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November 22, 2021

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Clerk's Chambers
Parliament Buildings
NAIROBI

Dear *Michael*

RE: GAZETTE NOTICE NO. 12325 ON GUIDELINES ON SHARE BUYBACKS FOR LISTED COMPANIES

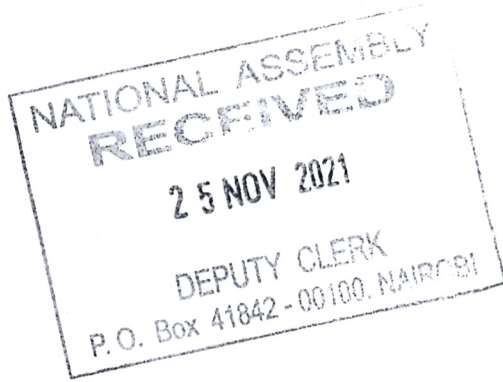
The above Guidelines have been issued under Gazette Notice No. 12325 and notification of the same made vide the Kenya Gazette Vol. CXXIII No. 230 of 12th November, 2021.

Pursuant to Section 11 of the Statutory Instruments Act, 2013, please find attached the Guidelines, the explanatory memorandum and public participation documents, for your necessary action.

Yours *Smurthy*
[Signature]

JULIUS MUIA, PhD, CBS
PRINCIPAL SECRETARY/NATIONAL TREASURY

Encl.



EXPLANATORY MEMORANDUM ON THE GUIDELINES ON SHARE BUYBACKS FOR LISTED COMPANIES

GAZETTE NO. 12325

PART I

Statutory Instrument	: Guidelines on Share Buybacks for Listed Companies.
Parent Act	: Capital Markets Act, Cap 485A.
Enacted Pursuant to	: Sections 11(3) (d) of the Capital Markets Act.
Name of the Ministry	: The National Treasury.
Gazetted on	: 12 th November, 2021

PART II

1. Purpose of Statutory Instrument

Share buybacks refers to the acquisition by limited companies of its own shares. The concept was introduced in Kenya pursuant to **Part XVI** of the **Companies Act, 2015** (the Companies Act) to provide limited companies with a unique opportunity to consider this option as an additional strategy for limited companies wishing to re-invest in themselves.

In a typical share buyback transaction, a company buys back its shares and then cancels them and the amount of the company's issued share capital is diminished by the nominal value of the cancelled shares. This effectively leaves the remaining shareholders with larger stakes in the company.

Part XVI of the **Companies Act** contains general procedures to be applied by any limited company intending to acquire its own shares either through a market purchase or an off-market purchase. Specifically, Division 3 gives limited companies that have a share capital powers to purchase its own shares including redeemable shares subject the requirements thereunder,¹ and any restriction or prohibition in the company's articles.

In addition to the prescriptive requirements under the Companies Act, the Capital Markets Authority (the Authority) has developed additional Guidelines that will further apply to Companies listed at the Securities Exchange. The Guidelines provide additional disclosure requirements that must be complied with to fully operationalize the share buyback regime for companies listed on

¹ Companies Act, 2015. See sections 447 to 451.

the bourse coupled by the need to protect investors while at the same time ensuring liquidity in the market.

2. Legislative Context

The Guidelines on Share Buybacks for Listed Companies are made pursuant to **section 11(3) (d)** of the **Capital Markets Act, Cap 485A** Laws of Kenya (the Act), which empowers the Authority to issue Guidelines on matters within its jurisdiction for purposes of carrying out its objectives under the Act. The Guideline is divided into the following parts:

Part I: Provides for the introduction and application of the Guidelines. It explains the nexus between the Guidelines and the Companies Act, 2015 and requires that companies undertaking a share buyback comply with both pieces of legislation.

Part II: Provides for the powers to undertake share buybacks by companies. It requires listed companies to ensure that their Articles of Association have a provision empowering them to undertake share buybacks. With regards to the shareholders, the Guidelines requires listed companies to seek for authorization to undertake a buyback from its shareholders in a general meeting and the submission of the shareholder circular to the shareholders, the Authority and the Securities Exchange.

Part III: Gives detailed requirements of what must be disclosed in the shareholder circular.

Part IV: Provides for off-market purchase transactions. Requires the submission of the draft share buyback contract together with the shareholder circular to the Authority for approval in line with the requirements of private transactions.

Part V: Requires the timely publication of notice by a company intending to undertake a share buyback. It also provides for the disclosures to be made in the public notice.

Part VI: Provides for on-market (Exchange) transactions. Specifically, it provides for the maximum and minimum buyback price.

Part VII: Provides for the minimum capital and free float requirement. The part specifically highlights that share buyback transactions ought not to reduce or breach the minimum capital and free float requirement for continued listing of the company on the respective market segment under the Capital Markets(Securities) (Public Offers, Listing and Disclosures) Regulations, 2002.

Part VIII: Addresses share buybacks relating to a class of shares and the treatment of treasury shares. It requires for the general rule that, where share buyback relates to a class of shares, the buyback ought not to exceed 10% of the total issued shares of that class in a given financial year. On treasury shares, it gives companies the option to keep the shares bought back in treasury

provided they do not exceed 10% of the total issued shares of that class and allows companies re-issue the treasury share pursuant to seeking approval from the Authority.

Part IX: Provides for the volume of the shares purchased. It limits the volume of shares that can be repurchased on any single day to a certain percentage.

Part X: Requires listed companies that undertakes a share buyback to make certain disclosures of the details of the buyback transaction to the Securities Exchange and publication of the same on the on the website of the Exchange.

Part XI: Provides for the maximum period for undertaking a share buybacks. The part also requires companies to separate its buyback programs by a period of 365 days.

Part XII: Provides for Conditions for undertaking, cancelling or suspending share buybacks. Prohibits companies from undertaking a share buyback during the period of two (2) weeks prior to the publication of its half-yearly or annual financial statements; or after it has become aware of any material information which has not been made public, which if disclosed, could affect the price of the shares. Also provides that a repurchase cancelled or suspended if material information is announced within 14 days prior to the buyback.

Part XIII: Provides for reporting and disclosures obligations. It requires companies that undertake a repurchase to avail reports to the Authority on a periodic basis and provides for what should be contained in the reports.

Part XIV: Provides the procedure for approval of delisting's and privatizations by independent shareholder in the event a share buyback triggers such.

Part XVI: Provides for the applicability of the Capital Markets (Take-overs and Mergers) Regulations, 2002 In the event a proposed share buyback breach the limits that may trigger a takeover.

Part XVII: Requires compliance with laws and regulations that may be applicable to share repurchase transactions.

3. Consultation

The Authority published a public notice in the daily newspapers requesting for comments from stakeholders and the general public between 30th June, 2020 and 31st July, 2020. The Comments received were reviewed and considered in the refinement of the Guidelines. The public notice and stakeholder engagement matrix are attached hereto.

4. Impact

4.1 The Impact on Fundamental Rights and Freedoms

The Share Buyback Guidelines seek to enhance fair treatment of shareholders and market integrity in share buyback transactions by promoting transparency and accountability.

4.2 The impact on the Private Sector

The Guidelines seek to provide additional guidance to listed companies to ensure that their right to share buybacks is not abused. It also seeks to achieve market stability.

3.3 The impact on the Public Sector

The Guidelines seek to promote investor protection and fair treatment of shareholders in a bid to bolster market confidence.

3.4 Impact Assessment

The Guidelines seek to promote market integrity by balancing the rights of companies to undertake share repurchases and the rights that accrue to shareholders.

5. Monitoring and review

The implementation of the Share Buyback Guidelines will be done through the approval and supervision processes whenever listed companies seeks approval from the Authority to undertake a share repurchase.

6. Contact

The Chief Executive
Capital Markets Authority
Embankment Plaza, 3rd Floor, Longonot Road, Upper Hill
P.O. Box 74800-00200,
NAIROBI

Tel: +254-20-2264900, 2221910, 2226225

Website: www.cma.or.ke



PUBLIC NOTICE

THE CAPITAL MARKETS ACT (CAP 485A)

DRAFT GUIDELINES ON SHARE BUYBACKS FOR LISTED COMPANIES

The acquisition by limited companies of their own shares was introduced in Kenya pursuant to the **Companies Act, 2015** (the Companies Act) to provide limited companies with a unique opportunity to consider this option as an additional strategy for them to re-invest in their operations.

Part XVI of the **Companies Act** contains general procedures to be applied by any limited company intending to acquire its own shares either through a market purchase or an off-market purchase.

In addition to the requirements under the **Companies Act**, the Capital Markets Authority pursuant to **Section 11(3) (d)** of the **Capital Markets Act, Cap 485A** has developed draft Guidelines on Share Buybacks by Listed Companies, 2020 that will apply to companies listed at the Nairobi Securities Exchange. The draft Guidelines provide additional requirements for share buyback transactions by listed companies, including disclosures, approval requirements and timelines. The Guidelines seek to enhance investor protection, promote liquidity and ensure transparency in share buyback transactions.

In accordance with **Section 12A(3)** of the **Capital Markets Act**, the Authority now invites stakeholders and the general public to submit comments on the proposed Guidelines on Share Buybacks for Listed Companies, available on www.cma.or.ke.

Kindly submit your comments by **July 31, 2020** to:

The Ag. Chief Executive
Capital Markets Authority
P.O. Box 74800-00200 Nairobi
3rd Floor, Embankment Plaza
Longonot Road, Upperhill
Email: comments@cma.or.ke,
Website www.cma.or.ke

SHARE BUYBACK GUIDELINES – COMMENTS FROM STAKEHOLDERS

PROVISION	COMMENT	PROPOSAL	CMA's RESPONSE
<p>Power to undertake share buyback.</p> <p>2.2 The proposed share buyback must be authorised by shareholders in a general meeting.</p> <p>2.3 Prior to a General Meeting that proposes to discuss a share buyback resolution, within reasonable time, the company shall provide shareholders with an approved circular detailing all terms and conditions of the proposed share buyback.</p> <p>2.4 The proposed shareholder circular shall be submitted to the Authority for review and approval prior to its circulation pursuant to Regulation 63 of the Capital Markets (Licensing Requirements) (General Regulations), 2002.</p>	<p>This should be the responsibility of the Board of Directors as part of their role in representing shareholders' best interests. It will also avoid missed opportunities due to timing of AGM versus stock price dislocations that shareholders could benefit from.</p>	<p>We propose the share buyback be authorized by the Board of Directors in their discretion at any time without a shareholder general meeting. Share buyback program details shall be disclosed publicly immediately following the decision to implement one.</p> <p>Consequently, proposal 2.3 should be eliminated.</p> <p>We propose 2.4 be amended such that the circular is not a proposal, but rather a disclosure of the intended buyback program to the Authority for review and approval.</p>	<p>The decision by the Board to undertake share buybacks is a critical and material one that requires shareholder consideration and approval. Without such approval, the shareholders may be disenfranchised.¹</p> <p>This position is supported under the Companies Act which provides that company may make a market purchase of its own shares only if the purchase has been approved by a resolution of the company</p>
	<p>Shareholders to have the opportunity to participate in equal terms in approving the share buyback and method adopted.</p>	<p>The share buyback and the method to be adopted to effect the buyback must be authorized by shareholders in a general meeting.</p>	<p>Proposal emanates from the Directors and shareholders have an option to either agree or disagree with the proposed method. The Shareholder circular indicates the details of how the share buyback will be conducted</p>

¹ Other jurisdictions: Australia and Brazil- Board of directors and the shareholders meeting. In France, Italy, Malaysia, Hong Kong and United Kingdom it is the shareholders meeting.

	<p>Adequate prior notice ensures fair treatment of shareholders.</p>	<p>To be deemed passed, the special resolution should be passed by 75% of shareholders present at general meeting</p> <p>Ample notice to shareholders to be given. At least 21 days as is with other notices to general meetings</p>	<p>and other key details as highlighted under the guideline. This then means that the shareholders will be equipped enough to approve the buyback in totality including the method that will be used to effect it.</p> <p>Sec 256 (5) of the Companies Act provides that anything done by ordinary resolution may also be done by a special resolution if the company so provides. To this extent then, we may opt to either make a special resolution a requirement or leave it at the discretion of the company. (Most regulations/rules require a special resolution at a general meeting).</p> <p>The Companies Act already gives the general rule on matters notice to be given for general meetings. Section 281 provides for at least 21 days' notice for private companies and at least 21 days' notice for an AGM and 14 days' notice for other general meetings for a public company. Companies will thus be required to comply with the standards set under the Act.</p>
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		Include submission of the shareholder circular to the Exchange.	Provision included under the new subsection 2.5.
<p>Shareholder circular</p> <p>Clause 3.2 In addition, the shareholder circular shall contain the following information...</p>	To provide appropriate disclosure on buyback activity including actions of company insiders and directors.	We propose the inclusion of an additional disclosure item aimed at providing more transparency including details of any share buyback made within the last 12 months, including the total number of shares purchased, purchase price paid, total consideration paid for the purchases and number of shares held by current and former corporate insiders and Directors	This disclosure will be addressed under guideline 12 on reporting and disclosure particularly 12.1 which provides that a company that undertakes share buyback transactions shall disclose in its annual report any share buyback transactions undertaken in a given year and the treatment of the shares bought back.
<p>Clause 3.2(b) The number of shares to be bought back.</p>	The value of shares to be purchased is more informative to shareholders so they can understand cash to be allocated to purchases and the effect on leverage. Share prices can vary considerably so the number of shares to be purchased under the current language is variable.	We propose the "number" of shares be replaced with "value" of buyback authorization.	No of share is a requirement under sec 458 (3) (a) of the Companies Act. Value of shares can be deduced through the minimum and maximum prices which has been addressed under guideline 3.2 (e).
	This protects market liquidity.	Number of shares to be bought -This should not be more than the required float.	Guideline no 7 addresses this. Addition included.

<p>Clause 3.2 (c) The method of effecting the share buybacks. This could either be through open market repurchase programs executed through tender offers or over a period of time on or off-market repurchases that would inform the approval required from the shareholders as prescribed in the Companies Act, 2015.</p>	<p>Off-market share buy backs violate shareholders rights to be treated equally. The repurchase transaction should be done at the Exchange to maintain transparency. OTC buy backs run the risk of possible misuse of material information by the companies' managers or other insiders.</p>	<p>Off market repurchases should be prohibited. All buybacks should be undertaken on the Exchange in the interest of maintaining a fair market and avoid price distortions.</p>	<p>The Companies Act already gives Companies a right to either purchase its own shares through an off-market purchase under a contract or by a market purchase (see section 450 (1) And (2) of the Act.)</p>
<p>Clause 3.2 (d) The treatment of the shares proposed to be bought back. The shares could either be held in treasury or cancelled.</p>	<p>Holding shares in treasury or cancellation results to sucking liquidity from the market. Cancellation of repurchased shares is an easier route to delisting.</p>	<p>Repurchased shares should not be cancelled. If held in treasury, the repurchased shares should be reissued within a given time period (12 months) at the then prevailing market price.</p>	<p>This provision has been borrowed from the Companies Act which allows a Company that has bought back its shares to either hold shares in treasury or cancel them subject to the conditions under sec 4.63.</p>
<p>Clause 3.2(e) The price per share of effecting the share buyback prescribing the maximum and the minimum price. In disclosing the price, detailed explanation should be provided</p>	<p>Disclosing minimum and maximum prices is overly transparent and potentially detrimental to existing shareholders. Additionally, we do not believe it is the responsibility of the company to disclose</p>	<p>We propose eliminating the provision.</p>	<p>The requirement to disclose both the minimum and maximum price that may be paid for the shares is a statutory requirement under sec 458(3) (b) as read with subsection 7 of the same section and thus cannot be entirely eliminated.²</p>

² In South Africa where the repurchase of the shares in a listed company is made by way of a general repurchase, the repurchase price cannot be greater than 10% above the weighted average of the market value of the shares for the five business days immediately preceding the date on which the transaction is affected.)

In Singapore, the acquisition price is the average of the closing market prices of the shares over the last 5 market days, on which transactions in the share were recorded, before the day on which the purchases are made and deemed to be adjusted for any corporate action that occurs after the relevant 5-day period. In the UK, the maximum

including valuation reports supporting the prescribed price.	valuation reports supporting the prescribed price.	
There will be no 2 price variables. For on market purchases, the minimum and maximum prices shall have to comply with the requirement of guideline 6.	This should be harmonized with guideline 6. This avoids two price variables.	
This can actually be used as financing model for the share buyback whereby a fresh issue could perhaps be that that few shares are issues at a high price to back to buyback more shares at a lower price. (Buying the undervalued stock and re-issuing at the 'corrected' market price).	Consider reviewing the line.	
Section 448 of the Companies Act provides that a limited company may not purchase its own shares unless they are fully paid. Further, 449 highlights that, '...a private ltd company may purchase its own shares only out of (a) Distributable profits or (b) The proceeds of a fresh issue of shares made for the purpose of financing the purchase	Also, is debt financing is allowed to execute share buy backs? It's not stated neither is it prohibited.	
Clause 3.2(f) The mode of financing the share buyback being either the <u>proceeds</u> from a <u>fresh issue of shares</u> or out of distributable profits of the company.	One of the rationale of share buybacks is to reduce the company's shares in circulation. The underlined statements may be imply the exercise in futility if a listed company issues new shares and then from proceeds buys back existing shares.	

purchase price for buybacks of less than 15% of ordinary shares, should not be more than 5% above the average market value of the company's equity shares for the 5 business days prior to the day the purchase is made

			<p>This provision therefore limits the mode of financing thus implying that companies may not purchase its own shares on credit terms.³ And the same is in line with international standards.</p>
		<p>Should be restricted to distributable profits only. This ensures the company is not compromising its solvency.</p>	<p>Refer to explanation above.</p>
<p>Clause 3.2(h) Declaration of solvency and liquidity by the directors of the company to undertake the share buyback. Such declaration should include a statement by the directors confirming that as at the date of the shareholder circular, the assets of the company are fairly valued and are equal or exceed the liabilities of</p>	<p>From an accounting standpoint, it is possible for a company to have a negative equity value while remaining well capitalized. This scenario can occur if treasury stock is greater than the rest of the equity value. It is noted the existence of provision 8.2 is likely to make this scenario unlikely.</p>	<p>For the avoidance of confusion, we recommend removing “the assets of the company are fairly valued and are equal or exceed the liabilities of the company and that” from the proposal.</p>	<p>The Capital Markets Securities Public Offers Listing and Disclosures Regulations already requires that for all listed companies the total assets must exceed the total liabilities at all times. The Regulatory requirement supersedes the accounting interpretation for the assessments of compliance with continuous reporting obligations</p>

³ This position is similar to UK and South Africa. Companies share buyback in Nigeria are only repurchased out of share premium account not older than nine months and or accumulated profit of the company which would otherwise be available for dividends. The mode of financing in India is also by use of the share premium account. Payment for the acquisition or purchase by a company of its own shares in Singapore must be made out of its distributable profits. 'Distributable profits' means profits that are available for payments as dividends but excludes any amount in the company's share premium accounts and the company's capital redemption reserves. In India, repurchase may be done using free reserves, securities premium account or proceeds of any shares or other specified securities however a company cannot buy back its own shares or other specified securities out of the proceeds of an earlier issue of the same kind of shares or specified securities.

<p>the company and that the company will be able to pay its debts as they become due in ordinary course of business for a period of 12 months.</p>	<p>The buyback should not leave the company with insufficient capital or impact on the company's solvency.</p>	<p>The declaration of solvency and liquidity by the directors of the company should be auditable and based on a recognized professional opinion.</p>	<p>and protection of investor interests as well.</p>
<p>Clause 3.2 (k) Any related party transaction or director's interest in the share buyback transaction.</p>	<p>Directors and managers of a company have greater access to information relevant to judging a company's prospects and valuation. This holds true regardless of obligations to disclose material information in a timely manner.</p>	<p>A company, its directors and subsidiaries should not deal with own shares during closed periods as defined in the CMA regulations and company's internal policies.</p>	<p>CMA has not defined any closed periods in its regulations. This can be hard to achieve</p>
<p>Clause 3.2 (m) Validity period for the buyback once approval is given.</p>	<p>Leaving the validity period open ended is open to abuse as the company can seek shareholder approval once for undefined length of time.</p>	<p>The validity period of the buyback approval should be limited to 12 months.</p>	<p>Provision included under the new guideline 11.⁴ <i>A company shall have a maximum period of eighteen months from the date of approval of the shareholder resolution for the completion of the</i></p>

⁴ In Nigeria, an issuer company has a maximum period of 12 months for the completion of the buyback programme and a separation of the buyback programme by a period of 365 days. In the case of a Public Company, a resolution conferring, varying or renewing approval shall specify a date on which the approval is to expire which may not be later than 18 months after which the resolution is passed.

			<i>buyback program and it shall separate its buyback programs by a period of 365 days.</i>
<p>Off-market purchase transactions.</p> <p>Off-market purchase transactions In the event of an intended off-market purchase, the draft share buyback contract shall be submitted to the Authority accompanying the shareholders' circular for the Authority's approval, in line with the requirements of private transactions.</p>	To ensure fair dealing	We recommend that the framework allow for off-market acquisitions to only be undertaken on an equal access scheme. To qualify as an equal access scheme, the offers under the scheme are to be made to every non inside and non-related party shareholder to purchase the same percentage of their shares and the terms of all the offers are the same.	<p>Basically what this means is that you are pro rating what a company can purchase per shareholder. It is a good idea but it assumes all shareholders want to sell which may not be the case and restricts shareholders who want to sell their entire holding. I think this needs further and extensive discussion.</p> <p>Companies Act provides A company is allowed to vary the terms of an off market purchase contract through a special resolution⁵. Any variation is subject the same procedures of barring the member whose shares are being bought from participating and members have a right to be availed with the resolution and the varied contract for inspection⁶. Any release of a company of its rights</p>

⁵ Section 454

⁶ Section 455, 456

		<p>Management and the Board of Directors and insiders, as well as related parties, shall not be allowed to transact in off-market purchase transactions except for transactions related to compensation schemes.</p> <p>This whole section should be expunged from the guidelines. OTC buy backs for listed securities should be prohibited. Refer to comment to guideline 3.2 above.</p>	<p>in an off market purchase is subject to the same process?.</p> <p>The disclosures in the guideline suffice.</p> <p>See comment on 3.2</p>
	<p>Off market purchase transactions—Guidelines require draft share buyback contract to be submitted to the Authority. However, the terms of the contract must be authorised by a resolution of the company before the contract is entered into.</p>		<p>What is to be submitted to the Authority is a <u>draft</u> contract and the accompanying shareholder circular which must have the details as provided for under guideline 3.</p> <p>Once the contract is approved by the Authority the same shall be tabled at the shareholders meeting.</p>

<p>Publication of notice.</p> <p>Clause 5-1 The company intending to undertake share buyback shall issue relevant public announcements subject to the Authority's approval to be published in at least one (1) newspaper of national circulation and made available on the company's website within one (1) day of the board's resolution to undertake the share buyback.</p>	<p>To seek clarification regarding the proposal.</p>	<p>We find the language of this proposal unclear. If the proposal is aimed at announcing to the market immediately prior to the company commencing a buyback then market participants would be able to front-run the company's repurchases. We also encourage buyback information to be disclosed publicly on the CMA and NSE website.</p>	<p>In the event there are material changes before shareholders' approval, the new draft should be resubmitted to the Authority.</p>
		<p>Is the stakeholder calling for a short publication period, say 12 hours? We need to include publication on NSE website, not sure of CMA website as it does not have much info on issuers.</p> <p>I think clarity is needed on this. The announcement to undertake a buy back is very different from the actual buy back as the buying back of shares will be done only after shareholder approval. The announcement on the other hand is after the board resolves to undertake a buy back. In my opinion there will be no announcement prior to actual purchase of shares as it will have already been publicly disclosed the validity period of the buy back.</p> <p>I agree the announcement just like any other material announcement should be disclosed on NSE website within 24 hours. I agree 24 hours is</p>	

<p>consistent with the rest of the regulations. This has been captured under 5.1(amended).</p>			
<p>See above.</p>	<p>Publication on the NSE and CMA websites within 24 hours of the board resolution to undertake a share buyback. 24 hours is consistent with release of other material information in the capital markets.</p>		
<p>See 3.2 above</p>	<p>Delete the words "on or off-market".</p>		<p>Clause 5.2 (a) The announcement shall contain material information on the share buyback including the following: a) The method of effecting the share buyback (on or off-market)...</p>
<p>The Companies Act requires for this disclosure under sec 458. This is to thus align it to the provisions under the Act. Clause 6.2 amended by adding 'whichever is lower.'</p>	<p>We propose eliminating the provision.</p>	<p>Overly transparent and potentially detrimental to existing shareholders Based on paragraph 6, there will only be a single price for the share buyback.</p>	<p>Clause 5.2(b) The announcement shall contain material information on the share buyback including the following: ... (b) The minimum and maximum prices</p>

<p>On-market (Exchange) transactions.</p> <p>Clause 6.1 For on-market (Exchange) transactions, the price bands shall be reasonable and fair, reflecting the share's price fluctuation during the previous 12 months prior to the day of the Board resolution of share buyback.</p>	<p>The proposal could potentially hinder the ability to execute a pre-established buyback program.</p>	<p>We recommend removing or adjusting the proposal.</p>	<p>See comment on this above on pricing</p>
	<p>What happens if the price moves up more than 10% above the weighted price average of the share 10 days prior to the day of the Board resolution of share buyback? Would this mean the share buyback be abandoned or seeking of a fresh approval from the Board?</p>		<p>The Authority will give permission to allow companies proceed with buyback.</p>
		<p>Reword 6.1 to substitute "Board resolution" with "shareholders' approval". This will protect the sanctity of pricing and avoid manipulation of price.</p>	<p>There is a significant time difference between board resolution and shareholders' approval. By time of shareholder's approval the market has already inculcated the pricing of the information.</p>
	<p>On market (Exchange) transactions—Under Section 458, a company may make market purchase of its own shares if the purchase has been approved by a resolution of the company. It is for the members to decide what</p>		<p>This criteria has been set to ensure there is no market abuse propagated through the share buyback.</p>

	should be the maximum and minimum prices. Will it be right for the Authority to stipulate the price?		
<p>Clause 6.2</p> <p>The minimum price shall be the nominal price of the shares or the average price at which most of the shareholders bought the share at.</p>	<p>This runs counter to the benefit of shareholders. Purchasing at a lower price is beneficial to shareholders.</p>	<p>We recommend removing the proposal.</p>	<p>The clause provides a basis for determining the minimum price, so this is not the price that the shares will ultimately be sold at. This is to protect shareholders against any buyback transactions that go below the set threshold.</p>
	<p>What happens if there is a further price drop below nominal price of the shares or the prevailing market price of the shares at the time the resolution was approved by the shareholders? Would this mean the share buy-back be abandoned or seeking of a fresh approval from the shareholders?</p>	<p>Authority to offer guidance on this</p>	<p>Provision amended by adding '...whichever is lower.' See guideline 6.2</p>
<p>Volume of shares to be purchased.</p> <p>Clause 9</p> <p>The volume of the shares purchased on any single day must not exceed 25% of the average daily trading volume for the four calendar weeks preceding the week of the purchase and must not be executed as to significantly adversely affect the liquidity of the shares in question. The buyback should not be</p>	<p>Placing a limit on volume of single day purchases may render a buyback difficult, if not impossible to implement for companies whose stock trades infrequently.</p>	<p>Companies shall be able to trade in one block trade per week without regard to the volume limit, provided it does not make any other repurchases on the same day.</p>	<p>The threshold is to ensure that the market is not distorted as a result of the share buyback, further, the buyback should only be executed on normal trading hours to ensure transparency. However, provision has been amended to allow the Authority to review the cap based on liquidity of the shares in the market.</p>

<p>effected during pre-open session of trading.</p>		<p>Though some counters have a large number of shares issued, the volume traded is quite small and they would not be able to achieve share buy backs efficiently. The clause would only work for the very liquid counters.</p>	<p>We request for a review of the 25% capping on the average daily trading volume.</p>	<p>See above.</p>
<p>Share buyback relating to a class of shares and treatment of treasury shares.</p> <p>Clause 8.3 Where the company has treasury shares and proposes to re-issue them, the company shall seek an approval from the shareholders and the Authority pursuant to the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations, 2002 prior to re-issuing the said treasury shares including a re-issue to Employee Share Ownership Schemes.</p>	<p>There's need for enhanced clarity regarding to time to elapse before buy back shares held as treasury are re-issued. In addition, does the guideline makes it open for listed companies to re-issue the shares in any allowable form (SEO, bonus or rights issuances) subject to approvals?</p>	<p>Consider to give some clarity.</p>	<p>This provisions is in line with section 529 the Companies Act on disposal of shares which provides, '...A company that holds shares as treasury shares may at any time (a) Sell the shares or any of them for a cash consideration or (b) Transfer the shares, or any of them for the purpose of or in accordance with Employee Share Scheme.</p> <p>However, the provision requires for approval to be sought before dealing in the shares which will take care of question of 'adequate' time in light of circumstances.</p>	<p>There will be no additional cost on this.</p>
<p>The Securities Exchange to make disclosure on share buybacks.</p>	<p>The guideline has not mentioned any additional charges for this. It is</p>	<p>Authority to confirm if this is covered under the annual listing</p>		

<p>Clause 10 The Securities Exchange shall disclose on its website, the share buybacks undertaken by any listed company. The disclosure shall include information on the company, the number of shares that have been bought back, the price per share of the shares bought back and the percentage of the free float in the post-buyback era.</p>	<p>not mentioned how the exchange will get this information, any company involvement and the timelines for reporting and also how the exchange will determine the free float in the post buyback era?</p> <p>The onus of disclosure should be on the company and not on the Exchange. The Exchange can only make this information available on its website and to the public after the disclosure.</p>	<p>fees. Authority to clarify these issues as they are critical to both the company and investors.</p>	<p>Provision amended. See new guideline 10.</p>
<p>Conditions for undertaking, cancelling or suspending share buybacks</p> <p>Clause 11 A company shall not effect share buyback transactions during the period of two (2) weeks prior to the publication of its half-yearly or annual financial statements; or after it has become aware of any material information which has not been made public, which</p>	<p>To avoid tipping off market participants that the company is in possession of material information.</p>	<p>This guideline should be reworded to put the onus of disclosure on the company that carries out a share buy back as follows: <i>Continuous disclosure – A company that undertakes share buyback shall disclose details of the buyback transaction immediately to the Securities Exchange and not later than the opening of the following trading day. The disclosure shall indicate the company's free float after the share buyback.</i></p> <p>Consider adding 'quarterly' for listed companies with quarterly reporting requirements.</p> <p>We propose language should be added that allows for companies to enter in pre-established, binding contracts that provide instructions to a broker to effect repurchases at a future time period. The company shall continue to purchase shares under this scheme even if it has obtained material inside information</p>	<p>Quarterly may be too stringent</p> <p>Not addressed. Perhaps the question needed to be paraphrased.</p>

<p>if disclosed, could affect the price of the shares. A buyback may be cancelled or otherwise suspended if material information is announced within 14 days prior to the buyback being conducted or if the company deems it fit, subject to that company doing so within reasonable time.</p>		<p>and regardless of possession of information the company shall not be able to exercise any subsequent discretion to dates of trades, price or number of shares to be repurchased.</p>	
<p>Reporting and disclosures Clause 12.1 A company that undertakes a share buyback transaction shall avail to the Authority a report on the transaction undertaken and the treatment of the shares acquired by the company. The reports shall include the price and volume of the shares bought back as well as any treasury shares sold.</p>	<p>The clause does not provide the frequency of reporting to the exchange. The reality is this can be daily, weekly, monthly, quarterly, or annual. The information is already with the exchange. Can the authority consider receiving the information from the exchange instead of the issuer?</p>	<p>Authority to consider indicating the frequency of reporting. Authority can consider a common database for the issuer, the exchange and the Authority. This will minimize reconciliation issues.</p>	<p>Agreed Amendment included in now clause 13.1</p>
	<p>There is need for clarity on timelines for disclosures.</p>	<p>We propose the following levels of disclosures: 1. Pre-implementation disclosures – Announcement to the NSE and CMA immediately a board resolution to undertake a buy back is passed. 2. Continuous disclosure – To the NSE and the CMA. The issuer to file within 10 days of the end of each month a report on the daily number of securities purchased (or sold), the average price, the name of the broker-dealer, the number of shares</p>	<p>Pre-implementation disclosure. Proposal included in the new subsection 2.5 This has sufficiently been included under guideline 10.</p>

		held in treasury or cancelled and the issuers free float.	
Additional Comments			
-	For clarity and avoidance of possible conflicts, there's need to state that listed companies shall also require no objection approval from their other regulators such as for banks and insurance companies.	Consider adding a clause providing for the same.	Guideline 15 requires companies to comply with applicable law and regulations during the share buyback process. This means that companies will be needed to procure approvals from their other regulators in the event a proposed buyback will affect their compliance requirements under other applicable laws.
Treasury shares:		Guidelines on how the Company that holds the Treasury Shares may use the same shares to, among other things, support the liquidity and price of its own shares in the market.	Sec 526 of the Companies Act provides that the treasury shares can either be held by the company or disposed. If the shares are held, the company shall enter itself in the register of members. The held shares can be sold for cash consideration or transferred for the purpose of an ESOP. We have included a statement in the disclosures to be made in the shareholder circular that where a company has treasury shares it shall disclose its intention for the same as guided under the Act.

**FEEDBACK ON COMMENTS AND ISSUES RAISED ON THE DRAFT GUIDELINES
DURING A MEETING WITH THE NATIONAL TREASURY HELD ON 16TH AUGUST 2021**

Provision under the Guideline	Comment/Question	Response
General Guideline	Will the guidelines only be applicable to listed company or all companies? If it's the former, kindly amend from 'company' to 'listed company'	The Guidelines applies to listed companies. We have amended to specifically refer to 'listed company' rather than 'company'. Guidelines amended
	Will the Guidelines fall under legal notice or gazette notice?	The AG will advise.
	What public participation conducted? Any evidence?	The Guideline was exposed to stakeholders through a 30 days stakeholder participation and an additional 2 weeks to allow for more input. Evidence of the public participation is as attached.
	What is the legal lifespan of a Guideline?	The Guideline is a statutory instrument, and therefore construed as such with a lifespan of 10 years.
	Consider adding a clause stating that words used should be construed within the meaning of the Act.	Amended accordingly.
	Provide definitions for new terms if any.	The Guideline has not included any new terms.
	Consider using 'Nairobi Securities Exchange' as opposed to 'Securities Exchange' to be more specific.	Use of the latter term is more inclusive because the term can be applied to other Securities Exchanges that may be licensed in the near future.
Clause 2: Powers to undertake a buyback	Kindly clarify on 2.4 and 2.5 on submission of the circular to both the Authority and the Securities Exchange. Will both be required to approve? If so, why? And, which approval will come first?	2.4 means that the Authority will be approving is the content of the circular in accordance with the requirements of Regulations 63 of the Licensing General Regulations. 2.5 on submission of the circular to the Exchange is an additional disclosure given the role that the Exchange places with regards to listed companies. However, the Exchange will not be approving the circular.

<p>Clause 6: On market (exchange) transactions</p>	<p>Kindly justify the 10% threshold.</p>	<p>UK has adopted a 5% maximum whereas South Africa has adopted a 10% maximum. 10% presents a fair consideration for effecting a buyback. In our view, because it is above the '30-day weighted average' this threshold allows enough room as an attractive offer to existing shareholders.</p> <p>Further, 10% is in line with the prescribed price limits in the NSE trading rules which is as follows;</p> <p>The daily price movement for an equity security in a single trading session shall not be more than 10% of the equity average price as determined during the previous session</p>
<p>Clause 8: Share buyback relating to a class of shares and treatment of treasury shares.</p>	<p>Kindly justify the 10% threshold.</p> <p>What consideration will the Authority use to for giving a waiver under 8.1?</p>	<p>8.1: worldwide, having a threshold limit is a policy decision aimed at ensuring that the buyback does not extinguish a certain class of shares, thus substantially affecting the free float and ultimately, liquidity. The limit in UK and Nigeria is 15%, India 25% and Singapore 10%. The Authority settled on the lower limit of 10%, as the most plausible, given the levels of liquidity of the Kenyan market.</p> <p>8.2: The limit of 10% on the Treasury Shares has been prescribed under section 527 of the Companies act, 2015.</p>
<p>Clause 9: Volume of shares to be purchased</p>	<p>Kindly justify the 25% threshold.</p>	<p>The threshold is to ensure that the stock is not significantly denied its market liquidity after the share buyback.</p> <p>The 25% limit in terms of volume in a given day was benchmarked with both UK and US.</p> <p>To make it inclusive, the provision further allows the Authority to review the cap based on liquidity of the shares in the market to</p>

		address challenges that may be creates for low liquidity counters.
	What does 'significantly affect' in this context mean?	This has been drafted in broad terms to give room for any other consideration required to ensure that the buyback does not adversely affect the liquidity of the stock in question, thus triggering a steep rise in its price.
Clause 10: Listed company to make disclosure on share buybacks to the Securities Exchange	How does disclosure under this provision differ from the disclosure through the circular under 2.5?	Disclosures through the circular under section 2 are intended to provide shareholders with the necessary information to determine whether to approve or not a share buyback transaction while those under this section are to be done after the share buyback exercise to provide details on the performance of the transaction. Amended to provide better clarity.
Clause 12: Conditions for undertaking, cancelling or suspending share buybacks	'Reasonable time' is subjective. Consider providing an actual period for what will suffice as reasonable time.	This has been amended to state that 'reasonable time' must be before the effective date of the buyback transaction. We may not be able to provide an actual period because various events may necessitate the cancellation of a transaction. This should be left open and the reasonableness left to the regulator to determine as no loss would be occasioned by any party other than the company that cancels the transaction.
Clause 14: Approval of delisting and privatization	Kindly justify the percentages	The percentages are to ensure that the decision to delist/turn the listed company into a private entity receives an unequivocal majority support, with the Directors of the company (who are now technically insiders) being precluded from voting.
	Please explain the correlation between 14(b) (i) and (ii). How are the percentages complementary?	There is a relationship in that; 75% being the ideal 'majority vote' threshold means that a clear majority needs to support this decision.

		The 10% minority vote threshold ensures that empowers the minority to have their say, with a 10% plus 1 vote implying that the SBB should not sail through. Given the implications of a delisting, the proposal is to ensure that the decision to delist has overwhelming support and has not been instigated by some insiders who are trying to secure/protect their interest.
Clause 15: Applicability of the Mergers and Takeover Regulations.	Kindly clarify on the applicability of the referred regulation	The Capital Markets (Take-overs and Mergers) Regulations, 2002 would be applicable if the buy-back coincidentally/because of breaking certain clauses of the SBB guideline leads to a takeover/merger since the shareholding after the buy back may be affected.
	Consider paraphrasing the provisions to make it clear.	Legal team to give feedback Provisions amended.