

Securities Markets and Their Regulation in Zambia: A New Dawn or a Rebranding of the Old Norms?

C Mulenga*

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Author

Chipasha Mulenga

Affiliation

University of Lusaka, Zambia.

Email

mulenga.chipasha@gmail.com

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Abstract

Securities markets are a barometer for the economic progression of any country. The quest to harness the maximum benefits that such markets afford has led governments to enact specific legislation and develop appropriate policies. Despite enacting legislation in 1970, it was only in 1993 that the Zambian securities market was established. Simultaneously, the *Securities Act* 1993 was also enacted. However, it was replete with shortcomings, leading to its repeal and replacement by the *Securities Act* 2016 (amended by the *Securities (Amendment) Act* 21 of 2022; hereinafter the *Securities Act* 2016 as amended). The *Securities Act* 2016 as amended has for the most part been hailed as a progressive piece of legislation that has incorporated global best practices aimed at enhancing the securities market. There is optimism that the *Securities Act* 2016 as amended has breathed new life into the securities industry which was seemingly ailing and on life support. It remains questionable, however, whether the *Securities Act* 2016 as amended enhances the performance of the securities market by effectively fostering fair and efficient trading and ensuring financial integrity, or if it simply reiterates the problems of its predecessor or worse still creates new challenges.

In this article the author critically assesses the *Securities Act* 2016 as amended to ascertain the extent to which it conforms to the IOSCO Principles 2017 and the practices of other countries such as Kenya, whose *Capital Markets Act* Chapter 485 offers greater clarity.

Keywords

Capital markets operator; clearing and settlement agencies; financial integrity; securities exchange; securities market.

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1 Introduction

Securities markets are a measure of a healthy economy as they possess the ability to generate interest from investors who contribute to their capitalisation. These markets provide a mechanism for the transformation of savings into financing for the real sector, thus constituting an alternative to bank financing.¹ Historically, the regulation of the securities market developed as a result of the market crash in the United States in 1921, prompting governments to start regulating issuers of securities and market intermediaries, as well as disclosure to investors.² The idea of establishing a securities market in Zambia was conceived in the 1970s. However, it was established only in 1993. An enabling legislative framework was needed to ensure the success of the market. This led to the enactment of the *Securities Act* 1993, whose objective was to provide for the regulation of the securities industry and establish the Securities and Exchange Commission (SEC or Commission) as the regulator.³

The *Securities Act* 1993 established the Lusaka Stock Exchange (now Lusaka Securities Exchange), which provided a platform for trading securities. This permitted securities that were previously held by state-owned enterprises to be held by the public and traded on the exchange.⁴ This notwithstanding, the *Securities Act* 1993 was replete with numerous weaknesses, such as the absence of the requirement for disclosure and the notification of substantial interest in the listed securities.⁵ The *Securities Act* 1993 did not cover situations where a person who is selling as an agent requires the principal to offer 100 per cent collateral against the short sell marked to market at the cost of every trading day until the transaction is completed.⁶ It was also bereft of provisions on civil liability for investors who have suffered a pecuniary loss and did not recognise foreign collective investment schemes unless these were authorised by the Commission.⁷

* Chipasha Mulenga. LLB (UNZA) LLM LLD (UP). Executive Dean, School of Law, Associate Professor of Law, University of Lusaka, Zambia. Email: mulenga.chipasha@gmail.com. ORCID: <https://orcid.org/0000-0003-0137-2351>.

1 Carvajal and Elliott 2007 <https://www.imf.org/external/pubs/ft/wp/2007/wp07259.pdf> 4.

2 LII date unknown https://www.law.cornell.edu/wex/securities_law_history.

3 Preamble of the *Securities Act* 1993.

4 Section 9 of the *Securities Act* 1993.

5 Mulendema *Should the Securities Act be Amended?* 32.

6 Mulendema *Should the Securities Act be Amended?* 32.

7 Mwenda 1999 *AJICL* 504; Mwenda 1997 *Stat L Rev* 152; Mwenda 1997 *Z L Rev* 33; Mwenda 2006 *J Bus & Sec L* 132.

Further, the *Securities Act* 1993 failed to recognise the need for the market to dovetail into the overall economic development of the country.⁸

These challenges necessitated a review of the *Securities Act* 1993 to ameliorate the situation by creating a legal and operating environment that allowed the securities market to thrive and be competitive. The *Securities Act* 41 of 2016 was therefore enacted to repeal and replace the *Securities Act* 1993. The overarching objective of the *Securities Act* 2016 is to ensure fair and efficient trading that instils investor confidence and promotes market integrity. According to its preamble, the *Securities Act* 2016 regulates the capital markets to foster fair and efficient trading, and licenses and regulates securities exchanges, clearing and settlement agencies, self-regulatory organisations, capital markets operators, credit rating agencies, and collective investment schemes. It also ensures the financial integrity of transactions, avoidance of systemic risk, and prohibits insider dealing. The *Securities Act* 2016 also provides for the auditing and corporate responsibility of listed companies and those whose securities have been registered with the Commission.⁹

Although it was only recently enacted, the *Securities Act* 2016 limited the Commission's authority over the regulated entities and was not in accord with the changing global trends in combating money laundering, terrorism and proliferation financing.¹⁰ It was therefore amended by Act 21 of 2022 which, among other things, provides for a risk-based approach in the supervision and regulation of the market,¹¹ revises the supervisory powers of the Commission,¹² addresses the vetting of beneficial owners of capital market operators,¹³ enhances the enforcement powers to effectively deal with offences of money laundering,¹⁴ combats the financing of terrorism and proliferation financing,¹⁵ and strengthens the information disclosure requirements to promote the detection of the involvement of an entity in illegal activities.¹⁶

The *Securities Act* 2016 as amended by Act 21 of 2022 (hereinafter the *Securities Act* 2016 as amended) is seen not only as a panacea for the

⁸ Mulendema *Should the Securities Act be Amended?* 32.

⁹ Preamble of the *Securities Act* 41 of 2016.

¹⁰ Republic of Zambia 2022 https://www.parliament.gov.zm/sites/default/files/documents/committee_reports/Report%20on%20the%20Securities%20%28Amendment%29%2C%20N.A.B.%20No.%2023%20of%202022.pdf 1, 20.

¹¹ Section 9(3) of the *Securities Act* 2016 as amended.

¹² Section 19 of the *Securities Act* 2016 as amended.

¹³ Section 9(2)(v) of the *Securities Act* 2016 as amended.

¹⁴ Sections 9(3) and 19D of the *Securities Act* 2016 as amended.

¹⁵ Sections 9(3) and 19D of the *Securities Act* 2016 as amended.

¹⁶ Section 19A of the *Securities Act* 2016 as amended.

limitations of its predecessor but also as a more progressive piece of legislation that has incorporated global best practices. Even though the *Securities Act* 2016 as amended has introduced some novel provisions,¹⁷ some are replete with inefficiencies, thus militating against the effective fostering of fair and efficient trading and the assurance of financial integrity in the securities markets. In this article the author critically assesses the *Securities Act* 2016 as amended to ascertain the extent to which it conforms to the IOSCO Principles 2017 and the practices of other countries such as Kenya, whose *Capital Markets Act* Chapter 485 offers greater clarity.

2 Assessing the provisions of the *Securities Act* 2016 against the IOSCO Principles

The IOSCO Principles 2017 set three fundamental objectives that securities regulation must achieve, namely: (a) the protection of investors; (b) ensuring that the markets are fair, efficient and transparent; and (c) the reduction of systemic risk. The protection of investors requires the full, accurate and timely disclosure of financial results to enable investors to make their decisions. This implies that the accounting standards employed by issuers to prepare financial statements should be of a high and internationally acceptable quality. Also, persons who hold securities in a company should be treated fairly and equitably.¹⁸

Market fairness, efficiency and transparency demand that the regulations are designed to detect and deter manipulation and other unfair trading practices.¹⁹ The reduction of systemic risk requires that minimum entry standards for market intermediaries are stipulated, initial and ongoing capital requirements are set, internal control mechanisms are established, and procedures to minimise damage and loss to investors occasioned by the default of a market intermediary are put in place.²⁰

Collectively, these objectives are aimed at ensuring that information is properly utilised and disseminated. The provisions of the *Securities Act*

¹⁷ The novel provisions relate to fostering fair and efficient trading; the licensing and regulation of securities exchanges, clearing and settlement agencies, capital markets operators, credit rating agencies and self-regulatory organisations; the financial integrity of transactions and systemic risk avoidance; auditing and corporate responsibility; the vetting of beneficial owners, enhancing the enforcement powers to effectively deal with offences for money laundering; and establishing and enhancing the Capital Markets Tribunal.

¹⁸ IOSCO *Objectives and Principles* 16-18.

¹⁹ IOSCO *Objectives and Principles* 36.

²⁰ IOSCO *Objectives and Principles* 29-32.

2016 (amended by Act 21 of 2022) are measured against these objectives under separate headings below:

2.1 Regulator responsibilities

The IOSCO Principles 2017 require that the regulator's responsibilities are clearly and objectively stated.²¹ The *Securities Act* 2016 as amended establishes the Commission, as a body corporate, whose mandate is to "create and promote conditions" that are "aimed at ensuring an orderly growth, integrity and development of the capital markets."²² The Commission is responsible for vetting a substantial shareholder following the criteria contained in guidelines including the source of the funds and the beneficial owner of a company whose securities are registered, authorised or licensed under the *Securities Act* 2016 as amended.²³ This provision, though laudable, does not recognise that when investors submit buy or sell orders on a securities exchange, they are not expecting to be vetted. Rather than overburdening the Commission with the vetting processes, capital markets operators (CMOs) should have been obliged to conduct their due diligence on their customers and potential business associates. It is unclear how vetting could be done for offshore clients or global custodians who held assets on behalf of underlying clients. It would be beneficial if the threshold of 15 per cent for substantial shareholders was harmonised. In addition, the provision ought to have been made to allow the Commission to obtain, verify and retain records on the beneficial ownership and control information.

The Commission is obliged to implement a risk-based approach in the supervision and regulation of capital markets, and in combating money laundering and countering the financing of terrorism, proliferation, and proliferation financing.²⁴ This approach places an onerous burden on market players who are also required to comply with internal controls requirements under the Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines, 2019.²⁵

²¹ IOSCO *Objectives and Principles* Principle 1.

²² Sections 7(1) and 9(1) of the *Securities Act* 2016 as amended. In terms of s 9(2), generally, the Commission is required to ensure compliance, license and regulate securities exchanges, clearing and settlement agencies, private capital funds, credit rating agencies and capital markets operators, to approve rules, constitutions, charters and articles, to regulate securities transactions, and to safeguard the interests of investors.

²³ Section 9(2)(v) of the *Securities Act* 2016 as amended.

²⁴ Section 9(3) of the *Securities Act* 2016 as amended.

²⁵ These guidelines provide guidance to issuers of securities and auditors on the application of ss 146, 147 and 149 of the *Securities Act* 2016 as amended.

The IOSCO Principles 2017 also require the regulator to be operationally independent and accountable with adequate powers, proper resources and the capacity to perform its functions and exercise its powers.²⁶ The Commission is not operationally independent as it "falls" within the "control" of the Ministry responsible for Finance, which appropriates money for its operations.²⁷ This leaves the Commission subject to the dictates of the Ministry, which may not appropriate sufficient funds for its operation if the Commission's actions are deemed unacceptable. The Commission is also susceptible to political control, thereby compromising its independence.²⁸ The Minister is extensively involved in the operations of the Commission, as can be seen in section 64, which empowers the Minister to direct a securities exchange to suspend its business for a specified period. Ordinarily this function should be performed by the regulator. No provision is made for the course of action that may be taken by a securities exchange which is aggrieved by the Minister's decision.

The IOSCO Principles 2017 demand that the staff of the regulator observe the highest professional standards, including appropriate standards of confidentiality.²⁹ There are no provisions under the *Securities Act* 2016 as amended which require the staff of the Commission to observe the highest professional standards. Ironically, the staff are immune from any action or proceeding in respect of "an act or thing done or omitted to be done in good faith in the exercise or performance of any of the powers, functions or duties conferred" under the *Securities Act* 2016 as amended.³⁰ This implies that the immunity is absolute, thus enabling the staff to act unprofessionally. Unfortunately the *Securities Act* 2016 as amended has not provided circumstances under which the immunity could be lifted, including the procedures thereof.

2.2 Self-regulatory organisations

A self-regulatory organisation (SRO) is "an organisation that regulates the operations and standards of practice and business conduct of its members and their representatives and which is recognised by the Commission."³¹ In

²⁶ IOSCO *Objectives and Principles* Principles 2-3.

²⁷ Regulation 8(1) of the *Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines*, 2019 states: "The Commission shall be funded by (a) such sums as may be payable to the Commission from moneys appropriated by Parliament for the purpose..."

²⁸ Carvajal and Elliott 2007 <https://www.imf.org/external/pubs/ft/wp/2007/wp07259.pdf> 11.

²⁹ IOSCO *Objectives and Principles* Principle 5.

³⁰ Regulation 7, First Schedule of the *Securities Act* 2016 as amended.

³¹ Section 2 of the *Securities Act*, 2016 as amended. Perhaps the reason for the inclusion of SROs under the *Securities Act* 2016 as amended could be the fact that

other words, an SRO is market-driven, competitive, demonstrates expertise, and has flexible rules and regulations which govern the conduct of members, supervise members' compliance, and ensure their compliance.³²

The IOSCO Principles 2017 subjects the SRO to the oversight of the regulator and to standards of fairness and confidentiality when exercising its powers and delegated responsibilities.³³ The *Securities Act* 2016 as amended has adopted this standard by requiring the Commission to recognise an entity as an SRO on condition that it is in the interest of the public to do so.³⁴ After its recognition, an SRO is obliged to regulate its operations and the standards of practice and business conduct of its members according to its policies, rules, procedures, by-laws and interpretations.³⁵ These, however, must be approved by the Commission, which shall be satisfied that such are in the interest of the public and that the financial affairs of the SRO are conducted by an auditor that has been approved by the Commission.³⁶

The *Securities Act* 2016 as amended mandates the Commission to ensure that the SRO's conduct is satisfactory.³⁷ Although SROs possess the ability to adapt to regulatory requirements, the challenge faced by the Commission is twofold: first, devising and administering a statutory oversight framework that does not usurp the ability of an SRO to rapidly and flexibly respond to varying conditions in the market; and secondly, how to effectively regulate an SRO so that its activities do not affect the securities market negatively. The recognition of an SRO denotes the granting of permission to act based on its own rules with the Commission monitoring it, but there is no express provision that curtails the decision-making ability of the SRO. This implies that the SRO may make a decision that negatively affects a person's rights without the sanction of the law.

Also, though the Commission permits an SRO to operate, it does not shield the SRO from any civil liability that may arise nor provide any defence where it is found to have violated provisions of the law. This implicitly limits what the SRO can do in pursuance of its objectives. It also allows its members to

not every entity having a bearing on the securities market can be regulated by the Commission and as such, certain entities meeting specified requirements are allowed to self-regulate their conduct and those of their members.

³² Carson 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747445 6; Schoer "Self-Regulation and the Australian Stock Exchange" 110.

³³ IOSCO *Objectives and Principles* Principle 9.

³⁴ Section 29(1) of the *Securities Act* 2016 as amended.

³⁵ Section 29(3) of the *Securities Act* 2016 as amended.

³⁶ Section 29(4) and (5) of the *Securities Act* 2016 as amended.

³⁷ Section 31 of the *Securities Act* 2016 as amended.

take unlimited legal actions. Although it may be argued that the *Securities Act* 2016 as amended gives it the authority to develop rules, these are limited to the membership and conduct of its members.

2.3 Enforcement of securities regulation

Securities markets are anchored in fairness and efficiency, therefore the need for the enforcement of compliance with the set rules and guidelines cannot be overstated. The Commission and the Tribunal are the primary institutions that enforce compliance.

2.3.1 Commission

The IOSCO Principles 2017 require the regulator to have comprehensive inspection, investigation and surveillance powers capable of ensuring compliance and enforcement.³⁸ The inspection and investigation powers must enable the regulator to obtain records, data and information. The regulator must also conduct market surveillance to enable it to anticipate the possible vulnerabilities in a securities market. This allows it to put in place pre-emptive measures that forestall acts that may disrupt orderly business on the securities market.³⁹ This dissuades misconduct, thereby promoting public confidence, consumer protection and the integrity of the market.⁴⁰ Besides inspection, investigation and market surveillance, the regulator must be able to impose administrative sanctions, seek orders from courts or tribunals, undertake criminal prosecution, suspend trading in securities, and accept binding undertakings.⁴¹

The *Securities Act* 2016 as amended has embraced a standard stipulating the actions that the Commission may undertake to ensure compliance: investigation,⁴² inspections,⁴³ and the institution of proceedings.⁴⁴ The use

³⁸ IOSCO *Objectives and Principles* Principles 10-12.

³⁹ IOSCO *Approaches to Market Surveillance* 5.

⁴⁰ IOSCO *Credible Deterrence* Principle 5.

⁴¹ IOSCO *Credible Deterrence* Principle 8.3.

⁴² Section 161(2) of the *Securities Act* 2016 as amended empowers the Commission to institute investigations where a CMO has engaged in defalcation, fraud, misfeasance, misconduct or a securities transaction that is not in the interest of the client or the public. An investigator is permitted to obtain records or any such information relating to the offence committed.

⁴³ Section 163(1) of the *Securities Act* 2016 as amended obliges the Commission to inspect any record or document, bank accounts and financial transactions of a CMO to ascertain the compliance of such a licensed person. For this purpose an inspector can enter the premises of a CMO and request any record in its possession or control.

⁴⁴ The Commission may institute proceedings before the Tribunal where any person has committed an act of misconduct in the capital markets. The proceedings are instituted by giving the Tribunal notice and a statement specifying the grounds being relied on; s 194(1)(2) of the *Securities Act* 2016 as amended. It may also refer to the

of inspections and investigation as the primary tools for enforcement is limited in terms of its powers of intervention over licensed persons. Instituting proceedings before the Tribunal is more effective. These tools are complemented by the power of the Commission to conduct surveillance.⁴⁵

The *Securities Act 2016* as amended charges the Commission to exercise surveillance powers by conducting supervisory action. The Commission is permitted to take supervisory action against a CMO where (a) there is a refusal or failure to comply with an order or directive; (b) an inspection or review is denied or obstructed; or (c) business is conducted contrary to the law.⁴⁶ Supervisory action may include taking possession of a CMO. Unfortunately no time frame is prescribed for such possession, thus subjecting the CMO to perpetual possession.⁴⁷ Also, even though a manager may be appointed to run the affairs of a CMO in possession, the *Securities Act 2016* as amended does not state the duties, roles and relationship of the manager with the Board and shareholders of the CMO.⁴⁸

A CMO must possess sufficient capital to enable its operations.⁴⁹ Where under-capitalisation occurs or is likely to occur, the Commission may (a) order it to submit a capital restoration plan within 30 days; (b) require it to increase the capital to prescribed levels within 90 days of the submission of a capital restoration plan; and (c) prohibit the awarding of a bonus or an increment to the emoluments and other benefits of a director and senior management.⁵⁰ Despite these actions, it is an arduous duty to carry out (b) as most modes of raising capital may take quite a lot longer than 90 days. Additionally, the Commission may at the cost of the CMO appoint a suitably qualified and competent person to advise and assist the CMO in designing and implementing a capital restoration plan. A person appointed is obliged

Director of Public Prosecutions an act of misconduct in the market or industry constituting a criminal offence; s 194(5).

⁴⁵ Section 19A-J of the *Securities Act 2016* as amended.

⁴⁶ Section 19B(1)(a)(b)(c) of the *Securities Act 2016* as amended. Supervisory action entails any action to enforce compliance with the applicable law, rules or regulations, including those for the correction of unsafe or unsound conditions or practices. See Law Insider date unknown <https://www.lawinsider.com/dictionary/supervisory-action>.

⁴⁷ Section 19B(2)(a) of the *Securities Act 2016* as amended.

⁴⁸ Section 19B(2)(b) of the *Securities Act 2016* as amended. S 19B(3) determines that where the Commission appoints a manager, the costs of managing the possession are borne by the CMO.

⁴⁹ Section 19E(5) of the *Securities Act 2016* as amended.

⁵⁰ Section 19E(1) of the *Securities Act 2016* as amended. Under-capitalisation is said to occur when a CMO does not fully comply with any prescribed capital adequacy requirements.

to provide a progress report to the Commission at intervals as that it may determine.⁵¹ This notwithstanding, no guidelines are provided on how to determine "a suitably qualified and competent person", thus leaving the determination in the sole discretion of the Commission. This may lead to bias and the appointment of unsuitable persons.

2.3.2 Tribunal

The Capital Markets Tribunal is established to hear and determine appeals from decisions of the Commission, proceedings relating to misconduct in the securities market, and such other matters as may be specified in the *Securities Act 2016* as amended or any other written law.⁵² The Commission is the only party allowed to make an application before the Tribunal which may issue an order if it finds that there was a contravention of the *Securities Act 2016* as amended.⁵³ The Tribunal also determines the act of misconduct and the resultant profit gained or the loss avoided.⁵⁴ Where misconduct is proven, the Tribunal may order the payment of an administrative fine, censure, compensation or restitution, may order that the CMO account for amounts or unjust enrichment obtained or desist from an activity, may order the prohibition of a reporting issuer or participant, or may order the payment of the costs of the proceedings.⁵⁵ The Tribunal shall, before making an order, satisfy itself that the order would not unfairly operate to the detriment of a person.⁵⁶ It may also reverse, vary, discharge or suspend the operation of the order.⁵⁷

The *Securities Act 2016* as amended requires the Tribunal to be properly constituted in hearing a manner, depending on the issue at hand.⁵⁸ A panel

⁵¹ Section 19E(2)(3) of the *Securities Act 2016* as amended.

⁵² Section 184(2)(3) of the *Securities Act 2016* as amended.

⁵³ Section 194A(1) of the *Securities Act 2016* as amended. The Tribunal may issue the following orders: (a) an order restraining a person from acquiring, disposing of, or dealing with any securities or assets; (b) an order appointing a person to administer the property of the CMO; (c) an order declaring a securities contract void or voidable; (d) an order directing a person to do or refrain from doing a specified act; or (e) any ancillary order that the Tribunal considers necessary.

⁵⁴ Section 194(3) of the *Securities Act 2016* as amended.

⁵⁵ Section 194(4) of the *Securities Act 2016* as amended.

⁵⁶ Section 194A(2) of the *Securities Act 2016* as amended.

⁵⁷ Section 194A(4) of the *Securities Act 2016* as amended.

⁵⁸ Section 190(1)(b)(c)(3) of the *Securities Act 2016* as amended obliges the Chairperson or Vice Chairperson to sit with at least two other members or the full membership in hearing any matter. Where a matter relates to practice or procedure, the Chairperson or any Tribunal member assigned for that purpose by the Chairperson can sit to hear it. Any member of the Tribunal specifically assigned by the Chairperson can sit for an uncontested matter relating to practice or procedure. Notwithstanding the aforesaid, the Chairperson, when present, presides and in his/her absence, the Vice Chairperson.

of three members who shall include the Chairperson or the Vice Chairperson is said to be duly constituted.⁵⁹ This also means that, where the Tribunal has less than three members, it would not have been duly constituted. This poses a question about the legality or validity of the proceedings as well as the decision rendered by the Tribunal. Section 185(7) attempts to address this concern, albeit in a rather strange manner. The section provides:

The validity of any proceedings, act or decision of the Tribunal *shall not be affected by any vacancy in the membership of the Tribunal or by any defect in the appointment of any member or by reason that any person not entitled to do so, took part in the proceedings.* [Emphasis added]

The section emphasises the validity of the proceedings notwithstanding "any vacancy in the membership" or "any defect in the appointment of a member". This means that, where an unqualified person was appointed by the Minister and such a person participated in the proceedings of the Tribunal, the decision rendered cannot be challenged on account of the unqualified person's taking part. Similarly, where during the proceedings the appropriate quorum is not met due to a vacancy, the members remaining can proceed to hear and determine the matter and their decision would be valid. Arguably, challenging the Tribunal may impinge on its integrity, but shielding it from challenge militates against fairness.

The Tribunal and its staff are also immune from any action or proceedings where an act has been taken or omitted in good faith in the exercise of any of the powers, functions or duties conferred upon them.⁶⁰ The immunity of the Tribunal and staff is absolute, but there should have been room for lifting the immunity. This would have ensured fairness, upon which securities markets are anchored. This can be attained only by holding erring members accountable for their actions or inaction.

2.4 Auditors

A licensed person is obliged to appoint an auditor to provide auditing services. The person appointed as an auditor must be a member of the Zambia Institute of Chartered Accountants (ZICA) and must meet the minimum criteria specified by the Commission.⁶¹ The IOSCO Principles 2017 prescribe that auditors should be independent, albeit subject to adequate levels of oversight.⁶² This principle is embraced by the *Securities Act* 2016 as amended and the Securities (Internal Control Reporting

⁵⁹ Section 190(4) of the *Securities Act* 2016 as amended.

⁶⁰ Section 195A of the *Securities Act* 2016 as amended.

⁶¹ Section 46A(1) of the *Securities Act* 2016 as amended.

⁶² IOSCO *Objectives and Principles* Principle 19-21.

Framework for Issuers of Registered Securities) Guidelines, 2019 which require the auditor to be independent. In this regard the auditor is required to provide attestation on the existence, adequacy and effectiveness of the internal control system of the company.⁶³ As such, a CMO cannot coordinate the processes of documenting and assessing its internal controls over financial reporting.⁶⁴

Regarding oversight, the *Accountants Act* 13 of 2008 requires adherence to the prescribed standards for an auditor's appointment. The *Securities Act* 2016 as amended also empowers the Commission to set the criteria for an auditor⁶⁵ but this only creates confusion, given that such power is reposed in ZICA.⁶⁶ Once a person has met the criteria set by ZICA, the person qualifies to audit any institution in Zambia. The *Securities Act* 2016 as amended should have permitted the Commission to suggest to ZICA for its consideration additional minimum requirements for an auditor, rather than to allow it to set additional criteria.

The IOSCO Principles 2017 state that the audit standards must be of a high and internationally acceptable quality.⁶⁷ The *Accountants Act* 13 of 2008 requires that auditing is conducted according to the standards prescribed by ZICA⁶⁸ and globally accepted standards — the International Financial Reporting Standards (IFRSs) and International Auditing Standards (ISAs). At the end of the audit the auditor must submit the audited results to the licensed person who, in turn, submits them to the Commission. Strangely, the *Securities Act* 2016 as amended requires the auditor to go beyond auditing and report a delay by a licensed person, a listed company or a company whose securities are registered by the Commission in submitting audited results.⁶⁹ It also makes it an offence when the auditor fails to provide a report.⁷⁰ This is unfair as the audited results are a matter between the CMO and the Commission. The *Securities Act* 2016 as amended also indirectly empowers the auditor to meddle in the internal processes of a licensed company.

⁶³ Section 149 of the *Securities Act* 2016 as amended.

⁶⁴ Guidance 4.3.2, *Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines*, 2019.

⁶⁵ Section 46A(1)(2) of the *Securities Act* 2016 as amended.

⁶⁶ Section 5 of the *Accountants Act* 13 of 2008. A perusal of this Act reveals that its concentration is on accountants rather than auditors, who are scarcely mentioned.

⁶⁷ IOSCO *Objectives and Principles* Principles 19-21.

⁶⁸ Section 29 of the *Accountants Act* 13 of 2008.

⁶⁹ Sections 46B(2) and 148(3) of the *Securities Act* 2016 as amended.

⁷⁰ Section 148(4) of the *Securities Act* 2016 as amended.

2.5 Credit rating agencies

Credit Rating Agencies (CRAs) are entities that provide an opinion on the creditworthiness of a licensed person, securities or an issuer.⁷¹ According to the IOSCO Principles 2017, a CRA should be subject to adequate levels of oversight through registration and ongoing supervision.⁷² Pursuant to this principle, the *Securities Act* 2016 as amended obliges any person who intends to establish and operate a CRA to apply to the Commission for a licence.⁷³ The Commission shall consider the proposed ownership structure, organisational structure and corporate governance policy, resources and expertise, procedures and methodologies, and any conflict of interest that may arise.⁷⁴ The appointment of the directors and senior management of the CRA must be approved by the Commission before granting the license to it.⁷⁵ This may be construed widely to imply the Commission's exercise of its supervisory role, but it interferes with the day-to-day operations of the CRA. It also usurps the power of a CRA to appoint persons according to its established policies.

A licence granted is subject to (a) terms, conditions and compliance requirements; (b) variation of conditions; (c) non-transfer or assigning; and (d) revocation, cancellation or surrender.⁷⁶ The CRA is required to adopt, implement and enforce adequate measures to ensure the credibility of its credit ratings.⁷⁷ The inherent danger is that a CRA may adopt a methodology that deliberately presents a result to lower the status of the person or entity credit-rated.

The Commission is mandated to make rules for a CRA relating to the organisational requirements, quality and integrity of credit ratings, the presentation of credit ratings, disclosures, fraudulent and misleading advertising, canvassing and marketing, and the responsibilities of a CRA to investors.⁷⁸ Although the Commission can make rules relating to the quality and integrity of credit ratings and the presentation of credit ratings, it cannot do so for those that ensure the "goodliness" of the rating methodologies.⁷⁹

⁷¹ S 2 of the *Securities Act* 2016 as amended defines a "credit rating" as an "opinion regarding the creditworthiness of a licensed person, securities or an issuer."

⁷² IOSCO *Objectives and Principles* Principle 22.

⁷³ Section 48(1) of the *Securities Act* 2016 as amended.

⁷⁴ Section 48(2) of the *Securities Act* 2016 as amended.

⁷⁵ Section 49(3) of the *Securities Act* 2016 as amended.

⁷⁶ Sections 51(1)(2)(3) and 52-53 of the *Securities Act* 2016 as amended.

⁷⁷ Section 57(1)(a) of the *Securities Act* 2016 as amended.

⁷⁸ Section 61(1) of the *Securities Act* 2016 as amended.

⁷⁹ Section 61(1)(b) and (c) of the *Securities Act* 2016 as amended.

2.6 Clearing and settlement

Clearing and settlement is the process of preparing for the settlement of a securities transaction which has been executed on a securities exchange.⁸⁰ The IOSCO Principles 2017 require securities settlement systems, central securities depositories, trade repositories and central counterparties to be subject to regulatory and supervisory requirements that are designed to ensure that they are fair, effective and efficient and that they reduce systemic risk.⁸¹ This principle is embraced to some extent by the *Securities Act 2016* as amended, which allows the Commission to license a company to act as a depository of securities, provide facilities, maintain records of trades and transfer of pledges, and hold security certificates.⁸² A company which desires to operate a clearing and settlement agency (CSA) must apply to the Commission.⁸³ The Commission shall grant the licence if satisfied that the CSA is in the public interest, has proper rules for prompt and accurate settlement, the safeguarding of money and the supervision of participants, and its application is supported by the licensed securities exchange. It shall also ensure that clearing arrangements are transparent and efficient, measures are in place for the establishment of a settlement guarantee fund, compliance by its participants is enforced, and there are sufficient financial, human and system resources.⁸⁴

The Commission shall approve the appointment of a director or senior management before granting the CSA a licence.⁸⁵ The *Securities Act 2016* as amended does not set the qualifications that such persons should possess to qualify to function as directors or senior managers in a CSA. This implies that the Commission sets the minimum qualifications, which could potentially be biased, thus rendering the process arbitrary and subjective.

A CSA should establish a procedure where control may be exercised over a participant's account. This could be on the condition that (i) the interested person is a beneficial owner or (ii) the securities are subject to a lien in favour of its issuer or a restriction or constraint on its transfer.⁸⁶ Securities transacted must be transferred within the period approved by the Commission and from the securities account of the transferor to that of the transferee. Where the consideration is monetary, the Bank of Zambia must

⁸⁰ Section 2 of the *Securities Act 2016* as amended.

⁸¹ IOSCO *Objectives and Principles* Principle 38.

⁸² Section 2 of the *Securities Act 2016* as amended.

⁸³ Section 21(1)(b) of the *Securities Act 2016* as amended.

⁸⁴ Section 23(1) of the *Securities Act 2016* as amended.

⁸⁵ Section 23(3) of the *Securities Act 2016* as amended.

⁸⁶ Section 98(1) of the *Securities Act 2016* as amended.

simultaneously transfer funds to the appropriate current accounts. If not monetary, the transfer must be done according to the CSA rules.⁸⁷ Regardless of whether the settlement is monetary or non-monetary, the transfer of securities is final and irrevocable.⁸⁸ A failure to effect a pledge or transfer of securities, which leads to a loss, entitles the person affected to claim compensation.⁸⁹

2.7 *Market intermediaries*

Market intermediaries are persons or entities that facilitate transactions between those selling securities and those willing to acquire them. They manage portfolios of individuals, execute buy and sell orders, deal in or distribute securities, and provide information on securities and their trading. The IOSCO Principles 2017 require minimum entry standards for market intermediaries. These should be coupled with initial and ongoing capital and other prudential requirements, and compliance mechanisms.⁹⁰ The *Securities Act* 2016 as amended complies with this requirement albeit in a limited manner. It also identifies dealers, investment advisers, representatives and share transfer agents as market intermediaries.

A dealer is defined as "a person specified in section *thirty-two* and who holds a dealer's licence."⁹¹ This implies that such a person (i) must fall within the contemplation of section 32, and (ii) hold a licence. A "person" contemplated in section 32(1) is, within the definition in section 2, a company and not an individual. This reasoning is fortified by (i) section 38(1), which does not permit the Commission to grant a dealer's licence to an individual; and (ii) section 2, which defines a dealer's licence as one granted to a company authorising it to carry on business as a dealer.⁹² The role of a dealer is to facilitate a transaction relating to registered securities between issuers and investors.⁹³

⁸⁷ Section 107(1) of the *Securities Act* 2016 as amended.

⁸⁸ Section 107(2) of the *Securities Act* 2016 as amended.

⁸⁹ Section 113(1) of the *Securities Act* 2016 as amended.

⁹⁰ IOSCO *Objectives and Principles* Principles 29-30.

⁹¹ Section 2 of the *Securities Act* 2016 as amended. A "dealer" is defined by s 32(1) as: "A company which carries on a business, whether as principal or agent, by— (a) making or offering to make with any person, or inducing or attempting to induce any person to enter into, or offering to enter into, any agreement for, or with a view to, buying, selling, exchanging, underwriting or subscribing for, securities; (b) soliciting or accepting any order for securities; or (c) otherwise transacting in securities, whether electronically or otherwise; shall apply for a dealer's licence."

⁹² A dealer is a company which is licensed to facilitate the buying, selling, exchanging, underwriting or subscribing for securities through solicitation, inducement and making offers.

⁹³ Section 80(1) of the *Securities Act* 2016 as amended.

An investment adviser is a person who provides advice on investments in securities or issues analysis or reports to enable the recipients to make decisions on the acquisition or disposal of specific securities.⁹⁴ Section 33(2) exempts certain categories of persons from obtaining a licence, notwithstanding their provision of investment advice.⁹⁵

A "representative" is a person who is employed by or acts for dealers or investment advisers and performs their functions.⁹⁶ To perform these functions, the person must hold a licence otherwise known as a "representative's licence", the award of which may depend on the person's being employed or acting only as the representative of a dealer or an investment adviser.⁹⁷

A share transfer agent is a person who acts on behalf of the issuer by creating and maintaining the records of the holders of securities issued by an issuer. The agent also deals with all matters connected with the transfer, issue, cancellation and redemption of its securities, safeguards securities and funds, and distributes dividends.⁹⁸ The rationale for the existence of such agents is to allow the company to focus on its core business without

⁹⁴ Section 33(1) of the *Securities Act* 2016 as amended states that "A person who— (a) engages or holds out as engaging in the provision of advice on investments in securities, including advice on subscribing for, or purchasing, selling, exchanging or holding of, securities to any person, a collective investment scheme or manager of a collective investment scheme; or (b) issues analysis or reports for the purposes of facilitating the recipients of the analysis or reports to make decisions on whether specific securities may be bought, sold, exchanged or subscribed for; shall apply for an investment adviser's licence in accordance with section *thirty-six*."

⁹⁵ Section 33(2) of the *Securities Act* 2016 as amended provides: "(a) a dealer who gives advice or issues analysis or reports as part of its business; (b) a dealer's representative who gives advice or issues analysis or reports as part of employment with a dealer; (c) a financial institution or insurance company; (d) an advocate or accountant whose advice with respect to investments is incidental to the practice of the profession; and (e) a person who gives advice or issues analysis or reports— (i) in an electronic or print media or any publication, which is made generally available to the public, and which does not have as its principal or only object, the provision of advice or the issue of analysis or reports, concerning securities; or (ii) in electronic print media for reception by the public, whether on subscription or otherwise: provided the person does not receive commission or other consideration for giving or publishing the advice."

⁹⁶ Section 2 of the *Securities Act* 2016 as amended.

⁹⁷ Section 34(3) of the *Securities Act* 2016 as amended.

⁹⁸ Section 2 of the *Securities Act* 2016 as amended. A "share transfer agent" can also be a "department or division, by whatever name called, of a listed company performing the activities stated provided that at any time, the total number of the holders of the company's securities exceed a prescribed amount." S 34(1) obliges a person who intends to do business as a share transfer agent to possess the necessary resources, to have the capacity to safeguard securities, to submit an application together with accompanying documents, to fulfil the prescribed capital adequacy requirement, to submit to the proposed disciplinary rules, and to be a fit and proper person.

being inundated with matters relating to securities. These persons may not strictly be said to be intermediaries, but their connection to an issuer minimally makes them so.

Dealers, investment advisers and representatives must be licensed by the Commission for them to act as such.⁹⁹ The applications must contain accurate information and be accompanied by a detailed statement of assets and liabilities (for individuals) or a profit and loss account (for companies), an auditor's report, proof of compliance to capital adequacy in terms of Securities (Accounting and Financial Requirements) Rules and of maintenance of net capital.¹⁰⁰ An application made shall be considered within 90 days. If there is no response within the stipulated period, the application shall be deemed to have been granted and the licence applied for duly issued.¹⁰¹ The grant depends on the Commission's being satisfied that the applicant will perform the duties of a licensed person efficiently, honestly and fairly in terms of the requirements of the licence as stipulated in the *Securities Act* 2016 as amended.¹⁰²

The *Securities Act* 2016 as amended prescribes the conditions that must be fulfilled by an individual or company before a licence can be granted.¹⁰³ The Commission can reject a company's application for a dealer's or investment adviser's licence.¹⁰⁴ The grant of a licence places certain obligations on the

⁹⁹ Section 36(1) of the *Securities Act* 2016 as amended.

¹⁰⁰ Section 36(2) of the *Securities Act* 2016 as amended. S 36(3) makes it an offence for "[a] person who, for the purpose of obtaining a licence in accordance with this Part, whether directly or indirectly, makes any representation, in writing, orally or otherwise, which is false or misleading in a material particular, commits an offence and shall be liable, on conviction, to a fine not exceeding six hundred thousand penalty units or to imprisonment for a term not exceeding six years, or to both."

¹⁰¹ Section 37(2) of the *Securities Act* 2016 as amended.

¹⁰² Section 37(1) of the *Securities Act* 2016 as amended.

¹⁰³ Section 38(3) of the *Securities Act* 2016 as amended. The *Securities Act* 2016 distinguishes the requirements that individuals must meet from those of a company. An individual is granted a licence based on (a) the provision of information pertaining to him/herself or a person employed or associated with the applicant; (b) having the mental or physical capacity to perform the activities relating to the licence; (c) not being an undischarged bankrupt; (d) having no conviction for fraud or dishonesty or any offence under the Act, regulations or rules; (e) being fit and proper; (f) having the ability to perform the duties of a licensee efficiently, honestly and fairly; (g) having the ability to meet the minimum financial, solvency and liquidity requirements; or (h) being above 21 years old.

¹⁰⁴ Section 38(5) of the *Securities Act* 2016 as amended. A licence can be refused on the following grounds - (a) failure to provide the necessary information relating to it or any person employed by or associated with it; (b) the mental or physical incapacity to perform by any of its directors; (c) any director's being an undischarged bankrupt; (d) the conviction of any of its directors, its controller or secretary or any officer for fraud or dishonesty; (e) the applicant's not being a fit and proper person to be licensed; (f) the existence of circumstances which are likely to lead to the improper conduct of business; (g) the applicant's inability to perform the duties of a licensed

holder such as the maintenance of securities records, notifying the Commission whenever there is a change in the information previously supplied, and the submission of the annual report, corporate governance policy, and audited financial statements.¹⁰⁵ Accounting records which sufficiently explain securities transactions and the financial position must be maintained and properly audited.¹⁰⁶ Books and records are to be maintained for ten years after the settlement or conclusion of a securities transaction and the appropriate reports are to be filed.¹⁰⁷

The IOSCO Principles 2017 require the establishment of a mechanism for dealing with the failure of an intermediary which results in a loss to investors.¹⁰⁸ In compliance with this requirement, the *Securities Act* 2016 as amended establishes the Compensation Fund to compensate persons who suffer "pecuniary loss occasioned by any default of a licensed person or any employee of a licensed person."¹⁰⁹ Compensation can be paid only if any dealing in securities resulted in a loss related to money, securities or other property which was entrusted to or received by the licensed person or an employee acting on behalf of the licensed person. Unfortunately, the basis for compensation is the law of torts rather than that of contract, which does not require the prejudiced party to establish a duty of care owed to him/her by the intermediary, its breach, and the resultant loss.¹¹⁰

A compensation claim has to be made to the Committee, which can order payment of the compensation amount, legal and other expenses incurred in investigating or defending claims where it is fair and just to do so.¹¹¹ Any disbursement due to the default by a licensed person is a debt due to the Fund which the Commission can recover from the licensed person.¹¹² Recovering from a defaulting licensee is in tandem with the overall objective of ensuring absolute compliance with the expected standard of conduct.

person; or (h) the applicant's inability to meet the minimum financial, solvency and liquidity requirements.

¹⁰⁵ Section 45(1), 46(1), 47(1) of the *Securities Act* 2016 as amended.

¹⁰⁶ Section 88(1) of the *Securities Act* 2016 as amended.

¹⁰⁷ Section 88(2) of the *Securities Act* 2016 as amended.

¹⁰⁸ IOSCO *Objectives and Principles* Principle 32.

¹⁰⁹ Section 177 of the *Securities Act* 2016 as amended.

¹¹⁰ Mwenda *Understanding Securities Law* 142. The repeal of the *Securities Act* 1993 has not made any changes to the provisions, which were adopted in their original form, under the *Securities Act* 2016 as amended.

¹¹¹ Section 180 of the *Securities Act* 2016 as amended.

¹¹² Section 183 of the *Securities Act* 2016 as amended.

2.8 Collective Investment Schemes

A Collective Investment Scheme (CIS) is an arrangement where members of the public are invited or permitted to invest money or other assets in a portfolio. These persons hold a participatory interest and share the risk and the benefit of the investment in proportion to their participatory interest.¹¹³ There are three CISs that are authorised under the *Securities Act* 2016 as amended — Investment Companies, Open-ended Investment Companies, and Unit Trusts.

The IOSCO Principles 2017 require the regulatory system to set standards for the eligibility, governance, organisation and operational conduct of those who desire to operate a CIS.¹¹⁴ In compliance with this requirement, the *Securities Act* 2016 as amended sets the criteria for the authorisation of persons to operate a CIS. According to section 121(1)(2), an application for authorisation must be made to the Commission by a dealer or investment adviser. The application must consist of the constitutive documents, the scheme's latest audited report, the management company's latest audited report and directors' resumes, the trustee/custodian's latest audited report, and a letter of consent to the appointment from the trustee/custodian and auditors.¹¹⁵ Authorisation may be granted if the Commission is satisfied that (a) the manager is competent; (b) the manager, trustee or custodian is a registered body corporate; (c) effective control of the scheme is vested in a manager and exercised independently of the trustee or custodian, and (d) the trust deed or custodial arrangement complies with the *Securities Act* 2016 as amended, regulations and rules.¹¹⁶ The Commission must determine whether the persons who operate a CIS are fit and proper.¹¹⁷

In terms of governance, a CIS shall appoint a trustee/custodian acceptable to the Commission.¹¹⁸ The trustee/custodian must place all the property of the CIS under his/her control and hold it in trust for the holders.¹¹⁹ The CIS shall also appoint a manager to manage it in the exclusive interest of the

¹¹³ Section 2 of the *Securities Act* 2016 as amended.

¹¹⁴ IOSCO *Objectives and Principles* Principle 24.

¹¹⁵ Rule 5(2) of the *Securities (Collective Investment Schemes) Rules* SI 61 of 1993. Constitutive documents are those that govern the formation of the scheme and include the trust deed (in the case of a unit trust) and the articles of association of an investment company and all material agreements; Rule 2 of the *Securities (Collective Investment Schemes) Rules*.

¹¹⁶ Section 121(3) of the *Securities Act* 2016 as amended.

¹¹⁷ Section 123(1)(3) of the *Securities Act* 2016 as amended.

¹¹⁸ Rule 1 of the *Securities (Collective Investment Schemes) Rules* SI 61 of 1993.

¹¹⁹ Rule 4(a) of the *Securities (Collective Investment Schemes) Rules* SI 61 of 1993

holders and maintain the books and records of accounts.¹²⁰ The trustee/custodian and the manager shall be independent of each other and not connected.¹²¹

The IOSCO Principles 2017 also requires that rules governing the form, structure, segregation and protection of client assets are in place.¹²² This requirement is effected by the Securities (Collective Investment Schemes) Rules SI 61 of 1993, which provides for the appointment of a trustee/custodian, a management company, investment limitations and prohibitions, the class and value of securities held, and representative appointment. On protection of assets, though there is a Compensation Fund it is limited to the acts or omissions of market intermediaries. This notwithstanding, investors participating in foreign CIS are afforded protection. In section 125(1)(b) the authorisation of a foreign CIS may be granted if "the scheme affords adequate protection to participants." It would be prudent to provide appropriate measures to protect all investors participating in a CIS from the misappropriation of their funds.¹²³ Further, section 128, which authorises the Commission to make rules for governing a CIS must be amended to include investor protection.

The IOSCO Principles 2017 demand disclosure, which is deemed necessary as it enables the investor to evaluate the suitability of a CIS.¹²⁴ In the application for authorisation the manager, trustee or custodian is required to give the Commission proper and accurate information. Where false or misleading information is given, the Commission can revoke authorisation.¹²⁵

The IOSCO Principles 2017 also demand that managers are subject to appropriate oversight.¹²⁶ The *Securities Act* 2016 as amended confers on managers, trustees and custodians the duty of ensuring the proper and effective functioning of the CIS, but there is no sanction where an omission or act done by them whether deliberately or negligently results in a loss suffered by the participant under a CIS. Although the Securities (Collective Investment Scheme) Rules 1993 requires trustees/custodians to take "reasonable care", no liability is placed on them for a failure to do so. Liability

¹²⁰ Rules 7 and 16 of the *Securities (Collective Investment Schemes) Rules* SI 61 of 1993.

¹²¹ Rule 6 of the *Securities (Collective Investment Schemes) Rules* SI 61 of 1993.

¹²² IOSCO *Objectives and Principles* Principle 25.

¹²³ Mwenda 1999 *AJICL* 504. Also see Mwenda *Legal Aspects of Corporate Finance* 321.

¹²⁴ IOSCO *Objectives and Principles* Principle 26.

¹²⁵ Section 126(b) of the *Securities Act* 2016 as amended.

¹²⁶ IOSCO *Objectives and Principles* Principle 28.

exists only in a situation where an act or omission is performed by an agent with whom any investments in bearer form are deposited. The *Securities Act* 2016 as amended obliges the Commission to issue rules relating to the rights and liabilities of the manager, trustee and custodian, but none have been promulgated.¹²⁷

2.8 Principles for secondary and other markets

Secondary markets facilitate the buying and selling of previously held securities. They enhance price stability, liquidity and the distribution of securities, and enable participants who hold securities to adjust their holdings in response to changes in their assessment of risk and return.¹²⁸ The IOSCO Principles 2017 require the oversight and supervision of securities exchanges. Manipulation and other unfair trading practices must be detected and deterred.

2.8.1 Securities exchanges

The IOSCO Principles 2017 require that trading systems including securities exchanges are subjected to regulatory authorisation and oversight.¹²⁹ The *Securities Act* 2016 as amended has embraced this requirement and made provision for the licensing of a securities exchange, which is defined as "an exchange established and operated by a company licensed to do so in accordance with section *twenty-two*." This definition implies that a securities exchange is (i) a company, and (ii) licensed to perform a particular act. Section 22 relates to the licensing requirements, and it can be deduced that a securities exchange provides a platform where registered and listed securities are transacted.¹³⁰ The *Securities Act* 2016 as amended obliges a company that desires to operate as a securities exchange to apply to the Commission for a licence. The applicant must satisfy the five conditions stipulated in section 22: (i) it must be necessary in the public interest; (ii) the applicant must possess sufficient financial resources; (iii) the applicant must have a minimum of five members who are dealers; (iv) rules and practices must be in place; and (v) adequate provision.

A licence to operate a securities exchange, once granted, remains valid until there is a revocation, cancellation or surrender.¹³¹ The Commission may

¹²⁷ Section 128(1)(c) of the *Securities Act* 2016 as amended.

¹²⁸ Andries 2009 *Centre for European Studies Working Papers* 71; Chakma 2023 <https://onlinenotebank.wordpress.com/2023/08/13/objectives-and-functions-of-secondary-market/>.

¹²⁹ IOSCO *Objectives and Principles* Principle 33.

¹³⁰ Section 79(1) of the *Securities Act* 2016 as amended.

¹³¹ Section 25(1) of the *Securities Act* 2016 as amended.

vary the licence conditions after a due investigation on the operations of the securities exchange, in the interest of trade on the markets or for investor protection.¹³² A licence may be suspended or cancelled by the Commission either in the interest of trade on the market or due to a contravention of the *Securities Act* 2016 as amended, the regulations or the rules.¹³³

The IOSCO Principles 2017 also demand that the supervision of exchanges and trading systems should ensure the maintenance of transparency and the integrity of trading through fair and equitable rules.¹³⁴ The *Security Act* 2016 as amended meets this principle by requiring that an exchange provides for the clearing and settlement of dealings in securities, effective monitoring and the enforcement of compliance with its rules, the *Securities Act* 2016 (as amended) and the regulations, that an exchange investigate complaints regarding the business transacted by any of its members, and that an exchange promote and maintain high standards of integrity and fair dealings by its members.¹³⁵

The Board of the Exchange shall provide general oversight, oversee the administrative affairs, and ensure compliance with the continuing obligations.¹³⁶ An exchange may make its own rules for proper and efficient regulation, operation, management and control.¹³⁷ The rules must, however, be approved by the Commission in writing lest they are of no effect.¹³⁸ The Commission may also make rules relating to (a) the conditions for the suspension of securities transactions; (b) the qualifications for membership and the fees chargeable; (c) the business carried on and the services provided; (d) the listing requirements, procedure, and rules for cancellation or suspension; and (e) the prescription of the free float to be maintained.¹³⁹

The Commission may give directions to an exchange where (i) it is satisfied that an exchange has ceased to meet the conditions; (ii) there is adequate evidence requiring the protection of investors; and (iii) it is for the proper regulation of trade on the securities exchange.¹⁴⁰ The Minister may suspend business on a securities exchange where he/she (i) has consulted the Commission; and (ii) is satisfied that the orderly transaction of business is

¹³² Section 26 of the *Securities Act* 2016 as amended.

¹³³ Section 27(1) of the *Securities Act* 2016 as amended.

¹³⁴ IOSCO *Objectives and Principles* Principle 34.

¹³⁵ Section 22(1)(g) of the *Securities Act* 2016 as amended.

¹³⁶ Section 65(2) of the *Securities Act* 2016 as amended.

¹³⁷ Section 67(1) of the *Securities Act* 2016 as amended.

¹³⁸ Section 67(2) of the *Securities Act* 2016 as amended.

¹³⁹ Section 74 of the *Securities Act* 2016 as amended.

¹⁴⁰ Section 62(1) of the *Securities Act* 2016 as amended.

being or is likely to be prevented due to (a) a natural disaster that has occurred in Zambia, or (b) an economic or financial crisis that has occurred within or outside Zambia.¹⁴¹ The suspension of business is the only remedy where a natural disaster or economic or financial loss has occurred. This is quite restrictive as there should be other intervention measures in tandem with the object of the *Securities Act* 2016 as amended – to foster fair and efficient markets – before a suspension is resorted to. Strangely, this is a reproduction of section 12 of the repealed *Securities Act* 1993. At the time when the *Securities Act* 1993 was enacted, records were stored manually and so a natural disaster (e.g. a flood) could destroy the records, necessitating the suspension of transactions. Today records are electronically stored, so section 64 is archaic and unresponsive to changes in technology and data storage methods.

2.8.2 *Unfair trading practices*

Securities regulation aims to ensure market integrity and fairness. The IOSCO Principles 2017 provides that the regulations must detect and deter manipulation and other unfair trading practices.¹⁴² This can be achieved by establishing measures that: (a) detect and prevent manipulation and price distortion; (b) ensure that the marketplace retains its financial integrity; and (c) protect customers against abusive and fraudulent practices.¹⁴³ The *Securities Act* 2016 as amended detects and deters three unfair trading practices - insider dealing and market manipulation.

2.8.2.1 Insider dealing

Insider dealing is the trading of securities by an insider for the benefit of the insider or any other person.¹⁴⁴ It involves the buying or selling of securities of a company by or on behalf of a person whose relationship with that company is such that he/she has superior and undisclosed information on the securities; while the other party to the transaction is uninformed.¹⁴⁵ Section 138 of the *Securities Act* 2016 as amended prohibits insider dealing while section 140 creates the offence.¹⁴⁶ In determining conduct which would amount to insider dealing, the *Securities Act* 2016 as amended distinguishes between an "insider" and a "person".

¹⁴¹ Section 64(1)(2) of the *Securities Act* 2016 as amended.

¹⁴² IOSCO *Objectives and Principles* Principle 36.

¹⁴³ Austin 2017 *William and Mary Business Law Review* 215; Shilts 2012 <https://web.archive.org/2012-06-15/160626-2756158.pdf> 1.

¹⁴⁴ Section 2 of the *Securities Act* 2016 as amended.

¹⁴⁵ Okene 1994 *Property, Conveyancing and Contemporary Law Journal* 92.

¹⁴⁶ A person found to have committed the offence is liable on conviction to a fine and imprisonment for a period not exceeding five years or both.

According to section 139(1), an insider shall not "directly or indirectly counsel, procure or otherwise advise any person to buy, sell, or otherwise transact in registered securities if the person has price-sensitive information until such information is publicly disclosed." This provision has four elements that must be proved for the offence to be said to have been committed, namely: (1) an "insider" who is a person related to the company;¹⁴⁷ (2) counselling, procuring or advising another person to deal (selling or buying or transacting);¹⁴⁸ (3) in registered securities;¹⁴⁹ and (4) the possession of undisclosed price-sensitive information¹⁵⁰.

Section 139(2) states that a "person shall not deal, counsel or procure another person to deal in securities of a company of which that person has any knowledge that - (a) is not publicly available; and (b) would, if it were publicly available, materially affect the price of the securities."¹⁵¹ This section applies to a person who may not fall within the description of section 139(1). Such a person must deal or counsel another person to deal, implying that no offence has been created where dealing has not taken place, despite the counselling or procuring. The securities being dealt with must be those issued by a company. This undeniably excludes government securities from being subject to insider dealing¹⁵² even though the *Securities Act 2016* as amended allows the trading of securities in a listed company owned by the government.¹⁵³ The person must possess "knowledge" that is undisclosed to the public. The assumption that a person needs to be "aware" of the nature of the information that the person possesses would be a fallacy. In all this, intention must be established. It must be proved that

¹⁴⁷ The definition of an "insider" in s 2 of the *Securities Act 2016* as amended brings out four categories of persons that can be considered to be insiders: (i) a director, officer, employee, independent contractor or shareholder, or a member of the company's audit committee; (ii) a person who receives inside information from a person(s) referred to in (i); (iii) a person that obtains inside information from a person specified in (ii); and (iv) a person who is connected with the company in any other way.

¹⁴⁸ Section 139 of the *Securities Act 2016* as amended.

¹⁴⁹ This implies that, where securities in question are not publicly traded or not registered with the Commission, this requirement would not have been met. Section 75(1)(2)(3) of the *Securities Act 2016* as amended requires an issuer of securities to register with the Commission the securities proposed to be issued to the public. It is an offence, therefore, to publicly trade unregistered securities.

¹⁵⁰ This refers to confidential information which, if disclosed to the public, could affect the price of the securities by either increasing or decreasing their value. It is possible that this element would not have been met if the person did not possess price-sensitive information, despite the person's being an insider.

¹⁵¹ Section 139(2) of the *Securities Act 2016* as amended is a rehash of s 52(1) of the repealed *Securities Act 1993*.

¹⁵² This assertion is fortified by s 4(1) of the *Securities Act 2016* as amended, which exempts "a transaction in government securities trade in the primary market."

¹⁵³ Section 3 of the *Securities Act 2016* as amended.

the person was aware, regardless of the position held or how such knowledge was acquired.¹⁵⁴ It must also be established that the undisclosed knowledge possessed could "materially affect the price of the securities" if disclosed to the public.¹⁵⁵ This can be determined, however, only at the moment of the dealing, for at this stage, the information is not known to the public and there is no impact on the price of securities.

2.8.2.2 Market manipulation

Manipulation occurs when there is an act to artificially inflate or deflate the price of a security or perform an act to influence the behaviour of the market for personal gain.¹⁵⁶ The *Securities Act* 2016 as amended identifies and deters market manipulating behaviour under Part XVIII.¹⁵⁷ In section 198(1) the creation of a false or misleading appearance of (a) the volume of trading or (b) the market for or the price of securities is considered market manipulation.¹⁵⁸ In this case the person has the intention to mislead by creating a false trading volume or an artificial price which diverts the actual price from the legitimate forces of supply and demand.¹⁵⁹

The *Securities Act* 2016 as amended also deems as market manipulation the use of any means that do not involve a change in the beneficial ownership of the securities.¹⁶⁰ This can happen when a person

¹⁵⁴ This implies that it is irrelevant whether the knowledge relating to price-sensitive information was acquired effortlessly or without solicitation; s 144 of the *Securities Act* 2016 as amended.

¹⁵⁵ The *Securities Act* 2016 as amended does not define "materially" or "materiality" but refers to "material fact" and "material change" in s 2. A "material fact" is that "which significantly affects or could reasonably be expected to significantly affect the market price or value of the securities of the issuer." A "material change" is a "change in the business, operations, assets or ownership of an issuer that could reasonably be expected to have a significant effect on the market price or value of the securities of the issuer and includes a decision to implement a change made by the issuer." These terms can be said to refer to an act that creates a change in the business operations of the issuer and significantly affects the market price or value of the securities of the issuer.

¹⁵⁶ This implies that the artificial inflation of the price of a security creates an impression that the company is doing well, and its securities are in demand, thus inducing an investor to buy. Artificial price deflation may give an impression to investors that the company is not in a sound state, and this might lead them to sell, thus pushing the price further downwards.

¹⁵⁷ This part reproduces Part VI (ss 48-51) of the repealed *Securities Act* 1993.

¹⁵⁸ Section 198(1) of the *Securities Act* 2016 as amended.

¹⁵⁹ Avgouleas *Mechanics and Regulation of Market* 109.

¹⁶⁰ Section 198 of the *Securities Act* 2016 as amended provides: "(2) A person shall not, in a securities transaction that does not involve a change in the beneficial ownership of securities or by any fictitious transaction or device, maintain, inflate, depress or cause fluctuations in the market price of securities. (3) A securities transaction shall not, for the purposes of subsection (2), involve a change in the beneficial ownership if a person who had an interest in the securities, before the securities transaction, or

simultaneously enters a buy and a sell order for the same securities at the same price. The transaction would be recorded, but it creates an impression of the existence of interest in acquiring the security concerned, yet there is no change in beneficial ownership.¹⁶¹ Similarly there is no change MEANING? of beneficial ownership where a person who had an interest in the securities, before the transaction still holds an interest after the completion of the transaction.

The issuance of deceptive statements to induce another person to purchase securities is also manipulation.¹⁶² A person can prove that they did not know, therefore the provision should have captured instances where persons are presumed to know because of their office, position, employment and qualification. Manipulation can also occur where material facts which are known to the person are concealed in a bid to induce another person.¹⁶³ It also includes the situation where a person carelessly or dishonestly makes a misleading or false statement, promise or forecast.¹⁶⁴ In either case the effect of the actions of the "manipulator" on the person who relied on the statement ought to have been included in the *Securities Act 2016* as amended.

The *Securities Act 2016* as amended protects unsophisticated, uninformed or "innocent" investors from fraudulent transactions by providing in section 197 that a person who (a) employs any device, scheme or artifice to defraud another person; or (b) engages in any act, practice or course of business which operates as a fraud or deception commits an offence. It also deals with a false statement which is not true regardless of whether or not the person knows of its falsity. Section 201 anticipates the possibility of a statement's being false or misleading and the person is aware of its falsity or misleading nature. It also deals with the omission of a material fact which may result in rendering a statement false or misleading. The latter implies

a person associated with the person in relation to the securities, holds an interest in the securities after the securities transaction."

¹⁶¹ Beneficial ownership refers to the ultimate owner of securities held in a securities account, excluding a nominee; s 2. of the *Securities Act 2016* as amended.

¹⁶² Section 199(a) of the *Securities Act 2016* as amended: a "person who induces or attempts to induce another person to deal in securities— (a) by making or publishing any statement, promise or forecast that the person knows to be misleading, false or deceptive."

¹⁶³ Section 199(b) of the *Securities Act 2016* as amended: a "person who induces or attempts to induce another person to deal in securities— (b) by any dishonest concealment of material facts."

¹⁶⁴ Section 199(c) of the *Securities Act 2016* as amended: a "person who induces or attempts to induce another person to deal in securities— (c) by recklessly or dishonestly making or publishing any statement, promise or forecast that is false or misleading; commits an offence ..."

that the omission of a material fact renders a statement false or misleading only if the person knew or had reason to know that such an omission would render it so. The only challenge is the need for proof that the person knew of the falsity or misleading nature of the information. This defeats the purpose of the provision.

3 Lessons from Kenya

Kenya's securities markets are governed by the *Capital Markets Act* Chapter 485. The *Capital Markets Act* establishes the Capital Markets Authority, which is responsible for the development of capital markets, removal of impediments and the creation of incentives for longer-term investments in productive enterprises. The Authority is mandated to create, maintain and regulate the market in an orderly, fair and efficient manner. It also facilitates the securities commodities market and derivatives market and brokerage services, the compensation fund, the use of electronic commerce for the development of capital markets in Kenya, and the protection of investor interests.¹⁶⁵ There are some features which would be beneficial if adopted, as follows.

3.1 Regulator responsibilities

The *Capital Markets Act* Chapter 485 establishes a Board whose responsibility is *inter alia* to ensure effective, efficient and transparent corporate governance systems and also to demand performance of their functions by members.¹⁶⁶ The Board appoints the Chief Executive Officer, who carries out the management and administration of the Commission.¹⁶⁷ Unfortunately, the qualifications or criteria of a person that is to be appointed as the Chief Executive Officer are not spelt out under the *Securities Act* 2016 as amended. In comparison with the equivalent legislation in Kenya, the *Capital Markets Act* Chapter 485 requires that a person appointed as the Chief Executive of the Capital Markets Authority must have a minimum of ten years of experience at a senior management level in matters of law, finance, accounting, economics, banking or insurance, and have expertise in money or capital markets or finance.¹⁶⁸ Adopting a similar provision could enhance the integrity of the market, especially considering their specialised nature.¹⁶⁹

¹⁶⁵ Section 11 of the *Capital Markets Act* Chapter 485.

¹⁶⁶ Section 8(1) of the *Capital Markets Act* Chapter 485.

¹⁶⁷ Section 16(2) of the *Capital Markets Act* Chapter 485.

¹⁶⁸ Section 8(2) of the *Capital Markets Act* Chapter 485.

¹⁶⁹ It is ironic that, while no minimum qualifications for the Chief Executive Officer's post are stipulated under the *Securities Act* 2016 as amended, the Commission demands

3.2 *Suspension of transactions*

The suspension of securities transactions due to the occurrence of a natural disaster, economic or financial crisis is not reflective of global practices and developments in the securities industry.¹⁷⁰ An example can be drawn from the *Capital Markets Act* Chapter 485, which states that where securities are affected by the government, a major market disturbance occurs, threatened or actual manipulation occurs, or it is necessary to protect the interests of the investors, the Authority may take action to maintain or restore the fair, efficient and transparent trading or to liquidate any position.¹⁷¹ In any of these circumstances, the Authority can terminate trading or suspend trading, restrict trading to the liquidation of securities, order the liquidation of all positions, confine trading to a specific price range, modify the trading days or hours, alter the conditions of delivery, fix the settlement price at which securities can be liquidated, require any person to trade in a specified manner, require margins for any securities, and modify any of the rules of a securities exchange.¹⁷² A suspension in trading shall not exceed three months.¹⁷³

3.3 *Self-regulatory organisations*

The *Capital Markets Act* Chapter 485 allows a person to make representations about a decision of a SRO, where ... An SRO's decision can also be allowed where it is thought that a delay in making the decision will prejudice a class of consumers.¹⁷⁴ There are no provisions under the *Securities Act* 2016 regarding the amelioration of a decision by an SRO that negatively affects the rights of persons. The *Capital Markets Act* Chapter 485, however, shields an SRO (or person acting on its behalf) from any liability "arising in contract, tort, defamation, equity or otherwise" if it was "done or omitted in good faith in the discharge of the duties delegated" to it.¹⁷⁵

for qualification of a CMO's directors and management who must be approved before a licence or authorisation may be granted. A cue may be taken from s 185(1), which requires members of the Tribunal to possess knowledge and experience in law, securities, commerce, finance or accountancy.

¹⁷⁰ See a comprehensive discussion under 2.9.

¹⁷¹ Section 22B(1) of the *Capital Markets Act* Chapter 485.

¹⁷² Section 22B(2) of the *Capital Markets Act* Chapter 485.

¹⁷³ Section 22B(3) of the *Capital Markets Act* Chapter 485.

¹⁷⁴ Section 18D of the *Capital Markets Act* Chapter 485.

¹⁷⁵ Section 18F of the *Capital Markets Act* Chapter 485.

3.4 Fund manager liability

The *Securities Act* 2016 as amended, and the Securities (Collective Investment Scheme) Rules 1993 are bereft of provisions which hold trustees/custodians/managers liable for acts or omissions that lead to a loss by a participant under a CIS. In comparison with the Capital Markets Act (Collective Investment Schemes) Regulations 2001, a fund manager is liable where he/she/it engages in an advisory contract or management service on behalf of the scheme without written approval from the trustees or board of directors.¹⁷⁶ Where loss has been occasioned to any third party without the required written consent, the fund manager becomes liable to make good the loss or damage caused. This provision implies that the fund manager must perform the duties effectively with the consent and direction of the fund to avoid the mismanagement of its assets.

A fund manager is also liable for any loss, damage or depreciation in the value of the scheme fund that arises from negligence, willful default or fraud.¹⁷⁷ No liability lies against a fund manager for an act done in good faith.¹⁷⁸ Regulation 20(3) limits the liability of a fund manager to the extent that the acts in question are those of the trustee under the information of the memorandum and rules and regulations of CISs. Damage shall not be attributed to the fund manager where an act or omission does not place him/her under liability.

4 Conclusion

This article has critically assessed the *Securities Act* 2016 (amended by Act 21 of 2022) to ascertain the extent to which it conforms with the IOSCO Principles 2017 and the practices of other countries such as Kenya, whose *Capital Markets Act* Chapter 485 offers greater clarity. An assessment of the *Securities Act* 2016 as amended reveals that some of the provisions that were ineffective under the *Securities Act* 1993 were adopted in their original form — in particular the suspension of business on exchanges,¹⁷⁹ insider dealing and unfair trading practices,¹⁸⁰ and the compensation mechanism for intermediary acts and omissions.¹⁸¹ It also establishes that, although the

¹⁷⁶ Regulation 17(3) of the *Capital Markets Act (Collective Investment Schemes) Regulations*, 2001

¹⁷⁷ Regulation 20(1) of the *Capital Markets Act (Collective Investment Schemes) Regulations*, 2001

¹⁷⁸ Regulation 20(2) of the *Capital Markets Act (Collective Investment Schemes) Regulations*, 2001

¹⁷⁹ Section 64 of the *Securities Act* 2016.

¹⁸⁰ Sections 139(2) and 197-199 of the *Securities Act* 2016.

¹⁸¹ Sections 177 and 179 of the *Securities Act* 2016.

Securities Act 2016 as amended generally conforms to the IOSCO Principles 2017, it has some flawed provisions. The *Securities Act* 2016 as amended does not provide for clarity on the vetting of offshore accounts, adopts an onerous risk-based approach, does not guarantee the operational and financial independence of the Commission, and grants immunity to the staff of the Commission although they are required to observe the highest professional standards.

The enforcement mechanisms are replete with weaknesses such as the non-delineation of the duties, roles and the relationship of the manager with the board and shareholders of the CMO undergoing supervisory action. The requirement that only the Commission may bring an action for misconduct before the Tribunal limits participation. This problem is compounded by the immutability of the Tribunal for issuing a decision, despite its being improperly constituted as required by the *Securities Act* 2016 as amended. Other flaws under the *Securities Act* 2016 as amended include the non-shielding of an SRO from civil liability, the usurpation of the power of ZICA and a CMO, and the absence of provisions on the liability of a trustee, custodian or manager.

Apart from addressing these flaws, the government could consider enhancing the *Securities Act* 2016 as amended by adopting provisions under Kenya's *Capital Markets Act* Chapter 485 on setting the qualifications of the CEO of the Authority, mitigation measures before the suspension of business on securities markets, the protection of an SRO from liability, and the liability of fund manager for acts or omissions that result in financial loss to an investor.

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List of Abbreviations

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| AJICL | African Journal of International and Comparative Law |
| CIS | collective investment scheme |
| CMO | capital markets operator |
| CRA | credit rating agency |
| CSA | clearing and settlement agency |
| IOSCO | International Organization of Securities Commissions |
| J Bus & Sec L | Michigan State University Journal of Business and Securities Law |
| LII | Legal Information Institute |
| SEC | Securities and Exchange Commission |
| SRO | self-regulatory organisation |

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