



## **POLICY GUIDANCE NOTE ON GLOBAL DEPOSITARY RECEIPTS (GDRs) AND GLOBAL DEPOSITARY NOTES (GDNs) IN KENYA**

This Policy Guidance Note (PGN) is a publication of Capital Markets Authority (Kenya) and is to be used as a guide on the operational environment for GDRs and GDNs and to inform ultimate design of a comprehensive legal and regulatory framework. This PGN is issued pursuant to section 12A of the Capital Markets Act.

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**July 2017**

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## **ARRANGEMENT OF PARAGRAPHS**

- 1 - Definitions
- 2 - General requirements
- 3 - Responsibility for issuance of depositary receipts and notes
- 4 - Pre-listing requirements for in-bound depositary receipts
- 5 - Approvals for in-bound depositary notes and appointment of other parties
- 6 - Applicability of the Act and regulations
- 7 - Approvals for out-bound depositary receipts and appointment of other parties
- 8 - Approvals for outbound depositary notes and appointment of other parties
- 9 - Role of the issuer
- 10 - Role of the custodian
- 11 - Rights of investors
- 12 - Role of depositary bank
- 13 - Role of the central depositary
- 14 - Role of licensed brokers and investment banks
- 15 - Role of accountants
- 16 - Role of lawyers
- 17 - Role of investment banks and underwriters
- 18 - Role of the securities exchange
- 19 - Requirements for underlying securities
- 20 - Requirements for depositary securities
- 21 - Clearing and settlement
- 22 - Eligibility requirements for issuers
- 23 - Requirements for issuance of depositary receipts and notes
- 24 - Documentation requirements for issuance of depositary securities
- 25 - Contents of the prospectus
- 26 - Additional issue of depositary securities
- 27 - Policy on securities distribution and operational issues

- 28 - Risk management and allocation of responsibilities
- 29 - Trading and settlement of depositary securities
- 30 - Transfer of securities outside a securities exchange
- 31 - Cancellation of depositary receipts and notes
- 32 - Rights of holders of depositary securities
- 33 - Continuing Obligations
- 34 - Fees and other charges
- 35 - Notifications to the Authority
- 36 - Review and updating of the Guidance Note
- 37 - Clarifications from the Authority

## 1. Definitions

In this Policy Guidance Note, unless the context otherwise requires-

“**depository bank**” means a regulated financial institution that creates and issues depository securities;

“**depository note**” means a negotiable certificate that represents ownership of bonds in a company listed in another country;

“**depository receipt**” means a negotiable certificate that represents ownership of shares in a company listed in another country;

“**depository securities**” means global depository receipts and global depository notes;

“**in-bound depository securities**” means securities whose primary jurisdiction of issuance is a foreign country and which are issued as depository securities in Kenya;

“**issuer**” means the depository bank for an unsponsored issue and the listed company or an agent appointed by the listed company for a sponsored issue;

“**out-bound depository securities**” means securities whose primary jurisdiction of issuance is Kenya and which are to be issued as depository securities in another jurisdiction;

“**sponsored depository security**” means a depository security in which the issuer of the underlying security has direct involvement in the issuance of the depository securities; and

“**unsponsored depository security**” means a depository security, issued by a depository bank without the involvement, participation or consent of the issuer of the underlying securities.

## 2. General requirements

2.1 This Policy Guidance Note focuses on the guiding principles for listing and trading, settling and cancelling in-bound and out-bound depository receipts and depository notes.

2.2 All transactions in the Kenyan market on depository receipts and depository notes shall be in Kenya Shillings.

2.3 All documents submitted to the Authority shall be in English.

2.4 All issuances of depository receipts and depository notes in Kenya shall be allocated an International Securities Identification Number by the securities exchange in which the securities shall be listed, to uniquely identify the securities.

## 3. Responsibility for issuance of depository receipts and notes

- 3.1 The ultimate responsibility of structuring an offer of depositary receipts or depositary notes shall be on the depositary bank for an unsponsored issue and on the issuer or an agent appointed by the issuer for a sponsored issue.
- 3.2 Depositary receipts or depositary notes shall be issued in Kenya in cases where a foreign company desires to sell them in Kenya or if it would be less costly and commercially viable for the depositary bank to service such a market using these instruments in the country rather than do a direct cross listing or such other reasons that the foreign company may have.
- 3.3 A locally listed company may issue the depositary receipts or depositary notes in a foreign country if it shall be less costly and commercially viable or for such other reasons the company may deem necessary.

#### **4. Pre-listing requirements for in-bound depositary receipts**

- 4.1 Before formally applying for listing, the issuer shall evaluate and understand the specific relevant listing requirements in Kenya as set out both in this Policy Guidance Note and in the relevant sections of the Capital Markets Act and regulations.
- 4.2 If the issuer is not a depositary bank, it shall appoint a depositary institution to handle depositary and custody aspects of the originally listed securities and a sponsoring Broker.
- 4.3 Prior to commencing the application process, the issuer shall appoint the relevant advising professionals such as lawyers, underwriters, accountants or any other professionals.
- 4.4 In consultation with the appointed professionals, the issuer shall evaluate the listing requirements, the listing schedule, the prospectus and other relevant documentation, in preparation for listing.

#### **5. Approvals for in-bound depositary notes and appointment of other parties**

- 5.1 Before approaching the Authority for approval to offer depositary notes in the Kenyan market, an issuer intending to list or privately offer depositary notes in Kenya, either by itself or through a depositary bank shall obtain and prove that it has all the necessary approvals and exemptions from its domicile jurisdiction.
- 5.2 If the issuer is not a depositary bank, it shall appoint a depositary institution, a custodian institution and a sponsoring Broker to handle depositary and custody aspects of the originally listed bonds.

5.3 Prior to commencing the application process, the issuer shall appoint the relevant advising professionals such as lawyers, underwriters, accountants or any other professionals.

5.4 In consultation with the appointed professionals, the issuer shall evaluate the listing requirements and the possible listing challenges, the listing schedule, the prospectus and other relevant documentation, in preparation for a listing.

## 6. Applicability of the Act and Regulations

6.1 For all intents and purposes, depositary receipts and depositary notes shall be recognized just like any other capital market security.

6.2 Depositary receipts and depositary notes fall within the definition of securities as defined in the Capital Markets Act and therefore the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations, 2002 shall be applicable to a public offer and listing of Depositary securities with the following exceptions.

| <b>Regulation that is not applicable</b>                      | <b>Rationale</b>                                                                                                                                                                                                                                          | <b>Comment</b>                                                                                                                                                                                                                                                           |
|---------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Regulation 7(1) – Eligibility to issue Securities             | Eligibility criteria needs to be amended for issuers of Depositary securities and needs to include eligibility requirements for the underlying Securities, Depositary securities and the Depositary Bank.                                                 | The issuer and depositary should comply with the eligibility conditions set out in Paragraph 22 of this Guidance Note.                                                                                                                                                   |
| Regulation 10(1) – Disclosures for public issues              | Disclosure requirements for Depositary securities differ from those for issues of equity shares and bonds and require additional disclosures                                                                                                              | The form and content of a prospectus for an offering of Depositary securities shall comply with the disclosure requirements set out in paragraph 25 of this Guidance Note.                                                                                               |
| Regulation 10A - Nominated Advisers sections (i), (j) and (k) | Directors of the issuer will usually undertake training specified by the securities regulator in the jurisdiction of the issuer’s primary listing and issuers cannot be required to have Kenyan Nominated Advisors attend board audit committee meetings. | The eligibility criteria shall allow the Authority to approve the offer and listing of Depositary securities in respect of issuers that fit the growth enterprises business criteria, without applying Reg. 10A Sec. (i), ( j) and (k) of the Public Offers Regulations. |

|                                                               |                                                                                                                                                                                                                   |                                                                                            |
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| Regulation 11 – Disclosure Requirements for Additional Issues | Disclosure requirements for additional issues of underlying securities and Depositary securities need to reflect similar provisions that are applicable to the issuer in the jurisdiction of its primary listing. | The issuer shall comply with the provisions set out in Paragraph 26 of this Guidance Note. |
| Regulation 19(1) – Continuing Obligations                     | The issuer is expected to comply with the continuing obligations in the jurisdiction of its primary listing and to provide information to the Authority and holders of Depositary Shares                          | The issuer shall comply with the provisions set out in Paragraph 33 of this Guidance Note. |

6.3 For the purposes of clarity, the Authority further confirms that the following Regulations and Guidelines issued by the Authority shall not be applicable to issuers of in-bound Sponsored Depositary securities.

| <b>Regulation</b>                                                                            | <b>Rationale</b>                                                                                                                                                                        | <b>Comments</b>                                                                                                                                                                                                                                                                                                                                             |
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| Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015         | Issuers would have been listed on a primary exchange outside Kenya and are expected to comply with the Corporate Governance guidelines in force in the jurisdiction of primary listing. | Where the Authority assesses that the Corporate Governance requirements that the issuer is required to comply with in the jurisdiction of its primary listing differ significantly from the Corporate Governance Code applicable to companies with a primary listing in Kenya, Paragraph 35.4 of this Guidance Note shall apply.                            |
| Regulation 61(1) of The Capital Markets (Licensing Requirements) (General) Regulations, 2002 | It may not be feasible to require a foreign issuer to publish a circular to all its shareholders with respect to private transfer of Depositary Shares in Kenya.                        | The Authority may require the applicant to publish a press notice in Kenya setting out the salient details in respect of any proposed private transfer of Depositary securities or through a public notice issued through the securities exchange.<br>Further, as indicated in Paragraph 30 of this Guidance Note, Depositary securities may be transferred |

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|  |  | privately to implement the creation and cancellation process of Depositary securities. |
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**7. Approvals for out-bound depositary receipts and appointment of other parties**

7.1 Before applying to issue depositary receipts or depositary notes on securities of listed companies in Kenya in any foreign jurisdiction, the issuer, whether as itself or as a depositary bank, shall obtain an approval in writing from the Authority.

7.2 If the issuer is not a depositary bank, it shall appoint a depositary institution, a custodian institution and a sponsoring broker to handle depositary and custody aspects of the originally listed shares.

**8. Approvals for out-bound depositary notes and appointment of other parties**

8.1 Before applying to issue depositary notes on Kenya’s listed bonds in any foreign jurisdiction, the issuer, whether as itself or as a depositary bank, shall obtain an approval in writing from the Authority.

8.2 If the issuer is not a depositary bank, it shall appoint a depositary institution, a custodian institution and a sponsoring broker to handle depositary and custody aspects of the originally listed shares.



## **9. Role of the issuer**

The issuer shall-

- (a) prepare the necessary issuance documentation including the prospectus, service level agreements and other relevant disclosure documents;
- (b) maintain continuous communication with the Authority and the securities exchange, while responding to all pertinent questions requiring redress prior to the offer;
- (c) send notices to the depository bank on any corporate action likely to have an impact on pricing of depository receipts or depository notes including splits, bonuses, shareholder meetings, dividends, change of management, rights issues and other relevant events within a reasonable time but not less than twenty one days before the proposed action or event;
- (d) develop and conduct an extensive investor relations engagement to establish the existence of a captive market and create awareness about the profile of the securities that would be on offer;
- (e) avail relevant required information on request to facilitate the processing of an application;
- (f) meet continuing prudential and other relevant obligations as prescribed by the Authority;
- (g) for in-bound depository receipts and depository notes, as applicable, the issuer shall ensure that a register of holders and the securities held including transfers of the securities is prepared, maintained and promptly updated, through an approved Kenyan registrar.

## **10. Role of the custodian**

The custodian shall-

- (a) either be a bank or any other financial institution licensed by the Authority, with the primary responsibility of ensuring the safe custody of the securities handed over for safekeeping;
- (b) not only hold the assets safely for the account of the depository, but also provide a periodical overview of the assets' value over time to the Authority and on request, to investors; and
- (c) only be responsible for any general losses or negligence, and not for any investment losses.

## **11. Rights of investors**

11.1 As the beneficial owners, investors shall have the right to –

- (a) access all information affecting the security that could influence purchase or continued holding of depositary receipts and depositary notes certificates;
- (b) vote in any shareholder meetings, for sponsored depositary securities, through the depositary bank or alternatively if the depositary bank is to vote by proxy, receive clear instructions mandating it to vote in relation to sponsored depositary receipts; and
- (c) distribution of dividend or interest where applicable using procedures that shall be clearly outlined in the prospectus.

11.2 In case of a rights issue, investors in depositary receipts and depositary notes shall be made aware well in advance about the details of the issue.

## **12. Role of Depositary Bank**

12.1 The Depositary, including any replacement Depositary, shall be a suitably authorized and regulated financial institution or consortium of financial institutions, acceptable to the Authority and each member of the consortium be duly incorporated or otherwise validly established according to the relevant laws of the place of incorporation or establishment, and be operating in conformity with those laws and its constitution.

12.2 Unless the Depositary itself is licensed by the Authority to perform the functions of a sub-custodian, payment agent and registrar within Kenya, it shall appoint a sub-custodian, paying agent and registrar in Kenya.

12.3 The primary role of the Depositary Bank shall be to avail all the necessary information to the Authority on type of depositary receipt or depositary note program, market to list or quote, issuance ratio, custody arrangements and foreign exchange conversion plans, among others.

12.4 The Depositary Bank shall be the overall coordinator of all parties, drawing up the issuance timetable, consulting with the issuer, the legal counsel, the custodian and the public relations firm among others, on the observance of obligations and timelines of the issuance.

12.5 By itself, or in close collaboration with the issuer, if sponsored, the Depositary Bank shall promptly announce and process corporate actions such as rights issues, bonus issues, dividends as and when made aware of such corporate actions.

12.6 The Depositary Bank shall also perform the following functions-

- (a) oversee the deposit of local shares in the custodian account;
- (b) offer securities registration and transfer services for depositary receipts or depositary notes holders;

- (c) offer facilitation services to depositary receipts or depositary notes holders including but not limited to; handling complaints, answering inquiries and distributing communications materials to registered holders;
- (d) on a quarterly basis, prepare reports and give an update to the investing public, the issuer, if applicable, and the Authority, a summary on the depositary receipts and depositary notes investors, the performance, the markets, trends and other key developments;
- (e) effect tax and other regulatory changes affecting the securities and maintain relevant documentation (if applicable);
- (f) advise on, coordinate and assist in executing corporate actions, including effecting depositary receipts and depositary notes ratio changes;
- (g) provide securities transfer and agency services in connection with the programme in accordance with the terms of the deposit agreement submitted to and approved by the Authority;
- (h) arrange for an international sub-custodian to accept deposits of underlying securities;
- (i) issue the negotiable depositary receipts and depositary notes that represent the shares;
- (j) for unsponsored programmes, ensure that voting decisions are effected;
- (k) either directly or through a local sub-custodian appointed by itself, maintain an account at the central depositary to receive depositary receipts and depositary notes for cancellation and on creation of new depositary receipts and depositary notes to be subsequently transferred to investors; and
- (l) either directly or through a registrar appointed by the Depositary, maintain the register of depositary receipts issued to reflect all transfers, issuances, cancellations and exchanges, monitor compliance with the limits specified in this Policy Guidance Note for minimum percentage of depositary receipts and depositary notes in public hands and maximum number of depositary receipts and depositary notes issued and submit regular reports to the Authority as per the relevant clauses of this Guidance Note.

12.7 The Depositary shall hold an account as a bare trustee in a local custody account either in its name or a nominee's name, for the sole benefit of the holders of the depositary receipts and depositary notes.

12.8 The Authority will permit the Depositary to receive cash distributions or other amounts from the issuer without segregating such distributions from other cash amounts held by the Depositary, provided that the documentation constituting the depositary receipts and depositary notes that the Depositary shall distribute such amounts to investors as soon as practicable taking into account circumstances such as requirements to convert foreign currencies into Kenya Shillings, contractual arrangements with local custodians and legal requirements applicable.

### **13. Role of the central depository**

The central depository shall-

- (a) avail a platform for clearing and settlement of transactions in the depository receipts and depository notes executed on the securities exchange within the normal settlement cycle; and
- (b) liaise with the Depository Bank or its agent, to effect the transfer for purposes of issuance or cancellation both the underlying securities and depository receipts and depository notes from the Depository's Agent to the Depository's custodian, Free-of-Payment, subject to payment of all statutory fees.

### **14. Role of licensed brokers and investment banks**

The licensed brokers or investment banks, whichever is applicable, shall-

- (a) act as placing agents on the initial public offer of depository receipts and depository notes; and
- (b) provide brokerage services to facilitate trading of depository receipts and depository notes.

### **15. Role of accountants**

Where applicable, accountants shall be charged with the responsibility of, among others:

- (a) preparing the issuer's accounts for incorporation into the prospectus;
- (b) reviewing the issuer's prospectus and interacting with the Authority on financial accounts matters; and
- (c) conducting periodic audits and preparing financial reports and audit opinions.

### **16. Role of lawyers**

Where applicable, the issuer's lawyers shall, in addition to any other responsibilities that may be performed-

- (a) prepare the legal opinion and if applicable review the depository counsel together with the Prospectus and regularly interact with the Authority to deal with any legal challenges to the issue;
- (b) prepare the draft deposit agreement providing that the depository holds in trust, for the sole benefit of the holders the securities to which the depository receipts and depository notes certificates relate, subject only to payment of the remuneration and appropriate expenses incurred by the depository; and
- (c) ensure compliance with securities laws, regulations and rules necessary for the approval and continuing compliance of the issue.

### **17. Role of investment banks and underwriters**

As applicable, on accepting to be the issuer's Investment Bank or Underwriter or advisor whichever is applicable shall perform the following roles, among others-

- (a) at the time of the offering, advise on size, pricing and marketing of offering, type of program to be launched, exchange or market that the securities shall trade in and ratio of depositary receipts and depositary notes to underlying securities;
- (b) act as the placement agent or underwriter in the issuance;
- (c) together with the public relations team, plan, advice and conduct road shows with the issuer's management to introduce the issuer to investors; and
- (d) provide research coverage for the issuer through research reports.

### **18. Role of the securities exchange**

The securities exchange shall-

- (a) obtain all relevant documentation and proposed timetable before admitting the depositary receipts and depositary notes for listing;
- (b) cross-check compliance with established rules and procedures on depositary receipts and depositary notes issuance and cancellation;
- (c) seek commitment in writing, on continuing obligations of the issuer;
- (d) confirm, in writing, to the Authority completeness of infrastructural (software, human resource other issuance stakeholders preparedness etc.) arrangements before admitting the securities for listing; and
- (e) obtain the Authority's approval of the listing in writing.

### **19. Requirements for underlying securities**

19.1 For in-bound securities, the underlying securities shall-

- (a) conform with the law of the issuer's place of incorporation;
- (b) be duly authorized in accordance with the requirements of the issuer's constitution; and
- (c) have any necessary statutory or other consents.

19.2 The securities that the depositary shares represent must be fully paid and free from all liens and any restriction on the right of transfer to the Depositary.

### **20. Requirements for depositary securities**

20.1 The Depositary Securities for which listing is sought shall-

- (a) conform with the law of the Depositary's place of incorporation;
- (b) be duly authorised in accordance with the requirements of the Depositary's constitutive documents;
- (c) have the necessary statutory or other consents;
- (d) be valid under the law which is expressed to govern the document giving effect to the Depositary securities;
- (e) be free from all liens and any restriction on the right of transfer and should be listed on an unrestricted market segment; and

(f) except where depositary receipts or notes of the same class are already listed, the expected aggregate market value of all receipts or notes shall be at least Kenya Shillings fifty million.

20.2 The Authority may admit to listing depositary receipts and depositary notes of lower value provided it is satisfied that there will be an adequate market for the Depositary securities concerned.

20.3 Unless otherwise determined by the Authority, where an application for listing has been made for a class of depositary receipts and depositary notes, twenty five per cent of that class of securities shall be in the hands of public investors.

20.4 Depositary Shares will not be regarded as being held in public hands if they are held, directly by:

- (a) a director or employee of the issuer or any of its subsidiary undertakings;
- (b) a person who is a related party with a director of the issuer or of any of its subsidiary undertakings;
- (c) the trustees of any employees share scheme or pension fund established for the benefit of any directors and employees of the issuer and its subsidiary undertakings;
- (d) any person who by virtue of any agreement has a right to nominate a person onto the board of directors of the issuer or its subsidiary undertakings; and
- (e) a strategic investor holding more than 5 percent of the total issued and paid-up securities.

20.5 The Authority may accept a lower market capitalisation or percentage in public hands if it determines that the market in the depositary receipts will be sufficiently liquid and will operate properly.

20.6 If the percentage of a class of depositary receipts in the hands of the public falls below twenty five per cent or such lower percentage as may be established by the Authority, the Authority may suspend and allow a reasonable time to restore the percentage, unless this is precluded by the need to maintain the smooth operation of the market or to protect investors.

## **21. Clearing and settlement**

The issuer or where applicable, the Depositary, shall ensure that appropriate arrangements are made with a central depositary licensed by the Authority under the Central Depositories Act, 2000, for the clearing and settlement of arrangements of the depositary securities.

## **22. Eligibility requirements for issuers**

The issuer shall meet the following eligibility requirements-

| <b>Requirement</b>                                                          | <b>Detail</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| <b>Incorporation status of the Issuer</b>                                   | <p>The issuer shall be a duly incorporated institution, complying with the relevant laws of the jurisdiction of incorporation and operating in conformity with those laws and its constitution.</p> <p>For purposes of the listing rules, the issuer shall be the originator of the relevant underlying securities or the depositary bank which shall be a foreign entity acceptable to the Authority and whose securities are not listed and trading on a securities exchange licensed by the Authority.</p>                                                                                                                                                                                                                                                                                                                                                   |
| <b>Size: Share capital</b>                                                  | The issuer shall be expected to comply with the minimum capitalization guidelines in force in the jurisdiction of primary listing or the minimum amount required to list in the Main Market Segment of a Securities Exchange in Kenya.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Net Assets</b>                                                           | Issuers shall comply with the minimum capitalisation and net asset guidelines in force in the jurisdiction of primary listing, or a Kenyan equivalent.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Free transferability of underlying Securities and Depository Shares</b>  | <p>The underlying Securities of the issuer shall be freely transferable and not subject to any restrictions on marketability or any pre-emptive rights.</p> <p>The Depository securities shall be freely transferable and not subject to any restrictions on marketability or any pre-emptive rights</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Competence and suitability of directors and management of the Issuer</b> | <p>At the time of the application, the issuer shall not be in breach of any of its loan covenants or other contractual obligations, particularly in regard to its maximum debt capacity.</p> <p>The directors of the issuer shall collectively have appropriate expertise and experience for the management of its business. The structure of the Board of Directors shall comply with the applicable Corporate Governance Guidelines or Regulations specified by the securities regulator in the jurisdiction of the issuer's primary listing.</p>                                                                                                                                                                                                                                                                                                             |
| <b>Dividend policy</b>                                                      | A statement on the future dividend policy, if applicable.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Track record, profitability and future prospects</b>                     | <p>As applicable, the issuer shall over the last five years, have been carrying on as its main activity, either by itself or through one or more of its subsidiaries, an independent business capable of generating revenue. The issuer must have declared profits after tax attributable to shareholders in at least three of the last five completed accounting periods to the date of the application for issue of the Depository securities.</p> <p>The issuer's securities must have been listed on a permissible Exchange for a minimum of two years.</p> <p>The Authority may waive these restrictions with respect to minimum track record, listing period and profitability where, in the opinion of the Authority, it would be in the public interest or promote compliance with public policy and legislative requirements such as minimum local</p> |

| <b>Requirement</b>                              | <b>Detail</b>                                                                                                                                                                                                       |
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|                                                 | shareholding legislation, to allow the offer and listing of Depository securities. The Authority shall consider such circumstances on a case-by-case basis.                                                         |
| <b>Solvency and adequacy of working capital</b> | As applicable;<br>The issuer shall not be insolvent.<br>The issuer shall have adequate working capital.                                                                                                             |
| <b>Depository Share ownership structure</b>     | Following the public offer of Depository securities, or immediately prior to listing in the case of an introduction, at least twenty five per centum of the Depository securities shall be held by public investors |
| <b>Certificate of Comfort</b>                   | The issuer shall provide a legal opinion in the form set out in Clause 23(1) of this Guidance Note.                                                                                                                 |

### **23. Requirements for issuance of depository receipts and notes**

- 23.1 As applicable, the issuer shall provide to the Authority a satisfactory legal opinion from a qualified counsel practicing in the issuer's country of incorporation, in a form satisfactory to the Authority, which shall include an opinion that at the time of the application for listing of the Depository securities-
- (a) the issuer is listed on a securities exchange;
  - (b) the issuer has the capacity to apply to list Depository securities;
  - (c) any issue of underlying securities and the establishment of the Depository securities facility is in compliance with the issuer's constitution and all applicable local laws and regulations and listing rules; and
  - (d) all actions, consents, registrations, and filings to be taken, obtained or made by the issuer under such laws have been taken or obtained.
- 23.2 No issuance of depository receipts or depository notes shall be conducted without corresponding proportionate securities being held in trust in a custody account.
- 23.3 On conclusion of the issuance process, through appropriate arrangements, the appointed sponsors or agents shall within a period specified in the Prospectus make payments for subscription through remittance to the issuer's currency account in the country of the depository receipts and depository notes issuance.
- 23.4 Upon confirmation of the payment for such subscription, through clearly outlined procedures and channels, the issuer shall organize for the transfer of the underlying securities in the country of incorporation and credit the underlying shares to the Depository's securities account opened with the local custodian which earlier appointed by the Depository.
- 23.5 Upon receiving advice on the details of the underlying securities received by the custodian, the Depository shall issue the depository receipts and depository notes. The depository or its agent shall be responsible for crediting depository receipts and



depository notes subscribed to by the investor in these securities to the investor's securities account.

- 23.6 If applicable, a designated sponsor/agent may act as a market maker, to minimize the price gap between depository receipts and depository notes price and the price of the underlying securities.

#### **24. Documentation requirements for issuance of depository securities**

- 24.1 As a general rule, to the extent applicable, all the requisite documentation for issuance of securities as outlined in the Capital Markets Act, shall apply in the case of issuance of both sponsored and unsponsored in-bound depository receipts and depository notes in Kenya.
- 24.2 The Issuance prospectus shall be a first step towards issuance. The prospectus shall contain all disclosures necessary, to help prospective investors make an informed decision as to whether or not, to participate in the offer.
- 24.3 In case of an offer of Depository securities offered to the public as specified in section 30B of the Capital Markets Act and listed on an exchange, the issuer shall prepare a prospectus that shall comply with the requirements of Part A of the Third Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 subject to the modifications set out in the table below;

| <b>Disclosure reference</b> | <b>Requirement as set out in the Regulations</b>                                                                                                                                                                   | <b>Amended requirement for depository receipts and depository notes issues to be sold by way of an unrestricted public offer</b>                                                                                                      |
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| B.02                        | A statement that a copy of the prospectus has been delivered to the Registrar                                                                                                                                      | Not applicable                                                                                                                                                                                                                        |
| C.07(i)                     | Written statements signed by the auditors or accountants setting out the adjustments made by them in arriving at any figures shown in any accountants report pursuant to G.04 and giving the reasons therefor; and | Deleted – not applicable as Issuer's financial statements will have been published in accordance with primary market regulations and time. Also, the cost of obtaining an accountant's report is likely to be an unnecessary expense. |
| F.02                        | Information shall be provided as to the portion of each class of securities held in Kenya and the number of shareholders in Kenya                                                                                  | Information shall be provided as to the portion of the class of securities that will be held by the Depository and that will underpin the planned                                                                                     |

| Disclosure reference | Requirement as set out in the Regulations                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Amended requirement for depository receipts and depository notes issues to be sold by way of an unrestricted public offer                                                                                                                                                                                                                                                |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | issue of the Depository securities in Kenya                                                                                                                                                                                                                                                                                                                              |
| G.04                 | Financial information as required by paragraphs G.14 and G.15 set out in the form of an accountant's report                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Not applicable – Instead, as issuer's financial statements will have been published in accordance with primary market regulations and time and cost of obtaining an accountant's report likely to be disproportionate to the value add for prospective investors.                                                                                                        |
| G.05                 | If applicable, an accountant's report, as set out in G.14 and G.15 on the asset which is the subject of the transaction                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Same as G.04 above.                                                                                                                                                                                                                                                                                                                                                      |
| G.11                 | <p>(1) Where not more than nine months have elapsed since the end of the financial year to which the last published annual accounts relate, an interim audited financial statement covering at least the first six months following the end of that financial year must be included in or appended to the prospectus. Where not more than six months have elapsed since the end of the financial year, un-audited financial statements covering the period preceding the six months shall be included in the prospectus of the issuer whose securities are already listed at a securities exchange.</p> <p>(2) Where the issuer prepares consolidated annual accounts, the interim financial statements must either be consolidated statements or include a statement that, in the opinion of the issuer's directors, the interim financial statements enable investors to make an informed assessment of the results and activities of the group for the period.</p> | The prospectus shall include extracts from any unaudited interim financial statements published – in accordance with the requirements of the primary securities exchange on which the securities of the issuer is listed - in the period from the date of the latest available audited financial statements have been made, to the date of application to the Authority. |
| G.25                 | The following information regarding the acquisition, within the last five years, or proposed acquisition by the issuer or any of its subsidiaries of any securities in or the business undertaking                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Disclosure as specified in G.25 shall apply to acquisition of property that is material to the issuer and, in any event, to property that has contributed more than 20% of the                                                                                                                                                                                           |

| Disclosure reference | Requirement as set out in the Regulations                                                                                                                                                                                      | Amended requirement for depository receipts and depository notes issues to be sold by way of an unrestricted public offer                                                                                                                                                                                                                                                                                                                               |
|----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                      | of any other company or business enterprise or any immovable property or other property in the nature of a fixed asset (collectively called the property”) or any other option to acquire such property shall be disclosed.... | Issuer’s group consolidated reported comprehensive income for the latest completed financial period or more than 20% of the issuer’s group consolidated net assets as at the end of the latest completed financial period.                                                                                                                                                                                                                              |
| G.26                 | The following details regarding any property disposed of during the past five years, or to be disposed of, by the issuer, or any of its subsidiaries.... and the nature and extent of his interest                             | Disclosure as specified in G.26 shall apply to the disposal of property that is material to the Issuer and, in any event, to property that has contributed more than 20% of the Issuer’s group consolidated reported comprehensive income in the financial period immediately preceding the disposal or more than 20% of the Issuer’s group consolidated net assets as at the end of the completed financial period immediately preceding the disposal. |
| H.01 to H.31         | Disclosures in respect of the Offer and Listing                                                                                                                                                                                | Not applicable –<br>Instead, the prospectus shall contain the information set out in Paragraphs 25                                                                                                                                                                                                                                                                                                                                                      |
| I.01 to I.08         | Disclosures in respect of vendors that have sold property to the Issuer or its subsidiaries in the past five years as well as terms of the agreements entered into with those vendors.                                         | Not applicable to foreign issuers that have been listed on foreign exchanges - Instead, issuers shall include information on vendors and terms of material transactions to the level disclosed in annual financial statements in the primary market in the prospectus.                                                                                                                                                                                  |

## 25. Contents of the prospectus

25.1 The prospectus shall outline information about the issuer including-

- (a) the name, registered office legal form, governance structure, operational jurisdictional outreach and relevant experience of the issuer;
- (b) the date and country of incorporation; and
- (c) the capital market regulatory provisions under which it operates in the country of domicile.

- 25.2 The prospectus shall also indicate details of the depositary bank including-
- (a) the name, registered office legal form, governance structure, operational jurisdictional outreach and relevant experience of the institution;
  - (b) The date and country of incorporation; and
  - (c) The regulatory provisions under which it operates in the country of domicile.
- 25.3 A highlight of the content and conditions of the deposit agreement including the date, parties, duration, and any indemnities or restrictions on the liability of the Depositary (if applicable), a statement as to how the terms of the deposit agreement may be varied and a description of how such agreement may be terminated.
- 25.4 The prospectus shall also indicate a summary of the material terms and conditions of the depositary receipts and depositary notes issuance including-
- (a) circumstances to necessitate withdrawal of deposited securities and for further issuance of depositary receipts and depositary notes ;
  - (b) conditions under which trading depositary receipts and depositary notes can be suspended;
  - (c) liability of parties to the issue;
  - (d) situations that may lead to the resignation and termination of Deposit Agreement and Depositary Bank services; and
  - (e) conditions under which a Deposit Agreement may be amended.
- 25.5 Other details to be disclosed include-
- (a) a statement of the relevant resolutions, authorizations, agreements and approvals on the basis of which, the Depositary receipts and depositary notes shall be created and issued;
  - (b) a statement of any right of pre-emption of shareholders exercisable in respect of any securities to be represented by the Depositary receipts and depositary notes (where applicable);
  - (c) the securities exchange(s) in which the issuer's securities are primarily listed and their per unit average price in Kenya Shillings for Six (6) months prior to the publication of the prospectus;
  - (d) the total number of securities being offered, whether it is a public or private placement, investor target category, offer type (book-build, fixed price etc.);
  - (e) the issue price, its justification, whether it is at a discount or premium and the number of securities on issue, frequency of issuance;
  - (f) The securities represented by the depositary receipts and depositary notes and the applicable conversion ratio;
  - (g) where applicable, the procedure for the exercise of any right of pre-emption, the transferability of subscription rights and treatment of subscription rights not exercised;
  - (h) a summary of the rights attaching to the depositary receipts and depositary notes , and in particular the voting rights, entitlement to share in any profits and, in the event of liquidation, in any surplus among others. In case of more than one class of securities of the issuer, details of each class;
  - (i) the ranking securities' rights in relation to the issuer's total financial obligations, covenants attached to issuance and, in the event of liquidation, any special rights attached;

- (j) a statement on the date(s) on which entitlements to dividends or interests shall fall due.
- (k) a statement regarding all taxes payable on the gains from the securities and if or not, they shall be withheld at source in the country of domicile;
- (l) a statement as to whether the issuer (or depositary bank) assumes responsibility for the withholding of tax at source;
- (m) a detailed account of the arrangements for the transfer of the securities to the beneficial owners and restrictions (if any) on their transferability;
- (n) in case of out-bound depositary receipts and depositary notes, where a listing of securities on another securities exchange is to be sought by the Issuer (or depositary Bank), among others, details of that securities exchange in terms of its size, global ranking and a justification of the listing in that market;
- (o) the period during which the issue shall remain open and names and addresses of the Issuer's (or depositary bank's) registrars, custodians, brokers, underwriters, transfer agents (where applicable) and other advisers as applicable;
- (p) the methods of and time limits for delivery of the securities, green-shoe option (if any), subscription rate for the issue to be considered successful and refunds arrangements in case of an over-subscription, the estimated net proceeds of the issue if known and the intended application of such proceeds;
- (q) where applicable, the names, addresses and descriptions of the persons underwriting the issue and the amount of portions not covered (if any);
- (r) the dates on which the underlying securities will be listed; and
- (s) where applicable, clearing and settlement arrangements for the securities.

## **26. Additional issue of depositary securities**

There shall be no requirement for a prospectus for an additional issue of depositary securities that arises by way of a corporate action by the Issuer such as scrip dividends, bonus issues etc. with respect to the underlying securities provided that:

- (a) the corporate action is in compliance with the requirements of the primary securities exchange on which its securities are listed or any competent authority or equivalent regulatory authority that regulates it and the information specified in Clauses 33 and 35 has been submitted to the Authority; and
- (b) the issuer makes appropriate arrangements to disclose information in respect of these corporate actions in accordance with Clause 35 of this Guidance Note.

## **27. Policy on securities distribution and operational issues**

The issuer shall outline its general policy on specific securities distribution and operational issues affecting Depositary securities issuance. These policies shall include among others, policies on:

- (a) dividend declaration and distribution;
- (b) transferability of Depositary securities;
- (c) securities ownership structure;
- (d) communication with stakeholders;
- (e) transfer of voting rights;
- (f) distribution of documents;
- (g) investor education;

- (h) collateralization and pledging; and
- (i) asset class categorization.

## **28. Risk management and allocation of responsibilities**

Prior to undertaking issuance of Depositary receipts and depositary notes, the issuer shall ensure that all foreseeable risks are comprehensively addressed, with clear provisions on allocation of responsibilities to minimize risk exposure. Among the risks to be exhaustively addressed include;

- (a) foreign currency fluctuation risk;
- (b) subscription risk;
- (c) underwriter's financial capacity risk;
- (d) competition risk;
- (e) securities custody risk;
- (f) issuer credit risk;
- (g) price fluctuation risk;
- (h) depositary bank resignation risk;
- (i) conflicts of interest risk;
- (j) liquidity risk; and
- (k) regulatory risk.

## **29. Trading and settlement of depositary securities**

29.1 Following the initial offer and listing of Depositary securities, investors shall trade their Depositary securities on the relevant securities market segment using the normal securities trading and settlement systems and processes as is the case for other listed securities.

29.2 Under the terms of the deposit agreement:

- (a) the Depositary may need to create new depositary securities by buying the underlying securities from the relevant primary securities exchange, putting them in a custody arrangement in that market and then creating and distributing newly created depositary securities to existing or new holders of Depositary securities in response to corporate actions by the Issuer such as splits, bonus issues, rights issues and subsequent offerings/employee share option plans, among others; and
- (b) Holders of depositary securities shall have the right to sell the Depositary securities to other investors on exchange or by private transfer or, if they do not get a ready buyer, they may require the Depositary to cancel held Depositary securities and request the Depositary bank to deliver a proportionate number of the underlying securities to their account (or pay a cash equivalent) to them.

## **30. Transfer of securities outside a securities exchange**

30.1 To facilitate the process of creation and cancellation of Depositary securities, it shall be necessary for the central securities depository to be able to transfer the underlying and Depositary securities between the nominated account of the Depositary Bank (or its agent) and other investors within or outside of the trading and settlement infrastructure on a

“free-of-payment” basis, subject to payment of relevant fees and commissions, given that the Depository Bank (or its agent) shall be acting as a conduit for the transfer of beneficial ownership between one investor and another.

- 30.2 Section 31 of the Capital Markets Act allows the Authority to authorize the transfer of a listed security outside of securities exchange either on a case-by-case basis or as provided for by the Authority in the rules. Consequently, by this section, the Authority, authorizes the Depository and licensed persons to transfer Depository Securities “free-of-payment” basis, subject to payment of relevant fees and commissions to implement:
- (a) instructions by the Depository or its agent to transfer newly created Depository securities to investors to implement an initial public offer or corporate actions that may lead to creation of new Depository securities that comply with the relevant clauses in this Guidance Note or instructions by the Depository or its agent to transfer cancelled Depository securities to the Depository Bank’s custodian or nominated agent to implement a redemption of the underlying securities on payment of a cash equivalent.
  - (b) instructions by investors and subsequent transfer of newly created Depository securities to their account on their depositing previously held underlying securities with the Depository Bank that are issued in accordance with the provisions of the Deposit agreement approved by the Authority and in accordance with the processes agreed between the Depository and the central depository.
  - (c) instructions by investors to cancel and subsequent transfer of Depository securities initially issued in accordance with the provisions of the Deposit agreement approved by the Authority and in accordance with the process agreed for such cancellations between the Depository Bank or its agent and the central depository specifically for such transactions and that comply with the provisions set out in 35.1.

### **31. Cancellation of depository receipts and notes**

- 31.1 The depository shall outline in the prospectus circumstances under which it shall allow for the cancellation of Depository receipts and depository notes.
- 31.2 Cancellation of the depository receipts and depository notes shall take place upon the request of the depository receipts and depository notes owner to cancel the security and receive the underlying securities.
- 31.3 The depository receipts and depository notes owner shall send a cancellation request to the depository or its agent, who will then cancel the depository receipt and instruct the custodian to deliver the underlying securities to the account of the depository receipts and depository notes owner.
- 31.4 Upon receipt of the application for cancellation, the Depository shall instruct the underlying securities’ custodian to deliver the proportionate number of underlying securities to the investor’s custodian, usually located in the issuer’s country of incorporation.

31.5 The Depositary shall then retire the proportionate number of Depositary receipts and depositary notes by debiting the same to the register of the securities' owners at the time when it is advised by the underlying securities' custodian that the transfer of the underlying shares has been effected as instructed.

31.6 For both in-bound and out-bound Depositary receipts and depositary notes, the issuer or Depositary Bank, if applicable, shall be clear from the outset, on the target category of investors and whether or not, the issuance and subsequent trading of the securities shall be on or off the exchange.

### **32. Rights of holders of depositary securities**

32.1 The issuer must ensure equal treatment of all holders of its listed depositary securities and underlying securities and for the purposes of this Guidance Note, the Depositary security shall be fully recognized and shall be generally equivalent to the rights of holders of the underlying securities represented by the Depositary securities.

32.2 To the extent possible, the issuer shall ensure that all the necessary facilities and information is promptly available to the Authority and of the holders of underlying securities and holders of Depositary receipts and depositary notes to enable all stakeholders exercise their rights as a regulator and beneficial owners respectively by ensuring they are promptly informed in case of, among others:

- (a) meetings which they are entitled to attend;
- (b) information to enable holders of depositary receipts and depositary notes to exercise their right to vote, where applicable;
- (c) allocation and payment of dividends;
- (d) the issue of new securities, including arrangements for the allotment, subscription, renunciation, conversion or exchange of the securities;
- (e) material changes to the level of debt;
- (f) changes in the board of directors; and
- (g) changes in the issuer's business line or model.

### **33. Continuing Obligations**

33.1 As a general rule, unless expressly provided, any information that might reasonably be expected to affect market activity of both the primary and underlying securities in depositary receipts and depositary notes arrangement shall be disclosed well in advance, in line with the disclosure provisions in the Capital Markets Act.

33.2 For in-bound depositary securities, the issuer shall ensure that copies of all documents required to be filed as part of continuing obligations are promptly made available to the Authority.



- 33.3 The issuer shall submit to the Authority, at the same time as it submits to shareholders, copies of all documents or other similar communication relayed to shareholders.
- 33.4 The issuer shall promptly notify the Authority of any corporate actions (mergers and acquisitions, dividend declarations, rights issues/splits/bonuses modification in the rights of the underlying securities and their corresponding depositary securities etc.) and in certain circumstances, the Authority may require a new application for listing of such additional securities.
- 33.5 Where applicable and in line with the requirements of the Capital Markets Act on publication of annual, semi-annual and quarterly reports, the issuer shall publish these reports in accordance with the Rules of the Securities Exchange on which the underlying securities are listed.
- 33.6 Prepared audited financial statements shall be compliant with International Financial Reporting Standards or any other applicable standards acceptable to the Authority.
- 33.7 For unsponsored issues, the depositary Bank shall ensure that to the extent applicable, any information that might reasonably be expected to affect market activity of both the primary and underlying securities in depositary receipts and depositary notes arrangement is disclosed promptly, in line with the disclosure provisions in the Capital Markets Act.

#### **34. Fees and other charges**

- 34.1 The depositary bank shall clearly spell out its policy on all fees, commissions and other charges payable by the investor in the prospectus and the charges shall only be changed on them getting express authority in writing.
- 34.2 Some of the chargeable fees shall include;
- (a) tax (stamp duty and other taxes)
  - (b) custodian Safekeeping Fee
  - (c) custodian Settlement Fee
  - (d) administration fees
  - (e) currency fluctuation adjustments
  - (f) miscellaneous Service Charges
  - (g) indirect Expenses
  - (h) broker Commission
  - (i) application and Listing Fees
- 34.3 An applicant for listing of Depositary securities shall pay initial listing fees calculated in accordance with the rates set out in the Sixth Schedule of The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002.
- 34.4 An applicant shall pay an annual fee for listing, calculated in accordance with the rates set out in the Sixth Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002.

### **35. Notifications to the Authority**

- 35.1 An issuer must inform the Authority in writing, promptly, when it becomes aware that the proportion of any class of listed depositary securities in the hands of the public has fallen below twenty-five per cent (25%) of the total number of issued depositary securities or, where applicable, such lower percentage as the Authority may determine.
- 35.2 For sponsored issues, the issuer shall promptly notify the Authority of any change of depositary. The issuer shall furnish the Authority with information with respect to the cancellations and ensure that the replacement depositary shall satisfy the applicable conditions set out in this Guidance Note.
- 35.3 The issuer shall provide information on changes to the registered holders on a monthly basis in compliance with the disclosure requirements of its primary listing exchange and/or any competent authority or equivalent regulatory authority that regulates it.
- 35.4 Where the Authority assesses that the corporate governance requirements that the issuer is required to comply with in the jurisdiction of its primary listing differ significantly from the corporate governance requirements applicable to companies with a primary listing in Kenya, the Authority may require the issuer to issue an undertaking to comply with the provisions of the Corporate Governance Code (to the extent applicable) for as long as the Depositary securities remain listed in Kenya.
- 35.5 Where, in the opinion of the issuer, disclosure of any matter required by the provisions of this Guidance Note would be unduly detrimental to the issuer, the issuer shall provide this information in confidence to the Authority and apply for a waiver from the relevant requirements, giving clear justification why it believes the information should not be disclosed.

### **36. Review and updating of the Guidance Note**

- 36.1 The Authority shall from time to time issue updates to this Guidance Note in respect of depositary receipts and depositary notes through a wide circulation medium as and when necessary;
- 36.2 The Authority shall review applications for issue and listing of depositary receipts and depositary notes to ensure that the proposed programme, applicants and advisors comply with the eligibility requirements and disclosure requirements as set out in this Note;
- 36.3 The Authority shall at any time require the applicant, its managers, its officers or employees to provide it with information to help confirm that the applicant meets its eligibility and continuing obligations.
- 36.4 The Authority shall take such enforcement action as provided under the Capital Markets Act on any person if it finds that such person has not complied with the provisions of this Guidance Note.

### **37. Clarifications from the Authority**

In case of doubt with respect to the content of this Guidance Note, the Authority advises market participants and investors to seek clarifications from the Authority.