

THE CAPITAL MARKETS ACT
(Cap.485A)

IN EXERCISE of the powers conferred by section 12 (1) of the Capital Markets Act, the Capital Markets Authority makes the following Regulations-

THE CAPITAL MARKETS (CONDUCT OF BUSINESS) (MARKET INTERMEDIARIES) REGULATIONS, 2011

Citation. **1.** These Regulations may be cited as the Capital Markets (Conduct of Business) (Market Intermediaries) Regulations, 2011.

Interpretation. **2.** In these Regulations, unless the context otherwise requires-

“client bank account” means a bank account established for the purposes of regulation 29;

“client funds” means money of any currency that, in the course of carrying on its regulated activity, a market intermediary holds or receives on behalf of a client, or owes a client;

“financial year” means the period of twelve months ending on the 31st December in each year;

“market intermediary” means a company holding a license issued under Part IV of the Act;

“regulated activity” means any activity that is controlled by the Act or any regulations made under the Act.

Standards of conduct. **3.** A market intermediary shall, when conducting a regulated activity, apply principles of best practice and, in particular-

(a) observe a high standard of integrity and fair dealing;

(b) act with due skill, care and diligence; and

(c) observe high standards of market conduct.

Know your client.

4. (1) A market intermediary shall seek sufficient information about the client and the client's circumstances to ensure that the services provided are consistent with those circumstances.

(2) Notwithstanding the generality of paragraph (1), a market intermediary -

(a) shall, when recommending investments to a client or where it has discretion to act on behalf of a client, take and document reasonable steps to satisfy itself that the recommendation or discretionary action is suitable for the client, taking account of all the available alternatives;

(b) shall not recommend, or where the market intermediary has discretion to act on behalf of a client, execute any sale or purchase that is unsuitable for the client;

(c) shall not recommend, or where the market intermediary has discretion to act on behalf of a client, execute sales or purchases of a frequency that does not benefit the client regardless of the commission that the sales or purchases may produce; and

(d) may execute an order of a client without satisfying itself as to its suitability only where the client agreement makes clear that the client is acting without the advice of the market intermediary.

(3) A market intermediary shall take all reasonable steps to ensure that it does not give advice or effect a transaction, on behalf of a client, unless the advice or transaction is suitable for the client considering the facts disclosed by the client and any

other relevant facts about the client that the market intermediary is or ought to reasonably be aware of.

Independence. **5.** Where a market intermediary is advising or acting on behalf of a client, it shall ensure that any claim it makes relating to its independence or impartiality includes any limitation that there may be on its capacity.

Fair and clear communications. **6.** A market intermediary shall ensure that any agreement, written communication, notification or information that it gives or sends to clients to whom it provides the service of a regulated activity is presented fairly and clearly.

Clients' understanding of risk. **7. (1)** A market intermediary shall not-

- (a) recommend a transaction to a client, or effect a transaction with or for him, unless it has taken all reasonable steps to enable the client to understand the risks involved;

- (b) knowingly mislead a client on any advantages or disadvantages of a contemplated transaction; or

- (c) promise a return unless such return is contractually guaranteed.

(2) A market intermediary shall give sufficient information to the client to ensure that the client's decisions are informed.

(3) A market intermediary shall, when making recommendations to a client, take all reasonable steps to satisfy itself that the client has a full understanding of –

- (a) the nature of the investment;

- (b) the fees and charges associated with the investment;

- (c) the risks of the investment;

- (d) the factors that are likely to affect the performance of the investment;
- (e) the terms and conditions of the investment;
- (f) the consequences of departing from the terms and conditions of the investment.

(4) Where a market intermediary-

- (a) after giving a client an explanation, in writing, is satisfied that the client understands the information required to be given under paragraph (3), the market intermediary shall retain a copy of such explanation in its records;
- (b) gives an explanation orally, it shall send a written note of the advice to the client and retain a copy of the explanation in the client's file;
- (c) is of the opinion that an explanation is not required, because of the client's existing knowledge, it shall document that opinion in its records.

Charges.

8. (1) A market intermediary shall charge its fees according to its agreement with the client, or in the manner prescribed by the Authority.

(2) A market intermediary shall, before providing the service of a regulated activity to a client, disclose to the client the basis for and its charges for the provision of the services and the nature and amount of any other remuneration payable by the client.

(3) A market intermediary shall provide a statement of fees or charges to a client, for each transaction or monthly for a client on whose behalf many transactions are undertaken.

(4) A market intermediary shall not take any fees or charges from any client's funds or liquidate client's securities for the purpose of recovering its fees

or charges unless it is in accordance with the client agreement or in the manner prescribed by the Authority.

Clients' rights.

9. (1) A market intermediary shall not, in any written communication or agreement, exclude or restrict –

- (a) any duty or liability to a client which it has under any law or under any regulations made by the Authority;
- (b) any other duty to act with skill, care and diligence that is owed to a client in connection with the provision to him of the service of a regulated activity;
- (c) any liability owed to a client for failure to exercise the degree of skill, care and diligence that may reasonably be expected of it in the provision of the service of a regulated activity.

(2) A purported exclusion or restriction prohibited by these regulations shall be void and of no effect.

Cold calling.

10. A market intermediary shall not, for the purposes of soliciting business relating to a regulated activity, make unsolicited telephone calls or attend at any property, unless it has established and monitors the implementation of operational procedures to-

- (a) maintain a Do-Not-Call list of prospects that is updated whenever any contacted person requests not to be called again;
- (b) train staff on the use of the Do-Not-Call list;
- (c) limit the making calls to between 8 a.m. and 5 p.m.;
- (d) oblige the callers to state their first and last names at the commencement of the call;
- (e) oblige the callers to state the firm's name and address and the fact that it is licensed by the Authority at the commencement of the call;

- (f) oblige the caller to provide a detailed overview of any product being marketed by the market intermediary prior to soliciting any offers;
- (g) record and avail copies of all recordings to the Authority for inspection.

Cessation
of
business.

11. Where a market intermediary intends to withdraw from a regulated activity, it shall—

- (a) notify the Authority and each of its clients of its intention; and
- (b) ensure to the satisfaction of the Authority that any business that is outstanding is properly completed or transferred to another market intermediary.

Conflict
interest.

of **12.** (1) A market intermediary shall –

- (a) identify and document the conflicts of interest that are likely to occur in the course of its regulated activity;
- (b) adopt and document appropriate policies to minimize those conflicts by identifying the instances where it would refuse to act and, where this is not necessary, making arrangements to minimize the risk of any loss to the client;
- (c) avoid any conflict of interest between itself and a client and where such a conflict exists, decline to act, or if it considers that the conflict can be managed, disclose it to the client and follow the policies developed to minimize damage to the client and to put the client's interests ahead of its own.

(2) A market intermediary shall not take advantage of information it obtained from providing services to a client for its own benefit or the benefit of its employees or the benefit of another client, and where such an eventuality is likely to occur, the

market intermediary shall–

- (a) adopt and document procedures, including the erection of information barriers, barriers between information technology systems, physical barriers or even separate office locations, to minimize the possibility of information from one client being used for the benefit of another client, its employees or the market intermediary;
- (b) train employees in matters relating to the conflict of interest and the procedures developed to avoid them;
- (c) obtain undertakings from employees that they will not use information gained from the clients for their personal benefit.

(3) Where a market intermediary has a material interest in a transaction to be entered into with or for a client, or a relationship which gives rise to a conflict of interest, the market intermediary shall not, knowingly, advise, or exercise discretion, in relation to that transaction unless it has –

- (a) disclosed the material interest or relationship that may give rise to a conflict, as the case may be, to the client; or
- (b) taken reasonable steps to ensure that neither the material interest nor relationship would adversely affect the interests of the client.

(4) A market intermediary shall take reasonable steps to ensure that neither it nor any of its employees or agents offers or gives, or solicits or accepts, any inducement that is likely to conflict with any of the duties owed to clients.

Client agreement required.

13. (1) A market intermediary shall not provide service in respect of a regulated activity unless it has entered a written agreement with the client and the service is to be provided in accordance with the

agreement.

(2) The client agreement shall set out the basis on which the market intermediary's services are provided, including—

- (a) essential information about the market intermediary, including its name, address and contact information;
- (b) the services to be provided;
- (c) the fees to be charged or the way the fees will be calculated;
- (d) the nature or basis of commissions to be received by the market intermediary from third parties in relation to the services provided to the client;
- (e) the obligations of the client, including the manner of giving instructions;
- (f) the rights of the client, including –
 - (i) the right to receive the title for any securities purchased;
 - (ii) the right to receive a statement of all fees and charges;
 - (iii) the right to information on the remuneration received by the market intermediary from third parties for the services provided, in relation to the client;
 - (iv) the right to ask for information on the experience, qualifications and disciplinary history of the market intermediary;
 - (v) the right to receive interest on funds held by the market intermediary on the client's behalf;
 - (vi) the right to receive payment for securities sold within a specified period;

- (vii) the right to see the market intermediary's conflict of interest policy;
 - (viii) the right to complain and to have that complaint dealt with fairly and promptly;
 - (g) the obligations of the market intermediary;
 - (h) the arrangements made for securing the titles to and for the custody of securities bought including through the use of nominee accounts and the use of a custodian, where appropriate;
 - (i) any conflicts of interest relating to the market intermediary;
 - (j) any connections the market intermediary has with third parties that could affect the services being provided, including a requirement that the market intermediary deals through certain third parties or recommend certain investment products;
 - (h) (k) the fact that the market intermediary is regulated by the Authority; and
 - (l) any other terms and conditions of the agreement, including the notice to be given in respect of any changes to it or its termination.
- (3) A market intermediary and a client shall abide by the terms of the agreement.
- (4) A market intermediary shall keep the signed written agreement and give the client a copy.

Contract notes.

14. (1) A market intermediary shall, in respect of every contract for the purchase or sale of securities it has entered into, not later than the end of the next trading day after the contract was entered into, make out a contract note which complies with paragraph (2) and where the market intermediary entered into a contract—

- (a) as agent, deliver the original contract note to the person on whose behalf it entered into the

contract; or

(b) as principal, retain the contract note for itself.

(2) The contract note shall state-

(a) whether it is in respect of a purchase or sale of securities;

(b) whether a specific or limit price has been specified or whether the market rate should be applied in addition to the ultimate price, per unit of the securities;

(c) the name and address of the market intermediary and the principal place at which it carries on its business;

(d) that the market intermediary is acting as principal or agent, where it is so acting;

(e) the name and address of the person, to whom the market intermediary is required to give the contract note and, where different, the name of the person for whom the transaction was undertaken;

(f) the date of the contract, and the date on which the contract note is made;

(g) the quantity and description of the securities that are the subject of the contract;

(h) the rate or amount of commission payable in respect of the contract;

(i) the amount of stamp duty, if any, payable in connection with the contract and, where applicable, in respect of the transfer;

(j) the date of settlement; and

(k) any other information as may be prescribed by the Authority to ensure that there shall

be a complete audit trail in respect of the execution of client instructions and the settlement of market transactions.

Client confidentiality.

15. (1) A market intermediary shall keep all information in its possession, relating to a client, whether obtained from the client or third parties, confidential.

(2) A market intermediary shall adopt and document policies and procedures designed to ensure that information obtained from clients and third parties is kept confidential and secure.

(3) The policies and procedures adopted shall include—

- (a) a requirement that employees undertake to maintain confidentiality, in their contract of employment;
- (b) how to determine the employees who may have access to confidential information;
- (c) procedures that effectively restrict access to confidential information by employees through the use of secure document management, storage systems and encryption protected information, within the market intermediary's Information Technology system; and
- (d) systems designed to safeguard the integrity of any electronic record or transaction recording system.

(4) Notwithstanding paragraph (1), a market intermediary may disclose information relating to a client to the Authority or an approved securities exchange, on request, or if it is ordered to do so by a court of competent jurisdiction.

Complaints procedure.

16. (1) A market intermediary shall adopt, document and disclose to a client its procedures for the proper handling of complaints from clients and ensure that appropriate remedial action is taken on the complaints promptly.

(2) A market intermediary shall designate an officer to review and investigate all complaints lodged by clients and recommend appropriate remedial action to the management of the market intermediary.

(3) A market intermediary shall handle complaints in a fair, appropriate and timely manner, and shall inform the client of the outcome.

(4) A market intermediary shall, depending on the nature of the complaint, provide where a complaint is justified, appropriate restitution and address the weaknesses in its internal systems that led to the action causing the complaint.

(5) A market intermediary shall document all the actions it has taken under the complaints procedure.

(6) The complaints procedure shall set out the process for dealing with complaints, including–

(a) the apportionment of responsibility for the actions that led to the complaint including to persons not specifically named in the complaint;

(b) the timeframe for dealing with a complaint;

(c) the timeframe within which to inform the complainant of progress in dealing with the complaint, which shall not be more than three months; and

(d) the right to appeal to the chief executive of the market intermediary or another appropriately senior officer nominated by the chief executive, where the complaint cannot otherwise be resolved.

(7) A market intermediary shall immediately and in all events within twenty four hours, inform the Authority of any complaint that is still unresolved, three months after it was received.

(8) A market intermediary shall maintain a record

of complaints showing—

- (a) the client or any other person from whom a complaint was received;
- (b) the nature of the complaint;
- (c) the officer handling the complaint;
- (d) the officer against whom the complaint was made or who was responsible for the action that led to the complaint;
- (e) the progress in handling the complaint;
- (f) the way the complaint was resolved; and
- (g) the time it took to resolve the complaint.

(9) A market intermediary shall also maintain a summary register of complaints.

Execution of client order.

17. A market intermediary shall not execute an order unless the client has made sufficient arrangements for the necessary funds or securities.

Timely execution.

18. A market intermediary shall execute client orders in the chronological sequence in which the orders were received and give priority to outstanding orders.

Best execution.

19. A market intermediary shall deal for a client on the best terms available for the client.

Timely allocation.

20. A market intermediary shall ensure that transactions it executes are allocated to the clients who gave the orders in a timely and equitable manner.

Fair allocation.

21. Where a market intermediary has aggregated an order for a client's transaction with an order for its own account transaction, or with an order for another client's transaction, the market intermediary shall in the subsequent allocation—

- (a) not give unfair preference to itself or to any of the clients; and

- (b) give priority to satisfying orders for client transactions, if all orders cannot be satisfied.

Off-market transactions.

22. A market intermediary shall report all trades in securities dealt with otherwise than at a licensed securities exchange in such manner as may be prescribed by the Authority.

Front running.

23. Where a market intermediary has a client order to execute, or where it intends to publish to clients a price-sensitive recommendation or research or analysis, it shall not knowingly effect an own account transaction in the securities concerned or in any related investment until the order has been executed or until the clients for whom the publication was principally intended have had, or are likely to have had, a reasonable opportunity to react to it.

Churning.

24. A market intermediary shall not –

- (a) deal or arrange a deal in the exercise of discretion for any client; or
- (b) advise a client to deal,

if the dealing could in the circumstances be reasonably considered as too frequent or too large having regard to the trading activities, investment objectives, size and operations of such client .

Insider dealing.

25. A market intermediary shall take reasonable steps to ascertain if any of its clients are insiders and maintain records that assist it to monitor insider dealing.

Prevention of money laundering, etc.

26. (1) A market intermediary shall, on each occasion that a client places an investment order with it, obtain from the client–

- (a) details relating to the origin and source of the money or funds used or to be used for the investment;
- (b) where the money or funds originate from outside Kenya, a confirmation from the

remitting entity of the nature of the client's business and details relating to the source of the money or funds; and

- (c) a written declaration by the client confirming—
 - (i) the accuracy of all information given under subparagraph (a) or (b); and
 - (ii) that the money or funds used for the investment in securities does not arise from the proceeds of any money laundering or other illicit activities.

(2) A market intermediary shall keep and maintain the information obtained from a client under paragraph (1) as part of the records required under regulation 32.

Notification on compliance.

27. (1) A market intermediary shall at all times comply with the Act, regulations made under the Act and with any other regulatory requirements prescribed by the Authority.

(2) A market intermediary shall cooperate with the Authority and give the Authority all the reasonable assistance it requires to discharge its functions under the Act.

(3) A market intermediary shall, immediately and in all events within twenty four hours inform the Authority of the occurrence of—

- (a) any event which could reasonably be expected to affect the Authority's assessment of its fitness and propriety or that of its management and staff;
- (b) a material breach of the regulatory requirements applicable to the market intermediary or a material change in any information provided in support of the licence application;
- (c) a reduction in working capital or financial resource to below one hundred and twenty per

centum of the specified minimum or a reduction of fifty per centum in the working capital or financial resource since the previous report to the Authority;

- (d) any concern of the market intermediary that it may not be able to meet its obligations to clients when they fall due;
 - (e) any shortfall in the funds held in the client account below the total obligations to clients;
 - (f) any inability to comply with any instruction or direction of the Authority;
 - (g) any misstatement in any return previously submitted to the Authority;
 - (h) any fraud on the market intermediary or by any of its employees;
 - (i) any disciplinary action against any of its key personnel;
 - (j) any investigation, finding or conviction relating to the market intermediary or any of the key personnel of the market intermediary by a law enforcement agency, regulatory authority, or professional association;
 - (k) any civil claim against the market intermediary that exceeds twenty five per centum of the minimum financial resource requirement of the market intermediary; and
 - (l) any action against it that may lead to its insolvency.
- (4) A market intermediary shall notify the Authority in not less than twenty eight calendar days, before it-
- (a) changes its name, business name (if different), business address and nature of business of the market intermediary;
 - (b) appoints a new chief executive, director or

compliance officer;

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- (c) appoints a new internal auditor;
- (d) decides to seek a licence from another regulatory authority in Kenya or abroad;

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- (e)
- (f) changes its capital structure substantially;
- (g) changes its ownership or substantial shareholding;
- (h) makes a substantial acquisition; or
- (i) decides to surrender its licence.

(5) A market intermediary shall keep records of all returns sent to and correspondence with the Authority.

Clients' funds.

28. (1) A market intermediary shall hold its clients' funds in trust for and on behalf of the clients on behalf of whom the funds were received or are held according to their respective shares.

(2) Clients' funds shall not form part of the assets of the market intermediary for any purpose and shall not be available in any circumstances for payment of any debt of the market intermediary.

Segregation of
clients' funds.

29. (1) A market intermediary that receives or holds clients' funds shall open one or more client bank accounts.

(2) A market intermediary shall segregate its client bank accounts from any account holding funds belonging to the market intermediary.

(3) A market intermediary shall deposit into a client bank account all funds received on behalf of or from a client, upon receipt.

(4) A market intermediary shall keep records of –

- (a) all the amounts it has deposited into a

client bank account held by the market intermediary, specifying the person on whose behalf the amounts are held and the dates on which they were deposited into the account;

- (b) all withdrawals from a client bank account, the dates of the withdrawals, and the names of the persons on whose behalf the withdrawals were made; and
- (c) any other particulars as may be prescribed by the Authority.

(5) A market intermediary shall on a daily basis reconcile its records showing the amounts held on behalf of each client in the client bank account and the aggregate of clients' money held in the client account or being held by third parties on behalf of clients.

(6) Where there is more than one client account, the market intermediary shall reconcile each client account separately as well as the aggregate position on all clients' accounts.

(7) The officer who is responsible for authorising payments into and out of the client accounts shall not carry out the reconciliation.

(8) A market intermediary shall obtain and maintain, in its records, written acknowledgement from the bank confirming that the clients' funds deposited with the bank are held in trust for the clients and are not available to offset any obligation of the market intermediary.

Accounting for
and use of clients'
funds

30. (1) A market intermediary shall promptly and accurately account for clients' funds and ensure that—

- (a) clients' funds and other funds are segregated;
- (b) the amount of clients funds standing to the credit of each client can be ascertained, at all times, by the Authority or any other party;

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- (c) funds held on behalf of a client are not used for the benefit of another client.

(2) A market intermediary shall not withdraw money deposited in a clients' bank account unless the money is required for the purposes of—

- (a) making a payment to, or in accordance with the written instructions of, a person entitled to the money;
- (b) purchasing, margining, guaranteeing, securing, transferring, adjusting or settling dealing in securities effected by the market intermediary on the written instructions of a client;
- (c) defraying brokerage and other charges incurred in respect of dealings in securities effected by the market intermediary on the written instructions of a client; or
- (d) making a payment that is otherwise authorized by law.

Segregation of other client property.

31. (1) All securities and other property held or received by a market intermediary on behalf of a client in connection with its regulated activity shall be segregated and accounted for separately.

(2) A market intermediary shall keep such books and accounts as are necessary to—

- (a) show all its dealings with a client's securities and other property held or received by it on behalf of a client; and
- (b) distinguish securities and other property it holds or has received on behalf of each client from its own securities and property and other securities and property held or received by the market intermediary.

(3) A market intermediary shall on monthly basis

reconcile the records of assets held by the market intermediary on behalf of clients, both individually and in aggregate, and compare the reconciliation with the evidence of the title to the assets controlled by the market intermediary, as immobilised securities or those held in certificated form (if any).

(4) Where a market intermediary has appointed a custodian to hold the clients' assets, the market intermediary shall maintain records of all assets held by the custodian and reconcile the records on monthly basis, with the records of the market intermediary of the assets held on behalf of its clients both individually and collectively.

(5) A market intermediary shall keep safely all evidence of title to client assets.

(6) A market intermediary shall not dispose of client assets unless the client has instructed it, in writing.

(7) A market intermediary shall ensure that its internal systems and controls do not permit its officers to dispose of, pledge, lend or otherwise deal with client assets except in accordance with these Regulations.

Requirements in
respect of
accounting records

32. (1) A market intermediary shall keep proper accounts and records that show the transactions, effected on its behalf or on behalf of others and the financial position of its regulated activity.

(2) The records and accounts maintained under paragraph (1) shall-

(a) disclose with reasonable accuracy, the financial position of a market intermediary at any given time;

(b) enable a market intermediary to prepare a statement of financial position and a statement of comprehensive income at any given time; and

(c) show whether a market intermediary is

maintaining adequate financial resources to meet its business commitments and withstand the risks to which its business is exposed to.

(3) Notwithstanding paragraph (1), the accounting records shall be complete, allow for an independent assessment of the matters in paragraph (1) and contain—

- (a) day to day entries of all sums of money received and expended by the market intermediary, and the matters in respect of which the receipt and expenditure took place;
- (b) a record of all the assets and liabilities of the market intermediary including any commitments or contingent liabilities;
- (c) day to day entries of all purchases and sales of securities by the market intermediary distinguishing those made by the market intermediary on its own account and those made on behalf of others;
- (d) day to day entries of the receipt and dispatch of documents of title, or documents evidencing title, to securities which are in the possession or control of the market intermediary;
- (e) day to day entries of —
 - (i) clients' funds paid into or out of a client bank account maintained for the purposes of these regulations;
 - (ii) receipts and payments of clients' funds that are not paid into or out of a client bank account, identifying the persons to whom each receipt or payment relates;
- (f) a record of —

- (i) the aggregate balances on client bank accounts;
 - (ii) individual client balances allocated as against the names of the client;
 - (iii) sufficient information to explain the market intermediary's dealings with each client bank account, including the time and date;
 - (iv) the time, date and complete particulars of instructions received from and trades executed for clients including details of short positions;
 - (v) complete particulars of the market intermediary's orders and trades, including time and date;
- (g) details of any credit extended or loans made in respect of margin or otherwise; and
- (h) details of all securities that are—
- (i) the property of the market intermediary, showing who holds them and if held otherwise than by the market intermediary details on whether they are held as collateral against loans or advances; and
 - (ii) not the property of the market intermediary, for which the market intermediary is accountable, showing by who or for whom they are held and distinguishing those which are deposited with a third party as security for loans or advances made to the market intermediary or any related person, for any other purpose;
- (i) any other particulars required from time to time by the Authority or the securities

exchange to be contained in the accounting records of a market intermediary.

Records to be up to date. **33.** (1) A market intermediary shall ensure that its records are updated on a daily basis.

(2) A market intermediary shall establish procedures that facilitate its compliance with its financial resource, client asset and working capital requirements.

(3) Notwithstanding the generality of paragraph (2) a market intermediary shall establish procedures for-

- (a) daily reconciliations of funds held in the client accounts;
- (b) daily calculations of the working capital and financial resource; and
- (c) the maintenance of a record of daily calculations and reconciliations.

Audit trail.

34. (1) A market intermediary shall record the information that is required to be recorded by these Regulations in a way that identifies all transactions and allows for the tracing of transactions, from the initiation of the order to its final settlement.

(2) A market intermediary shall file, index, cross-reference or arrange its records in a manner that permits prompt access to any particular record.

Conformity with accounting standards

35. A market intermediary shall keep its accounting records in accordance with the International Financial Reporting Standards.

Retention of records

36. A market intermediary shall preserve the accounting records keep under regulation 32 for seven years from the date on which they are made.

Inspection of records.

37. The Authority or any person authorised by the

Authority may, at reasonable times and during the period which accounting records kept under regulation 32 are required to be preserved, require a market intermediary to produce, the accounting records for purposes of inspection.

Imposition of additional requirements securities exchange or self regulatory organizations. **38.** (1) A securities exchange or other self regulatory organization may impose additional obligations or requirements that it considers necessary on market intermediaries that are members of the exchange or the self regulatory organization.

(2) Notwithstanding the generality of paragraph (1), a securities exchange or self regulatory organization may impose additional obligations or requirements relating to-

- (a) the keeping of accounts, books and records;
- (b) periodic financial reporting to the securities exchange or self regulatory organization in the form and manner required by the securities exchange or self regulatory organization;
- (c) the audit of accounts;
- (d) the information to be given in audit reports; or
- (e) spot order checks.

Preparation of annual financial statements. **39.** A market intermediary shall, at the end of its financial year, prepare in accordance with International Financial Reporting Standards annual financial statements that consist of-

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- (a) a statement of financial position, that gives a true and fair view of the state of affairs of the market intermediary, as at the last day of the financial year;
 - (b) a statement of comprehensive income, that gives a true and fair view of the market intermediary's profit or loss, for the financial year.

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- 105/2013 (c) a statement of changes in owners' equity;
- Inserted by L.N 105/2013 (d) a statement of cash flows;
- Inserted by L.N 105/2013 (e) a description of the accounting policies which the market intermediary has applied and adopted while preparing the financial statements; and
- Inserted by L.N 105/2013 (f) notes on financial statements explaining the various items that appear in the financial statements under this Regulation.

Power to require returns. **40.** (1) The Authority may, by a notice in writing, require a market intermediary to submit to it such periodic returns as it may specify.

(2) The Authority may, in addition to any periodic returns required under paragraph (1), by a notice in writing require a market intermediary to generally or in a particular case or class of cases, submit to the Authority such exceptional returns as it may specify.

Submission of annual financial statements. **41.** (1) A market intermediary shall submit to the Authority, within three months after the end of each financial year, its auditor's report together with—

- (a) its annual financial statements; and
- (b) a written confirmation that it has complied with these Regulations and any other additional requirements of the Authority.

(2) Where an auditor's report on a market intermediary is qualified on grounds of the auditor's uncertainty on the completeness or accuracy of the accounting records, the report shall, when it is being submitted by the market intermediary to the Authority be accompanied by a written statement signed by two directors stating whether—

- (a) all the accounting records of the market intermediary were made available to the auditor for the purposes of its audit;

(b) all transactions undertaken by the market intermediary were properly reflected and recorded in its accounting records; and

(c) all the other records of the market intermediary and related information were made available to the auditor.

Appointment of external auditor

42. (1) A market intermediary shall appoint an external auditor and issue him with an engagement letter, that sets out his powers and duties, and is signed by both the market intermediary and the external auditor.

(2) The market intermediary shall retain a copy of the engagement letter issued under paragraph (1).

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(3) A market intermediary shall not appoint or remove an auditor except with prior approval of the Authority at least one month prior to such appointment or removal.

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(4) A person appointed as an auditor under this Regulation shall serve for a maximum period of four consecutive years

Powers and duties of auditors.

43. (1) An auditor appointed under regulation 42–

(a) shall have access at all reasonable times to the accounting records, other records and documents relating to the business of a market intermediary; and

(b) may request the market intermediary to provide such information or explanations that he considers necessary for the performance of its duties.

(2) An external auditor shall before preparing a report for the purposes of these Regulations, carry out an examination that will enable him to determine whether-

- (a) the annual financial statements of the market intermediary were prepared in accordance with these Regulations;
- (b) in the case of the statement of the financial position, a true and fair view of the financial state of affairs of the market intermediary was given as at the end of the financial year;
- (c) in the case of the statement of comprehensive income, a true and fair view of the profit or loss of the market intermediary was given for the financial year;
- (d) the market intermediary kept proper accounting records throughout the financial year;
- (e) the market intermediary kept clients' funds and other client's assets properly segregated as is required under these Regulations;
- (f) the statement of financial position and the statement of comprehensive income are in agreement with the market intermediary's accounting records;
- (g) he has obtained all the information and explanations which, to the best of his knowledge and belief, are necessary for the purposes of its audit;
- (h) the market intermediary has maintained throughout the financial year systems adequate to enable him to identify documents of title, or documents evidencing title, to securities title in safekeeping for the market intermediary's clients in accordance with these regulations; and
- (i) the market intermediary complied with these Regulations throughout the financial

year.

(3) An external auditor shall, after carrying out an examination, submit a report on the annual financial statements of the market intermediary to the Authority.

Contents of
auditor's report.

44. (1) The external auditor shall state whether the annual financial statements of the market intermediary have been audited in accordance with the International Standards on Auditing, in his report.

(2) The external auditor shall state his opinion on the matters that he is required to determine under regulation 43 (2).

Qualified reports.

45. (1) Where the external auditor forms the opinion that a market intermediary has not complied with any provision of these Regulations relating to the keeping of accounts, financial records and preparation of financial statements, the external auditor shall state the opinion in his report and specify the provisions that have not been met.

(2) Where the external auditor did not obtain all the information and explanations that, to the best of its knowledge and belief, are necessary for the purposes of its audit, it shall state that fact in its report.

(3) Where the external auditor is not able to form an opinion on whether a market intermediary has not complied with any provision of these Regulations relating to the keeping of accounts, financial records and preparation of financial statements, it shall state so in its report and give the reasons for not being able to form an opinion.

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46.

Remedial
measures and
administrative
sanctions

47. (1) Where a market intermediary contravenes any provision of the Act or these Regulations,-

- (a) the officers of the market intermediary shall be jointly and severally liable to indemnify the market intermediary against any loss arising from the contravention; and
- (b) the market intermediary shall be liable to the sanctions or penalties prescribed in the Act.

Transition

48. Any market intermediary licensed prior to the coming into force of these Regulations shall comply with these Regulations within one year of such commencement.

Made on the....., 2011.

KUNG’U GATABAKI,
Chairman,
Capital Markets Authority.

STELLA KILONZO,
Chief Executive,
Capital Markets Authority.