

(Legislative Supplement No. 96)

LEGAL NOTICE NO. 295

THE CAPITAL MARKETS ACT

(Cap. 485A)

IN EXERCISE of the powers conferred by section 12 (1) of the Capital Markets Act, the Cabinet Secretary for the National Treasury makes the following Regulations—

THE CAPITAL MARKETS (SECURITIES LENDING,
BORROWING AND SHORT-SELLING) REGULATIONS, 2017

PART I—PRELIMINARY

1. These regulations may be cited as the Capital Markets (Securities Lending, Borrowing and Short-selling) Regulations, 2017.

Citation.

2. In these regulations, unless the context otherwise requires—

Interpretation.

“lending agent” means a third party who is not a party to a securities lending agreement but who provides support services to securities lenders including the monitoring of loans, the negotiation of lending fees or rebate rates, and the management of collateral;

“lending agreement” means a written securities lending contract executed by both the securities lender and borrower;

“lending fee” means a fee charged by a securities lender to the borrower for the loan of securities under these regulations;

“margin” means the minimum amount of collateral required in a securities lending transaction above the value of the loaned securities as specified in the lending agreement;

“primary regulator” means the regulatory agency primarily responsible for regulating the business of the person;

“rebate rate” means part of the interest earned by the collateral held by the securities lender that is remitted to the borrower where the collateral is in the form of cash;

“regulated person” has the meaning assigned to it under the Act and includes pension funds, insurance companies, investment funds, exchange-traded funds and commercial banks;

“securities lending” means the temporary transfer of securities from a lender to a borrower with the concurrent written agreement to return the securities either on demand or at a future date;

“short position” means the net investment position in a security in which the security has been borrowed and sold but not yet replaced; and

“short sale” means any sale of a security which the seller does not own at the time of the sale.

PART II—SECURITIES LENDING AND BORROWING

3. (1) A securities lending and borrowing transaction shall be carried out in accordance with these regulations.

Securities lending and borrowing transactions.

(2) The Authority may exempt a sell buy-back or any facility that is similar to a securities lending or borrowing transaction as contemplated under these regulations.

(3) A person shall apply in writing to the Authority to exempt a sell buy-back or a facility that is similar to a securities lending transaction from the application of these regulations.

(4) An application under subregulation (3) shall state the reasons for which the exemption is being applied for.

(5) The Authority shall consider the application under subregulation (3) and make a decision within twenty-one days of receiving the application.

4. The Authority shall prescribe the criteria for the identification of securities that may be lent under these regulations.

Criteria for identifying securities to be lent or borrowed.

5. (1) A securities lending and borrowing transaction shall be carried out by —

Persons to undertake securities lending and borrowing.

- (a) a regulated person; or
- (b) any other person specified for that purpose by the Authority.

(2) A regulated person or a person specified by the Authority in accordance with subregulation (1) shall comply with—

- (a) these regulations;
- (b) any additional requirements that may be imposed by the Authority; and
- (c) any other requirements that may be imposed by its primary regulator.

(3) A regulated person may act as an intermediary for a securities borrower or lender:

Provided that the intermediary shall disclose any potential or actual conflicts of interest in relation to his or her role in the securities lending or borrowing transaction to the borrower or lender as the case may be.

6. (1) The lender and borrower in a securities lending and borrowing transaction shall enter into a lending agreement before undertaking the securities lending and borrowing transaction.

Securities lending and borrowing agreement.

(2) A lending agreement shall include—

- (a) detailed identification of the lender;

- (b) detailed identification of the borrower;
- (c) the securities to be lent;
- (d) the number of the securities to be lent;
- (e) the agreed value of the securities to be lent for the purposes of the transaction;
- (f) the term of the transaction;
- (g) the method of calculating the lending fee or rebate and the payment schedule of the lending fee or rebate as the case may be;
- (h) the nature and value of the collateral;
- (i) the full transfer of the title and interest in the securities to be lent;
- (j) the full transfer of the title and interest in the collateral to be provided;
- (k) the methodology for the revaluation of the collateral;
- (l) the person who shall be responsible for the revaluation of the collateral;
- (m) the margin attached to the securities lending and borrowing transaction, if any;
- (n) the nature and consequences of default or other failures in relation to the terms of the lending agreement;
- (o) the exercise of voting rights associated with the securities to be lent;
- (p) the exercise of voting rights associated with the collateral to be provided where the collateral is a type of security that has voting rights associated with it; and
- (q) the procedure for recalling or returning the lent securities.

7. (1) A securities lending and borrowing transaction shall not be registered as a sale or purchase on a traded market.

Reporting of transactions.

(2) A market intermediary who carries out a securities lending and borrowing transaction shall, once in every month or in any frequency that may be determined by the Authority, submit to the Authority a report of securities lending and borrowing transactions the market intermediary has carried out in the period under review.

(3) The Authority may require each regulated person to report the net securities lending and borrowing position of each security held by the regulated person on a regular basis.

8. (1) A borrower in a securities lending and borrowing transaction shall provide the lender with collateral of at least one hundred per centum of the value of the borrowed securities.

Collateral for securities lending and borrowing transactions.

(2) The lender in a securities lending and borrowing transaction may require the borrower to provide an additional margin on the collateral provided under subregulation (1).

(3) The quality of the collateral required in a securities lending or borrowing transaction may include—

- (a) cash in Kenya shillings;
- (b) Government securities; or
- (c) any other type of security that may be specified by the Authority.

(4) The lent securities and the collateral shall be revalued daily and the amount of the collateral held in relation to the lent securities shall be adjusted in relation to the revaluation.

(5) Where it is not possible to revalue the lent securities daily, the securities may be revalued on a weekly basis or more frequently as may be required by the Authority and the collateral held in relation to the securities shall be adjusted in relation to the revaluation.

9. (1) The collateral provided by the borrower in a securities lending and borrowing transaction may be used by the lender as follows—

Other use of collateral.

- (a) in the case of cash, it may be deposited in an interest bearing account;
- (b) in the case of Government securities, it may be used in overnight repo transactions; or
- (c) in any other case, it may be used as the Authority may prescribe.

(2) The primary regulator of the borrower or lender may also impose additional restrictions on the use of the collateral held by a lender of securities.

(3) The lender in a securities lending and borrowing transaction may appoint, in writing, a lending agent to manage the collateral provided by the borrower and shall specify, at the time of appointment, the uses to which the collateral may be put by the agent.

10. (1) The lender in a securities lending and borrowing transaction shall continue to enjoy the economic benefits associated with the securities he or she has lent to the borrower during the period when the securities have been lent including dividends or interest.

Rights and obligations of the lender.

(2) The lender in a securities lending and borrowing transaction shall be entitled to a lending fee from the borrower for lending the securities.

11. A borrower in a securities lending and borrowing transaction shall—

Rights and obligations of the borrower.

- (a) have full legal title of the securities he or she has borrowed;
- (b) where the collateral provided is in the form of securities, continue to receive all economic benefits associated with

the securities given as collateral including dividends or interest; and

- (c) pay the securities lender such amount as may be needed to ensure that the collateral provided remains sufficient at all times.

PART III—SHORT-SELLING OF SECURITIES

12. (1) The short-selling of securities shall be carried out in accordance with these regulations.

Short-selling.

(2) A seller may enter into a short-selling transaction if the seller provides documentary evidence that shows that he or she has—

- (a) entered into an agreement to borrow the securities to cover the short sale;
- (b) reasonable grounds to believe that the securities will otherwise be delivered to him or her in time to cover the short sale; and
- (c) entered into an arrangement with another party under which that party has confirmed in writing that it will have the securities and will deliver them in time to cover the short sale.

(3) A person who contravenes the provisions of subregulation (2) commits an offence and shall be liable, on conviction, to the penalty specified under the Act.

13. (1) The Authority shall prescribe the criteria to identify securities that may be subject to short sales.

Securities permitted in short sales.

(2) Any prevalidation requirements or obligations applicable to securities transactions shall not apply to short-selling transactions.

14. (1) Short-selling transactions shall only be carried out by regulated persons or any other person specified by the Authority.

Persons permitted to undertake short-selling.

(2) Each regulated person who intends to engage in a short-selling transaction shall comply with these regulations, any additional requirements imposed by the Authority and any other requirements imposed by the regulated person's primary regulator.

15. (1) A seller who engages in a short-selling transaction shall, when submitting an order, declare to the exchange or, if acting through a market intermediary, to that intermediary, that it is a short sale.

Requirements for short-selling.

(2) Each short sale shall be carried out in the same trading environment as normal purchases or sales of securities.

(3) A securities exchange or a trading platform shall, for the purposes of facilitating short-selling transactions, formulate rules to provide for buying in.

(4) Despite the generality of subregulation (3), each short sale of securities shall be identified as a short sale by the selling broker under the rules of the exchanges or trading platforms contemplated in subregulation (3).

(5) For the purposes of this regulation, “buying in” means the buying of securities effected by a securities exchange which a seller has failed to deliver on the day fixed for settlement;

16. (1) A participant in an exchange or trading platform who holds a short position in a security of five per centum or more of the total amount of the security in issue shall report this position immediately to the relevant exchange or trading platform and the Authority.

Reporting of and limits on short positions.

(2) The Authority may revise the limit prescribed in subregulation (1) and may prescribe different limits for different categories of securities.

(3) A short position in any security by a participant and related persons shall not exceed ten per centum of the total amount of the security in issue.

(4) The Authority may revise the limit prescribed under subregulation (3), and may prescribe different limits for different categories of securities, or prescribe the limits of short positions that specific participants or types of participants may hold.

17. (1) The Authority may suspend the short sales of a security or impose controls on the prices that may be input on short sales of a security —

Suspension or price control.

- (a) where the price movements of the security meet the conditions set out in the relevant rules of a regulated securities exchange or other infrastructure provider for the imposition of price controls or suspension of trading;
- (b) where the short sales of the security have been temporarily prohibited under the rules of a regulated securities exchange;
- (c) where the short sales of the security that is trading in Kenya have been prohibited in another jurisdiction or have been made subject to price controls as a result of concerns about market order; or
- (d) to maintain or restore the fair, efficient and transparent trading in the security.

(2) The Authority shall review suspensions of shorts sales or impositions of price controls on short sales under subregulation (1) at least once a week.

(3) Where the Authority has reviewed a suspension of a short sale or the imposition of price controls on a short sale under subregulation (2), it may —

- (a) maintain the suspension or the price control;
- (b) lift the suspension; or
- (c) remove the price control.

18. A person who contravenes any provision of these regulations for which a specific penalty is not provided shall be subject to sanctions by the Authority as specified under the Act.

General penalty.

19. Any matter required to be prescribed or specified by the Authority shall be prescribed or specified by the Authority by way of a circular.

Matters to be prescribed by the Authority.

Dated the 27th November, 2017.

HENRY K. ROTICH,
Cabinet Secretary for the National Treasury.