

LAWS OF KENYA

THE CAPITAL MARKETS (AMENDMENT) ACT

No. 37 OF 2011

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THE CAPITAL MARKETS (AMENDMENT)

ACT

No. 37 of 2011

Date of Assent: 2nd December, 2011

Date of Commencement: 16th December, 2011

An Act of Parliament to amend the Capital Markets Act and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Capital Markets (Amendment) Act, 2011.

Amendment of section 2 of Cap 485A.

2. Section 2 of the Capital Markets Act, in this Act referred to as "the principal Act" is amended —

- (a) by inserting the following new definitions in proper alphabetical sequence-

"derivatives dealer" means a person who carries on the business of buying, selling, dealing, trading, underwriting, or retailing securities derivatives as an agent for investors or on his own account, with the intention of selling them to the public;

"futures contract" means a contract for the acquisition or disposal of securities or other instruments, such as a commodity or a financial instrument, under which delivery is to be made at a future date and at a price agreed upon when the contract is made and shall include a reference to a date and a price determined in accordance with the terms of the contract;

"key personnel" means a person who manages or controls the activities of a licensed or a regulated person and includes-

- (a) the chief executive officer, chief financial officer, chief compliance officer, secretary to the Board, chief internal auditor, or any manager; and
- (b) any person who holds a position or discharges responsibilities of any person referred to in paragraph (a);

"options contract" means a contract that gives its holder the right and

not the obligation to buy or sell a fixed number of securities or any other instrument at a fixed price on or before a given date;

"over the counter" means the trading of securities otherwise than at an approved securities exchange;

"regulated person" means an operator of an approved person, a licensed person, a listed company or a person approved to offer securities to the public;

"self-regulatory organization" means an organization whose object is to regulate the operations of its members or of the users of its services and includes the organizations that may be recognized as such, by the Authority;

(b) in the definition of "quotation"-

(i) by deleting the words "stock market" appearing immediately before the word "market" in paragraph (a) and substituting therefor the words "securities market"; and

(ii) by deleting the words "stock market" appearing immediately before the word "market" in paragraph (b) and substituting therefor the words "securities market";

(c) in the definition of "securities" by deleting paragraph (c) and substituting therefor the following new paragraph —

(c) derivatives including futures contracts and options contracts on-

- (i) securities;
- (ii) indices;
- (iii) interest or other rates;
- (iv) currency;
- (v) futures; or
- (vi) commodities.

Amendments of section 11 of Cap. 485A.

3. Section 11 of the principal Act is amended-

(a) in subsection (1)(b), by deleting the words "stock market" wherever they occur and substituting therefor the words "securities market";

(b) in subsection (3)-

- (i) by inserting the following new subparagraph in paragraph (d) immediately after subparagraph (iii)-
- (iv) the criteria for determining whether a person is fit and proper to be licensed or approved under this Act;
- (ii) by inserting the words "central depository" immediately after the words "investment bank" in paragraph (e);
- (iii) by deleting the words "central depository" appearing immediately after the words "securities exchange" in paragraph (f);
- (iv) by deleting all the words appearing immediately after the words "securities of which" in paragraph (h) and substituting therefor the words "are publicly offered or traded on an approved securities exchange or on an over the counter market";
- (v) by deleting all the words appearing immediately after the words "securities of which" in paragraph (i) and substituting therefor the words "are publicly offered or traded on an approved securities exchange or on an over the counter market";
- (vi) by deleting the words "traded on an approved securities exchange" appearing in paragraph (m) and substituting therefor the words "publicly offered or traded on an approved securities exchange or on an over the counter market";
- (vii) by inserting the words "self regulatory organization" immediately after the word "any" appearing in paragraph (p).

Insertion of section 11A in Cap 485A.

4. (1) The principal Act is amended by inserting the following new section immediately after section 11 -

Delegation of functions.

11A. (1) The Authority may delegate any of its functions under this Act to-

- (a) a committee of the Board;
- (b) a recognized self regulatory organization; or
- (c) an authorized person.

(2) The Authority may, at any time revoke a delegation made under this section.

(3) A delegation made under this section shall not prevent the Authority from performing the delegated function.

Amendment of section 12 of Cap. 485A.

5. Section 12 of the principal Act is amended in subsection (1)-

(a) by deleting the words "stock market" appearing in paragraph (e) and substituting therefor the words "securities market";

(b) by inserting the following new paragraph immediately after paragraph (m)-

(n) self regulatory organizations.

Insertion of part 11A in Cap. 485A.

6. The principal Act is amended by inserting the following new Part immediately after Part II-

PART 11A

RECOGNITION OF SELF REGULATORY ORGANIZATIONS

Recognition of self regulatory organization.

18B. (1) An organization which intends to operate as a self regulatory organization shall apply to the Authority, in the prescribed form, for recognition as such.

(2) An application made under subsection (1) shall specify the functions and powers that the organization is seeking to exercise upon recognition.

(3) The Authority may, in respect of an application made under subsection (1), subject to such terms and conditions as it considers necessary, by notice in the Gazette, declare an organization to be a recognized self-regulatory organization where it is satisfied that the organization —

(a) has a constitution and internal rules and policies which are consistent with this Act or related legislation;

(b) has the capacity and financial and administrative resources necessary or desirable to carry out its functions as a self regulatory organization, including dealing with a breach of the law or of any other applicable standards or guidelines;

(c) is a fit and proper person;

(d) has competent personnel for the carrying out of its functions; and

(e) satisfies such other criteria as may be specified by the Authority

(4) A person who operates or purports to operate as a self regulatory organization without being recognized as such by the Authority commits an offence.

(5) The Authority may, in writing, delegate any of its powers or functions to a self regulatory organization.

(6) A delegation made under subsection (5) shall specify-

(a) the function or power delegated to the self regulatory organization;

(b) the extent of disciplinary powers delegated and the scope of sanctions which may be imposed;

(c) the terms and conditions upon which the power or function has been delegated and may be exercised;

(d) the persons authorized to exercise the delegated powers or functions on behalf of the self regulatory organization;

(e) the manner in which a self regulatory organization shall submit periodical reports to the Authority in respect of the exercise of a delegated power or function; and

(f) any other matter which the Authority may prescribe.

Rules of self regulatory organizations.

18C. (1) A self regulatory organization shall make rules relating to the matters for which it has regulatory or supervisory functions, including any sanction and disciplinary powers to be exercised in connection with the functions delegated to it.

(2) The rules made under subsection (1) shall make provisions relating to —

- (a) management structures and shareholding rights of the self regulatory organization taking into consideration the interests, rights and liabilities of its members, consumers, investors and users of their services;
- (b) rules of membership and conditions for approval and admission of members;
- (c) the procedure for dispute resolution between members, users, investors and their clients and the right of appeal to the Authority or other relevant primary regulator; and
- (d) the rules and procedures of the self regulatory organization relating to reporting and accountability to any primary regulator other than the Authority.

(3) The rules made under subsection (1) shall not be implemented unless they have been approved by the Authority.

(4) A self regulatory organization shall submit any amendments to its constitution to the Authority for approval before the amendments come into operation.

Restriction on decision by a self regulatory organization.

18D. A self regulatory organization shall not make a decision, under its rules, which is likely to adversely affect the rights of a person unless the self regulatory organization

- (a) has given that person an opportunity to make representations about the matter; or
- (b) considers, on a reasonable ground, that a delay in making the decision will prejudice a class of consumers.

Disciplinary action by a self regulatory organization.

18E. (1) A self regulatory organization may take disciplinary action against any of its members in accordance with its rules, if the member contravenes any provision of the rules.

(2) A self regulatory organization shall, where it has taken disciplinary action under subsection (1), immediately inform the Authority, in writing, of the name of the member, the action taken and the reason therefor, including the amount of any fine and the period of suspension, if any.

(3) The Authority may, on its own motion or on application by an

aggrieved person, review any disciplinary action taken under subsection (1) and may affirm, modify or set aside the decision after giving the aggrieved person and the self regulatory organization an opportunity to be heard.

(4) Nothing in this section shall preclude the Authority, in any case where a self regulatory organization fails to act against its member, from suspending, expelling or otherwise disciplining a member of the self regulatory organization.

(5) The Authority shall, before taking any action under subsection (4), give the licensed person and the self regulatory organization an opportunity to be heard.

(6) Any action taken by a self regulatory organization under subsection (1) shall not prejudice the power of the Authority to take any further action that it considers necessary with regard to the licensed person.

Protection from personal liability.

18F. No civil liability, whether arising in contract, tort, defamation, equity or otherwise shall be incurred by —

- (a) a self regulatory organization; or
- (b) any person acting on behalf of a self regulatory organization including-
 - (i) any member of the Board of directors, employee or agent of the self regulatory organization; or
 - (ii) any member of any committee established by the self regulatory organization,

in respect of anything done or omitted in good faith in the discharge of the duties delegated to the self regulatory organization under this Part or in the performance of its functions under its rules.

Appointment of key personnel by a self regulatory organization.

18G. A self regulatory organization shall not change its key personnel except with prior written notification to the Authority of the intention to change and receipt from the Authority of a confirmation that it has no objection to the proposed change.

Directions to a self regulatory organization.

18H. (1) The Authority may, after giving a self regulatory organization a reasonable opportunity to be heard in respect of any matter, give a direction, in writing, to the self regulatory organization in terms of this section.

(2) A direction given under subsection (1) may-

(a) suspend any provision of the constitution or rules of a self regulatory organization for a period specified in the direction;

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(b) require a self regulatory organization, subject to the Companies Act or any other law, to amend its constitution in the manner specified in the direction so as to bring it in conformity with this Act, or any other law;

(c) require a self regulatory organization to amend its rules; or

(d) require a self regulatory organization to implement or enforce its constitution or its rules.

Removal of an officer of the self regulatory organization.

181. The Authority may, if it reasonably believes that —

(a) an officer of a self regulatory organization is not a fit and proper person to be an officer of the organization; or

(b) an appointment of a person or the continuing in office as an officer of a self regulatory organization is likely to be detrimental to the self regulatory organization, or may prejudice the interest of investors and consumers of financial services or members of the relevant sector or industry,

after giving the officer and the self regulatory organization an opportunity to be heard, direct the self regulatory organization not to appoint the officer, or to remove the officer from office.

Annual report.

18J. (1) A self regulatory organization shall, within ninety days after the end of every financial year, submit to the Authority, its financial statement and an annual report which shall include —

(a) a report on the corporate governance policy of the self regulatory organization;

(b) financial statements prepared and audited in accordance with the accounts and audit requirements for regulated persons; and

(c) such other requirements as may be specified by the Authority.

(2) An auditor who, in the course of his audit, has reason to believe that —

(a) there is or has been an adverse change in the risks inherent in the business of a self regulatory organization with the potential to jeopardize the ability of the self regulatory organization to continue as a going concern;

(b) the self regulatory organization may be in contravention of any provisions of this Act, or directions issued by the Authority;

(c) a financial crime has been or is likely to be committed; or

(d) serious irregularities have occurred,

shall report the matter, in writing, to the Authority.

(3) A report made under subsection (2) shall not constitute a breach of the duties of the auditor.

Amendment of section 19 of Cap. 485A.

7. Section 19 of the principal Act is amended by deleting the words "stock market" and substituting therefor the word "securities market".

Insertion of section 19A in Cap. 485A

8. The principal Act is amended by inserting the following new section immediately after section 19-

Restriction on use of the words "stock exchange", "securities exchange" etc

19A. A person shall not use the words "stock exchange", "securities exchange", "derivatives exchange" or "futures exchange" in connection with a business except in accordance with a securities exchange licence granted by the Authority.

Amendments of section 20 of Cap. 485A.

9. Section 20 of the principal Act is amended-

(a) in subsection (5), by deleting the words "stock exchange" and substituting therefor the words "securities exchange";

(b) by inserting the following new subsection immediately after subsection (7)-

(8) The Authority may require an applicant for a licence as a securities exchange to lodge an application to be recognized as a self regulatory organization as a condition for obtaining and maintaining its licence.

Amendment of section 23 of Cap. 485A.

10. Section 23 of the principal Act is amended-

(a) in subsection (1), by inserting the words "derivatives dealer, central depository" immediately after the words "investment bank";

(b) in subsection (2), by deleting the words "central depository" appearing immediately after the words "collective investment scheme".

Amendments of section 29 of Cap. 485A.

11. Section 29 of the principal Act is amended-

(a) in subsection (1), by inserting the following new paragraph immediately after paragraph (g) -

(gg) in the case of an application for a derivatives dealer's licence, that the applicant may carry on business either on behalf of clients or on the applicant's own behalf, or both;

(b) in subsection (2), by inserting the words "imposed by the Authority or the relevant securities exchange and any self regulatory organization" immediately after the words "all requirements";

(c) by deleting subsection (3) and substituting therefor the following new subsection-

(3) A securities broker, a derivatives dealer or a dealer whose license is revoked under section 26, shall cease to be a member of the securities exchange.

Amendment of section 31 of Cap. 485A.

12. Section 31 of the principal Act is amended in subsection (1A) by-

(a) inserting the following new subparagraph immediately after subparagraph (i)-

(ii) the security trades over the counter and such trade is reported in accordance with the rules prescribed by the Authority;

(b) by re-numbering the existing subparagraph (ii) as item (iii).

Amendment of section 32A of Cap 485.

13. Section 32A of the principal Act is amended in subsection (1)(a) by inserting the words "or otherwise publicly offered" immediately after the words "stock exchange".

Amendment of section 35 of Cap 485A.

14. Section 35 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (c)-

"(cc) refusing to approve a public offer of securities;".

