

LEGAL NOTICE NO. 113

THE CAPITAL MARKETS ACT

(Cap. 485A)

IN EXERCISE of the powers conferred by section 12 of the Capital Markets Act, the Cabinet Secretary to the National Treasury makes the following Regulations:—

THE CAPITAL MARKETS (SECURITIES) (PUBLIC OFFERS,
LISTING AND DISCLOSURES) (AMENDMENT) REGULATIONS,
2013

1. (1) These Regulations may be cited as the Capital Markets (Securities)(Public Offers, Listing and Disclosures) (Amendment) Regulations 2013.

Short Title

2. Regulation 2 of the Capital Markets (Securities)(Public Offers, Listing and Disclosure) Regulations (hereinafter referred to as “the principal Regulations”) is amended by inserting the following new definitions in proper alphabetical sequence-

Sub.Leg

“East African Partner State regulator” means the regulator in an East African Community member state charged with the supervision of the capital markets; and

“regional fixed income securities” means fixed income securities issued under regulation 7(1)(d).

3. The principal Regulations are amended by inserting the following new regulation immediately after Regulation 6A—

Book building	6B. A person proposing to offer its securities to the public or a section of the public may use a book building process to determine the price for the offer of securities in accordance with the requirements set out in the Eighth Schedule to these Regulations.
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4. Regulation 7 of the principal Regulations is amended in paragraph (1) by adding the following new subparagraph immediately after subparagraph (c)—

(d) with respect to regional fixed income securities to be issued within the East African Community, the issuer complies with the eligibility requirements as set out in Part B of the Second Schedule.

5. The Second Schedule to the principal Regulations is amended by—

- (a) inserting the expression “Part A” immediately after the title “Second Schedule”; and
- (b) inserting the following new Part immediately after the new Part A—

PART B

r.7(1)(d)

I. REQUIREMENTS FOR ISSUANCE OF REGIONAL FIXED INCOME SECURITIES

ELIGIBILITY TO ISSUE

Eligibility to issue An offer of fixed income securities approved for issue in more than one jurisdiction in East African Community shall be considered as a regional offer of fixed income securities and shall comply with the relevant regulations, rules or guidelines attaching to issuers of securities to the public in any jurisdiction in which the issue has been made.

Approval entity The issuer shall elect a primary jurisdiction in which the issuer shall lodge the prospectus. The issuer shall simultaneously submit the prospectus to the regulators of other jurisdictions which the issuer proposes to raise capital for approval. The procedure for approval is as set out in item II of this Part.

ISSUER

Issuer The issuer shall be an entity incorporated or registered as a foreign entity in all jurisdictions where the offer is to be made.

Incorporation status. Where the issuer is not a company, then the issuer shall be duly established under a written law or recognized under an international treaty.

Share Capital The minimum paid-up share capital shall be the local currency equivalent of United States of America dollars 850,000.

Net Assets The net assets shall be the local currency equivalent of United States of America dollars 1,700,000.

All sovereign borrowers, quasi-sovereign borrowers and treaty organizations are exempted from the share capital and net assets requirements.

Profitability An issuer, other than a special purpose vehicle, shall be required to have reported profits in at least two of the previous three years preceding the offer.

Provided that—

the regulatory authorities shall retain the discretion to grant a waiver in circumstances where decline in profitability is not considered to be a consequence of the fundamentals of the company.

Exemption of SPVs A special purpose vehicle without a track record may raise capital and such special purpose vehicle shall be subjected to disclosure requirements on performance projections, risk factors and mitigations and on the

availability of financial information to assess any projections made.

An issuer that is an SPV shall be eligible for approval to make offers to institutional or sophisticated investors but not unrestricted offers to the public.

ISSUE

The minimum size of a regional fixed income security issue shall be the local currency equivalent of United States of America dollars 850,000.

Issue size

An issuer may raise funds in any jurisdiction in the region without restriction on the jurisdiction where proceeds are to be used subject to disclosure of that fact in the information memorandum and subject to obtaining the necessary exemptions on exchange controls, if required.

Denomination of Offer and application of funds outside the jurisdiction where funds are raised.

An issuer shall determine the currency or currencies for the issue.

An issuer may secure credit enhancement:

Credit Enhancement

Provided that where credit enhancement is to be provided, the following requirements shall apply-

-- In the case of a guarantee:

- the guarantor shall be a bank, duly licensed non-bank financial institution, or recognized international financial institution;
- a letter of no objection shall be provided by the credit enhancer's primary regulator (other than in the case of an international financial institution);
- the guarantor shall be required to have a valid credit rating.

The Authority may prescribe any conditions or information requirements applicable to any other form of credit enhancement.

Notwithstanding that an issuer has made a regional fixed income security offer, the issuer, may, at any time, raise an additional amount in any one or more jurisdictions in accordance with a further pricing supplement updating the disclosures in the regional information memorandum. In all events, where a green shoe option is available, it shall be made to all countries where the offer has been made available.

Additional offers.

FINANCIAL DISCLOSURE REQUIREMENTS

Where an issuer has a track record, the following financial statements complying with International Financial Reporting Standards for the three years preceding the offer shall be required-

Financial Statement Disclosure.

- Audited accounts not more than six months old at the time of the offer;
- Where the audited accounts are more than six months old they shall be supported by management accounts.
- Management accounts shall be prepared to a date within one month

of the date of the offer.

Financial Ratios	The financial ratios requirements applicable to national fixed income securities offers shall not be applicable to regional fixed income securities offers.
Cash flow projections.	An issuer shall provide <i>proforma</i> financial statements which cover a period of not less than three years from the date of issue or where the fixed income security has a shorter maturity period, the life of that fixed income security.
Disclaimer statement.	<p>All prospectuses for regional offers of fixed income securities shall contain the following statement on the front page-</p> <p>“As a matter of policy, the approving regulators assume no responsibility for the correctness of any statements or opinions made or reports contained in this prospectus. Approval of the issue or listing is not an indication of the merits of the issuer or of the securities”</p>
Listing.	<p>Listing shall be mandatory for all regional offers of securities which are to be offered to the public or a section of the public:</p> <p style="padding-left: 40px;">Provided that this requirement shall not apply to offers targeted at institutional, sophisticated or professional investors.</p> <p>An issuer who is not eligible for listing may be approved to issue its securities to sophisticated, institutional or professional investors and the securities may be approved for trade on regulated Over the Counter (OTC) markets.</p> <p>“An institutional”, “a sophisticated” or “a professional” investor means for the purposes of regional fixed income securities –</p> <ol style="list-style-type: none"> (a) any person licensed under any securities legislation applicable in the East African Community region; (b) any authorized or a recognized scheme by any securities legislation applicable in the East African Community region; (c) an individual, either alone or with any of his associates on a joint account, having proven liquid assets in excess of an amount as may be prescribed from time to time, or its equivalent in any foreign currency; (d) any company or partnership having proven liquid assets in excess of an amount as may be prescribed from time to time, or its equivalent in any foreign currency.
Trading, clearing and settlement.	An issuer of regional fixed income securities shall comply with the requirements relating to trading, clearing and settlement on any exchange

on which its securities are traded or in line with the rules for the relevant OTC market as well as those of any central depository through which its securities are cleared and settled.

An issuer of regional fixed income securities shall maintain a valid credit rating for so long as the issue remains outstanding: Credit Ratings

Provided that where an issuer has no track record or where the debt is to be funded from revenue from a specific project or designated cash flows, then the credit rating shall be in respect of the project or performance projections.

Only a credit rating agency with a publicly available Code of Conduct guiding its ratings practices and which is in compliance with International Organization for Securities Commissions (IOSCO) Code of Conduct Fundamentals for Credit Rating Agencies (CRA) shall be eligible to provide credit rating reports:

Provided further that a credit rating agency which complies with the IOSCO CRA code shall not be required to be registered in any East African Community jurisdiction to be eligible to provide credit rating reports.

All Information Memoranda for regional offers of fixed income securities shall include a cautionary statement with words to the effect that-

“A credit rating is not a recommendation to apply for the securities on offer or an assurance of performance of the offer or or the issue and investors should exercise due diligence and use the rating only as one of the considerations in making their investment decision.”

An issuer of regional fixed income securities shall in respect of any issue of securities comply with the following requirements relating to professional parties. Professional Parties.

Transaction Arranger, Sponsoring Stockbroker or Placing Agent:

Appoint a transaction arranger, placing agent or a sponsoring stockbroker who shall be a corporate body licensed to carry out such function by at least one East African Community Partner State regulator and has affiliates in all regional jurisdictions where the security will be issued.

Accountant's report

Appoint a reporting accountant for the issue who shall be in compliance with all the requirements of their professional bodies. The reporting accountant shall be a firm registered in any East Africa Community country with affiliates in all East African Community countries.

Legal Opinion

Appoint a legal adviser who shall be in compliance with all the requirements of their professional bodies. The legal advisers shall be a

firm registered in any East African Community country with affiliates in all East African Community countries.

Paying and Receiving Bank

Appoint paying and receiving banks which shall be banks licensed in the East African Community countries where funds are being raised. The issuer shall determine the number of receiving banks.

Continuous disclosure obligations.

An issuer of a regional fixed income security shall be required to comply with the continuous disclosure obligations applicable to offers of fixed income securities in all jurisdictions in which it has raised capital from the public.

Where the regional fixed income security is listed on one or more securities exchanges or is traded on any regulated market within the East African Community region, it shall comply with the continuous obligations imposed by that securities exchange or market.

The issuer is obliged to avail to investors in all jurisdictions in which the issuer has raised capital, all relevant information for proper appraisal of the financial position of the issuer in an effective and timely manner.

The matters subject to continuous reporting includes-

- updates on rating reports;
- interim financial reporting;
- audited financial reports.

Penalties.

An issuer who fails to comply with the continuous disclosure obligations including failure to provide any required information to all investors simultaneously, is liable for breach of the continuous reporting obligations in any jurisdiction in which such omission occurs and the applicable sanctions shall apply.

Dispute resolution. The law in force in the jurisdiction where a cause of action arises shall apply in case of a dispute between an investor and an intermediary or between an issuer and an intermediary. The information memorandum shall specify the applicable law and mode of dispute resolution where a dispute involves the issuer and an investor.

Payment of evaluation fees

Evaluation fees shall be paid at the time of application to the primary regulator. It shall be the duty of the primary regulator to transfer to the other regulators their share of the evaluation fees paid. In the event of a rejection, the issuer shall forfeit twenty five per cent of the evaluation fee paid.

II. INFORMATION MEMORANDUM APPROVAL PROCEDURE FOR ISSUANCE OF REGIONAL FIXED INCOME SECURITIES

1. The issuer shall submit, for approval, a draft information memorandum accompanied by an evaluation fee to all East African Partner State regulators in which it intends to raise capital indicating the jurisdiction that the issuer desires to be the primary approving jurisdiction (primary regulator)
2. Where an application has been lodged that is incomplete or unmeritorious *ab initio* as a regional fixed income security, the primary regulator shall have the discretion to reject the application in whole and inform the other regulators of such rejection and the reasons thereof. In the event of a rejection and the issuer wishes to proceed with the issuance, the issuer shall be required to lodge the application afresh in all jurisdictions and be liable to pay any application costs attaching thereto.
3. Each regulator shall apply the eligibility and disclosure requirements for issuance of regional fixed income securities for purposes of assessing the application.
4. In the event that any regulator seeks to interpret the applicability of any provision of the eligibility and disclosure requirements, that regulator shall officially communicate with all other regulators to determine the manner in which that matter will be addressed and the majority opinion shall prevail.
5. Where a regulator has communicated with the other regulators in accordance with paragraph 4, the regulators consulted shall revert within five working days of the receipt of communication and the final position shall be communicated to the issuer within ten days and copied to all regulators.
6. The other regulators shall submit any comments on the information memorandum to the primary regulator for consolidation for communication to the issuer. Where the primary regulator proposes to exclude certain matters from communication to the issuer, it shall communicate its intention to the other regulators, which action shall be subject to the timelines for communication under paragraph 5.
7. The primary regulator shall, upon completion of its review, submit the same for consideration and approval by its relevant authority in accordance with its applicable procedures for approval of offers to the public:

Provided that the submission shall not be made later than five working days following the receipt of the complying document from the issuer.

8. In the event of an approval, the primary regulator shall issue a letter to all other regulators communicating its approval and confirming that the issue complies with the regional criteria.
9. In the event of the grant of an approval of the issue, the primary regulator shall provide a copy of the letter of approval and details of any conditions imposed on that approval to all the other regulators. This approval will not be

communicated to the issuer pending circulation and determination by the other regulators.

10. Upon receipt of a copy of the approval letter from the primary regulator, every regulator which is in receipt of the information memorandum shall submit the final Information Memorandum together with the primary regulator's approval letter to their respective authorities for consideration and determination:

Provided that such submission shall not be made later than five working days following the receipt of the primary regulators decision as per the approval timetable set out in item III of this Part.

11. In the event that approval is declined, the primary regulator shall provide a copy of the reasons for such decision to all other regulators for their consideration. The primary regulator shall specify where the approval has been withheld for reasons other than those in the criteria set down for regional issues. Where a rejection occurs for reasons other than failure to comply with the regional guidelines, the other regulators shall retain full statutory discretion to approve or reject the application placed before it notwithstanding any approval or rejection by the primary regulator.
12. For the purposes of coordination, the approving regulators shall engage with any listing exchange in their jurisdiction to ensure compliance by the issuer with any reporting and disclosure obligations issued by the regulator and the securities exchange.
13. In so far the issuer has raised capital in a particular jurisdiction, the relevant regulator shall be responsible for the supervision of that issuer in respect of that issue.
14. Where an imbalance in information disclosure occurs, the regulators shall coordinate any action with any relevant securities exchanges or trading platforms on which the securities in question are traded to mitigate the negative impacts of such information asymmetry on investors.
15. Any changes or interpretations made to this Schedule or the Approval Procedure shall be published by all the jurisdictions.

III. APPROVAL TIMETABLE

T: Complying application lodged with all the regulators.

T+ 10: All comments from regulators lodged with the primary regulator.

T + 15: All areas for consultation for interpretation resolved.

T+ 20: All issues communicated to the issuer.

Y (date issuer reverts with complying documents) + 10: Primary regulator board determination (primary board may approve with conditions) and issues letter of comfort.

Y+ 15: All other regulator's board determination (decisions may be conditional indicating matters to be addressed).

Y+ 17: Communication of regulator's decision to issuer.

"day" means a business day.

6. The principal Regulations are amended by inserting the following new Schedule immediately after the Seventh Schedule—

EIGHTH SCHEDULE (r.6B)

REQUIREMENTS FOR OFFER OF SECURITIES USING A BOOK BUILDING PROCESS

PART I

PRELIMINARY

1. “Book building” means a process undertaken by which a demand for the securities proposed to be issued by an issuer is elicited and built up and the price of such securities is assessed for the determination of the quantum of such securities to be issued.

“Book building portion” refers to the pool of securities that will be available for offer and allotment to the participating entities through the book-building process and which have been segregated from the securities to be offered at a fixed price.

“Book runner” refers to the primary coordinator of the book building process in debt and equity offers.

“Participating entity” means a professional investor as prescribed by the Authority.

“Regulations” means the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002.

PART II—BOOK BUILDING PROCESS

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| 2. | The portion of securities offered to the public that are to be available for the book-building process shall be identified as the “book building portion” in the information memorandum. | Book building portion |
| 3. | The balance of securities constituting the offer to the public, excluding the book building portion, shall be separately identified as fixed price portion in the information memorandum. | Fixed price portion |
| 4. | A complying information memorandum shall be lodged with and approved by the Authority prior to the opening of the book building process and shall disclose, in addition to all other requirements: | Approval of the information memorandum |
| | (1) the size of the issue and the amounts to be raised through the book building and fixed price portions; | |
| | (2) the criteria for bid consideration and selection in the | |

- book building process;
- (3) the duration of the book building period;
- (4) the method and process of bidding;
- (5) the names and addresses of the book runner or syndicate members operating the bidding terminals for submitting bids

Provided the information memorandum shall be approved pending inclusion of the price of the offer and the quantum of securities to be issued.

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| Appointment of the book runner | 5 | The book runner shall be nominated by the issuer from amongst persons who are qualified to act as transaction advisers and shall be identified as such in the information memorandum. |
| Circulation of information memorandum | 6. | The information memorandum approved by the Authority shall be circulated by the book runner to the participating entities inviting offers for the securities in respect of the book building portion. |
| Records of orders on book building portion | 7. | The book runner on receipt of the orders shall maintain a record of all the participating entities' names and the number of securities ordered and the price at which the participating entity is offering to subscribe to securities under the book building process. |
| Determination of the offer price | 8. | At the close of the book building period and following a review of the orders received in accordance with the criteria disclosed in the information memorandum, the book runner and the issuer shall determine the price at which the securities shall be offered to the public. |
| Price for the offer shall be the same | 9. | The issue price for the book building portion and fixed price portion categories shall be the same. |
| Issuer to ensure adequate arrangements are made to secure payment | 10. | The issuer and book runner shall ensure that adequate arrangements for funds are made by all participating entities to support any offers lodged during the book building process. The nature of the arrangement required of participating entities shall be disclosed in the information memorandum. |
| Allotment for the book building portion category. | 11. | The information memorandum shall indicate one date of allotment which shall be deemed date of allotment for the both the book building and fixed price portions. |
| Responsibility of the book runner. | 12. | The book runner shall have primary responsibility for the book building process. |
| Securities to be offered through book building | 13. | An issuer may offer up to one hundred per cent of the offer securities through a book building process subject, where appropriate, to compliance with eligibility requirements relating to listing. |

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| 14. | The information memorandum may prescribe a floor price or an indicative price band for the book building process and shall give the basis for the determination of the same. | Indication of floor price or price band |
| 15. | On establishment of the offer price, the quantum of securities to be offered shall be determined based on the issue size divided by the price which has been determined | Determination of the number of securities to be offered |
| 16. | No incentive, whether in cash or kind, shall be paid to investors to participate in the book building process or the offer of securities. | No participation incentives |
| 17. | On determination of entitlements in the book building process the number of securities which each participating entity is to be allocated shall be communicated to the respective participating entity within 24 hours and a return on all allocations shall be made to the Authority within the same period. | Communication of allocation to participating entities |
| 18. | The information memorandum containing all disclosures required under these regulations including the price and the number of securities offered shall be registered with the Registrar of Companies. | Registration of the final information memorandum with the Registrar of Companies |

PART III -- ADDITIONAL DISCLOSURES

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| 19. | The following additional disclosure requirements shall be made in the information memorandum: | Additional disclosures |
| | (1) The particulars of syndicate members of the book runner where more than one book runner is appointed. | |
| | Provided that the rights, obligations and responsibilities of each shall be defined in a binding agreement. | |
| | (2) The following statement shall be given under the 'basis for issue price: | |
| | "The issue price has been determined by the issuer in consultation with the book runner, on the basis of assessment of demand from the participating entities for the offered securities by way of book-building." | |
| | (3) The following accounting ratios shall be given under the basis for issue price for each of the accounting periods for which the financial information is given where applicable: | |
| | (a) Earning per share, pre-issue, for the last five years, as adjusted for changes in capital. | |
| | (b) Price earning ratio (P/E), pre-issue and comparison thereof with industry P/E where available | |
| | (c) Average return on net-worth in the last five years. | |

(d) Net-Asset value per share based on last balance sheet.

- (4) The accounting ratios disclosed in the information memorandum shall be calculated after giving effect to the consequent increase of capital on account of compulsory conversions outstanding, as well as on the assumption that the options outstanding, if any, to subscribe for additional capital shall be exercised.

PART V—PROCEDURE FOR BIDDING

Procedure for
bidding

20. The method and process of lodging of offers during the book building process shall be subject to the following:

- (1) Bidding during the book building period shall be open for at least 3 days.
- (2) Bidding shall be conducted on an electronically linked transparent system of computer terminals.

Provided that the Authority may, in writing, authorize bidding to be conducted otherwise than on an electronic system on a case by case basis.

- (3) The syndicate members shall ensure that at least one electronically linked computer terminal is available for purposes of bidding at all locations where bids may be submitted.
- (4) All locations where bids may be lodged shall be specified in the information memorandum.
- (5) Investors shall place their bids only through the syndicate members who shall be responsible for ensuring that bids are only accepted from participating entities.
- (6) The investors shall have the right to revise their bids in line with the procedure to be prescribed in the information memorandum.

Provided that where the Authority has authorized bidding to be conducted otherwise than on an electronic facility, investors shall not have rights to revise their bids.

- (7) Bidding form—
- (a) There shall be a standard bidding form to ensure uniformity in bidding and accuracy of information.
- (b) The bidding form shall contain information about the investor, the price and the number of securities that the investor wishes to bid for.
- (c) All bidding forms shall be serially numbered.
- (d) The bidding form shall be dated and time

stamped prior to being issued in duplicate and signed by the investor and countersigned by the syndicate member, with one form retained by the investor and the other by the book runner or the syndicate member.

- (8) At the end of each day of the bidding period the demand shall be displayed graphically on the computer terminals for the information of the syndicate members as well as the investors and a record maintained by the book runner.

PART VI—ALLOCATION AND ALLOTMENT PROCEDURE

21. In case of an under subscription in any category, the undersubscribed portion may be allocated to the bidders in the other categories in accordance with the allocation policy disclosed in the information memorandum. Allocation in case of under subscription.
22. The allocation of securities to investors under the book building portion shall be determined by the issuer and the book runner in accordance with criteria explicitly set out in the information memorandum. Allocation criteria to be disclosed
23. Following the book building process— Period of fixed price offer.
- (1) The offer period for the fixed price portion, shall open within 5 working days from the date of closure of bidding; and
- (2) The fixed price offer shall remain open for a period of at least 10 working days.
24. The investors who have participated in the book building process shall not be barred from participating in the fixed price portion of the offer. Investors eligible to make application in fixed price offer

PART VII—MAINTENANCE OF BOOKS AND RECORDS

25. The issuer shall open two different accounts for collection of application moneys, one for the book building portion and the other for the fixed price portion category. Separate collection accounts
26. A final book of demand showing the result of the allocation process shall be maintained by the book runner. Book runner to maintain the result of the allocation process
27. The book runner, any syndicate member, participating entities and other intermediaries involved in the book building process shall maintain adequate records on the book building process. Records to be maintained
28. The Authority shall have the power to inspect the records, books and documents relating to the book building process. Authority's power to inspect records

Made on the 18th June, 2013.

HENRY ROTICH,
Cabinet Secretary for the National Treasury.