USING TRUSTS TO PROTECT MOBILE MONEY CUSTOMERS

by

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Some 1.8 billion people today have a mobile phone and no bank account. Mobile money is the provision of financial service through mobile phones. It offers the substantial potential benefits of financial inclusion to poor people in poor nations. This article explores how trust law can be used to address the key risks these mobile money customers face: bankruptcy of the e-money provider, illiquidity and fraud. Prudential regulation is largely inapplicable because most providers are telecommunications companies not banks. Trusts law is a highly efficacious way to address this regulatory lacuna.

I. INTRODUCTION

While precise terminology tends to vary across countries, e-money (known elsewhere as 'mobile money') is typically defined as a type of stored value instrument that (i) is issued on receipt of funds; (ii) consists of electronically recorded value stored on a device (such as a

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server, card, or mobile phone); (iii) may be accepted as a means of payment by parties other than the issuer; and (iv) is convertible back into cash.[1] The concept of convertibility distinguishes e-money from credit cards, retail gift cards, airtime, and other payment instruments that are not readily convertible.[2] An e-money issuer may be a payment service provider, credit issuer, or telecommunications company. This article focuses on these types of 'non-bank' e-money issuers, and labels them 'Providers'. In many e-money systems, cash and e-money are usually exchanged at 'agents' of the Provider. These tend to be shops, petrol stations, and other retail outlets.[3] Payments between e-money customers tend to be made through mobile phones.[4]

E-money is growing rapidly around the world. In 2012 almost 30 million active users of e-money services performed 224.2 million e-money transactions totalling $4.6 billion. In Sub-Saharan Africa there were 81.8 million customers, and twice as many e-money users as Facebook users. There are now more e-money agent outlets than bank branches in at least 28 countries.[5] Kenya's e-money sector is particularly prominent, due primarily to the explosive growth of M-PESA, an e-money product launched in 2007 by Safaricom, a Vodafone subsidiary. Within five years of its launch, 15 million users have signed up to M-PESA – more than half of Kenya's adult population.[6]

The rapid growth of e-money has prompted considerable interest from the international development community.[7] This is because by using existing infrastructure, particularly mobile phones and agents, transaction costs are sharply reduced, enabling banks and non-banks to cheaply and effectively provide financial services to large numbers of customers currently without access to such services (the 'unbanked').[8] Research suggests that providing financial services to the unbanked helps them to better deal with economic shocks, manage

[1] See Alliance for Financial Inclusion, "Guideline Note Mobile Financial Services: Basic Terminology" (CGAP Report, 2012); Ali Ndilawana, Olga Morawczynski & Oliver Popov, "Mobile Money in Uganda: A Preliminary Study" (Paper presented at the 2nd International Conference on Mobile Communication Technology for Development, Kampala, 2010) at 1; Janet Hernandez, Jeff Bernstein & Amy Zirkle, "The Regulatory Landscape for Mobile Banking" (GSR Discussion Paper, International Telecommunications Union, 2011).
[2] Ali Ndiwalana et al, ibid at 1.
[3] Alliance for Financial Inclusion, above n 1.
[4] Ibid.
[5] Claire Pénicaud, "State of the Industry: Results from the 2012 Global Mobile Money Adoption Survey" (Report, GSMA, 2013) at 26.
[6] Ignacio Mas and Dan Radcliffe, "Mobile Payments Go Viral: M-PESA in Kenya" (2010) in P. Chuhan-Pole and M. Angwafo (World Bank), eds, 'Yes Africa Can: Success Stories from a Dynamic Continent' (August 2011) 32 *Capco Institute's Journal of Financial Transformation* at 169.
[7] Beth Jenkins, "Developing Mobile Money Ecosystems" (Report, International Finance Corporation and Harvard Kennedy School, 2008) at 2.
[8] Timothy R Lyman, Mark Pickens & David Porteous, "Regulating Transformational Branchless Banking: Mobile Phones and Other Technology to Increase Access to Finance" (2008) CGAP Focus Note No 43 at 2–3 [Regulating Transformational Branchless Banking]; Michael Tarazi & Paul Breloff, "Regulating Banking Agents" (2011) CGAP Focus Note No 68 at 1 [Regulating Banking Agents].

liquidity needs, make investments, and ultimately move out of poverty.[9] Bringing the unbanked into the formal financial system tends to come under the broad development objective of 'financial inclusion'.[10]

However, the potential of e-money to extend financial services to unbanked communities must be balanced with adequate customer protection. This is because, and as explained below, many of the unbanked will have had little, if any interaction with formal financial services, and so may be particularly susceptible to mistreatment in an e-money scheme. Dias and McKee have argued that a customer protection framework should include customer awareness safeguards, transparent fees, and clear, well-publicised complaints procedures.[11]

A particularly important component of such a framework is protecting 'customers' funds', which are the monies that customers give to the Provider in exchange for an equivalent value of e-money. Such funds are stored on the Provider's server and not intermediated, and so are not usually protected by prudential regulation.

An alternative protection involves using trusts law in relation to customers' funds. A number of jurisdictions seek to use this protection by requiring the Provider to hold customers' funds in a trust account. These jurisdictions include Malawi,[12] Afghanistan,[13] Kenya,[14] Sri Lanka,[15] and several Pacific Island countries.[16] This paper explores how trusts law can protect customers' funds and ultimately help minimise novel risks customers face when using e-money.

There are three main risks facing e-money customers, each of which relates to the Provider or its agents: insolvency, illiquidity and operational risk. This paper explores these risks as they apply to the Provider. Trusts can be used to protect customers' funds through fund isolation, fund safeguarding, and reducing operational risk. These protections can be implemented by specific provisions in a trust, which come under three main categories. First, a declaration of

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[9] Ahmed Dermish, Christoph Kneiding, Paul Leishman, Paul and Ignacio Mas, 'Branchless and Mobile Banking Solutions for the Poor: A Survey of the Literature' (2012) 6(4) *Innovations* 81 at 93.
[10] Shunko Rojas, "Financial Inclusion: Financial Services for the Unbanked" (Research Memorandum, Institute for Global Law & Policy, 2012).
[11] Denise Dias and Katherine McKee, 'Protecting Branchless Banking Consumers: Policy Objective and Regulatory Options', CGAP Focus Note No 64, September 2010.
[12] Reserve Bank of Malawi, *Guidelines for Mobile Payment Systems* (March 2011).
[13] Da Afghanistan Bank, *Article Two: Money Service Providers Regulation*, <http://www.centralbank.gov.af/pdf/MoneyServiceProvider_English.pdf>.
[14] Alliance for Financial Inclusion, "Case Study: Enabling E-money Transfer: The Central Bank of Kenya's Treatment of M-PESA" (Report, AFI, 2010).
[15] Simone di Castri, "Enabling E-money Policies in Sri Lanka: The Rise of eZ Cash" (Report, GSMA, July 2013).
[16] For example, Fiji, Papua New Guinea, Vanuatu, Samoa & Tonga: Joep Roest, "E-Money Trust Arrangements Review in the Pacific" (Presentation given at the APEC Conference, Pacific Financial Inclusion Programme, 18 October 2012).

trust establishes the relationship of trustee and beneficiary between the Provider and the customers so as to effect fund isolation and protect customers' funds from the potential insolvency of the Provider. Secondly, clauses of the trust deed should include customer protection rules relating to liquidity, restrictions on use of funds, and diversification to assist in effecting fund safeguarding. Third, clauses of the trust deed should authorise the regulator to act as a 'Protector', which will involve the auditing and monitoring of the trust accounts.

This paper explores this argument in six parts. This section, Part I, introduces e-money and the issue of storage of customers' funds. Part II explores the three main risks that can arise in relation to customers' funds. Part III explains the three trust protections that can be used to minimise risks to customers' funds. Part IV discusses how a regulator can implement the trust protections in theory. Part V details how a regulator can implement the trust protections in practice and Part VI concludes. All our recommendations here are subject to obtaining legal advice on the law in individual jurisdictions. Trusts must be tailor-made to the specific jurisdictions in which they are created.

II. THE MAIN RISKS TO CUSTOMERS' FUNDS

A. *Regulatory Interest and Caution About E-Money*

Many members of the international development community and regulators in developing countries are interested in the experiences of Kenya and other sophisticated e-money sectors because of the potential of e-money to contribute to financial inclusion.[17] In late 2010 the G20 launched the Global Partnership for Financial Inclusion in Seoul. Regulators in many developing countries, such as Malaysia[18] and India,[19] are increasingly required to further financial inclusion as part of their mandate.[20] Moreover, regulators from 40 countries have

[17] See, for example, Mudita Tiwari & Deepti KC, 'Mobile Payment Systems: What Can India Adopt from Kenya's Success?', CGAP (2 April 2013): online CGAP <http://www.cgap.org/blog/mobile-payment-systemswhat-can-india-adopt-kenya%E2%80%99s-success>; James Bilodeau, William Hoffman and Sjoerd Nikkelen, "Findings from the Mobile Financial Services Development Report," in World Economic Forum, ed, *Mobile Financial Services Report* (World Economic Forum USA, 2011); Gunnar Canmer, Emil Sjôblom, & Caroline Pulver, "What Makes a Successful Mobile Money Implementation? Learnings from M-PESA in Kenya and Tanzania", *GSMA* (2009), online: GSMA <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/03/What-makes-a-successful-mobile-money-implementation.pdf>; Financial Stability Board & International Monetary Fund, "Financial Stability Issues in Emerging Market and Developing Economies: Report to the G20 Finance Ministers and Central Bank Governors" (Report, 2 November 2011).

[18] Central Bank of Malaysia Act 2009, ss 5(2)(f), 49(b) <http://www.bnm.gov.my/documents/act/cba2009_01.pdf>.

[19] See, for example, Chakrabaty, 'Financial Inclusion: A Road India Needs to Travel' (Speech, Reserve Bank of India, 12 October 2011) <http://rbi.org.in/scripts/BS_SpeechesView.aspx?Id=607>.

[20] See, for example, Gokarn, "Financial inclusion – a consumer centric view" (Vith Narayanan Memorial Lecture, Kumbakonam, 21 March 2011); Hawkins, Penelope, "Financial access and financial stability", in Bank for International Settlements, ed, Central Banks and the Challenge for Development (Bank for International Settlements, 2006) at 65–79; Zeti, "Customer protection and financial education" (Welcoming address at the

signed the Maya Declaration — publicly committing to increase financial inclusion in their respective countries. The Declaration includes a commitment to put in place a financial inclusion policy that will create an enabling environment that "makes full use of appropriate innovative technology", which includes e-money.[21]

Despite this increased interest, many regulators have been reluctant to permit e-money to operate in their jurisdictions to the same extent as Kenya and other countries with well-established e-money sectors, such as the Philippines. For example, India only permits Providers to use 'semi-closed wallets' in which stored value can only be traded between customers of the same scheme, and cannot be cashed out.[22]

This reluctance may be partly due to a lack of understanding of the risks involved in e-money and how to deal with them. Research on this topic tends to be underdeveloped.[23] Furthermore, a large-scale failure of an e-money system is yet to occur, so it is currently difficult for regulators to draw lessons from failures.[24] This makes research of the type undertaken in this article particularly important, because a poorly managed failure of an e-money system in one country may further discourage e-money regulators in other countries.[25]

B. Emerging Risks, Particularly Storage of Customers' Funds

Recent occurrences of fraud and theft support the reluctance of countries such as India to embrace e-money. For example, in August 2013, Uganda's Annual Police Crime and Traffic Report cited an increase in cybercrime due to e-money and use of automated teller machines.[26] Theft of customers' funds has emerged as a particularly important issue. This is largely due to the discovery, in May 2012, that employees of MTN Uganda, a telecommunications company, had stolen around US$3.5 million of customers' funds.[27] This

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Financial Inclusion Policymakers Forum in Kuala Lumpur, 5 April 2011). AFI reported in June 2013 that 31 countries have a dedicated financial inclusion strategy, of which 17 have financial inclusion in their institutional mandate: Alfred Hannig, 'Global Trends and Challenges on Financial Inclusion' (Presentation at the AFI Conference on Financial Inclusion: Challenges and Issues for the Deposit Insurer, Manila, 20 June 2013) at 7.

[21] *Maya Declaration* (The AFI Network Commitment to Financial Inclusion, Mexico, 30 September 2011).

[22] Reserve Bank of India, *Draft Guidelines for issuance and operation of Prepaid Instruments in India 2009*, art 3.3.

[23] Michael Klein and Colin Mayer, "Mobile Banking and Financial Inclusion: The Regulatory Lessons" (World Bank, 2011) at 6.

[24] Dermish et al, above n 9.

[25] Paul Makin, 'Regulatory Issues Around Mobile Banking', http://www.oecd.org/ict/4d/44005585.pdf.

[26] Steve Candia, "Cyber Crime Increases by 14 percent: Police Report", *The New Vision* (2 August 2013) online: All Africa <http://allafrica.com/stories/201308050195.html>.

[27] Note that the funds were stolen from a 'suspense account'. This account stores funds from transactions that could not be completed. For example, if an e-money customer uses the wrong payee details, the funds will be taken from the payers' account and stored in the suspense account: Jeff Mbanga, "How MTN Lost Mobile Billions" *The Observer* (24 May 2012), online: All Africa <http://allafrica.com/stories/201205250847.html>.

event has created concern that customers' funds may not be adequately protected while they are stored with the Provider.[28]

Storage of customers' funds operates as follows: the customer deposits or 'cashes in' money ('customers' funds') with the Provider in exchange for e-money. The Provider stores the customers' funds while the customer uses e-money to trade with other customers. Later, the customer 'cashes out' any remaining balance of his or her e-money. This means that the customer receives any remaining e-money that he or she has for an equivalent amount of cash from the Provider.

It is easiest to understand regulatory concerns in relation to storage of customers' funds by comparing the operation of banks and Providers. Customers deposit money with banks. Prudential regulation, involving minimum capital levels and limitations on leverage, aims to reduce the riskiness of banks and ensure the safety of deposits.[29]

In e-money, customers' funds are being stored as an 'e-float' under the legal ownership of a Provider. Prudential regulation is not normally applied to Providers as they are not banks and are not usually permitted to intermediate customers' funds.[30] Instead, e-money is treated as a cause of 'counterparty risk' — a temporary risk while funds are transferred electronically from one party to another.[31] However, without prudential oversight, a regulatory gap exists in relation to how the Provider deals with customers' funds.

The fraud committed by employees of MTN Uganda suggests that e-money has reached the size at which this regulatory gap should be addressed. Without regulatory intervention, fraud and other forms of misuse of customers' funds are likely in the future. This is because many e-money customers will have limited education and experience with financial services (if any), and so may be particularly vulnerable.[32] Furthermore, as Providers take on larger e-floats, the consequences of misuse of customers' funds will have greater consequences, both in terms of the scale of loss for individual customers and the overall impact on the local economy. The next sub-section examines the risks that apply to customers' funds while stored with the Provider, and how trusts can contribute to minimising these risks.

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[28] See, for example, Michael Tarazi and Paul Breloff, above n 8; Kate Lauer and Michael Tarazi, "Supervising Nonbank E-Money Issuers" (CGAP Brief, July 2012).
[29] Vincent P Polizatto, "Prudential Regulation and Banking Supervision: Building an Institutional Framework for Banks" (PPR Working Paper Series vol 340, World Bank Publications, 1990).
[30] Simone di Castri, "Mobile Money: Enabling Regulatory Solutions" (Report, GSMA Mobile Money for the Unbanked, February 2013) at 10; Tarazi and Breloff, above n 8 at 3.
[31] See, for example, James J McAndrews, "E-Money and Payment Systems Risks" (1999) 17(3) Contemp Eco Pol 348.
[32] Dias and McKee, above n 11.

C. *Main Risks to Customers' Funds*

Storing funds with a non-prudentially regulated entity creates the three risks identified earlier — insolvency, illiquidity, and operational risk. This sub-section examines each risk in turn.[33]

1. *Insolvency*

As with a bank, there is a risk that the Provider may become insolvent. If this occurs, the Provider may use customers' funds to repay debts that it owes to other parties.[34] This use of funds might be required under local bankruptcy laws if customers' funds are not held under a trust.[35] This problem may be exacerbated if the Provider uses customers' funds as collateral to obtain loans from third parties.[36]

2. *Illiquidity*

A Provider should provide only as much e-money as exists in the e-money system or 'float', which is held by customers, agents, and itself. In other words there should be a 1:1 relationship between e-money and customers' funds. However, this 1:1 relationship can be broken if the Provider spends some of the customers' funds for its own purposes. For example, the Provider may use customers' funds to pay for its operating expenses rather than storing them. This may mean that when a customer seeks to cash in its remaining e-money, the Provider cannot return all of it.[37]

The 1:1 relationship is a manifestation of the 100% reserve requirement historically espoused in traditional banking as an argument for 'narrow banking' — the separation of deposit and investment banking where demand deposits are fully backed by cash or, in some proposals, highly liquid, safe assets.[38] The 1:1 ratio is particularly important in e-money schemes

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[33] This paper owes an intellectual debt to Michael Tarazi and Paul Breloff, above n 8, and Kate Lauer and Michael Tarazi, above n 29 who have examined these issues.
[34] Tarazi & Breloff, above n 8 at 6.
[35] Note that this use of funds may be required even if the customers' funds *are* clearly distinguished. The customer may be an unsecured creditor – they will be subject to the *pari passu* rule. Their funds *will* be used to pay outstanding debts.
[36] Note that in such case they may have a relatively weak claim (rather than an equal claim) against a secured creditor.
[37] Tarazi & Breloff, above n 8 at 3.
[38] For different formulations of narrow banking see: Bossone, B "Should Banks be Narrowed?" (Levy Economics Institute, Working Paper No. 354, 2002) at 2; Green, G 'The Louisiana Banking Act of 1842: Policy Making During Financial Crisis' (1969) 7 Explorations in Eco Hist 399; Pennacchi, G "Narrow Banking" (2012) 4 Ann Rev Fin & Eco 141 at 146; Milton Friedman, *A Program for Monetary Stability*, (New York: Fordham University Press, 1960); Tobin, J "A Case for Preserving Regulatory Distinctions" (1987) Proceedings 167 at 172; Robert Litan, *What Should Banks Do?*, (Brookings Institution Press, 1987); Alexandre, C, Mas, I & Radcliffe, D, "Regulating New Banking Models to Bring Financial Services to All" (2011) 54(3) Challenge 121 at 122 [Regulating New Banking Models].

operated by nonbank Providers — which are not prudentially regulated — to remove the risk of intermediation, thus ensuring customers have constant access to all of their funds.[39]

3. *Operational Risk*

Operational risk arises due to the Provider's internal activities, such as fraud, theft, misuse, negligence, or poor administration. The fraud committed by employees of MTN Uganda, described above, was a manifestation of operational risk. Whilst other aspects of operational risk exist, this article only covers fraud and theft in relation to customers' funds, and how this risk can be minimised by trust law.

III. THE THREE TRUST PROTECTIONS FOR E-MONEY

A trust is a legal relationship whereby a person, the settlor, gives legal title in property to a 'trustee', who must then hold the property (the 'trust property' or 'trust assets') on behalf of a third person — the beneficiary, who holds the 'beneficial interest' in the property.[40] A trust may be conceived of as an equitable obligation on behalf of the trustee to deal with the property given to them by the settlor for the benefit of persons (of which the trustee may be one) who may enforce the obligation.[41] There may be multiple trustees and beneficiaries,[42] and the settlor need not always create the relationship explicitly.[43] A trust may be established by the execution of a trust deed (or instrument). This is a legal document containing clauses that govern the obligations of the trustee and the rights of the beneficiary.[44] The trustee has the power to use the trust assets, however, when doing so, the trustee is usually required to comply with a number of duties that it owes the beneficiary, as the trust creates a fiduciary relationship between the parties.[45] An overarching duty is to use the trust assets for the benefit of the beneficiaries.[46] A number of other trustee duties are usually imposed on the trustee, such as to understand and adhere to its obligations under the trust deed, exercise the skill of a 'prudent' person in the performance of duties under the trust, and not profit from the office of trustee, except to the extent permitted by the trust deed.[47]

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[39] Tilman Ehrbeck and Michael Tarazi (2011), 'Putting the Banking in Branchless Banking: Regulation and the Cause for Interest Bearing and Insured E-money Savings Accounts' in World Economic Forum, *Mobile Financial Services Development Report* (2011) at 2.
[40] FW Maitland, *Equity: A Course of Lectures* (University Press, 1969) at 44.
[41] Underhill and Hayton, *Law relating to Trusts and Trustees* (17th Edn, 2007) at 2; *Re Marshall's Will Trusts* [1945] Ch 217 at 219.
[42] Graham Moffat, Gerry Bean, John Dewar, *Trusts Law: Text and Materials* (Cambridge: Cambridge University Press, 2005) at 3.
[43] Ibid.
[44] Ibid at 120.
[45] Ibid at 405; Paul Finn, *Fiduciary Obligations* (Law Book Company Ltd, 1977) at 18.
[46] Ibid at 18.
[47] Moffat et al, above n 43 at 405.

The beneficiary can enforce the terms of the trust deed because they have certain rights against the trustee, as well as against third parties who obtain, or claim, a legal interest in trust assets.[48] The beneficiary can enforce those rights by suing the trustee for failing to comply with the trustee duties.[49] The trustee duties contained within the trust deed are often reinforced by regulation.

As outlined in the Introduction to this paper, trust law applies to customers' funds in a number of countries including Malawi, Afghanistan, Kenya, Sri Lanka and several Pacific islands. However, it has been suggested that some trust instruments in some of these jurisdictions require clearer drafting to more adequately protect customers' funds.[50]

Customer protection in e-money operations can be a new domain for trust law. This is because the trust deed can be a 'rule book' for the use of customer funds. It can contain rules relating to fund isolation, fund safeguarding, and the reduction of operational risk. These rules can be characterised as duties owed by the trustee (the Provider) to the beneficiaries (the customers), and can be enforced under the respective trust law regimes in each jurisdiction. This subsection explores these three categories of rules.

A. *Fund Isolation*

Fund isolation rules address the problem of loss of customer or agent funds. This problem occurs because of the way laws tend to classify ownership of funds. Usually, customers' funds are stored in aggregate in one or more bank accounts in the name of the Provider, not the customers. This structure means the Provider is the legal owner of the account. In the event of insolvency the Provider can use the customers' funds to pay off debts.[51]

Fund isolation deals with this problem by requiring the Provider to store customers' funds in a separate account — usually a trust account in a bank. For example, in Afghanistan, Providers are obliged to deposit 100% of customers' funds in a trusteeship account, the beneficiaries of which are the e-money customers.[52] If there is a trust declared over the funds which are held in this separate bank account the *customer* retains the beneficial ownership of

[48] Ibid at 4.
[49] Greg Kelly, "Trusts and Asset Planning: An Introduction" in Don Breadon, ed, *Law of Trusts* (Lexis Nexis) para 1.20.
[50] For example, Fiji, Papua New Guinea, Vanuatu, Samoa & Tonga: Joep Roest, above n 16.
[51] Tarazi & Breloff, above n 8 at 6.
[52] Da Afghanistan Bank, above n 13, Part E, s 2.5.10(d).

the funds.[53] As such, the funds cannot be claimed by third party creditors should the Provider become insolvent.[54]

B. *Fund Safeguarding*

Fund safeguarding rules aim to minimise the loss of agents' or customers' funds and illiquidity risk by ensuring the Provider always has a 1:1 ratio between e-money and the float. Maintaining this 1:1 ratio means the Provider will always have enough funds to repay the customers when they want to cash out their remaining e-money. The 1:1 ratio can be achieved through liquidity rules and restrictions on the use of customers' funds.[55]

Liquidity rules usually require the Provider to hold liquid assets equal to the amount of e-money that the Provider has distributed. This is normally achieved by requiring the Provider to hold customers' funds as deposits in a bank as a 100% reserve requirement.[56] However, some jurisdictions allow the Provider to hold safe, liquid assets such as government securities. The Central Bank of the Philippines ('BSP') requires Providers to hold the equivalent amount of e-money purchased by customers in bank deposits, government securities or "such other liquid assets as the BSP may allow."[57] These assets operate as a form of insurance of customers' funds — because the assets are liquid, the Provider should be able to quickly and easily convert them into regular money. This should mean that the assets are always available to return customers' funds when customers want to cash in their e-money.

Rules further exist to restrict the use of customer funds. These restrictions aim to ensure that the Provider uses customers' funds solely at the behest of the customer, rather than for any other purpose. When these funds are isolated, they can later be returned to customers who want to cash out their e-money. Several particularly common examples of restrictions on use of customers' funds include requirements that the Provider cannot use customers' funds to finance its own business expenses;[58] can only use customers' funds to repay customers who

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[53] The distinction between beneficial owner and legal owner is an important one, and should be carefully considered. Equity allows the use and benefit of the land to be held separately from the legal title. Thus, even if the legal title to property is held by one person, another person may enjoy the 'beneficial title.' Beneficial ownership can only be recognised in courts of equity and not by the common law: *Lewin on Trusts* (Sweet & Maxwell, 17th ed, 2000) at 3.

[54] Tarazi & Breloff, above n 8 at 6.

[55] Ibid.

[56] Ibid at 3. See similarities with other jurisdictions, for example, Indonesia: Bank Indonesia Regulation Concerning Electronic Money, No. 11/12/PBI/2009, 13 April 2009; and Circular Letter Concerning E-Money, No. 11/11/DASP, 13; see Malaysia also (Guideline on Electronic Money BNM/RH/GL -16-3, July 2008). See Philippines (Circular 649, 9 March 2009).

[57] Bangko Sentral ng Pilipinas, *Circular No 649 (2009)*, art 5(D).

[58] See Indonesia (Circular Letter Concerning E-Money, No. 11/11/DASP, 13 April 2009).

want to cash out their remaining e-money;[59] cannot use customers' funds as collateral or guarantees; and cannot use customers' funds to extend credit.[60]

Finally, as outlined above, liquidity rules often require the Provider to hold customers' funds as deposits in a bank. However, these assets may be diminished if the bank becomes insolvent. Diversification rules aim to reduce the risk that *all* customers' funds would be affected by requiring the Provider to hold these assets in multiple banks.[61] Safaricom originally held all customer funds in a single bank account at the Commercial Bank of Africa, however, following the exponential growth of M-PESA in Kenya, it has opened several additional accounts across different banks to diversify risk.[62] While cash deposits in a trust account will generally not be considered property of the custodial bank in the case of receivership, diversification of funds will provide added protection in the case of uncertainty. However, this approach may not be required given that banks are usually regulated in a manner that provides extensive protection for the deposits.[63] For example, deposit insurance may help to alleviate some of the risk arising from a bank's insolvency.

Trust law can be used to implement the above fund safeguarding rules. These rules can take the form of 'trustee duties', which outline how the trustee (who may be the Provider) must deal with the customers' funds (the trust assets). These duties can be explicitly contained in the trust deed, trusts legislation and general law, or implied, where a court would determine that a term is required to fill a gap in the trust deed.[64]

Furthermore, the trust deed should contain certain provisions that are not trustee duties but also work towards safeguarding customers' funds. For example, the trustee should be prohibited from amending the trust terms to get access to customers' funds and should be obliged to pay customers' funds to customers if the trust is terminated. Furthermore, only reliable and trustworthy persons ('fit and proper') should be able to be employed by the trustee, which can also help ensure customers' funds are stored rather than used for other purposes.

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[59] See, for example, Reserve Bank of Malawi, *Guidelines for Mobile Payment Systems* (2011), s 8.
[60] See, for example, Bangko Sentral ng Pilipinas, *Circular No 649 (2009)*, art 5(C). See Indonesia (Circular Letter Concerning E-Money, No. 11/11/DASP, 13 April 2009).
[61] Tarazi & Breloff, above n 8 at 3, 6. This approach is used in Afghanistan (Amendment to the Money Service Providers Regulation to Extend Regulatory Oversight to E-Money Institutions, 25 November 2009) and Kenya.
[62] William Jack and Tavneet Suri, "The Economics of M-PESA" (Working Paper 16721, National Bureau of Economic Research, 2011) at 10.
[63] See, for example, Douglas W Diamond and Philip H Dybvig, "Bank Runs, Deposit Insurance and Illiquidity" (1983) 91(3) J of Pol Eco 401.
[64] See Moffat et al, above n 43 at ch 10.

Ultimately, most fund safeguarding rules can be contained in the trust deed, so long as it is adequately drafted. As we outline in Part III(C) below, a regulator may need to take an 'active' role in ensuring the Provider complies with the terms of the trust deed. Furthermore, and as discussed in Part IV, a regulator may need to consider various implementation issues before imposing safeguarding rules on a Provider.

C. *Reducing Operational Risk*

There are a wide variety of operational risks, such as misappropriation or negligent mismanagement of assets. As outlined above, this article focuses on the risk of theft of customer's funds, including through fraud. Reducing such theft and fraud involves requiring the Provider to keep records of the account in which customers' funds are held, and ensure that these accounts can be checked by a regulator.[65] If accounts are being checked, there may be less opportunity for employees of a Provider to steal customers' funds. Trust law can create rules that minimise operational risk in relation to customers' funds in two ways: auditing and monitoring.

(a) *Auditing:* The trust deed can contain clauses that outline when the Provider must audit the trust accounts, and describe how this auditing should take place. This auditing process can help ensure the integrity of the system.[66] These rules can be in the form of trustee duties, as with the duties in relation to fund safeguarding rules.

(b) *Monitoring and the Regulator as a 'Protector':* It is advisable that there be a person who is provided with powers to ensure that the Provider is actually auditing the trust account and that the Provider is complying with the terms of the trust. Normally in trust law, the beneficiaries (which are the customers in an e-money scheme) or their designates would do the auditing as they have the power to enforce the terms of the trust by suing the trustee for breaches of the trust's terms.[67] This means that the regulator would usually take a largely passive approach to monitoring the trust accounts of regulatory bodies.

However, this traditional approach to monitoring the Provider's actions may not be feasible in relation to e-money. For many customers, e-money is their first sustained interaction with formal financial services, and they may not fully understand financial matters, let alone trust

[65] Klein and Mayer, above n 23 at 13; Makin, above n 25.
[66] Klein and Mayer, above n 23 at 13.
[67] Kelly, above n 49 at para 1.20; *Young v Murphy* [1996] 1 VR 279. Note that the beneficiaries' rights over the trust's assets will remain intact even if the trustee becomes insolvent. This means that should a trust be established over customers' funds, such funds will still be protected against third party creditors, even if the trustee becomes insolvent.

related rules and principles.[68] This lack of practical oversight may enable the Provider to avoid complying with the trust deed, thereby increasing operational risk.

In this instance the country's e-money regulator should take an *active approach* that involves monitoring and enforcing the terms of the trust on behalf of the customers. In doing so, the regulator would operate as a 'Protector'. This role involves giving an entity the authority to oversee the actions of the trustee.[69] If the regulator is designated as Protector in the e-money trust deed, or via legislation, it will be able to take an active approach in monitoring the Provider's fulfilment of its role as trustee, particularly the extent to which the Provider is storing and protecting customers' funds. Protectors are used in other areas of trust law, such as in offshore jurisdictions where investors are concerned about the trustworthiness of companies that hold funds on their behalf.[70] Protectors have served in this role since the 1980s[71] and typically have powers to remove and appoint trustees, approve trustee remuneration, review the administration of the trust, settle disputes, and terminate the trust.[72] In some jurisdictions, their role has been codified by legislation.[73]

Assigning the regulator the role of Protector raises two important issues. First, there is debate over whether the power given to a Protector creates a fiduciary relationship with the beneficiaries[74] — a relationship which may not be feasible between a regulator and e-money customers. The distinction between fiduciary and non-fiduciary relationship carries with it important ramifications for the extent of limitations on the power. Although the characterisation of the Protector as a fiduciary was described by Duckworth as a "distraction",[75] it may have consequences for a Protector's obligations to the beneficiary under the trust. Bove argues that if the Protector is not considered a fiduciary, then the only limitation on a Protector's powers (aside from ensuring that they are exercised for the purpose they were given) would be that their exercise cannot be illegal or against public policy.[76] Case

[68] Dias and McKee, above n 11.
[69] Antony Duckworth, 'Protectors: Law & Practice' (2010) 19(1) Trusts & Trustees 98 at 100.
[70] Matthew Conalgen & Elizabeth Weaver, "Protectors as Fiduciaries: Theory & Practice" (2012) 18 (1) Trusts & Trustees 17 at 20; see also Richard Ausness, "The Role of Trust Protectors in American Trust Law" (2010) 45 Real Prop Trusts & Estate LJ 319; Tsun Tey, "Trust Protector" (2008) 20 Singapore Academy of Law Journal 99; Alexander Bove, "The Case Against the Trust Protector" (2011) Probate & Property 50.
[71] Antony Duckworth, above n 69 at 98.
[72] Conalgen & Weaver, above n 70 at 19.
[73] See, for example, *Trusts Act 1992* (Belize) s16; *International Trusts Act 1984* (Cook Islands) s 20; *International Trusts Act 1995* (Barbados) s 26; *Trusts Act*, Revised Statutes of Anguilla, Chapter T70, ss 1, 15; *International Exempt Trust (Amendment) Ordinance 1995* (Nevis) s 9; *Trustee Act 1998* (Bahamas) s 81.
[74] See, for example, Conalgen & Weaver, above n 70 at 36; Duckworth, above n 69 at 34; Ausness, above n 70; Tey, above n 70.
[75] Duckworth, above n 69 at 100.
[76] Bove, above n 70 at 51.

law and statute provides no settled indication of whether a Protector is a fiduciary,[77] and thus the question must be approached on a case-by-case basis.[78] It must be determined whether the power given to the Protector is held in a fiduciary capacity — that is, whether the holder of the power is forbidden from exercising it for his or her own benefit. The examination acquires further nuances when it is considered that the power may be held in a limited or qualified fiduciary capacity — where the power may be used on an irregular basis or where the holder of the power may be entitled to some benefit.[79]

Trust-related legislation may expressly denote whether the Protector is a fiduciary. In several jurisdictions, statute provides that the Protector will take their powers as a fiduciary, unless a contrary intention is expressed in the trust deed.[80] Other statutes provide that a trust Protector is not a fiduciary unless the trust deed provides that the trust Protector is a fiduciary.[81] Absent any legislation to the contrary, a party can contract out of a fiduciary duty by explicit language in the trust deed.[82] This means that should it wish to do so, the regulator can contract out of any fiduciary duties that might arise through it serving as a Protector, unless such duties are imposed by legislation.

Practical issues also arise in using a Protector for the customers' funds held by e-money Providers. Most importantly, it must be determined who would serve as Protector. Normally a Protector is a private party, rather than a public body such as a regulator.[83] It would also be necessary to decide whether the Provider would appoint the Protector through a trust deed, or whether a nominated Protector would be mandated by statute. Given the typically limited capacity of e-money customers to protect their own interests, the regulator should have a role in the protection of customers' funds.[84] This role could range from having the statutory authority to appoint a Protector for each trust administered by each Provider to undertaking the role of Protector itself.

The e-money trust deed can be used to modify, limit, and clearly define the role of Protector so as to give the regulator authority to actively monitor the duties of the Provider. The role of

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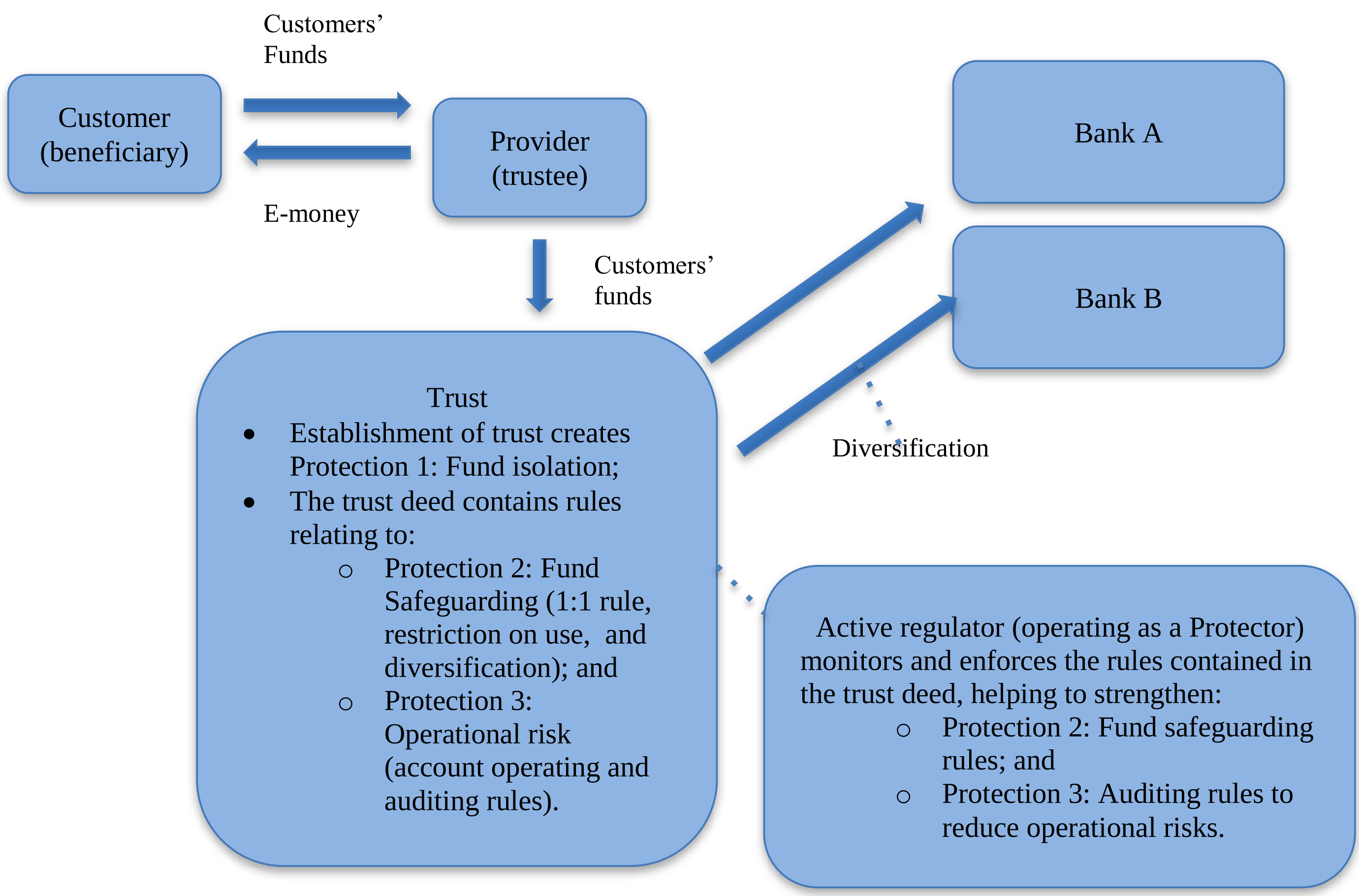
[77] See, for example, *Rawson Trust Co Ltd v Perlman* [1990] 1 Butterworths OCM 31, 50; Conalgen & Weaver, above n 70 at 20; Duckworth, above n 70 at 99.
[78] Conalgen & Weaver, above n 70 at 20.
[79] Ibid.
[80] These jurisdictions include Anguilla, Belize, Nevis, and jurisdictions governed by the Uniform Trust Code of the United States: *Uniform Trust Code* (US), § 808(b).
[81] Such as Alaska and Arizona: *Alaska Stat.* (Alaska) § 13.36.370(d); *Ariz. Rev. Stat. Ann.* (Arizona) § 14-18018(D).
[82] See, for example, *Kelly v Cooper* [1993] AC 205; *ASIC v Citigroup Global Markets Australia Pty Limited (No 4)* [2007] FCA 963.
[83] See Conalgen & Weaver, above n 70.
[84] Dias and McKee, above n 11.

the Protector would need to be determined according to the regulatory landscape of each jurisdiction. Whilst this role requires a closer analysis that is not the purview of this article, it should be noted that it may be a useful mechanism to ensure active regulatory supervision that will protect customers' funds. The regulation of e-money is a new frontier for trust law, and further research into the role of a Protector to ensure oversight of the Provider in e-money arrangements is warranted.

Once the three trust protections are implemented by the trust deed the relationship between the customers, the Provider, and the regulator would appear as follows:



IV. HOW THE REGULATOR CAN IMPLEMENT THE THREE TRUST PROTECTIONS — IN THEORY

Ultimately, policy makers may wish to protect customers' funds through a series of provisions in legislation. Until that time, it may be advisable to implement the trust protections in a trust deed that is attached to legislation. This legislation could require Providers to use such a trust deed when providing e-money services. The benefit of implementing an effective trust deed is that it can simultaneously create fund isolation, fund safeguarding, and operational risk protections. Furthermore, a trust deed can be used as a 'stop-gap' measure until research on storage of customers' funds becomes more advanced and other legal methods, such as legislation, can be used. Finally, a trust deed can collect all or most of the rules relating to storage of customers' funds, which are usually contained in a variety of sources. These often include regulations, correspondence from a country's financial regulator to the Provider, and provisions in the Provider's contract which the customer signs when he or she begins using e-money.[85] This may make it easier for customers, the Provider, and the regulator to understand rules relating to storage of customers' funds.

This article does *not* recommend that a regulator necessarily adopt all of the clauses from Part IV. Each regulator should consider which clauses are appropriate, using the implementation principles listed in Part V. A regulator may decide that certain terms of the clauses from Part IV are not appropriate in the context of their jurisdiction and/or the commercial context in which the Provider operates. Furthermore, the recognition of the trust law principles outlined in this article is largely limited to jurisdictions that have a common law legal system, such as Fiji, Kenya, Papua New Guinea, and Uganda.[86] The recommendations in this article will not be directly applicable to non-common law countries.[87] The paper now explores features of a trust deed that can create the protections outlined in Part III.

A. *Feature 1: Implement a Trust Deed Which Contains a Declaration of Trust*

Fund isolation can protect customers' funds if there is a trust relationship between the customer and Provider. Usually, to establish such a relationship, there must be sufficient evidence of an intention to form a trust relationship.[88] The strongest evidence of such an intention comes from implementing a trust deed containing a declaration of trust, in which the Provider declares that it holds the customers' funds ('trust assets') on behalf of the customers (the 'beneficiaries').[89]

B. *Feature 2: Include Fund Safeguarding Rules in the Trust Deed*

The trust deed can contain trustee duties, which require the Provider to deal with customers' funds in certain ways. It is important to note that there is no international best practice on a number of important customer protection provisions in relation to e-money. For example, consensus is yet to emerge on whether interest from customers' funds should be paid to the customer, Provider, or another entity, such as a charitable trust.[90] Regulators will need to determine the position they will take on such issues. Furthermore, any fund safeguarding rules that are imposed will need to be consistent with other regulation in each country,

[85] For example, in Samoa, these documents include the *Trustee Act* (1975), *Trustee Companies Act* (1988), and Digicel Samoa's E-money Operations Manual.
[86] "Common Law Systems and Mixed Systems with a Common Law Tradition", *JuriGlobe: World Legal Systems*, online: University of Ottawa <http://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php>.
[87] For a comparative discussion of trust-like relationships in civil law countries see Henry Hansmann and Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73(2) NYULJ 434.
[88] Glanville L Williams, "The Three Certainties" (1940) 4(1) Modern L Rev 20 at 20; Moffat et al, above n 42 at 117, 160.
[89] Glanville L Williams, ibid; *Stapelton v Stapleton* (1844) 60 ER 328; Moffat et al, above n 42 at 165.
[90] See, for example, Ehrbeck and Tarazi, above n 39.

particularly those that relate to trust law.[91] As outlined in Part III, these fund safeguarding rules come under three broad categories: liquidity rules, restrictions on the use of customers' funds, and diversification of the e-float.

C. Feature 3: Provide the Regulator with Active Powers

As outlined in Part III, by operating as a Protector, a regulator can monitor the way in which the Provider complies with the trust deed, which can help strengthen the fund safeguarding rules (protection 2) and auditing rules (protection 3). The following trust provisions can establish a country's regulator as a Protector.

First, provisions should determine which of a country's regulators has authority to operate as a Protector in relation to the trust fund. Second, provisions should outline the duties of the regulator, particularly to operate in the interests of the customers. Third, provisions should list the powers of the regulator, such as the ability to demand additional audits of accounts, remove a Provider, and sue the Provider on behalf of the customers. The trust deed can also provide the regulator with powers to refuse to consent to various applications from the Provider, such as to amend the trust deed, terminate or wind up the trust deed, and appoint a person as a new trustee. These powers ensure that the trust account is operated in the interests of customers. Fourth, provisions should enable the regulator to review the audits of the trust fund, which reduces the opportunity for the Provider or its employees to engage in theft or fraud. This monitoring process can be done in conjunction with the banks in which the Provider has deposited customer funds.[92]

V. HOW THE REGULATOR CAN IMPLEMENT THE THREE TRUSTS PROTECTIONS — IN PRACTICE

As outlined above, regulators should not simply transplant the provisions outlined in Part IV into their jurisdictions. Important domestic issues will determine whether clauses from Part IV are likely to operate effectively, such as whether there is legislation which impacts upon the operation of a trust deed.[93] Regulatory objectives and the approach to achieving these objectives will also differ from country to country, according to, amongst other things, the

[91] For example, in Vanuatu, the *Trustee Company Act* (1971).
[92] For example, Sri Lanka has regulations that place obligations on the custodian banks to conduct regular audits and monitor accounts at predefined times, reporting irregularities to the central regulator: Section 6.2 of Sri Lanka's Mobile Payment Guidelines No. 2 (2011) for Custodian Account Based Mobile Payment Services.
[93] See, for example, "legal transplantation literature" which suggests that the social, cultural and political differences between countries means that effective regulatory rules in one jurisdiction may be ineffective in another: Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 The Modern L Rev 1.

types of models and services being offered, the prudential framework, and the level of financial system development.[94] There has been a wealth of reports and articles on the need to consider local circumstances.[95] Several steps, outlined below, may help regulators to ensure that regulation adequately minimises risks, while also permitting e-money to develop.

A. *Step 1: Determine Regulatory Authority and Capacity*

In many countries, regulators do not have clear authority to supervise e-money. This is often because regulatory authority is shared between a country's central bank, bank regulator, and telecommunications authority.[96] E-money is uniquely situated across several regulatory domains; this overlap creates a risk of coordination failure and the potential that regulations across different domains will be inconsistent.[97] Providing a regulator (or multiple regulators) with sufficient authority to regulate e-money is the first step in implementing the trust protections and creating a consistent environment.

It is also crucial to ensure the regulator has sufficient capacity to regulate e-money. This is a new and rapidly developing form of financial service, and many regulators are still learning about the risks in this market, and the technical regulatory approaches to dealing with them.[98] Furthermore, the law of trusts often interacts with a variety of legislative enactments relating to unit trusts and trustee companies, perpetuities, banking, and bankruptcy. Regulators should only implement regulation that they have sufficient technical expertise to supervise effectively.[99] As the regulation of e-money is a new domain for trust law, regulatory authority

[94] See Dias and McKee, above n 11.

[95] See, for example, Amrik Heyer & Ignacio Mas, "Seeking Fertile Grounds for E-money" (Working Paper, GSMA, 3 September 2009); Emil Sjöblom, Gunnar Camner & Caroline Pulver, "What Makes a Successful E-money Implementation? Learning from M-PESA in Kenya and Tanzania" (Report, GSMA, 2009); Ignacio Mas & Amolo Ng'weno, "Three keys to M-PESA's success: Branding, Channel Management and Pricing" (2010) 4(4) *Journal of Payments Strategy and Systems* 352 at 355–356; Ignacio Mas & Olga Morawczynski, "Designing Mobile Transfer Services: Lessons from M-PESA" (2009) 4(2) *Innovations: Tech, Governance, Globalisation* 77 at 77–78; Wolfgang Fengler, "How Kenya Became a World Leader for E-money" *World Bank* (16 July 2012), online: World Bank <http://blogs.worldbank.org/africacan/how-kenya-became-a-world-leader-for-mobile-money>; "Making E-money Pay in Africa", *BBC* (20 September 2012) online: BBC <http://www.bbc.com/future/story/20120920-making-mobile-money-pay/all>. See also, the experience of the Central Bank of Kenya in designing regulation for M-PESA: Mwangi S. Kimenyi and Njuguna S. Ndung'u, "Expanding the Financial Services Frontier: Lessons From Mobile Phone Banking in Kenya" (Brookings, 2009), online: Brookings <http://www.brookings.edu/research/articles/2009/10/16-mobile-phone-kimenyi>.

[96] In Kenya, the financial supervisor has established its authority through written agreements with the Provider.

[97] David Porteous, "The Enabling Environment for Mobile Banking in Africa" (Report, Department for International Development, 2006) at 5.

[98] The issue of lack of domestic institutional capability is gaining scholarly interest through what Lant Pritchett labels the 'paper tiger' problem. This term refers to the way in which institutions in developing countries have insufficient local capacity to properly implement international standards, and so, in the interests of satisfying external pressure, particularly that applied by ambitious and demanding donors, develop means of appearing to implement these standards without effectively doing so. The result is that standards tend to be implemented in form rather than substance: Lant Pritchett, "The Problem with Paper Tigers: Development Lessons from the Financial Crisis of 2008" in Francis Fukuyama & Nancy Birdsall, eds, *New Ideas for Development After the Financial Crisis* (Johns Hopkins University Press, 2011).

[99] See, for example, Kimenyi and Ndung'u, above n 95.

and capacity to oversee the administration of the trust — as Protector, for example — must be clearly established.

B. *Step 2: Implementation Principles to Determine Which Clauses from Part IV to Use*

Clauses from Part IV should not simply be 'cut and pasted' into a trust deed. Regulators should follow several implementation principles to determine which aspects of the terms listed in Part IV are appropriate for their jurisdiction and the specific commercial context of the Provider. The principles we suggest are as follows:

1. *Approach E-money Regulation Holistically*

Regulators should aim to use trust law as part of a wider regulatory framework for e-money. There are various issues that cannot be adequately addressed through the implementation of a trust deed, all of which are important for customer protection and the wider development of the e-money market.[100] Implementing the provisions from Part III without addressing those other issues may create regulatory gaps that distort the operation of the market.[101]

2. *Use a Consultative Approach*

Countries with the most advanced e-money markets tend to have a consultative regulatory model, in which the regulator, Providers, and banks work together to design effective regulation. By obtaining input from the private sector, regulators tend to be better able to design regulation that protects customers, is commercially viable, and ultimately enables the e-money market to grow.[102] Furthermore, regulators will need to decide upon their policy for important aspects of customer protection. A consultative approach with the private sector will enable regulators to determine policy that protects customers and still enables Providers to continue developing their products. For example, Safaricom and Vodafone approached the regulator before the initial launch of M-PESA and now maintain a strong consultative relationship.[103]

3. *Likely Effectiveness: Consider Local Circumstances*

Each country requires a customised approach. Consequently, during the consultative process, regulators should be mindful of which aspects, if any, of the clauses from Part IV can operate effectively in their home country.

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[100] For example: limits on the amounts of e-money that can be held by a customer, operational and verification issues and competition concerns.
[101] For an overview of those issues, see Alexandre et al, "Regulating New Banking Models", above n 39.
[102] See again, the policy and practice of the Central Bank of Kenya as discussed in Kimenyi and Ndung'u, above n 95.
[103] International Finance Corporation, "M-Money Channel Distribution Case: Kenya" (Report, World Bank, 2009) at 9.

4. ***Adopt a 'Proportional' Approach to Implementing the Recommendations***

Regulators should remember that more extensive implementation of provisions listed in Part IV may better protect customers but may impose increased regulatory costs on the Provider and the regulator. Increased regulatory costs will have significant consequences for customers, Providers, and regulators because increased regulatory costs reduce the ability of the Provider to experiment with e-money products that can meet the needs of unbanked or underbanked populations. In addition, more extensive use of clauses outlined in Part IV requires greater expertise and resources from the regulator in order to implement more complex laws.[104]

In determining which terms of Part IV to implement, regulators should be guided by the 'proportionality principle'. This approach requires the regulator to understand the risks presented by e-money and design regulation and supervision such that the costs to the regulator, the Provider, and customers are proportionate to the risks that relate to customers' funds.[105]

In relation to trust law and e-money, there are four reasons why the proportionality principle should result in a light touch approach to regulation. First, Providers tend to have strong non-regulatory incentives to protect customers' funds. E-money is still new in many jurisdictions, and many Providers are eager to demonstrate reliability in order to gain credibility with customers and regulators.[106] Second, Providers require a high degree of regulatory freedom in order to experiment and develop products that meet the needs of unbanked or underbanked populations.[107] Third, many e-money schemes will already have at least some of the protections listed in this report in a variety of non-trust documents, such as the contract between customers and the Provider. Fourth, many regulators are still developing expertise in relation to e-money, making it unwise to expect such institutions to implement complex regulation.

C. ***Step 3: Develop Additional Regulation If and When Required***

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[104] LIRNEasia and UP-NCPAG, "Mobile Banking, Mobile Money and Telecommunication Regulations" (Report, International Development Research Centre and Department for International Development, 2008) at 2–3; Beth Jenkins, above n 7 at 22; Lyman et al, above n 8 at 6.
[105] Lyman et al, ibid.
[106] Jenkins, above n 7 at 9; Cynthia Merritt, "Mobile Money Transfer Services: The Next Phase in the Evolution in Person-to-Person Payments" (Retail Payments Risk Forum White Paper, Reserve Bank of Atlanta, August 2010) at 8.
[107] Heyer and Mas, above n 94 at 7; Kimenyi and Ndung'u, above n 94; Porteous, above n 96 at 15; Michael Tarazi, "Branchless Banking: The Test and See Approach" *CGAP* (10 February 2010), online: CGAP <http://www.cgap.org/blog/branchless-banking-test-and-see-approach>.

As outlined above, this article focuses on using trust law to target the most pressing regulatory issues in relation to customers' funds. Regulators should also monitor other issues that are increasingly featuring in discussions about the future direction of e-money, such as competition issues, maximum limits on e-money accounts, and maximum transaction volumes between customers.[108] In order for e-money to be truly transformative, the regulatory approach must be sufficiently flexible to allow for innovation, yet certain enough to create predictability and protect customers' funds.[109] Using trust instruments grants certainty and protection for the customer, yet still allows for legislation to be implemented that addresses the other areas of regulation of e-money that will inevitably arise as the field develops, such as anti-money laundering and terrorist financing regulations.[110]

VI. Conclusion

In 2015, e-money transfers in Africa alone are expected to exceed $US200 billion — approximately 18% of the entire continent's GDP.[111] Clearly, e-money has enormous transformative potential for financial inclusion. However, this potential will be severely compromised if customer protection is not robustly addressed in the regulatory framework of every jurisdiction in which e-money operates. The customer — often a person with little or no financial experience — will be exposed to key risks such as bankruptcy of the Provider, illiquidity, and fraud.

Trust law provides an established yet flexible mechanism by which to regulate customer protection in e-money. The trust deed can be used as a 'rule book' for the use of customer funds so as to ensure customers' funds are adequately protected. This article has explored three ways in which trusts can be used to address the main risks facing e-money customers: fund isolation; fund safeguarding and rules to reduce operational risk. Declaring a trust creates a relationship of trustee and beneficiary between the Provider and customers, which isolates customers' funds and protects them from the potential insolvency of the Provider. Clauses of the trust deed can limit the way in which customers' money is used and authorise the regulator to act as a 'Protector' with the power to monitor and audit the Provider to ensure

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108 See, for example, Louis de Koker, "The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Risks Within the New Standards Framework" (2013) 8(3) *Washington Journal of Law, Technology & Arts* 165; Pierre-Laurent Chatain, Andrew Zerzan, Wameek Noor, Najah Dannaoui & Louis de Koker, *Protecting Mobile Money Against Financial Crime: Global Policy Solutions and Challenges* (World Bank, 2011).
109 Porteous, above n 98 at 15.
110 See, for example, Marina Solin & Andrew Zerzan, "E-money Methodology for Assessing Money Laundering and Terrorist Financing Risks" (Discussion Paper, GSMA, January 2010).
111 Kalliope Kokolis, "Media (R)evolutions: E-money in Africa", *World Bank* (22 August 2012), online: *World Bank* <http://blogs.worldbank.org/publicsphere/media-revolutions-mobile-money-africa>.

compliance with the terms of the trust. Given most e-money customers may have limited financial experience, we suggest that e-money regulators take an active approach as Protector.

This article aims to assist regulators and industry by demonstrating how trust law can be used to promote financial inclusion and by providing a number of trust provisions that can be used to do so. However, effective protection of customers' funds will require providers to adapt the trust provisions to the particular jurisdiction and commercial context in which the Provider operates. Providers, regulators and banks should work together to design regulation that is commercially viable and which will enable the e-money market to grow. Furthermore, the recognition of trust law principles is largely limited to jurisdictions with a common law legal system, so the recommendations in this article will not be directly applicable to non-common law countries. While regulators may ultimately wish to protect customers' funds through legislation, trust law provides an effective interim measure to ensure that risks to customers' funds are minimised.