that is within the description of the collateral in the registration; or
 - (ii) cash proceeds as defined in section 85.

(2) A security interest in proceeds not covered by paragraph (b) of subsection (1) is temporarily effective against third parties until the expiration of ten days after the proceeds arose.

(3) The security interest in proceeds referred to in subsection (2) shall cease to be effective against third parties if the lender does not amend the registration within ten days after the proceeds arose.

Concurrent registration not necessary for effectiveness of a security interest

17. (1) A security interest that covers a right to property which is registered in another registry is effective against third parties where the lender satisfies the requirements under this Act.

(2) Concurrent registration of a security interest in collateral in another registry is not required for purposes of making the security interest effective against third parties.

Collateral Registry and Registration of Charges

Collateral Registry

18. There is established by this Act a registry to be known as the Collateral Registry.

Functions of the Registry

19. The functions of the Registry are

- (a) to keep and maintain a Register of security interests;
- (b) to keep and maintain a platform for the conduct of searches in security interest; and
- (c) to perform any other function determined by the Bank.

Appointment of the Registrar

20. (1) The Board shall appoint a Registrar for the Registry.

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(2) The Registrar shall hold office on the terms and conditions specified in the letter of appointment.

Functions of the Registrar

21. (1) The Registrar is responsible for the functions of the Registry.

(2) The Registrar, in the performance of the functions under subsection (1), shall

- (a) verify whether authorisation for registration has been properly granted under this Act; or
- (b) conduct a scrutiny of the information provided on the registration form.

Staff of the Registry

22. The Board shall appoint other officers and employees that the Board considers necessary for the effective implementation of the functions of the Registry under this Act.

Registration of security interest

23. (1) A lender in whose favour a security interest is created shall register that security interest with the Registry.

(2) A lender that is subject to the supervision of the Bank, in whose favour a security interest is created, shall register that security interest with the Registry within a period determined by the Bank.

(3) A lender who contravenes subsection (2) is liable to pay to the Bank an administrative penalty of the monetary equivalent of ten penalty units for each day that the breach continues.

(4) Despite paragraph (b) of subsection (3) of section 1, where the loan amount advanced by the lender under a credit agreement is five hundred Cedis or less or an amount determined by the Bank by notice published in the *Gazette* and in two daily newspapers of nationwide circulation, that lender may register the security interest under this Act.

(5) The Bank shall, in accordance with this section, collaborate with other financial sector regulators for the purposes of ensuring the registration of security interests created by the institutions that they regulate.

(6) Despite provisions to the contrary in the Stamp Duty Act, 2005 (Act 689) a lender or a registrant may register a security interest under this Act before or after the stamping of a credit agreement.

(7) A lender or registrant who makes a fictitious or fraudulent registration commits an offence and is liable on summary conviction to a fine of not less than one thousand five hundred penalty units and not more than three thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both.

Effectiveness of a registration

24. (1) A registration under this Act is effective when a registration number, date and time of registration is entered in the Register and becomes publicly searchable.

(2) The effectiveness of a registration shall not be affected by any defect, irregularity, omission or error, unless the defect, irregularity, omission or error is misleading to a reasonable searcher.

(3) The registration is ineffective if the registration cannot be disclosed when a search is conducted against the correct identifier of the borrower.

(4) The registration with respect to collateral required to be identified by a collateral identification is ineffective only as against a buyer if there is a misleading defect, irregularity, omission or error in the collateral identification as a result of which the registration cannot be disclosed when a search is conducted against the correct collateral identification.

(5) An error of the kind covered by this section shall not render a registration ineffective with respect to another borrower or collateral that is sufficiently identified or described.

Grounds for the refusal of a registration

25. The Registrar shall refuse to enter a registration in the Register if

- (a) the information is not submitted in the prescribed form;
- or
- (b) the prescribed fee has not been paid by the person submitting the registration form, unless arrangements for payment is made in accordance with the Registry Rules.

Authorisation to register

26. (1) The lender or a representative of the lender shall, with the consent of the borrower, register a security interest in collateral by the borrower in favour of the lender at any time.

(2) A borrower who enters into a credit agreement is deemed to have authorised the lender to register the security interest in the collateral.

Public access to the Registry

27.(1) A registrant may submit a registration to the Registry in a form prescribed under this Act or in the Registry Rules, if that person

- (a) has established a user account with the Registry; and
- (b) pays or has undertaken to pay the prescribed fee.

(2) A person may, subject to the payment of the prescribed fees, submit a search request to the Registry.

Particulars of registration

28. A registrant shall specify the following on the registration form:

- (a) the identifier of the borrower in the manner prescribed in the Registry Rules;
- (b) the identifier of the lender in the manner prescribed in the Registry Rules;
- (c) the maximum amount secured by the security interest;
- (a) a description of the collateral in the manner prescribed in the Registry Rules;
- (e) effective period of the registration of the security interest as specified under a credit agreement; and
- (j) any other information required by the Registry Rules.

Acknowledgment of registration

29. (1) The Registrar shall issue and deliver an acknowledgment of the registration electronically to a registrant.

(2) A registrant shall, after receipt of the acknowledgement, submit a copy of the acknowledgment to the borrower within fifteen days of receipt.

(3) The production of an acknowledgement issued under this section in proceedings before a court, is evidence of registration with respect to a security interest in the collateral specified in that acknowledgment.

Amendment of registration

30. (1) An amendment to a registration may be effected only by a registrant, by registering the amendment at the Registry at any time before the expiration of the registration.

(2) The registrant shall amend a registration where

- (a) the parties have agreed to change the maximum amount secured by the security interest; and
- (b) the collateral described in the registration includes

property that is not collateral under a credit agreement between the lender and the borrower.

(3) An amendment to a registration is effective and has priority from the date of registration of the amendment where the amendment

(a) adds collateral other than proceeds;

(b) adds a new borrower, that is not a transferee of collateral; or

(c) modifies the maximum amount secured by the security interest.

(4) Where required, a borrower may apply to court for an order to compel a lender to amend a registration.

Discharge of registration

31. (1) A lender shall, where subsection (2) applies, discharge a registration, in the prescribed form, at any time before the time of expiry of a registration and furnish the borrower with proof of the discharge.

(2) The lender shall discharge a registration if

(a) the obligations under the credit agreement to which the registration relates have been performed and there is not a commitment to make a future advance;

(b) the lender consents to the release of whole or part of the security interest described in the registration;

(c) the registration was effected fraudulently or without the authorisation of the borrower; or

(a) the security interest has been extinguished in accordance with this Act.

(3) Pursuant to paragraph (a) of subsection (2), where the borrower fully meets the obligations under a credit agreement, the lender shall within five days discharge a registration and release the security interest in full.

(4) The memorandum issued by the Registry upon a discharge of registration shall specify whether the security interest is released in whole or in part.

(5) A borrower may demand in writing that a lender complies with this section.

(6) A lender shall give to the borrower, a copy of the memorandum issued by the Registry upon a discharge of registration.

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(7) A lender shall, within five days after receipt of a written demand, that complies with this section from the borrower, discharge a registration, unless the registration lapses before the expiration of that period.

(8) Where the lender fails to comply with the written demand within five days after receipt of the written demand, the borrower may apply to court for an order to compel the lender to discharge a registration.

Discharges and amendments of registrations by Registrar

32. The Registrar shall not make an amendment or entry of a discharge in the Register, except where

- (a) a system error occurs on the Register; or
- (b) the amendment or discharge is pursuant to an order of a court of competent jurisdiction.

Time and expiry of registration

33. (1) A registration is effective for the period stated in the registration form, pursuant to the provisions of a credit agreement.

(2) A lender may extend the effective date of a registration at any time before its expiration.

Searches

34. (1) A person may, without having to provide reasons, conduct a search on the Register and obtain results of the search in accordance with this Act and in the manner prescribed in the Registry Rules.

(2) A person conducting a search under subsection (1) may do so by reference to the following:

- (a) the identifier of a borrower in accordance with the Registry Rules;
- (b) the identifier of the collateral in accordance with the Registry Rules; or
- (c) the registration number assigned to the registration.

(3) The result of the search issued by the Registry is evidence of the existence or absence of the registration on the Register at the date and time the result is issued and is admissible as evidence in court proceedings.

(4) A person shall not use the results of a search obtained from the Registry for the purposes of maligning, causing willful injury or unwarranted damage to a borrower or interested party.

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(5) A person that contravenes subsection (4) commits an offence and is liable upon summary conviction to a fine of not less than two hundred and fifty penalty units and not more than two thousand five hundred penalty units or to a term of imprisonment of not less than two years and not more than five years or to both.

General Priority Rules

Priority of registration

35. Irrespective of the time of registration, a security interest registered under this Act shall have priority over any other registration under any other enactment.

Priority between security interests

36. Priority between security interests in the same collateral shall be determined by the order of their registration unless otherwise provided in sections 37 to 42.

Priority of a security interest in proceeds

37. Subject to section 16, priority of a security interest in original collateral shall extend to proceeds from that collateral.

Subordination of priority

38. (1) A lender may at any time in writing, subordinate its priority under this Act in favour of any existing or future lender or other creditor without the need for the borrower to be a party to the subordination.

(2) The agreement to subordinate the priority of a security interest shall not adversely affect the rights of a person who is not a party to the agreement.

Priority of future advances

39. The priority of a security interest extends to all secured obligations, including obligations incurred after the security interest became effective against third parties to the extent of the maximum amount stated in the registration.

Priority of purchase money security interest

40. (1) A purchase money security interest in collateral or its proceeds, other than inventory, has priority over a non-purchase money security interest in the same collateral created by the same borrower, where the purchase money security interest in the collateral or its proceeds is made

effective against third parties by registration not later than five days after the day on which the borrower obtained possession of the collateral.

(2) The purchase money security interest in the inventory or its proceeds has priority over non-purchase money security interest created by the same borrower if it is made effective against third parties by registration, and the holder of the prior security interest receives a notification from the borrower before the borrower obtains possession of the collateral created by use of the purchase money security interest.

Priority of security interest in accessions and commingled goods

41. (1) A security interest in goods that is made effective against third parties before the time when the goods become an accession has priority over a claim to the goods as an accession made by a person with an interest in the goods.

(2) Where the security interest in goods that is effective against third parties subsequently becomes part of a product or mass, and its identity is lost, that security interest shall continue in the product or mass.

(3) If more than one security interest in the goods is effective against third parties before the goods become part of a product or mass, the security interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.

Priority with respect to transferred collateral

42. If a borrower transfers an interest in collateral that at the time of the transfer is subject to a security interest effective against third parties, that security interest has priority over any other security interest created by the transferee.

Priority of Transferees of Money, Negotiable Instruments, Security Certificates and Deposited Securities

Priority of transferee of money

43. A transferee of money takes the money free of a security interest, unless the transferee acts in collusion with a borrower in violation of the rights of a lender.

Priority of transferee of funds

44. A creditor who receives through any payments system, the

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payment of a debt owed to that creditor by a borrower shall receive the payment free of a security interest, unless the transferee acts in collusion with a borrower in violation of the rights of a lender.

Priority of a purchaser of a negotiable instrument, a document of title or a security certificate

45. A purchaser of a negotiable instrument, document of title or security certificate has priority over a security interest in that negotiable instrument, document of title, chattel paper or security certificate effective against a third party in the negotiable instrument, the document of title, the chattel paper or the security certificate, if the purchaser

- (a) gave value for the purchase;
- (b) acquired the negotiable instrument, the document of title or the security certificate without knowledge that the transaction is a breach of a credit agreement to which the security interest relates; and
- (c) took possession of the negotiable instrument, the document of title or the security certificate.

Priority of Buyers

Priority of buyer or lessee

46. (1) A buyer or lessee of movable property that is collateral, acquires that movable property free of a security interest that has not been made effective against a third party if the movable property was acquired for value.

(2) A buyer of goods sold in the ordinary course of business of a seller, and a lessee of goods leased in the ordinary course of business of a lessor, shall take the goods free of a security interest created by the seller or a lessor, unless the buyer or the lessee knows that the sale or the lease constitutes a breach of a credit agreement under which the security interest was created.

(3) A buyer of immovable property for value shall, where the mortgage of the lender has not been recorded under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96), take that immovable property free of a security interest that has been made effective only under this Act.

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Priority Rules Related to Interests in Immovable Property and Fixtures

Priority of mortgages

47. A security interest in an immovable property in the form of a mortgage that is made effective against a third party under this Act has priority over any other mortgage subsequently registered under this Act, the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

Priority of right to payment related to immovable property

48. (1) A security interest in a rental payment or a right to payment that arises in connection with an immovable property that is made effective against a third party under this Act has priority over any other security interest or mortgage subsequently registered under this Act, Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

(2) A buyer of an immovable property in respect of which a security interest in a rental payment or a right to that payment has been made effective against a third party under this Act and not recorded under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96), takes that immovable property free of that security interest.

Priority of security interests in fixtures

49. A security interest in a fixture made effective against a third party under this Act has priority over any other security interest or mortgage subsequently registered under this Act, the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96).

Special Priority Provisions for a Lien Arising by Operation of Law

Possessory lien with respect to movable property

50. A possessory lien in a movable property created by operation of law and held by a person who provided materials or services in respect of that movable property that is the subject of a security interest made effective under this Act, has priority over that security interest if

- (a) the materials or services relating to the lien were provided in the ordinary course of business;
- (b) the lien has not arisen under an Act that provides that the lien does not have the priority; and

- (c) the person who provided the materials or services did not, at the time the person provided those materials or services, know that a credit agreement relating to the materials or services contained a provision prohibiting the creation of a lien by the borrower.

Lien with respect to immovable property

51. A possessory lien in an immovable property created by operation of law and held by a person who provided materials or services in respect of that immovable property that is the subject of a security interest made effective under this Act has priority over that other security interest, if the person providing the materials or services registered the lien under this Act before the security interest was registered.

Judgment liens

52. (1) The interest of a judgment creditor in any collateral shall have priority over any security interest in the same collateral if the security interest is not made effective against third parties at the time of execution of the judgment.

(2) In this section, “time of execution” means

- (a) the time of seizure, if property is seized by or on behalf of an execution creditor; or
- (b) the time when a judicial order is served on a person who is holding property for or on behalf of a borrower.

Repayment and Recovery of Debt

Obligation of borrower or guarantor

53. (1) A borrower or guarantor may settle the credit amount at any time, subject to notice requirements and the conditions provided for in the credit agreement.

(2) A credit agreement may provide for the terms and conditions of any repayment and the order in which advance payments are to be applied.

(3) Unless otherwise agreed by the parties, the amount required to settle a debt in a credit agreement is the total of

- (a) the principal amount;
- (b) the accrued interest charges;

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(c) a prepayment charge, if any, agreed between the borrower and lender; and

(a) the other fees and charges payable by the borrower to the lender up to the date for settlement.

(4) Subject to any notice requirements provided in a credit agreement, a lender shall accept any payment under a credit agreement when it is tendered, even if that is before the date on which the payment is due.

(5) A lender shall credit each payment made under a credit agreement to the borrower as of the date of receipt of the payment.

Default

54. (1) Where an event of default arises under a credit agreement and the lender decides to realise its security interest; the lender shall give a notice of the default to the borrower in writing and request the borrower to pay the amount due within a period of thirty days.

(2) Where the collateral is perishable, the period of notice under subsection (1) shall not apply, if the lender gives reasonable notice to the borrower.

(3) The lender may deliver the notice by

(a) hand personally;

(b) courier service;

(c) registered mail; or

(a) other means agreed upon by the lender and the borrower in the credit agreement.

(4) A notice delivered

(a) by hand, is effective on the date it is received personally, and the receipt evidenced by acknowledgment of the borrower;

(b) by registered mail, is effective on the date it is officially recorded as delivered by a return receipt or its equivalent;

(c) by courier service is effective where

(i) the borrower receives it personally,

(ii) it is left at the premises of the borrower when the borrower evades or rejects service,

(iii) it is left in the custody of an adult on the premises for delivery to the borrower, and

(iv) it is officially recorded as delivered by a return receipt or its equivalent; and

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(a) by other means, in accordance with paragraph (a) of subsection (3), is effective on the date it is made available to the borrower.

(5) A notice delivered under paragraph (c) of subsection (3) shall indicate the mode of service or delivery on the return receipt or its equivalent.

(6) A lender may publish a notice of default in two daily newspapers of nationwide circulation where three consecutive attempts at service or delivery under subsection (3) have failed.

(7) Where a borrower fails to

(a) pay the amount outstanding;

(b) make satisfactory arrangements to pay the amount outstanding to the lender; or

(c) cure a default other than failure to make payment

within the time period stipulated in the notice, the lender may enforce the rights as set out in section 55.

Remedies of lender on default

55. (1) Upon the satisfaction of the requirements under section 54, the lender may

(a) sue the borrower on any covenant to perform under the credit agreement;

(b) where registered under this Act, realise the security interest in the collateral without initiating proceedings in court; or

(c) appoint a Receiver or Manager under subparagraph (iii) of paragraph (b) of section 67.

(2) Where the collateral is a document of title, the lender may proceed either against the document of title or the property covered by it.

Lender's right to possession

56. (1) Where a lender realises a security interest in accordance with paragraph (b) of subsection (1) of section 55, the lender may take possession of the collateral or render the collateral unusable without removal.

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(2) Where a lender has a right to take possession of property that is subject to a security interest, that lender may enforce that right without initiating proceedings in court for that purpose.

(3) A lender is not required to give notice to the borrower before repossessing or rendering a collateral unusable under this section.

Warrant for police assistance

57. (1) Where a lender is unable to enforce a right of possession in a peaceable manner, the lender may upon a warrant issued by a court use the services of the police to

- (a) remove the collateral; or
- (b) evict the borrower where the collateral is immovable property, subject to the rights of third parties or other persons in possession of the collateral.

(2) Where a borrower receives notice of an application made by the lender to a court for a warrant to be issued for the purpose of removing collateral, evicting the borrower or other person in possession, that borrower may within three days after receipt of the notice, object to the request by giving evidence to the court that

- (a) full payment of the amount owed has been made;
- (b) the default has been cured; or
- (c) the default has not occurred.

(3) The court shall issue a warrant, if five days after service of the notice of the request for a warrant on the borrower, the borrower does not file an objection to the request for a warrant.

(4) A person who

- (a) fails without reasonable excuse, to vacate premises being foreclosed by a lender under subsection (1) when duly requested to do so; or
- (b) obstructs a lender in the lawful exercise of a right conferred on the lender by this section

commits an offence and is liable on summary conviction to a fine of not more than five hundred penalty units; and in the case of a continuing offence, to a further fine of not more than fifty penalty units for each day the offence continues.

Application of collateral in satisfaction of obligation

58. (1) A lender may collect and apply an account receivable, security, moneys in a deposit account, cash in hand or a negotiable instrument taken as collateral to the satisfaction of the obligation secured by the collateral if the borrower is in default.

(2) Unless otherwise agreed between the lender and the borrower, the lender may notify the account debtor and collect payment even before default by the borrower.

Realisation of collateral after default

59. (1) A lender shall realise the collateral either by auction, public tender, private sale or any other method provided for in the credit agreement.

(2) The price at which a collateral is sold shall be commercially reasonable.

(3) For the purposes of this Act, where a lender is realising its security interest in collateral by way of auction in accordance with the Auction Sales Act, 1989 (PNDCL 230) the process of realisation by the lender shall be deemed to be an execution of a judgment debt.

(4) For the purposes of this Act, where a lender realises security interest in an immovable property either by auction, public tender, private sale or any other method provided for in a credit agreement, a transfer of legal title in the immovable property to a purchaser may be confirmed by a court of competent jurisdiction.

(5) Where a lender transfers collateral to a purchaser for value, pursuant to the realisation of a security interest, the purchaser shall acquire the interest of the borrower in the collateral.

Notice of sale of collateral

60. (1) A lender who intends to realise collateral under this Part shall, at least ten days before the sale, give notice in writing to the following persons:

- (a) the borrower and the debtor;
- (b) any person who has registered a security interest with respect to the same interest in the collateral, before the lender took possession of the collateral; and
- (c) any other person that has given the lender notice that that person claims an interest in the collateral before the lender took possession of the collateral.

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- (2) Subsection (1) does not apply if
- (a) the collateral is likely to perish within ten days after possession of the collateral has been taken;
 - (b) the lender believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately;
 - (c) the cost of care and storage of the collateral is disproportionately large in relation to its value;
 - (a) after the lender takes possession of the collateral, every person entitled to receive notice under subsection (1) consents in writing to the immediate sale of the collateral; or
 - (e) a court grants leave to the lender to sell the collateral without complying with subsection (1).

Effect of sale of collateral

61. Where collateral has been sold under section 59, any other security interest in that collateral and its proceeds shall be extinguished.

Accounting for sale

62. Where collateral is sold, the lender shall, within fifteen days after the sale of the collateral, give the persons referred to in subsection (1) of section 60 a statement of account in writing, showing

- (a) the amount of the gross proceeds from the sale;
- (b) the amount of the costs and expenses of the sale; and
- (c) the balance owing by the lender to the borrower, or by the borrower to the lender, as the case may be.

Distribution of proceeds of sale

63. (1) A lender who realises collateral under section 59 shall apply the proceeds of the sale in the following order towards:

- (a) the satisfaction of the debt of any prior interest registered under this Act or lien arising by operation of law;
- (b) the reasonable costs and expenses of the sale incurred by the lender; and
- (c) reasonable legal expenses

before applying the net proceeds of the sale towards the satisfaction of the debt or other obligation secured by the security interest of the lender.

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(2) After applying the proceeds in accordance with subsection (1), any surplus from the proceeds of sale of collateral shall be paid into a designated escrow account agreed by the parties who may have subordinate security interest under this Act.

(3) The surplus from the proceeds of sale of collateral under subsection (2), shall be paid to a person who has a subordinate security interest or any other person that claims an interest in the collateral upon the order of a court in respect of the proceeds.

(4) Any remaining proceeds of sale after the required payments have been made in accordance with subsections (1) and (3) shall be paid to the borrower.

Retention of collateral after default

64. (1) A lender who has priority over all other lenders may, after default of payment by the borrower, propose to retain the collateral in full or partial satisfaction of the obligation secured by the collateral.

(2) The lender shall give to the persons listed in subsection (1) of section 60, notice of the proposal which shall include the retirement of the secured amount in the respective security agreements.

(3) The lender shall sell the collateral under section 59 if a person who is entitled to a notice under subsection (1) of section 60 and whose interest in the collateral would be adversely affected by the proposal of the lender to retain the collateral gives to the lender within ten days after receiving the notice referred to in subsection (2), a notice of objection to the proposal, to retain the collateral.

Effect of retention of collateral

65. (1) Where a notice of objection is not received by the lender at the expiration of the ten days period referred to in subsection (3) of section 64, the lender is deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation secured by it.

(2) An election by a lender to retain collateral under subsection (1) extinguishes other security interests and claims in that collateral subordinate to the security interest of that lender.

Right to settle debt and redeem collateral

66. (1) A person who is entitled to receive a notice under subsection (1) of section 60 may, unless the person otherwise agrees in writing after

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the borrower has defaulted at any time before a lender sells the collateral in accordance with section 59 or is deemed to have retained the collateral in accordance with section 64, settle the debt and redeem the collateral by tendering to the lender,

- (a) the principal amount owed to the lender,
- (b) the accrued interest on the principal amount,
- (c) any fee for the prepayment of an obligation, if agreed between the borrower and the lender,
- (a) other fees payable by the borrower to the lender up to the date for settlement, and
- (e) a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for sale, if those expenses have actually been incurred by the lender, and any other reasonable expenses incurred by the lender.

(2) The right of the borrower to redeem the collateral has priority over the right of any other person to redeem that collateral.

Appointment of receiver or manager

67. A lender in whose favour a security interest is created may, upon default of the borrower,

- (a) appoint a receiver or manager in accordance with the provisions of a credit agreement; or
- (b) apply to court for the appointment of a receiver or manager to
 - (i) take possession of and protect the property;
 - (ii) collect the rents and profits derived from the property; and
 - (iii) realise the security interest on behalf of the lender.

Registration of appointment or removal of receiver or manager

68. (1) A person who

- (a) appoints a receiver or manager; or
- (b) obtains an order for the appointment of a receiver or manager

shall, within five days of the occurrence of the events in paragraph (a) or (b) submit a notice to that effect to the Registry.

(2) The Registry shall enter and relate the notice of appointment of a receiver or manager with the relevant registration in respect of the borrower.

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(3) Where a

- (a) person appointed receiver or manager of the property ceases to act as receiver or manager, or
- (b) person who has entered into possession relinquishes possession

the lender shall, within ten days of the occurrence of the events in paragraph (a) or (b), submit a notice to that effect to the Registry.

(4) A person who fails to submit a notice under this section is liable to pay an administrative penalty of the monetary equivalent of one thousand penalty units.

Supervisory and Enforcement Role of Bank of Ghana under this Act

Functions of the Bank under this Act

69. (1) In furtherance of this Act, the Bank shall

- (a) promote the effective functioning of the Registry;
- (b) promote and support the development of a fair, transparent, competitive, and accessible credit market;
- (c) collaborate with the Lands Commission, Registrar-General's Department, the Driver and Vehicle Licensing Authority and any other relevant registry for the purpose of effective implementation of this Act;
- (d) receive complaints from the public about alleged contraventions of this Act;
- (e) monitor the credit market to detect and prevent conduct that is prohibited by this Act;
- (f) conduct investigations to ensure compliance with this Act;
- (g) issue and enforce compliance orders;
- (h) promote public awareness of credit matters, through
 - (i) public education in the form of the design and dissemination of information to the public, or
 - (ii) the provision of guidance to the credit market and industry, or
 - (iii) adoption of other measures to develop public awareness of the provisions of this Act;
- (i) advise the Minister on matters of national policy related to credit and on the determination of standards as regards protection of the rights of borrowers and lenders in terms of this Act; and

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- (j) report annually on the volume and cost of different types of credit products, market practices relating to those products, and their implications for the choice for the borrower and competition in the credit market to the Minister.
- (2) In furtherance of subsection (1), the Bank may
 - (a) have regard to international developments in the field of credit and financing; or
 - (b) consult a person, organisation or institution about a matter.

Rules by the Bank

70. The Bank may, by a Notice, make rules for the effective implementation of this Act.

Investigation

- 71.** Where the Bank has reason to suspect that a person has
- (a) committed an offence under this Act, or
 - (b) committed the offence of fraud or dishonesty in relation to a credit agreement

the Bank may conduct investigations as it considers necessary in pursuance of this Act.

Examination by the Bank

72. (1) The Bank may, in the performance of its supervisory function, examine the books, accounts, documents and transactions of a lender who is subject to the supervision of the Bank and may make copies or take possession of the records of that lender.

(2) The Bank may appoint a person to perform the function specified in subsection (1) on terms and conditions determined by the Bank.

(3) A lender who is subject to supervision by the Bank shall give the Bank access to and shall produce books, accounts, documents and information required to conduct the examination.

Order for search of premises

- 73.** (1) Where the Bank has reasonable grounds to suspect that
- (a) an action prohibited by this Act has taken place, is taking place, or is likely to take place on or in the premises,

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- (*b*) an article connected with an investigation into the prohibited conduct is in the possession of, or under the control of a person who is on or in the premises, or
- (*c*) a book, the production of which has been requested by the Bank but which has not been produced in compliance with the direction is in the possession of a person who is in the premises or has control of that premises

the Bank may apply to a court for the issue of a warrant authorising the Bank or a person named in the warrant to enter and search the premises.

- (2) A person authorised to enter and search premises may
- (*a*) search any person on the premises if there are reasonable grounds to believe that the person has personal possession of an article or document that has a bearing on an investigation being undertaken by the Bank;
 - (*b*) examine an article or document that is on the premises and that has a bearing on an investigation being undertaken by the Bank;
 - (*c*) request information from
 - (i) the owner of an article or document,
 - (ii) a person in control of the premises where the article or document is kept,
 - (iii) a person who has control of the article or document, or
 - (iv) any other person who may have information about that article or document;
 - (*a*) take extracts from, or make copies of, any book or document that is in the premises and has a bearing on an investigation being undertaken by the Bank; and
 - (*e*) use any computer system on the premises, or require assistance of a person on the premises to use that computer system, to
 - (i) access data contained in or available to that computer system;
 - (ii) reproduce a record from that data;
 - (iii) seize an output from that computer for examination and copying; and

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- (iv) attach, and if necessary, remove from the premises for examination and safekeeping, any item that has a bearing on an investigation being undertaken by the Bank.

(3) In this section “premises” includes structure, building, place, aircraft, vehicle and vessel.

Power of court to make certain orders

74. Where on the application by a person alleging infringement under this Act, it appears to a court that another person

- (a) has committed an offence under this Act;
- (b) has contravened the conditions or restrictions of a licence or a code of conduct issued by or with the permission of the Bank; or
- (c) is about to do an act that, if done, would be an offence or contravention of this Act

the court may, without limitation to other orders it may make, make an order to secure compliance with any other order under this section, and direct that other person to do or refrain from doing a specified act.

Administrative sanctions

75. Where there is an infringement under this Act, the Bank may impose an administrative penalty of not more than the monetary equivalent of five thousand penalty units and in the case of a continued breach, to an additional penalty of the monetary equivalent of not more than fifty penalty units for each day the breach continues.

Rights of Borrower

Right to apply for credit

76. (1) A person who has a legal capacity to enter into a contract may apply to a lender for credit.

(2) A lender may refuse to enter into a credit agreement with a prospective borrower on reasonable commercial grounds consistent with the customary risk management and underwriting practices of the lender.

(3) This Act does not establish a right of a person to require a lender to enter into a credit agreement with that person.

Protection against discrimination in respect of credit

77. (1) A lender shall not discriminate against a person on the grounds of gender, race, colour, ethnic origin, religion, creed, social or economic status or use any of these grounds as the basis to

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- (a) assess the ability of a person to meet the obligations of a proposed credit agreement;
- (b) refuse an application for entry into a credit agreement, or to enter into a credit agreement;
- (c) determine an aspect of the cost of a credit agreement to the borrower;
- (a) propose or agree on the terms and conditions of a credit agreement;
- (e) assess or require compliance by the person with the terms of a credit agreement;
- (j) exercise any right of the lender under a credit agreement, this Act or any legislation relating to credit; or
- (g) determine whether to continue, enforce, seek judgment as regards a credit agreement or terminate a credit agreement.

(2) A person aggrieved by a decision of a lender that appears to have been made contrary to subsection (1), may make a complaint to the Bank for redress.

Delivery of documents

78. A lender may deliver a document required to be delivered to a borrower

- (a) in person;
- (b) by ordinary mail;
- (c) by facsimile;
- (a) by electronic-mail;
- (e) by printable web-page; or
- (j) by any other means agreed between the lender and the borrower.

Credit rights of borrower

79. (1) A lender shall not in response to a right exercised by a borrower under this Act

- (a) penalise the borrower;
- (b) alter, or propose to alter the terms or conditions of a credit agreement with the borrower to the detriment of the borrower; or
- (c) take an action to accelerate, enforce, suspend or terminate a credit agreement with the borrower.

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(2) In a credit agreement a lender shall impose on a borrower an interest rate that is calculated on an annual basis and not on a monthly basis.

(3) Where a credit agreement provides for the application of a penal interest rate on a delayed repayment of

- (a) the principal amount of the loan,
- (b) the interest on the principal amount of the loan, or
- (c) both the principal amount and the interest on the principal amount of the loan

the agreed penal rate shall be applied on the amount of the delayed payment only and not on the total amount of the outstanding loan.

(4) Where a credit agreement or the provision of a credit agreement is declared by a court to be unlawful, and severed from the agreement, the lender in that agreement shall not, in response to that decision

- (a) alter the terms or conditions of any other credit agreement with a party to the impugned agreement, except to the extent necessary to correct the unlawful provision, or
- (b) take an action to accelerate, enforce, suspend or terminate another credit agreement with another party to the impugned agreement.

Confidentiality, personal information and borrower credit records

80. (1) A lender or a person who acts on behalf of a lender shall not disclose information obtained from a borrower unless the disclosure is required by

- (a) this Act;
- (b) the Credit Reporting Act, 2007 (Act 726);
- (c) any other law; or
- (a) a court of competent jurisdiction.

(2) Despite subsection (1), a lender subject to the consent of the borrower, may disclose information obtained from the borrower to another person.

Pre-agreement disclosure

81. (1) A lender shall provide a borrower with a clear, comprehensive and accurate information regarding a credit agreement and shall inform a borrower of the rights and responsibilities of that borrower.

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(2) A lender regulated by the Bank shall not conclude a credit agreement with a prospective borrower unless the lender provides the prospective borrower with a pre-agreement statement and quotation in the form specified in the Schedule.

(3) A pre-agreement statement shall specify

- (a) the principal amount;
- (b) the proposed disbursement schedule of the principal debt;
- (c) the interest rate;
- (d) the total amount involved in the proposed agreement;
- (e) the proposed repayment schedule;
- (f) the basis of any cost that may be assessed if the borrower breaches the contract.

(4) Any charges or fees that are not disclosed to a borrower in a pre-agreement statement prior to the execution of a credit agreement, shall not be payable.

(5) A lender who contravenes this section is liable to an administrative penalty of the monetary value of one thousand five hundred penalty units to be paid to the Bank.

(6) In furtherance of subsection (3) a borrower may sue a lender for damages for loss suffered as a result of a contravention.

Account statement

82. The lender shall not later than five days after the request of a borrower, provide a statement capturing the status of a loan including, any payment made, remaining balance, fees and interest.

Miscellaneous Provisions

Regulations

83. The Minister may, in consultation with the Board, by legislative instrument make Regulations for the effective implementation of this Act.

Method of recourse to Court

84. A person who seeks recourse to the Court for any remedy under this Act shall do so in accordance with the High Court (Civil Procedure) Rules, 2004 (C.I. 47) or the District Court Rules, 2009 (C.I. 59) .

Interpretation

85. In this Act, unless the context otherwise requires,

“accession” in relation to goods, means goods that are physically united with other goods in a manner that the identity of each of the original goods is not lost;

“Bank” means the Bank of Ghana continued in existence under subsection (1) of section 1 of the Bank of Ghana Act, 2002, (Act 612);

“bank” means any other bank other than the Bank of Ghana, issued with banking licence in accordance with the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930);

“Board” means the governing body of the Bank of Ghana;

“borrower” means a person who enters into a credit agreement with a lender;

“cash proceeds” means money, cheques, deposit accounts or other similar medium of exchange;

“collateral” means movable or immovable property that is subject to a security interest;

“collateral identification” includes

(a) in the case of a vehicle, the vehicle identification or chassis number marked or attached to the body frame by the manufacturer;

(b) in the case of other movable property the serial number marked on or attached to the property by the manufacturer; and

(c) in the case of immovable property, the plot number, land title registration or deeds registration number or geographical coordinates of the land or building;

“creditor” means a person to whom money is owed;

“debtor” means a person who owes payment or other performance of a secured obligation, whether or not that person is the borrower who granted the security interest, including a secondary obligor such as a guarantor of a secured obligation;

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“equipment” means a tangible property that is primarily used or intended to be used by the borrower in the operation of its business other than inventory or consumer goods;

“finance lease” means a lease agreement, even if not nominally referred to as a lease, under which, at the end of the lease

(a) the lessee may acquire ownership of the asset that is the object of the lease;

(b) the lessee automatically becomes the owner of the asset that is the object of the lease; and

(c) the asset has no more than a nominal residual value;

“hire purchase agreement” means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee;

“inventory” means goods that are

(a) held by a person for sale or lease;

(b) to be provided under a contract for services;

(c) raw materials or work in progress; or

(d) materials used or consumed in a business;

“lender” means a person who enters into a credit agreement with a borrower and includes

(a) a person who advances credit;

(b) a person that sells goods on credit;

(c) a person that provides services on credit;

(d) a finance lessor; and

(e) a buyer of accounts receivable;

“lien” includes an interest in property created by an order, a decree, a judgment, or any other statutory lien;

“maximum amount” means the principal loan amount, interest and any charges or fees for the period for which a registration is effective under this Act;

“netting agreement” means an agreement between two or more parties that provides for one or more of the following:

(a) the net settlement of payments due in the same currency on the same date whether by novation or otherwise;

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- (*l*) upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of the sums into a single currency and netting into a single payment by one party to the other; or
- (*c*) the set-off amounts calculated as set out in paragraph (*l*) under two or more netting agreements;

“novation” means the variation of an obligation under a contract with the consent of the parties or the replacement of a party to a contract with the consent of the parties;

“perishable collateral” includes food products, agricultural products, pharmaceutical products, chemical products and any other collateral subject to decay or expiration;

“prior law” means any law that regulates security interest before the commencement of this Act;

“proceeds” means an identifiable or traceable property received as a result of sale or other disposition, collection, lease or licence of collateral, civil or natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of collateral;

“product or mass” means tangible property that is so physically associated or united with other tangible property that it has lost its separate identity;

“property” includes movable and immovable property;

“purchase money security interest” means

- (*a*) a security interest in collateral retained by a seller that secures an obligation to pay an unpaid portion of the purchase price of the collateral;
- (*l*) a security interest taken by a person who gives value for the purpose of enabling a borrower to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or
- (*c*) an interest of a finance lessor but does not include a transaction of sale and lease back to the borrower;

“register” means a register of security interest kept and maintained by the Registry;

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“Registry” means the Collateral Registry established under section 18;

“registration form” means an electronic form prescribed by the Registry in the Registry Rules for the purpose of registering security interest;

“Registry Rules” means a notice issued by the Bank for the effective implementation of this Act;

“registrant” means a lender or a representative or an agent of the lender registering security interest or undertaking post-registration activities on the register;

“security interest” means a proprietary right in a movable or immovable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest and regardless of the type of asset, the status of the fixed and floating charge, chattel mortgage, mortgage over an immovable property, contractual lien, pledge, outright or security assignment of receivables, reservation of title, finance lease, trust for the purposes of security or other encumbrance of any nature created by an agreement other than a lien arising by operation of law;

“specialised deposit-taking institution” means a body corporate which engages in the deposit-taking business and is issued with a licence in accordance with the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930); and

“value” means consideration that is sufficient to support a simple contract, and includes an antecedent debt or liability, and a binding commitment to provide future value.

Conflict of laws

86. Where there is a conflict between this Act and any other enactment regarding the creation, perfection, effectiveness of security interests against a third party, enforcement and priority, the provisions of this Act shall supersede the provisions of that enactment.

Transitional provisions

87. (1) Subject to subsection (2), prior law shall apply to a matter that is the subject of proceedings before a court or an arbitral tribunal commenced before the entry into force of this Act.

(2) Where an attempt to enforce a security interest has been made by a lender before the entry into force of this Act, enforcement may continue under the prior law or may proceed under this Act.

(3) A security interest created before February 2010 shall, subject to subsections (5) and (6) be registered in accordance with section 23 within twelve months from the date of commencement of this Act.

(4) A person other than an individual lender who contravenes subsection (3) is liable to pay an administrative penalty not exceeding the monetary equivalent of one thousand penalty units.

(5) The priority rules and other incidences of a registration under this Act shall not apply to a registration made under subsection (3).

(6) Where the security interest is not registered before the expiration of the transitional period, the prior security interest is effective against third parties only from the time it is registered under this Act.

Repeals and savings

88. (1) The Borrowers and Lenders Act, 2008 (Act 773) is repealed.

(2) Despite the repeal of the Borrowers and Lenders Act, 2008 (Act 773) any Regulations, rules, orders, directives, notification, instructions or any other executive or administrative act lawfully made, given or done under the Borrowers and Lenders Act, 2008 (Act 773) shall upon the coming into force of this Act continue in force until amended, reviewed, terminated or revoked in accordance with this Act.

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SCHEDULE
(Section 81 (2))
Pre-agreement Disclosure

PRE-AGREEMENT TRUTH IN LENDING DISCLOSURE STATEMENT:

(This is neither a Contract nor a commitment to Lend)

Lender's Name:
 Applicant

Prepared by:

Address:

Application No:

Date prepared:

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit at a yearly rate%	The amount the credit will cost you (specify currency and amount) US\$ or GH¢	The amount of credit provided to you or on your behalf US\$ or GH¢	The amount you will have paid after making all payments as scheduled US\$ or GH¢
REQUIRED DEPOSIT PAYMENTS:			
Your payment schedule will be:			
Number of Payments		Amount of Payments	When Payments Due
<input type="checkbox"/> DEMAND FEATURE: This obligation has a demand feature <input type="checkbox"/> VARIABLE RATE FEATURE: This loan contains a variable rate feature. A variable rate disclosure has been provided earlier.			

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<p>You may obtain the insurance from anyone you want that is acceptable to creditor. If you purchase property or flood insurance from creditor, you will pay US\$ or GH¢ for a one year term.</p>
<p>SECURITY: You are giving a security interest in: <input type="checkbox"/></p> <p>The goods or property being purchased <input type="checkbox"/> Real property you already own <input type="checkbox"/></p>
<p>FILING FEES: US\$ or GH¢</p> <p><input type="checkbox"/> LATE CHARGE: If a payment is more than [] days late, you will be charged %</p> <p><input type="checkbox"/> PREPAYMENT: If you pay off early, you</p>
<p><input type="checkbox"/> will or will not have to pay penalty of []</p> <p><input type="checkbox"/> may or may not be entitled to a refund of part of the finance charge.</p>

Date of *Gazette* notification: 8th May, 2020.

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MEMORANDUM

The Borrowers and Lenders Act, 2008 (Act 773) introduced significant innovations into Ghana's credit market. The Registry and the Secured Transactions Regime introduced by the Act had the potential to improve access to finance for small and medium-scale enterprises in line with the trajectory across the world.

The Act is however fraught with problems which undermine its own broad objectives. A comprehensive review of global best practices reveals that the regulatory regime put in place by the Borrowers and Lenders Act on the Registry is not adequate. The outstanding issues and questions relate to detailed rules on systems and procedures that support a modern Secured Transactions Regime. The loopholes in Act 773 include the use of a manual registry, the lack of express provisions such as priority rules, provisions on proceeds for realisations and inadequate enforcement provisions.

The Bank of Ghana has sought to mitigate the limitations through Notices and Guidelines. Whereas the Bank's powers to issue the said Notices and Guidelines are derived from the Act itself and may be exercised in appropriate situations to fill in gaps existing in the laws, administrative Notices and Guidelines may not be the appropriate vehicle to drive change which borders on the legal rights of parties to a credit agreement. It is therefore necessary to enact new legislation to address this issue.

The Bill seeks to repeal the Borrowers and Lenders Act, 2008 (Act 773), to establish a Collateral Registry, to provide a legal framework for the registration and enforcement of security interests in collateral, to establish an order of priority of security interests and generally to provide for credit agreements, to regulate transactions between borrowers and lenders.

Clauses 1 to 4 deal with application, creation of security interest and credit agreement. *Clause 1* provides for the application of the Bill with respect to specified security interest. However, security interests specified in subclause (3) of *clause 1* are excluded from the application of the Bill.

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Clause 2 deals with the application of the Bill with respect to other credit agreements. The rights of a consumer in an enactment that offers the consumer protection are not affected by the Bill. *Clauses 3* and *4* define security interest and credit agreement respectively.

Clauses 5 to *13* deal with the effectiveness of a security interest between the lender and borrower and collateral description. The requirement for the execution of a credit agreement is set out in *clause 5*. Despite the requirement for registration under the Bill, a credit agreement which has not been registered under the Bill is effective between the parties to the agreement but the right of the lender to enforce the security interest is subject to the rights of any other lender or person entitled to priority under the Bill, *clause 6*. *Clause 7* provides that a security interest in property does not operate as a transfer of title in property from the borrower to the lender. *Clause 8* requires a credit agreement to contain a description which reasonably identifies the property to be provided as collateral. However, secured obligations under a credit agreement may be generically described, *clause 9*.

Clause 10 provides for the automatic extension of a security interest to identifiable proceeds of the collateral. *Clauses 11* to *13* provide for contractual limitations on the creation of a security interest in account receivables, contractual limitations on the creation of a security interest in deposit accounts and contractual limitations on the creation of a security interest in intellectual property respectively.

Clauses 14 to *17* deal with the effectiveness of a security interest against third parties. A security interest is effective against third parties when the security interest has been created and registered, *clause 14*. *Clause 15* deals with the extension of security interest to proceeds. *Clause 16* provides for the circumstances under which a security interest continues to be effective against third parties. By *clause 17*, concurrent registration is not necessary for the effectiveness of a security interest.

Clause 18 establishes the Collateral Registry the functions of which are set out in *clause 19*. The appointment and functions of the Registrar

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are set out in *clauses* 20 and 21. The Board is required by *clause* 22 to appoint other officers and employees that the Bank considers necessary for the effective implementation of the functions of the Bank under the Bill.

Clause 23 makes it mandatory for a lender in whose favour a security interest is created to register the interest with the Registry. The effectiveness of registration is dealt with by *clause* 24. *Clause* 25 provides for the grounds for refusal of a registration. *Clause* 26 deals with authorisation to register. The Registry is accessible to the public under *clause* 27. A person who seeks to register a security interest is required to provide specific information listed in *clause* 28. The Registrar is required by *clause* 29 to acknowledge the registration. A registrant may register an amendment of a registration under *clause* 30. *Clauses* 31 and 32 deal with the discharge of registration and discharge and amendments of registration by the Registrar respectively. The period for the effectiveness of a registration is the period stated in the registration form pursuant to the credit agreement. The right of a person to conduct a search in the Register is provided in *clause* 34.

Clauses 35 to 41 provide for general priority rules. Irrespective of the time of registration, a security interest registered under the Bill shall have priority over any other registration under any other enactment, *clause* 35. *Clauses* 36 and 37 provide for priority between security interests and priority of a security interest in proceeds. A lender may at any time in writing, subordinate its priority under this Act in favour of any existing or future lender or other creditor without the need for the borrower to be a party to the subordination, *clause* 38.

Priority of future advances and priority of purchase money security interest are dealt with by *clauses* 39 and 40 respectively. Under *clause* 41, a security interest in goods that is made effective against third parties before the time that the goods become an accession has priority over a claim to

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the goods as an accession made by a person with an interest in the goods. *Clause 42* deals with priority with respect to transferred collateral.

Clauses 43 to 45 deal with priority of transferee of money, priority of transferee of funds and priority of a purchaser of a negotiable instrument, a document of title or a security certificate respectively. The priority of a buyer or lessee is dealt with by *clause 46*.

Priority rules related to interest in immovable property and fixtures are dealt with by *clauses 47 to 49*. A security interest in an immovable property in the form of a mortgage that is made effective against a third party by the Bill has priority over any other mortgage subsequently registered under the Bill, the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (NRCD 96), *clause 47*. The priority of a right to payment related to immovable property and priority of security interest in fixtures are dealt with by *clauses 48 and 49* respectively.

Special priority provisions for lien arising by operation of law are provided for in *clauses 50 to 52*. *Clause 50* provides for the circumstances under which a possessory lien in a movable property created by operation of law and held by a person who provided materials or services in respect of that movable property that is the subject of a security interest made effective under the Bill has priority over that security interest. A lien with respect to immovable property is provided under *clause 51*. The interest of a judgment creditor in the collateral should have priority over any security interest in the same collateral if the security interest is not made effective against third parties at the time of execution of the judgment, *clause 52*.

Clauses 53 to 68 deal with repayment and recovery of debt. *Clause 53* provides for the obligation of a borrower or guarantor. A borrower or guarantor may settle the credit amount at any time, subject to notice requirements and the conditions provided for in the credit agreement. However, where an event of default arises under a credit agreement and the lender decides to realise the security interest of the lender *clause 54* requires that the lender gives notice of the default to the borrower in writing and request the borrower to pay the amount due within a period of thirty days. *Clause 55* provides a lender, upon satisfaction of the notice

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requirement under *clause 54*, with specific remedies on default by the borrower.

The right of the lender to take possession of the collateral or render the collateral unusable without removal is provided by *clause 56*. Where a lender is unable to enforce a right of possession in a peaceable manner, *clause 57* empowers the lender, upon a warrant issued by a court and subject to the rights of third parties or other persons in possession of the collateral, to use the services of the police to remove the collateral or evict the borrower where the collateral is immovable property. *Clause 58* empowers a lender to collect and apply an account receivable, security, moneys in a deposit account, cash in hand or a negotiable instrument taken as collateral to the satisfaction of the obligation secured by the collateral if the borrower is in default.

Clause 59 provides for the means by which a lender may realise the collateral and the price at which the collateral is sold is required to be commercially reasonable. A lender who intends to realise collateral is required to give a notice of at least ten days before the sale, *clause 60*. The effect of the sale of collateral under *clause 59* is that any other security interest in that collateral and its proceeds are extinguished, *clause 61*. *Clause 62* requires a lender who sells collateral to submit a statement of account in writing with respect to the matters listed under the *clause*, to the persons specified by *clause 60*. A lender who realises collateral is required to apply the proceeds in accordance with the order set out in *clause 63*.

Clause 64 empowers a lender who has priority over all other lenders to propose to retain the collateral in full or in partial satisfaction of the obligation secured by the collateral, after default of payment by the borrower. The effect of retention of collateral is provided in *clause 65*. The right of a person to settle the debt and redeem collateral at any time before the lender sells the collateral or before the lender is deemed to retain the collateral is provided by *clause 66*. A lender in whose favour a security interest is created is empowered to appoint a receiver or manager in accordance with the provisions of the credit agreement, *clause 67*. A person who appoints a receiver or manager or obtains an order for the

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appointment of a receiver or manager is required to submit a notice to that effect to the Registry, *clause 68*.

The supervisory and enforcement role of the Bank of Ghana under the Bill are dealt with by *clauses 69 to 75*. *Clause 69* provides for the functions of the Bank in the Bill including the promotion of the effective functioning of the Registry, the promotion and support of the development of a fair, transparent, competitive and accessible credit market. The Bank is also required to issue and enforce compliance orders and advise the Minister on matters of national policy related to credit and on the determination of standards as regards protection of the rights of borrowers and lenders in terms of the Bill. *Clause 70* empowers the Bank to make rules for the effective implementation of the Bill. *Clause 71* confers investigative powers on the Bank where the Bank has reason to suspect that a person has committed an offence under the Bill or has committed the offence of fraud or dishonesty in relation to a credit agreement. *Clauses 72 and 73* confer on the Bank the power to examine the books, accounts, documents and transactions of a lender and to apply to a court for the issue of a warrant authorising the Bank or a person named in the warrant to enter and search the premises of the lender respectively.

Clause 74 empowers the Court to make certain orders where on an application to the Court, it appears to the Court that a person has committed an offence under the Bill, has contravened the conditions or restrictions of a licence or a code of conduct issued by or with the permission of the Bank, or is about to do an act that, if done, would be an offence or contravention of the Bill. The powers of the Bank to impose administrative sanctions are set out in *clause 75*.

Clauses 76 to 82 deal with the rights of a borrower. The right of a person who has legal capacity to enter into a contract to apply for credit is provided under *clause 76*. *Clause 77* protects a borrower against discrimination in respect of credit. *Clause 78* provides for the means by which a document may be delivered to a borrower and the credit rights of a borrower is protected under *clause 79*. *Clause 80* imposes a duty of

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confidentiality on a lender with respect to the personal information and credit records of a borrower. A lender has a duty under *clause 81* to provide a borrower with clear, comprehensive and accurate information regarding a credit agreement. *Clause 82* requires a lender to provide an account statement to a borrower not later than five days after a request by the borrower.

Miscellaneous provisions are dealt with in *clauses 83 to 88*. The power of the Minister to make Regulations is provided by *clause 83*. *Clause 84* provides for the method of recourse to the Court. The words and phrases used in the Bill are interpreted in *clause 85*. The provisions of the Bill supersede the provisions of any other enactment where there is a conflict between the Bill and any other enactment regarding the creation, perfection, effectiveness of security interests against a third party, enforcement and priority, *clause 86*. Transitional provisions and repeal and savings provisions are set out in *clauses 87 and 88* respectively.

KEN OFORI-ATTA

Minister responsible for Finance

Date: 5th May, 2020.