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By the leader of
majority party
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THE CAPITAL MARKETS ACT

(Cap. 485A)

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

THE CAPITAL MARKETS (ONLINE FOREIGN EXCHANGE TRADING) REGULATIONS, 2017

PART I- PRELIMINARY

1. These Regulations may be cited as the Capital Markets (Online Foreign Exchange Trading) Regulations, 2017.

Citation

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

Interpretation.

“binary options” means an option which involves making a bet on the price movement of an underlying asset in the near future for a fixed amount;

“client” means a person who is registered with an online foreign exchange broker or money manager and has executed an agreement with the online forex broker or money manager for dealing through such online foreign exchange broker or money manager in foreign exchange transactions;

“client account” means a bank account established and maintained by an online foreign exchange broker for the purposes of regulation 23;

“client funds” means money of any currency which a client deposits in a client account or which the online foreign exchange broker owes to a client and includes any other property deposited with an online foreign exchange broker in the course of its business for which that broker is liable to account to its client and any money or other property accruing therefrom;

“cornering activity” in relation to foreign exchange means use of currency held in significant amounts to be able to manipulate its price;

“leverage” means the ratio of the market price of an agreed multiple of contracts to the agreed margin where margin is the deposit or payment made to create, vary or maintain a position of the contracts;

“money manager” means an entity licensed by the Authority to engage in the business of managing the online foreign exchange portfolio of an individual or institutional investor in return for a fee based on a percentage of assets under management;



“dealing online foreign exchange broker” means an entity licensed by the Authority to engage in the business of online foreign exchange trading as principal and market maker;

“online foreign exchange trading” means the internet-based trading of foreign exchange and includes trading in contracts for difference based on a foreign underlying asset;

“online foreign exchange trading platform” means an internet-based trading system through which foreign exchange trading is conducted; and

“non-dealing online foreign exchange broker” means an entity licensed by the Authority that acts as a link between the foreign exchange market and a client in return for a commission or mark-up in spreads and does not engage in market making activities.

PART II—LICENSING OF ONLINE FOREIGN EXCHANGE BROKERS AND MONEY MANAGERS

3. (1) A person shall not carry on or purport to carry on business as a dealing online foreign exchange broker, non-dealing online foreign exchange broker or a money manager unless that person has been granted the relevant licence by the Authority.

Obligation to seek a licence

(2) A person who carries on or purports to carry on business as a dealing online foreign exchange broker, non-dealing online foreign exchange broker or a money manager without the relevant licence commits an offence.

4. (1) A person who intends to operate as a dealing online foreign exchange broker, non-dealing online foreign exchange broker or money manager, shall apply to the Authority for a licence in Form 1 as set out in the First Schedule.

Application for a licence.

(2) An application under paragraph (1) shall be accompanied by—

- (a) the documents, information and declarations specified in regulation 5;
- (b) in the case of an application for a dealing online foreign exchange broker or a non-dealing online foreign exchange broker licence, a letter from a recognized online foreign exchange trading platform stating that the applicant meets all the relevant requirements of that platform and that the platform will admit the applicant if licensed by the Authority;
- (c) in the case of a money manager, an agreement with an online foreign exchange broker who is licensed by the Authority;
- (d) client on-boarding policies;
- (e) business plans;
- (f) individual risk assessments;

- (g) Anti-Money Laundering and know your client checks;
- (h) product sensitization framework including client appropriateness assessment;
- (i) internal dispute resolution mechanisms to be adopted to resolve customer complaints and disputes;
- (j) all relevant service level agreements with other online foreign exchange market service providers, where applicable; and
- (k) the fees as set out in the Second Schedule.

5. (1) An applicant for a licence under regulation 4 shall be eligible for a licence if the applicant—

Eligibility for a licence.

- (a) is a company incorporated in Kenya and limited by shares;
- (b) has a chief executive officer who—
 - (i) is a fit and proper person in accordance with section 24A of the Act;
 - (ii) has experience of not less than five years in the business of buying, selling, managing, or dealing in foreign exchange, foreign exchange futures or futures contracts; and
 - (iii) is a member of a professional body;
- (c) has the necessary infrastructure including office space, equipment and staff, to effectively discharge its activities;
- (d) in the case of a dealing online foreign exchange broker, has a person in charge of trading with at least three years' experience in foreign exchange trading, demonstrated ability to perform and in possession of certification from the Association Cambiste Internationale-Financial Markets Association or its equivalent;
- (e) has, as its directors, substantial shareholders and key personnel, persons who are fit and proper in accordance with section 24A of the Act;
- (f) has a minimum paid up capital, which shall not be impaired, of—
 - (i) fifty million shillings, in the case of a dealing online foreign exchange broker;
 - (ii) thirty million shillings, in the case of a non-dealing foreign exchange broker; or
 - (iii) ten million shillings, in the case of a money manager; and
- (g) undertakes to maintain at all times, liquid capital of—
 - (i) thirty million shillings or eight per cent of total liabilities whichever is higher in the case of a dealing or a non-dealing foreign exchange broker; or

(ii) five million shillings or eight per cent of total liabilities whichever is higher; in the case of a money manager;

(2) In addition to the eligibility criteria set out in paragraph (1), an applicant shall not be eligible for a licence if the applicant has not complied with the Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011.

L.N 144/2011.

6. The Authority may, when considering an application made under regulation 4—

Furnishing of information, clarifications, etc.

- (a) require an applicant to furnish such additional information or clarifications regarding any previous dealings in foreign exchange, securities, commodities and any other matter connected thereto; or
- (b) request an applicant or its key personnel to appear before the Authority to make personal representations.

7. (1) The Authority shall grant a licence to an applicant if the Authority is satisfied that the applicant meets the eligibility criteria and the requirements set out in regulations 4 and 5 and inform the applicant in writing of the grant.

Grant of licence.

(2) Where the eligibility criteria are not met, the Authority shall not refuse to grant a licence without giving the applicant an opportunity of being heard.

(3) Where, after hearing the applicant, the Authority determines that a licence should not be granted, the Authority shall communicate, in writing, the decision to the applicant within fourteen days of the decision, stating the grounds for refusal.

(4) An applicant aggrieved by the decision of the Authority under paragraph (3) may appeal to the Capital Markets Tribunal within fifteen days of receipt of the decision of the Authority.

8. A licence granted under regulation 7(1) shall be valid unless suspended or revoked.

Validity of licence.

9. A dealing or non-dealing online foreign exchange broker or money manager shall pay the relevant annual licence fee set out in the Second Schedule.

Annual license fees

10. The Authority may, after giving an applicant an opportunity to be heard, by order, in writing, suspend the license of an online foreign exchange broker or money manager for such period as the Authority may specify in the order or take such administrative action as it considers appropriate where the Authority is satisfied that a dealing or non-dealing online foreign exchange broker or money manager has—

Suspension of a license.

- (a) failed to comply with any conditions subject to which the license was granted under these Regulations;
- (b) failed to comply with any requirement of the Act or these Regulations or directions made or given thereunder;
- (c) failed to adhere to any standard of conduct set out in these Regulations;

- (d) failed to comply with the directives of the Authority in respect of business conduct, dealings with clients and financial prudence;
- (e) failed to furnish any information relating to its transactions as may be required by the Authority;
- (f) failed to submit periodical returns as required by the Authority;
- (g) furnished the Authority with wrong or false information;
- (h) failed to settle an investor complaint where such complaint had been adjudicated by the Authority;
- (i) not co-operated in any enquiry or inspection conducted by the Authority;
- (j) engaged in price manipulation, rigging, insider trading or cornering activities or any unlawful activities in foreign exchange transactions and all related products;
- (k) experienced or is experiencing financial position deterioration to an extent that the Authority is of the opinion that the continuance of the online foreign exchange broker or money manager in the business of foreign exchange trading is no longer in the interest of investors;
- (l) failed to pay the annual fees;
- (m) failed to utilize its licence within one year after grant of its licence or has ceased from conducting the licensed business for a period of more than thirty days unless it has obtained the approval of the Authority to do so; or
- (n) conducted its activities in a manner that is detrimental to the public interest.

11. The Authority may, after giving the applicant an opportunity to be heard, by order, in writing, revoke the licence of a dealing or non-dealing online foreign exchange broker or money manager where the Authority is satisfied that—

Revocation of a
licence.

- (a) the reasons for the suspension of a licence under regulation 10 have continued during the period of suspension;
- (b) a dealing or non-dealing online foreign exchange broker or money manager—
 - (i) has engaged or is engaging in insider trading, market manipulation or any other unfair practice or market abuse;
 - (ii) has been found guilty of fraud or convicted of a criminal offence; or
 - (iii) has not complied with the directives of the Authority or;

- (c) it is necessary for the protection of investors,

12. (1) A licence granted under regulation 7 shall automatically be revoked if the dealing or non-dealing online foreign exchange broker or money manager—

Automatic revocation of a licence.

- (a) is declared insolvent by a court of law;
- (b) voluntarily surrenders the license to the Authority; or
- (c) is wound up by a court order.

13. A dealing or non-dealing online foreign exchange broker or money manager aggrieved by the decision of the Authority to suspend or revoke its license may, within fifteen days of being notified of the suspension or revocation by the Authority, appeal to the Capital Markets Tribunal.

Appeal against suspension or revocation of licence.

14. Despite a suspension or revocation of a license under regulations 10, 11 or 12, a dealing or non-dealing online foreign exchange broker or money manager shall be responsible for clearing all its outstanding obligations up to the date of the revocation or suspension of the license.

Online foreign exchange broker or money manager to clear liabilities.

15. (1) As a condition of continued licensing as a dealing or non-dealing online foreign exchange broker or money manager, respectively, an online foreign exchange broker or money manager shall, within fifteen days of the end of every month, submit to the Authority, in the form prescribed by the Authority, a certified copy of—

Continuing obligations.

- (a) the details of any customer complaints and resolution status;
- (b) evidence of daily reconciliations;
- (c) for the money-manager, reports on the total funds under management;
- (d) a full set of monthly management accounts; and
- (e) risk-based capital adequacy returns.

(2) In addition to the documents required under paragraph (1), the Authority may require an online foreign exchange broker or a money manager to provide such other documents as the Authority may consider necessary.

(3) An online foreign exchange broker or a money manager shall, on a monthly basis or at such other intervals as the Authority may specify, submit to the Authority a summary of traded volumes per currency, in the prescribed form.

PART III—THE CONDUCT OF ONLINE FOREIGN EXCHANGE BUSINESS

16. (1) An online foreign exchange broker may—

- (a) open clients' accounts;
- (b) provide a trading platform;

Standards of conduct.

- (c) provide access to market information that the clients may utilize in formulating their strategies;
 - (d) monitor traders' positions; or
 - (e) provide end-of-day reports.
- (2) A dealing online foreign exchange broker may trade as principal and market maker.
- (3) A money manager shall—
- (a) choose and manage investments prudently for his or her clients;
 - (b) develop an appropriate investment strategy;
 - (c) take positions in the market to meet the investment goals of the client;
 - (d) undertake financial analysis; and
 - (e) monitor foreign exchange portfolio investments on behalf of the client.
- (4) An online foreign exchange broker shall not offer for trading—
- (a) currency pairs involving the Kenya shilling ; and
 - (b) binary options.
- (5) An online foreign exchange broker or a money manager, in the conduct of foreign exchange business, shall, at all times, act in accordance with the principles of best practice and, in particular, shall—
- (a) observe a high standards of integrity and fair dealing;
 - (b) act with due skill, care and diligence;
 - (c) observe high standards of market conduct;
 - (d) seek from clients information about their circumstances and investment objectives which might be reasonably expected to be relevant in enabling the online foreign exchange broker or money manager to fulfill their responsibilities to the clients;
 - (e) take reasonable steps to give every client any information needed to enable the client to make a balanced and informed investment decision, in a comprehensible form;
 - (f) avoid any conflict of interest with clients and, where such a conflict unavoidably arises, ensure fair treatment of the client by complete disclosure or by declining to act while always ensuring the interests of the online foreign exchange broker or money manager are never unfairly placed above those of the client;
 - (g) maintain adequate financial resources to meet the foreign exchange business commitments and withstand the risks to which the business is subject;
 - (h) in the case of an online foreign exchange broker ensure that

- all clients' funds are held in a bank licensed under the Banking Act; Cap. 488
- (i) in the case of an online foreign exchange broker, keep clients' funds segregated from its own funds and ensure that at no point shall the clients' funds be used for margining, hedging or as company assets, including where the company becomes insolvent;
 - (j) apply stringent governance and risk-management procedures throughout the business including adoption of risk-management procedures to deal with stop losses, no negative accounts, double lock limited risk accounts, margin call and close out procedures;
 - (k) comply with the Proceeds of Crime and Anti Money Laundering Act, 2009 and Prevention of Terrorism Act, 2012; No. 9 of 2009
No. 30 of 2012
 - (l) organize and control internal affairs in a responsible manner and clearly separate its front office and back office functions;
 - (m) have efficient procedures and arrangements for addressing complaints by clients;
 - (n) have adequate arrangements to ensure that all staff employed by the online forex broker or money manager are suitable, adequately trained and properly supervised, and subjected to well-defined compliance procedures;
 - (o) adopt and enforce written procedures with regards to communications with the public;
 - (p) deal with the Authority in an open and co-operative manner and keep the Authority informed of anything concerning the online forex broker or money manager that might reasonably be expected to be disclosed to the Authority; and
 - (q) comply with the requirements of these Regulations and shall inform the Authority immediately and in any case not later than twenty four hours in case of non-compliance.
17. An online foreign exchange broker shall determine and obtain adequate professional indemnity insurance for its key personnel. Professional indemnity.
18. (1) A money manager shall enter into an agreement, in writing, with an online foreign exchange broker that shall clearly set out the scope of activities that the money manager may undertake. Agreement between online forex broker and money manager.
- (2) The agreement referred to in paragraph (1) shall have detailed provisions that include —
- (a) clear duties, responsibilities and performance of the money manager;
 - (b) an undertaking by the money manager to disclose conflict or potential of interest to the online forex broker as soon as practical after becoming aware of the conflict;

- (c) the responsibility of the online forex broker to monitor the money managers conduct and to ensure compliance with the terms and conditions of the agreement;
- (d) obligations of the money manager including —
 - (i) compliance with laws;
 - (ii) conduct of marketing activities; and
 - (iii) termination procedures;
- (e) the terms of remuneration of the money manager; and
- (f) the notices between the online forex broker and the money manager; and dispute resolution mechanisms.

19. (1) An online foreign exchange broker may provide leverage, not exceeding four hundred times that of the client's deposit, for foreign exchange trading in a currency pair between any currency pair or underlying assets to its client.

Leverage ratio.

(2) The Authority may, by circular, revise the leverage ratio provided in paragraph (1) from time to time as may be necessary to stabilize volatility in global and local currencies or for investor protection.

20. An online foreign exchange broker or money manager shall establish risk-management mechanisms, systems and procedures to ensure that the online foreign exchange trading platform provider is credible and that any risks associated with the platform are addressed in a timely manner.

Systems audit.

21.(1) An online foreign exchange broker or a money manager shall prepare and maintain books of accounts and other documents which shall disclose a true, accurate and up to date position of the business in electronic or manual form.

Maintenance of books of accounts, records, etc.

(2) The books of accounts, documents and records prepared and maintained under paragraph (1) shall include—

- (a) journals or other comparable records;
- (b) cash books and any other books of original entry that form the basis of entries into any ledger, including books that contain daily records of all orders for purchase or sale of foreign exchange, all purchases and sales of foreign exchange and all other debits and credits;
- (c) ledgers or other comparable records reflecting asset, liability, reserve, capital, income and expense accounts;
- (d) ledgers or other comparable records reflecting foreign exchange bought or sold, of which the delivery is delayed;
- (e) records of all balances of all ledger accounts in the form of trial balances to be prepared at least once at the end of the six months of every year of account; and
- (f) records of transactions with the banks including clients' deposits and withdrawals from the client group account maintained with a licensed bank.

(4) The books of accounts and other documents prepared and maintained under these Regulations shall be preserved for a minimum period of seven years.

22. An online foreign exchange broker shall not open a foreign exchange trading account for a client unless the broker has—

Risk disclosure statements.

- (a) furnished the client with a separate written risk disclosure statement;
- (b) received an acknowledgement, signed and dated by the client, confirming that the client has received the risk disclosure statement and understood the nature and contents of the risk disclosure statement; and
- (c) executed a written agreement with the client at the commencement of the relationship.

23. (1) An online foreign exchange broker shall—

Segregation of clients' funds.

- (a) maintain strict segregation between its own funds and every individual client's funds without any co-mingling between own funds and clients' funds;
- (b) open a segregated clients' account with a bank licensed under the Banking Act; and
- (c) ensure that all deposits and withdrawals by the clients are only made through the individual client's accounts established under paragraph (b).

(2) An online foreign exchange broker shall undertake daily reconciliations between the clients' account maintained at the designated bank and individual clients' account ledgers maintained by the broker or money manager.

(3) An online foreign exchange broker shall not accept cash from, or pay cash to, a client for any transaction under these Regulations.

24. A money manager—

Handling of clients funds by money manager

- (a) shall not receive client's money; and
- (b) shall only have trading rights access to the funds deposited by the client directly to the client's online trading account through the online foreign exchange broker.

25. (1) An online foreign exchange broker or a money manager and the associates of online foreign exchange brokers or money managers shall observe high standards of commercial honour and uphold just and equitable principles of trade in the conduct of its foreign exchange business.

Business conduct regulation.

(2) An online foreign exchange broker or a money manager shall, in the conduct of foreign exchange business comply with the respective practices and standards relating to the conduct of the foreign exchange business for which it is licensed specified in these Regulations.

(3) An online foreign exchange broker or a money manager shall comply with the Capital Markets (Conduct of Business) (Market Intermediaries) Regulations, 2011 to the extent applicable including—

LN 145/2011

- (a) advertisement by or on behalf of an online foreign exchange broker or money manager;
- (b) the disclosure to a client of the financial risks in respect of trading forex recommended by the online foreign exchange broker or money manager to a client;
- (c) the avoidance of any conflict of interest between the online foreign exchange broker or money manager and a client;
- (d) recommendations made by an online foreign exchange broker or money manager;
- (e) submission of annual audited accounts; and
- (f) any other matter relating to the practices and standards of conduct required of an online foreign exchange broker or money manager in conducting foreign exchange business for which it is licensed.

(4) An online foreign exchange broker or a money manager shall submit to the Authority reports and accounts on monthly, quarterly, semi-annual basis and on such other intervals as the Authority may request.

(5) An online foreign exchange broker or a money manager shall prepare and submit to the Authority an annual report demonstrating how compliance with these Regulations was achieved in the year that the report relates to.

26. (1) An online foreign exchange broker or money manager shall appoint a compliance officer who shall be responsible for—

Compliance officer.

- (a) monitoring the compliance by the online foreign exchange broker or money manager with the Act, rules, regulations, notifications, guidelines or instructions issued by the Authority; and
- (b) handling investors' grievances.

(2) A compliance officer appointed under paragraph (1) shall be accredited by the Chartered Institute of Securities and Investments or in accordance with such other competency standard as the Authority may prescribe.

(3) An online foreign exchange broker or a money manager shall furnish the Authority with the details and qualifications of the compliance officer within two weeks of the appointment of the compliance officer.

(4) A compliance officer shall, immediately and independently, report to the Authority any non-compliance by the foreign exchange broker or money manager that may be observed by the compliance officer.

(5) The compliance officer may be held personally liable for the failure to ensure proper compliance by the online foreign exchange broker with the regulatory requirements of the Authority.

27 (1) A dealing or non-dealing online foreign exchange broker or money manager shall appoint a money laundering reporting officer who shall be responsible for—

Money laundering reporting officer.

- (a) reporting to the Financial Reporting Centre, any transaction or activity that he has reason to believe is suspicious;
- (b) being informed of all suspicious activities available to the licensee and take action on suspicious disclosures as soon as practical so as not to delay the reporting of such disclosures;
- (c) creating awareness to all the employees on the anti money laundering laws as well as the audit systems adopted;
- (d) ensuring that persons are screened before being hired as employees; and
- (e) any other responsibility that may be imposed by any written law.

(2) A money laundering reporting officer may also be the compliance officer required under regulation 26.

PART V—INSPECTION

28. The Authority or any person authorized by the Authority may inspect the books of accounts, other records documents and systems of an online foreign exchange broker or money manager, where there is need to—

The right of the Authority to inspect.

- (a) establish that the books of accounts and other books are being maintained in the manner required;
- (b) ensure that the provisions of the Act, regulations and rules made thereunder are being complied with;
- (c) investigate any complaints received from investors, other online foreign exchange brokers or money managers, or any other person on any matter having a bearing on the activities of the online foreign exchange broker or money manager; and
- (d) investigate, on its own motion, in the interest of online foreign exchange business or the interest of investors, into the affairs of an online foreign exchange broker or money manager.

29. (1) The Authority shall, before undertaking an inspection under regulation 32, give the online foreign exchange broker or money manager a reasonable notice of the Authority's intention to do so.

Procedure for inspection.

(2) Notwithstanding paragraph (1), the Authority may direct, in writing, that an inspection of an online foreign exchange broker or a money manager be carried out without notice to the online foreign exchange broker or money manager if the Authority is satisfied that it is in the interest of the investors or in the public interest that such notice should not be given.

(3) The inspecting officers or any other person authorized by the Authority shall have the power to inspect the online foreign exchange broker or money manager in the manner directed by the Authority.

30. (1) An inspecting officer may require a shareholder, director, an officer or an employee of an online foreign exchange broker or a money manager which is being inspected to produce, such books, accounts and other documents in his or her custody or control and furnish the inspecting officer with the statements and information relating to foreign exchange transactions within such time as the inspecting officer may require.

Obligations of
online forex broker
or money manager
under inspection.

(2) An online foreign exchange broker or money manager shall—

- (a) allow the inspecting officer reasonable access to the premises occupied by the online foreign exchange broker or money manager by any other person acting on behalf of the online foreign exchange broker or money manager;
- (b) extend reasonable facilities to the inspecting officer to examine any books, records, documents and computer data in the possession of the online foreign exchange broker, money manager or any other person; and
- (c) provide copies of documents or other materials which, in the opinion of the inspecting officer, are relevant.

(3) An inspecting officer shall, in the course of inspection, be entitled to examine or record statements of any shareholder, director, partner, proprietor or employee of an online forex broker or money manager under inspection.

(4) A director, an officer or an employee of the online foreign exchange broker or money manager under investigation shall give to the inspecting officer all assistance in connection with the inspection which the online foreign exchange broker or money manager may reasonably be expected to give.

31. The Authority may, after considering an inspection report, take the appropriate action provided for under the Act.

Action on inspection
report.

32. (1) The Authority may, in the interest of investors, appoint a qualified auditor to audit the books of accounts or investigate any affairs of an online foreign exchange broker or a money manager.

Appointment of an
auditor.

(2) The Authority may direct that the costs associated with the investigation of the affairs of an online foreign exchange broker or money manager under paragraph (1) shall be borne by the online foreign exchange broker or money manager.

(3) A shareholder, director, officer or employee of the online foreign exchange broker or money manager which is being audited or investigated shall produce, to the auditor, such books, accounts and other documents in his or her custody or control and furnish the auditor with such statements and information relating to foreign exchange transactions within the time as the auditor may require.

(4) An online foreign exchange broker or a money manager shall—

- (a) allow the auditor reasonable access to the premises occupied by the online foreign exchange broker, money manager or by any other person acting on behalf of the online foreign exchange broker or money manager;
- (b) extend reasonable facilities to the auditor for the examination of any books, records, documents and computer data in the possession of the online foreign exchange broker, money manager or any other person; and
- (c) provide copies of documents or other materials which are, in the opinion of the auditor, relevant.

(5) An auditor shall, in the course of an audit or investigation, be entitled to examine or record statements of any member, director, partner, proprietor or employee of an online foreign exchange broker or a money manager under audit or investigation.

(6) A director, an officer or an employee of the online foreign exchange broker or a money manager under audit or investigation shall give the auditor all assistance which the licensee may reasonably be expected to give in connection with the audit or investigation.

(7) The auditor shall have a right to request for bank statements from the bank at which the online foreign exchange broker or money manager maintains its office account and in the case of an online foreign exchange broker, the client account.

PART VI—OFFENCES AND PENALTY

33. (1) An online foreign exchange broker or money manager shall not engage in any foreign exchange transaction that is prohibited by any written law.

Prohibited conduct.

(2) An online forex broker, a money manager or an associate of an online foreign exchange broker or money manager that is engaging in any foreign exchange transaction shall not—

- (a) cheat, defraud or deceive, or attempt to cheat, defraud or deceive any person;
- (b) willfully make or cause to be made a false report, or willfully enter or cause to be entered a false record in or in connection with any foreign exchange transaction;
- (c) disseminate, or cause to be disseminated, false or misleading information, or acknowledge inaccurate report, that affects or tends to affect the price of any foreign currency;
- (d) engage in manipulative acts or practices regarding the price of any foreign currency or foreign exchange transaction;
- (e) willfully submit materially false or misleading information to the Authority or its agents with respect to foreign currency transactions; or

(f) embezzle, steal or knowingly convert any money, securities or other property received or accruing to any person or in connection with foreign exchange transactions.

(3) A person who engages in any conduct that is prohibited under paragraphs (1) or (2) commits an offence.

34. A person who is convicted of an offence under these Regulations shall be liable to such penalty as specified under sections 25A and 34A of the Act and any additional action for damages in respect of the loss occasioned by the commission of the offence. Penalty.

FIRST SCHEDULE

FORM 1

(r. 4(1))

THE CAPITAL MARKETS ACT

(Cap. 485A)

THE CAPITAL MARKETS (ONLINE FOREIGN EXCHANGE TRADING)
REGULATIONS, 2017

**APPLICATION FOR A LICENCE TO CONDUCT THE BUSINESS OF AN
ONLINE FOREIGN EXCHANGE BROKER/MONEY MANAGER**

Application is made for an online forex broker/money manager licence under the Capital Markets (Online Foreign Exchange Trading) Regulations, 2017 and the following statements are made in respect thereof:

Note:

If space is insufficient to provide details, please attach annexure(s). Any annexure(s) should be identified as such and signed by the signatory of this application.

Information provided should be as at the date of the application or renewal.

1. Name of company Limited
2. Registered office
3. Date of incorporation
4. Address
5. E-mail
6. Location, address and telephone number of principal office.....
.....
7. Location, address and telephone number of branch offices
.....
8. Details of capital structure:
 - (a) Nominal capital (KSh.)
 - (b) Number of shares
 - (c) Paid-up capital (KSh.)
9. Shareholders (please attach a list)

| <i>Name</i> | <i>Address and telephone number</i> | <i>Number of shares held</i> |
|-------------|-------------------------------------|------------------------------|
| | | |

10 (a) Directors (please attach a list)

| <i>Name</i> | <i>Identity Card/ Passport number</i> | <i>Date of Appointment</i> | <i>Date of birth</i> | <i>Permanent address and telephone number</i> | <i>Academic or Professional qualification</i> | <i>Number of shares held in the company</i> |
|-------------|---------------------------------------|----------------------------|----------------------|---|---|---|
| | | | | | | |

(b) Secretary

Name.....

Address

Institute of Certified Secretaries of Kenya Registration No.

(c) Chief executive and other key personnel

| <i>Name</i> | <i>Identity Card/ Passport number</i> | <i>Date of Appointment</i> | <i>Date of birth</i> | <i>Permanent address & telephone number</i> | <i>Academic or Professional qualification</i> | <i>Number of shares held in the company</i> |
|-------------|---------------------------------------|----------------------------|----------------------|---|---|---|
| | | | | | | |

11. Particulars of other directorship(s) of the directors and secretary.

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12. Particulars of shares held by directors or secretary in other companies

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13. Has the applicant or any of its directors, secretary or members of senior management at any time been placed under receivership, declared bankrupt, or compounded with or made an assignment for the benefit of his creditors, in Kenya or elsewhere? Yes/ No. If 'yes', give details

.....

14. Has any director, secretary or senior management of the applicant been a director of a company that has been:

- (a) denied any licence or approval under the Capital Markets Act or equivalent legislation in any other jurisdiction: Yes/No.
If Yes, give details.
.....
- (b) a director of a company providing banking, insurance, financial or investment advisory services whose licence has been revoked by the relevant authority? Yes/No. If Yes, give details.
.....
- (c) subjected to any form of disciplinary action by any professional body of which the applicant or any of its director was a member? Yes/ No.
If yes, give details.
.....
- 15. Has any court ever found that the applicant, or a person associated with the applicant was involved in a violation of the Capital Markets Act or Regulations thereunder, or equivalent law outside Kenya? Yes / No.
If 'yes', give details.
.....
- 16. Is the applicant and/or a person associated with the applicant now the subject of any proceeding that could result in a 'yes' answer to the above question (15)? Yes/No.
If 'yes,', give details.
.....
- 17. (1) Is the applicant, or any shareholder, director or the secretary of the applicant, a member or director of a member company of any securities or derivatives exchange or any over the counter platform? Yes/ No.
If 'yes', give details.
.....
- (2) Have any of the above persons been -
 - (a) refused membership of any securities or derivatives organization? Yes / No.
If 'yes', give details
.....
 - (b) expelled from or suspended from trading on or membership of any securities or derivatives organization or any over the counter platform? Yes/No.
If 'yes' give details
.....
 - (c) subjected to any other form of disciplinary action by any stock/securities or derivatives exchange? Yes/No.
If 'yes', give details.
.....

18. Business references:

| <i>Name</i> | <i>Address</i> | <i>Telephone number (s)</i> | <i>Occupation</i> |
|-------------|----------------|---------------------------------|-------------------|
| | | | |

19. One bank reference, where the applicant is a bank the reference shall be given by another bank independent of the applicant

20. Profile of the chief executive and key employees in the applicant company:

| <i>Name</i> | <i>Post</i> | <i>Qualifications</i> | <i>Experience</i> |
|-------------|-------------|-----------------------|-------------------|
| | | | |

21. List the office facilities of the applicant

.....

22. State the exact nature of the activity to be carried on which obliges the applicant to apply for a licence from the Capital Markets Authority

.....

23. Any other additional information considered relevant to this application:

.....

We(Director),
(Director) and (Secretary) declare that all the
information given in this application and in the attached documents is true and
correct.

Dated this day of 20

Signed:

.....) Director

.....) Director

.....) Secretary

Note:

1. The following shall be submitted with the application for a licence:

- (a) memorandum and articles of association
- (b) certificate of incorporation;
- (c) a statement of the un-audited accounts for the period of accounting year ending not earlier than six months prior to the date of application and audited annual accounts for the preceding two years or an auditor's certificate in case of a newly established entities (in the case of application of licence), management accounts up to the 30th November and audited annual accounts for the preceding year (in the case of renewal of licence);
- (d) a declaration by the directors as to whether after due enquiry by them in relation to the interval between the date to which the last accounts have been made and a date not earlier than fourteen days before the date of the application –

- (i) the business of the company has, in their opinion, been satisfactorily maintained;
 - (ii) there have, in their opinion, arisen any circumstances adversely affecting the company's trading or value of its assets;
 - (iii) there are any contingent liabilities by reason of any guarantees given by the company or any of its subsidiaries;
 - (iv) there are, since the last annual accounts, any changes in published reserves or any unusual factors affecting the profit of the company or any of its subsidiaries.
- (e) a declaration by persons authorized as prescribed to accompany the application form;
- (f) an application fee of Kshs. 10,000.

SECOND SCHEDULE

(r. 4(g), 10)

ONLINE FOREIGN EXCHANGE BROKER/MONEY MANAGER LICENCE FEES

| | Kshs. |
|----------------------------------|---------|
| (a) Application fees for licence | 2,500 |
| (b) Annual fees | |
| (i) Dealing broker | 250,000 |
| (ii) Non-dealing broker | 100,000 |
| (iii) Money manager | 100,000 |

Dated the 7th August, 2017

HENRY ROTICH,
Cabinet Secretary for the National Treasury.

**EXPLANATORY MEMORANDUM TO THE CAPITAL MARKETS (ONLINE
FOREIGN EXCHANGE TRADING) REGULATIONS, 2017**

LEGAL NOTICE NO. 226 OF 2017

PART I

| | |
|--------------------------------------|---|
| Name of Statutory Instrument: | The Capital Markets (Online Foreign Exchange Trading) Regulations, 2017 |
| Name of the Parent Act | Capital Markets Act, Cap 485A |
| Enacted Pursuant to | Sections 12(1) (jj) of the Capital Markets Act |
| Name of the Ministry | The National Treasury |
| Gazetted on | September 1, 2017 |
| Tabled on | : |

PART II

1. Purpose of the Statutory Instrument

The Capital Markets (Online Foreign Exchange Trading) Regulations, 2017 (“The Regulations”) seek to establish a regulatory framework for-

- (a) licensing requirements for online foreign exchange brokers and money managers;
- (b) conduct of online foreign exchange business;
- (c) inspections;
- (d) offences and penalties.

2. Legislative Context

The regulations are made pursuant to section 12(1) (jj) of the Capital Markets Act which empowers the Cabinet Secretary, National Treasury, to formulate rules and regulations to regulate the operations and supervision of online foreign exchange trading activities and online foreign exchange brokers.

3. Policy Background

The need to develop the necessary regulatory framework for online foreign exchange trading was informed by the global developments in the market, innovation and the interest as well as active participation of traders and investors in the local market. Though there are a number of people

and institutions engaging in online foreign exchange trading, there was no regulatory framework in place in Kenya either prohibiting or regulating the business. This had resulted in fraudulent dealings, loss of investments and public outcry.

Some statistics indicate that over 50,000 Kenyans are participating in online foreign exchange trading using foreign registered brokers. This poses huge risk to investors engaging in unregulated activity. The regulatory framework therefore provides a basis for the licensing of online foreign exchange brokers and the regulation of the business.

It has been noted that regulation in most jurisdictions began after several retail traders were adversely affected through financial scams, lack of broker integrity and proper understanding of risks inherent in online foreign exchange business. This has been the case in Kenya.

The regulations are aligned with the Authority's mandate of developing the market and protecting investors and aims at ensuring fair conduct of online foreign exchange business and the participants.

4. Consultation Outcome

The regulations were drafted in consultation with the relevant stakeholders. This ensured that the drafting process addressed all the pertinent issues and the interests of traders, investors and regulators.

The Regulations were published for stakeholder comments and proposals through the daily newspapers and the Authority's website on July 19, 2016 for thirty days. A stakeholder workshop was held on February 28, 2017 at Crowne Plaza where further comments were received. Some of the comments received include-

| Stakeholders' Comments | Authority's Consideration |
|---|--|
| 1. The Regulations have minimal provision on investors | The focus is on setting an effective framework for the conduct of online foreign exchange trading and the licensing framework. However, provisions on protection of investors have been added. |
| 2. There is need for a framework for money managers and introducing brokers | The framework for money managers was introduced but since introducers were not to be licensees of the Authority, it was decided that provisions relating to introducing brokers shall not be included. |
| 3. Review the leverage ratios. | Leverage ratios that would spur activity in the |

| | |
|---|--|
| | online forex market in Kenya introduced. |
| 4. Increase the scope for the instances where a licence can be suspended to include market abuse and insider dealing. | Proposal adopted |
| 5. Set capital requirements based on the functions of the broker. | Proposal adopted |

In refining the Regulations, the Authority was guided by the proposals from stakeholders both locally and internationally. The Regulations therefore represent the local environment and the Global developments and best practices.

In order to learn from global experiences, the Authority conducted benchmarking study in Australia and United Kingdom in May 2017. The study enabled the Authority to learn from other regulators and market participants. As a result, the regulations were further refined and streamlined.

6. Guidance

The draft Regulations were uploaded on the Authority's website for ease of access by stakeholders and the public. Workshops and stakeholder sessions were organized to inform stakeholders on the Regulations considering that online foreign exchange business regulation has not been in place before. Further, the Authority occasionally posts update on capital markets products and services including online foreign exchange trading on its Facebook page to create awareness.

7. Impact

a. The Impact on Fundamental Rights and Freedoms

The Regulations seek to broaden economic environment by providing an effective regulatory framework for the business of online foreign exchange trading. This will ensure that such business is conducted with integrity, fairness and regulatory oversight.

As a result, this will foster the protection of fundamental rights and freedoms of the people and institutions especially consumer rights. The Regulations do not limit or infringe upon any right or fundamental freedom under the Bill of Rights. On the contrary, it ensures that there are fair market practices that promote transparency, efficiency and accountability in the conduct of online foreign exchange business.

b. The impact on the Private Sector

The Regulations seek to enhance integrity and orderly market conduct for online foreign exchange brokers and online foreign exchange traders. The private sector will therefore have its

online foreign exchange trading business recognized, protected and regulated by law. As a result, the private sector will grow through enhanced opportunities to engage in the online foreign exchange market.

c. The impact on the Public Sector

The Regulations provide a framework for facilitative business environment while at the same time ensuring that the market is orderly and transparent. There will be increased investor confidence in the market through the promotion of high standards of transparency and integrity. The investors will have a wide range of competing investment opportunities. The regulations will be important in dealing with fraud and scams in online foreign exchange business. With a regulated market, tax slippages will be reduced which will in turn benefit the economy as a whole.

6.4 Impact Assessment

The Regulations will greatly promote market liquidity and prevent financial scams and frauds against unsuspecting investors in online foreign exchange business. It does not impose undue burden or cost on the conduct of online foreign exchange business.

8. Monitoring and review

The implementation of the Regulations will be monitored through periodic reports and regulatory impact assessments. The Regulations will be reviewed in line with the Authority's annual and periodic assessment of the impact of Regulations on market development.

In addition, all the monitoring roles and powers of the Authority are still applicable including the power to take enforcement actions against foreign exchange business participants for breach of the Act or Regulations, Circular or Guidelines of the Authority.

9. Contact

HENRY K. ROTICH
Cabinet Secretary for the National Treasury

18th September, 2017