



REPUBLIC OF KENYA

PARLIAMENT

NATIONAL ASSEMBLY LEGISLATIVE PROPOSALS
(Legislative Proposal No.....of 2023)

**THE CAPITAL MARKETS (AMENDMENT)
LEGISLATIVE PROPOSAL, 2023**

(This Legislative Proposal, if approved under S.O 114(8) of the National Assembly Standing Orders, will be published in the Kenya Gazette as a Bill)

THE CAPITAL MARKETS (AMENDMENT) BILL, 2023

A Bill for

AN ACT of Parliament to amend the Capital Markets Act

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Capital Markets (Amendment) Act, 2023.

Amendment of
section 2 of Cap.
485A.

2. The Capital Markets Act (in this Act referred to as the “principal Act”) is amended in section 2 by —

(1) inserting the following new definitions in their proper alphabetic sequence —

“blockchain” means a system of recording information in a shared digital register which is duplicated and distributed across the whole network of computer systems within the business network;

“cryptocurrency” means a form of digital currency in which transactions are verified and records maintained by a decentralized system;

“crypto miner” means a person or business that is involved in the activity of crypto mining;

“crypto mining” includes—

- (a) the process of creation of new coins; and
- (b) the process of validation of cryptocurrency transactions on a blockchain network by adding them to the digital register to prevent duplication of transactions in digital currency on a distributed network;

“digital currency” means a digital representation of value that—

- (a) is not issued or guaranteed by a central bank or public authority;
- (b) does not have the legal status of currency or money; and
- (c) has controllable electronic records;

accepted by natural or legal persons based on agreement or actual price, as a means of exchange or payment for —

- (i) investment purposes;
- (ii) can be transferred, stored; and
- (iii) traded by electronic means;

(2) in the definition of “securities” by inserting the following new

paragraph immediately after paragraph l—

“(la) digital currencies; and”

Amendment of section 12 of Cap 485A.

3. Section 12 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (m)—

“(ma) the trading in digital currencies”

Insertion of new Part in Cap. 485A.

4. The principal Act is amended by inserting the following new part immediately after Part IVB—

PART IVC- DIGITAL CURRENCIES

Application of Part. **30AA.** This part shall apply to the trade in digital currencies as is provided for in trading of securities.

Application for license. **30AB.** (1) A person who intends to introduce a new cryptocurrency product shall make an application to the Authority in the prescribed form for a license.

(2) A person who applies for a license under subsection (1) shall satisfy the Authority that—

- (a) the new cryptocurrency product was subjected to a product development period of not less than two years; and
- (b) the product was subject to a product test on a customer base of not less than ten thousand customers.

(3) The Authority shall consider the conditions for a grant of license as provided in subsection (2) and

may--

- (a) grant a license;
- (b) reject the grant of license by giving written reasons; or
- (c) provide for any necessary additional requirements to be met before the grant of a license.

Ownership of digital currency. **30AC.** A person to whom a license is granted under section 30BB shall register the digital currency with the Authority.

Responsibilities of persons trading in digital currency. **30AD.** A person who trades in digital currencies shall—

- (a) keep records of digital currency transactions, including purchases and sales;
- (b) pay taxes on any gains that are made from transactions in digital currencies in accordance with the applicable laws.

Taxation of digital currency. **30AE.** (1) Where the digital currency is held—

- (a) for a period not exceeding twelve months, the laws relating to income tax shall apply; or
- (b) for a period exceeding twelve months, the laws relating to capital gains tax shall apply.

(2) A person who possesses or deals in digital currency shall provide the Authority with the following information for tax purposes—

- (a) the amount of the virtual currency in terms of Kenya Shillings;
- (b) the type of virtual currency transacted in;
- (c) the date on which the virtual currency was acquired;
- (d) the date on which the virtual currency was sold;
- (e) the amount of proceeds from the transaction;
- (f) any costs related to the transaction; and

(g) the amount of any gain or loss on the transaction.

Register of digital currencies. **30AF.** The Authority shall cause to be kept a centralized electronic register of all transactions in digital currencies.

Transitional provisions. **30AG.** Within six months of the enactment of this Part, a person trading in digital currencies shall apply to the Authority for a license as provided in this Part.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to amend the Capital Markets Act, Cap. 485A to include a digital currency into the definition of securities and as such, governed by this Act. This will then provide for governance and oversight in an area that is quickly growing, but is not adequately regulated exposing citizens to various risks. The amendment will provide for specific provisions to govern digital currency transactions in Kenya including, the definition of digital currencies, its creation through crypto mining, provide for regulations around trading of digital currencies, outline responsibilities of persons or businesses trading in digital currencies, provide for its taxation, ownership and provide for promotion of innovation in this area. This amendment will also ensure that environmental aspects of digital currency generation, crypto mining is done in an environmentally safe manner. And will encourage for citizen participation in an equitable and decentralized financial system that utilizes smart contracts, connecting Kenyans to global markets.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill does not delegate legislative powers nor does it limit fundamental rights and freedoms.

Statement of how the Bill concerns County Governments

The Bill does not concern county governments in terms of Article 109(5) of the Constitution as it does not contain provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

Monetary policy and currency regulation is a function of the National Government as provided in paragraph 10 of Part 1 of the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the, 2023.

ABRAHAM KIRWA,
Member of Parliament.

Section 2 of Cap No. 485A which is intended to be amended—

2. Interpretation

In this Act, unless the context otherwise requires—

“**agent**” means any person appointed in writing by a licensed person, except in a derivatives market, to perform any of the functions ordinarily performed by the licensed person on behalf of that licensed person;

“**authorised securities dealer**” means a person authorized to deal in securities and operate in a specific market segment as may be prescribed by the Authority;

“**Authority**” means the Capital Markets Authority established by section 5;

“**beneficial owner**” means a natural person who, whether alone or with associates, is the ultimate owner or controller of a legal person or arrangement, or, if there is no legal person or arrangement, the person on whose behalf a transaction is being conducted;

“**Board**” means the Board of the Authority constituted under section 5;

“**capital market instrument**” means any long-term financial instrument whether in the form of debt or equity developed or traded on a securities exchange or directly between two or more parties for the purpose of raising funds for investment;

“**collective investment scheme**” includes an investment company, a unit trust, a mutual fund or other scheme whether or not established or organized in Kenya which—

(a) collects and pools funds from the public or a section of the public for the purpose of investment;

(b) is managed by or on behalf of the scheme by the promoter of the scheme;

and includes an umbrella scheme whose shares as herein defined are split into a number of different class schemes or sub-schemes, each of which is managed by or on behalf of a common promoter, but does not include—

(i) a body corporate incorporated under any law in Kenya relating to building societies, co-operative societies, retirement benefit schemes, credit unions or friendly societies;

(ii) an arrangement where each of the holders of the shares is a body corporate in the same group as the promoter;

(iii) an arrangement where each of the holders of the share is a *bona fide* employee, former employee, wife, husband, widow, widower, child, stepchild of the employee or former employee of the directors or shareholders of a body corporate in the same group as the promoter;

(iv) arrangements where the receipt of contributions from the holders of shares in the collective investment scheme constitutes the acceptance of deposits in the course of a business which is a deposit-taking business for the purpose of the Banking Act (Cap. 488);

(v) contracts of insurance;

(vi) retirement benefits scheme;

"commodity" means—

(a) agricultural, livestock, fishery, forestry, mining or energy goods or any product that is manufactured or processed from any such goods;

(b) financial instruments;

(c) an index, right, or interest in any such commodity;

(d) such other thing as the Cabinet Secretary may, by notice in the *Gazette*, determine to be the subject of a commodity contract;

"commodity contract" includes—

(a) spot commodity contract;

(b) commodity futures contract; and

(c) such other contract or class of contracts as the Authority may, by regulations prescribe;

"**commodity market**" means a market or facility licensed by the Authority or a facility, whether electronic or otherwise at which, offers or invitations to sell, purchase or exchange commodity contracts are regularly made on a centralized basis, being offers or invitations that are intended or may reasonably be expected to result directly or indirectly in the acceptance or making, respectively of offers to sell, purchase or exchange of commodity contracts but does not include—

(a) the office or facilities of a commodity dealer or broker;

(b) the office or facilities of a clearing house;

"**company**" means a company formed and registered under the Companies Act (Cap. 486);

"**Compensation Fund**" means the Investor Compensation Fund established by section 18;

"**credit rating agency**" means an organisation which provides the service of evaluating the relative creditworthiness of issuers of securities and assigns ratings to such securities;

"**dealer**" means a person who carries on the business of buying, selling, dealing, trading, underwriting or retailing of securities except exchange-traded derivatives contracts whether or not he carries on any other business;

"**dealer's representative**" *deleted by Act No. 3 of 2000, s. 4;*

"**dealing in securities**" means making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into—

(a) any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities except in exchange-traded derivatives contracts; or

(b) any agreement the purpose or intended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities except in exchange-traded derivatives contracts;

"**derivatives exchange**" means a securities exchange which has been granted a license to list exchange-traded derivative contracts by the Authority under the Act or approved for such purposes and in accordance with the regulations issued thereunder;

"**derivatives dealer**" *deleted by Act No. 48 of 2013, s. 2(e);*

"**derivatives market**" means a place at which, or a facility, whether electronic or otherwise, by means of which offers or invitations to sell, purchase or exchange-traded derivative contracts are

regularly made on a centralised basis, being offers or invitations that are intended or may reasonably be expected to result, directly or indirectly, in the acceptance or making, respectively, of offers to sell, purchase or exchange-traded derivative contracts, whether through that place, facility or otherwise, but does not include—

- (a) the office or facilities of a derivatives broker; or
- (b) the facilities of a clearinghouse;

“director” has the meaning assigned to it in the Companies Act (Cap. 486);

“exchange-traded derivative contracts” means standardized type of securities or financial instruments which derive their value from the value of underlying assets, indices, or interest rates that are transacted on a licensed derivatives exchange;

“expert” in respect of a matter or an opinion, means a person whose profession, occupation, religious standing, expertise or reputation gives authority to a statement made by that person in relation to that matter or opinion;

“financial instrument” includes securities, mortgage contracts, property contracts, pension contracts, insurance contracts, leasehold contracts, certificates of interest and any variations or derivatives thereof;

“fund manager” means a manager of a collective investment scheme, registered venture capital company or an investment adviser who manages a portfolio of securities in excess of an amount prescribed by the Authority from time to time;

“futures broker” means a body corporate admitted into the membership of a derivatives exchange and duly licensed by the Authority to engage in the business of trading in exchange-traded derivatives contracts as an agent for investors in return for a commission and on its own account;

“futures contract” *deleted by Act No. 48 of 2013, s. 2(f)*;

“futures member” means a person admitted to the membership of a futures exchange in accordance with the Regulations made under the Act and rules of that derivatives exchange but does not denote a shareholder or an equity holder of that derivatives exchange;

“incorporation documents” means the principal documents governing the formation of a collective scheme and includes the trust deed, memorandum and the articles of association and all material agreements as the case may be;

“**information memorandum**” means any prospectus or document, notice, circular, advertisement or other invitation, in print or electronic form, containing information on a company or other legal person authorized to issue securities or a collective investment scheme calculated to invite offers from the public or a section of the public and includes a short-form prospectus, a shelf prospectus, information notice, an offering memorandum in respect of asset backed securities and a supplementary prospectus;

“**insider**” means any person who is or was connected with a company, or is deemed to have been connected with a company and who is reasonably expected to have access, by virtue of such connection, to unpublished information which, if made generally available, would be likely to materially affect the price or value of the securities of the company, or who has received or has had access to such unpublished information;

“**investment adviser**” means any person (other than a *bona fide* officer, director, trustee, member of an advisory board or employee of a company as such) who, for remuneration—

(1) carries on the business of advising others concerning securities; or

(2) as part of a regular business, issues or promulgates analyses or reports concerning securities; or

(3) *deleted by Act No. 22 of 2022, s. 53;*

(4) deals with long term financing equity and debt and acts as adviser or under

writer in relation to a public issue of securities; or

(5) such other persons as the Authority may, prescribe to be within the intent of this definition: but the expression does not include—

(a) a bank as defined in section 2 of the Banking Act (Cap. 488);

(b) a company or association registered under Part III of the Insurance Act (Cap. 487);

(c) an advocate, accountant or certified public secretary in practice whose carrying on of that business is solely incidental to the practice of his profession;

(d) a trust corporation within the meaning of the Trustee Act (Cap. 167);

(e) a dealer or his employee whose carrying on of that business is solely incidental to the conduct of his business of dealing in securities; or

(f) a person who is the proprietor of a newspaper and holder of a permit issued under the Books and Newspapers Act (Cap. 111), where—

- (i) insofar as the newspaper is distributed generally to the public, it is distributed only to subscribers to, and purchasers of, the newspaper for value;
- (ii) the advice is given or the analyses or reports are issued or promulgated only through that newspaper;
- (iii) that person receives no commission or other consideration for giving the advice or for issuing or promulgating the analyses or reports;
- (iv) the advice is given and the analyses and reports are issued or promulgated solely as incidental to the conduct of that person's business as a newspaper proprietor;

“investment bank” means a non-deposit taking institution licensed by the Authority to advise on offers of securities to the public or a section of the public, takeovers, mergers, acquisitions, corporate restructuring involving companies listed or quoted on a securities exchange, privatisation of companies listed or to be listed on a securities exchange or underwriting of securities issued or to be issued to the public and to engage in the business of a stockbroker or dealer;

“investment company” means a collective investment scheme organised as a limited liability company under the Companies Act (Cap. 486) in which the rights of the participants are represented by shares of the company;

“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 of licensed persons; and
- (b) any person who holds a position or discharges responsibilities of any person referred to in paragraph (a);

“licence” *deleted by Act No. 3 of 2000, s. 4;*

“licensed person” means a person or body corporate who has been issued

with a licence or approved by the Authority;

“member” *deleted by Act No. 10 of 2010, s. 45;*

“mutual fund” means a collective investment scheme set up as a body corporate under section 30(5) whereby—

(a) the assets of the scheme belong beneficially to and are managed by or on behalf of the body corporate;

(b) the investments of the participants are represented by shares of that body corporate;

(c) the body corporate is authorised by its articles of association to redeem or repurchase its shares otherwise than in accordance with section 68 of the Companies Act (Cap. 486);

“online forex broker” means a body corporate duly licensed by the Authority to engage in the business of online trading in foreign exchange as an agent of investors in return for a commission and on its own account;

“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 except in exchange-traded derivatives contracts otherwise than at an approved securities exchange;

“promoter” means a person acting alone or in conjunction with others directly or indirectly who takes the initiative in forming or organising the business of a collective investment scheme but does not include an underwriter commission without taking any part in the founding or organising of the collective investment scheme business;

“quotation”, in relation to securities and in relation to a securities exchange, or a derivatives exchange includes the displaying or providing, on a securities exchange or a derivatives exchange, of information concerning—

(a) in a case where offers to sell, purchase or exchange the securities at particular prices, or for particular consideration, are made or accepted on that securities market or a derivatives market, those prices or that consideration;

(b) in a case where offers or invitations are made on that securities market or a derivatives market, being offers or invitations that are intended, or may reasonably be expected, to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange the securities at particular prices or for particular consideration, those prices or that consideration; or

(c) in any other case, the price at which, or the consideration for which particular persons, or particular classes of persons, propose, or may reasonably be expected, to sell, purchase or exchange the securities;

“real estate investment trust” mean an arrangement in respect of real estate or interest in real estate of any description, structured in accordance with the rules prescribed by the Authority to enable a person taking part in the arrangement, whether by becoming an owner of the property or any part of it or otherwise, to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the real estate or interest in the real estate or sums paid out of such profits of income;

“registered venture capital company” means a company approved by the Authority and incorporated for purposes of providing risk capital to small and medium sized businesses in Kenya with high growth potential, whereby not less than seventy-five per cent of the funds so invested consist of equity or quasi- equity investment in eligible enterprises;

“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;

“REIT manager” means a company incorporated in Kenya and licensed by the Authority to provide real estate management services in respect of a real estate investment trust;

“representative” means a representative of any person licensed by the Authority who is in the employment of the licensed person and plays a critical role in that company, and includes a trader, director, general manager, analyst, or any other person employed by the licensee who plays a critical role;

“securities” means—

(a) shares in the share capital of a company ("shares");

(b) any instrument creating or acknowledging indebtedness which is

issued or proposed to be issued ("debt securities");

(c) loan stock, bonds and other instruments creating or acknowledging indebtedness by or on behalf of the Government, Central Bank, or public authority ("Government and public entities");

(d) rights, options, or interests, whether described as units or otherwise, in, or in respect of such shares, debt securities and Government and public securities;

- (e) any right, whether conferred by warrant or otherwise, to subscribe for shares or debt securities ("warrants");
- (f) any option to acquire or dispose of any other security;
- (g) futures in respect of securities or other assets or property;
- (h) securities and collective investment scheme products structured in conformity with Islamic principles for investments;
- (i) units in a collective investment scheme, including shares in an investment company, or other similar entities whether established in Kenya or not;
- (j) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities;
- (k) the rights under any depositary receipt in respect of shares, debt securities and warrants ("depositary receipts");
- (l) asset backed securities; and
- (m) any other instrument prescribed by the Authority to be securities for the purposes of this Act,

but does not include—

- (i) securities of a private company, other than asset backed securities;
- (ii) bills of exchange;
- (iii) promissory notes, other than asset backed securities;
- (iv) certificates of deposit issued by a bank; and
- (v) any other instrument prescribed by the Authority not to be securities for the purposes of this Act;

“securities exchange” means a market, derivatives exchange, securities organization or other place at which securities are offered for sale, purchase or exchange, including any clearing or settlement, with or without novation, or transfer services connected therewith;

“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;

“share” means a share in the share capital of a body corporate, a unit in a unit trust or an interest in any collective investment scheme;

“sophisticated investor” means—

- (a) a person who is licensed under this Act;
- (b) an authorized scheme or a collective investment scheme;
- (c) a bank, a subsidiary of a bank, insurance company, co-operative society, statutory fund, pension or retirement fund; or
- (d) an individual, company, partnership, association or a trustee on behalf of a trust which, either alone or with any associates on a joint account subscribes for securities with an issue price as the Authority may prescribe from time to time;

“spot commodity trading” means the purchase or sale of a commodity at its current market or spot price, where it is intended that such transaction results in the physical delivery of the commodity, and “spot commodity contract” shall be construed accordingly;

“stockbroker” means a person who carries on the business of buying or selling of securities as an agent for investors in return for a commission;

“stockbroking agent” means a person, not being a salaried employee of a stockbroker, who, in consideration of a commission, solicits or procures stockbroking business on behalf of a stockbroker;

“stock exchange” means a market, exchange or other place at which securities are offered for sale, purchase or exchange, including any clearing, settlement or transfer services connected therewith;

“stock market” means a market, or other place at which, or a facility by means of which—

- (a) offers to sell, purchase or exchange securities are regularly made or accepted;

(b) offers or invitations are regularly made, being offers or invitations that are intended or may reasonably be expected to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange securities; or

(c) information is regularly provided concerning the prices at which, or the consideration for which, particular persons, or particular classes of persons, propose, or may reasonably be expected, to sell, purchase or exchange securities;

“substantial shareholder” means any person who is the beneficial owner of, or is in a position to exert control over, not less than fifteen per cent of the shares of a body corporate;

“trading participant” means a licensed person with rights to trade at an approved securities exchange;

“trustee” in relation to real estate investment trust or a collective investment scheme, means a person appointed under a trust deed of a real estate investment trust or a collective investment scheme, as the case may be, as its trustee;

“underwriting” means the purchase or commitment to purchase or distribute by dealers or other persons of issue or offer of securities for immediate or prompt public distribution by or through them;

“unit trust” means any scheme or arrangement in the nature of a trust in pursuance whereof members of the public are invited or permitted, as beneficiaries under the trust, to acquire an interest or undivided share (unit of investment) in one or more groups or blocks of specified securities and to participate proportionately in the income or profits derived therefrom.

Section 12 of Cap No 485A which is intended to be amended—

12. Power of the Minister to issue rules and regulations

(1) The Minister shall formulate such rules and regulations as may be required to regulate—

(a) listing and de-listing of securities on a securities exchange;

(b) disclosures about securities transactions by—

(i) stockbrokers, derivatives brokers and dealers;

(ii) persons who acquire or dispose of securities or exchange-traded derivatives contracts; and

- (iii) a securities exchange;
- (c) the keeping and proper maintenance of books, records, accounts and audits by all persons approved or licensed by the Authority and regular reporting by such persons to the Authority of their affairs;
- (d) the operations of any other bodies corporate or persons dealing with capital market instruments;
- (e) the procedure for the participation of foreign investors in the securities market;
- (f) collective investment schemes;
- (g) registered venture capital companies;
- (h) credit rating agencies;
- (hh) the issue and subsequent trading in Kenya, of offers approved outside Kenya;
- (i) the issue, transfer, clearing and settlement of securities;
- (j) securities clearing and settlement or depository organisations;
- (jj) the operations and supervision of online forex trading activities and online forex brokers;
- (k) fund managers;
- (ka) spot commodity trading and commodity markets;
- (l) investment banks;
- (m) authorized securities dealers;
- (n) self regulatory organizations;
- (nn) the use of money raised from the issue of securities, in cases in which the securities are issued to raise money for a specified purpose;
- (o) the financial penalties or sanctions for breach of rules, guidelines or notices made or issued by the Authority or non-compliance with the requirements imposed by the Authority;

(p) the fees payable annually by a securities exchange, derivatives exchange or central depository or for securities or exchange-traded derivatives contracts' transactions, licences and approvals required by this Act to be issued or granted on an application to the Authority;

(q) the disclosure requirements and other terms and conditions on which securities or exchange-traded derivatives contracts may be listed or de-listed from a securities exchange or a derivatives exchange, respectively, or offered for sale to the public or a section thereof.

(2) All rules and regulations formulated under subsection (1) shall—

(a) take into account and be consistent with the objective of promoting and maintaining an effective and efficient securities market; and

(b) be exposed for comment by stakeholders and the general public for a period of thirty days through notification in at least two daily newspapers of national circulation and the electronic media.

(c) *deleted by Act No. 35 of 2012, s. 3(b)(ii).*

(3) For the purposes of this Act, stakeholders shall include listed companies and all persons licensed or approved by the Authority or financial or other institutions whose operations have, in the opinion of the Authority, a bearing on the development and regulation of capital markets in Kenya.