



REPUBLIC OF KENYA
MINISTRY OF FINANCE
FINANCIAL AND LEGAL SECTOR TECHNICAL ASSISTANCE PROJECT

REVISED DRAFT **SECURITIES INDUSTRY ACT 2009**

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Consultancy assistance to review and strengthen legal and regulatory framework
for the Capital Markets Authority



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REVISED DRAFT

SECURITIES INDUSTRY BILL 2009

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REVISED DRAFT

A BILL FOR

AN Act of Parliament to regulate the securities industry for the protection of investors, and for connected purposes.

ENACTED by the Parliament of Kenya, as follows –

PART I PRELIMINARY

1. Short title and commencement

This Act may be cited as the Securities Industry Act 2009 and shall come into operation on such day as the Minister may, by notice in the Gazette, appoint and different days may be appointed for different provisions.

2. Definitions

(1) In this Act, unless the context otherwise requires –

“asset backed securities” has the meaning given in section 82;

“associate”, in relation to –

(a) an individual, means –

(i) that individual’s spouse, son, adopted son, step-son, daughter, adopted daughter, step-daughter, father, step-father, mother, step-mother, brother, step-brother, sister or step-sister;

(ii) any company of which that individual is a director;

(iii) any company in which that individual, or any of the persons mentioned in subparagraph (i), has control of 20% or more of the voting power in the company, whether such control is exercised individually or jointly;

(iv) any employee of that individual; or

(b) a company, means another company in which the first-mentioned company has control of not less than 20% of the voting power in that company ,

and a reference in this Act to an associated person or associated company shall be construed accordingly;

“Authority” means the Capital Markets Authority established by section 4 of the Capital Markets Authority Act 2009;

“authorized scheme” means a collective investment scheme declared by order of the Authority under section 58 to be an authorized scheme for the purposes of this Act;

“bond dealer” means a person participating, whether as agent or principal, in a bond market, whether trading listed or unlisted bonds, and including trading on an over- the- counter market;

“client” means a person on whose behalf a regulated person carries on any regulated activity;

“client assets” means money received or retained by, or any other property (including securities) deposited with, a regulated person in the course of its business for which it is liable to account to its client, and any money or other property accruing therefrom;

“client money” means money of any currency that, in the course of carrying on its regulated activity, a regulated person holds or receives on behalf of a client, or which it owes to a client;

“collective investment scheme” has the meaning given in section 53;

“company”, in relation to a regulated person, means a company or other body corporate incorporated in Kenya;

“contract for differences” means rights under a contract which does not provide for the delivery of securities but whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in –

- (a) a share index or other similar factor connected with the securities;
- (b) the price of particular securities; or
- (c) the interest rate offered on money placed on deposit;

“control”, in relation to securities, means the power to exercise a controlling influence over the voting power attached to securities;

“credit rating agency” means a company that provides the service of evaluating the relative credit-worthiness of issuers of securities and assigns ratings to such securities;

“custodian”, in relation to a collective investment scheme, means the person to whom the property of the scheme is entrusted for safekeeping;

“custodian agreement” means any agreement to which the fund manager of the collective investment scheme and the custodian are parties relating to the appointment and functions of the custodian;

“depository receipt” means a certificate or other record (whether or not in the form of a document) –

- (a) which is issued by or on behalf of a person who holds any relevant securities of a particular issuer; and
- (b) which acknowledges that another person is entitled to rights in relation to the relevant securities or relevant securities of the same kind,

and “relevant securities” here means shares, debt securities and warrants;

“director”, in relation to a company, includes –

- (a) a person occupying in relation to it the position of a director (by whatever name called); and
- (b) a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that company are accustomed to act;

“document” includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form;

“expert” includes engineer, valuer, accountant, lawyer and any other person whose profession gives authority to a statement made by him;

“formation documents” means, in the case of an unincorporated scheme, the management contract, and in the case of an investment company, means its constitution, together with in each case the custodian agreement;

“fund manager” means, in relation to a collective investment scheme that is a unit trust, or an investment company that is not self-managed, the management company appointed by the management contract and, in relation to an investment company that is self-managed, means that company, and includes a manager of a venture capital company;

“futures” means rights under a contract for the acquisition or disposal of securities or other property under which delivery is to be made at a future date and at a price agreed when the contract is made (including a reference to a date and a price determined in accordance with the terms of the contract);

“investment adviser ” means a person who, by way of business –

- (a) gives advice on whether, which, the time at which or the terms or conditions of which, securities may be bought, sold, exchanged or subscribed for;
- (b) issues analyses or reports, for the purposes of facilitating the recipients of the analyses or reports to make decisions on whether, which, the time at which, or the terms or conditions on which, specific securities may be bought, sold, exchanged or subscribed for; or
- (c) manages a portfolio of securities for another person –
 - (i) without holding property of the other person; and
 - (ii) on terms that preclude him from doing so,but does not include –
 - (A) a licensed stockbroker who gives such advice or issues such analyses or reports wholly incidental to the carrying its business as a stockbroker; and
 - (B) a person who gives such advice or issues such analyses or reports –

(AA) only in a newspaper, magazine, book or other 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 analyses or reports, concerning securities; or

(BB) only in television broadcast or radio broadcast for reception by the public, whether on subscription or otherwise; and

(d) such other persons as may be prescribed;

“investment bank” means a person who, by way of business, advises on the public offer of securities, the listing of securities, mergers and acquisitions or corporate restructuring and any related activities;

“investment manager” means a person who manages, or offers or agrees to manage, a portfolio of securities belonging to another person, whether on a discretionary authority granted by that other person or otherwise;

“issuer” means –

(a) in the case of shares or debentures, the company whose shares or debentures are being issued, offered for subscription or purchase or in respect of which an invitation to subscribe or purchase has been made;

(b) in the case of units in a collective investment scheme, the management company;

(c) in the case of asset backed securities, the originator, any securitisation arranger and the person making available, offering for subscription or purchase or making an invitation to subscribe for or purchase such asset backed securities but not shall not include the trustee; and

(d) in the case of any other securities, the person making available, issuing, offering for subscription or purchase, or making an invitation to subscribe for or purchase, such securities,

and “issue” shall be construed accordingly;

“licensed person” means a person licensed under this Act;

“listed company” means a company any of whose securities are listed on the securities market of a securities exchange;

“listed securities” means securities listed on the securities market of a securities exchange;

“management contract” means any agreement to which the custodian of the collective investment scheme and the fund manager are parties relating to the appointment and functions of that fund manager;

“margin” means the amount of money deposited by a client with his stockbroker when borrowing from that stockbroker to buy securities;

“money” includes any form of money, whether represented by a cheque or other payable order, or otherwise;

“Nairobi Stock Exchange” means the Nairobi Stock Exchange Limited;

“offering memorandum” has the meaning given in section 82;

“offeror” means a person, other than an issuer, who offers securities to the public;

“originator” has the meaning given in section 82;

“participant”, in relation to a collective investment scheme, means the persons who participate in such a scheme, and includes members of an investment company;

“prescribed” means prescribed by regulations made by the Authority;

“promotion”, in relation to a collective investment scheme, means advertising to the public, issuing an offer or application form, or circulating or making available promotional materials;

“prospectus” means any prospectus, notice, circular, material, advertisement, publication or other invitation offering to the public (or any section of the public however selected) for subscription or purchase any shares or debentures of a company and, in the case of asset backed securities, includes an unrestricted offer;

“recognized scheme” means a collective investment scheme declared by order of the Authority under section 66 to be a recognized scheme for the purposes of this Act;

“record” includes records stored or recorded by means of a computer;

“regulated activity” means a securities activity specified in section 20;

“regulated market” means any stock exchange, over-the-counter market or other organized securities market that is regulated, operates regularly and is open to the international public;

“regulated person” means a company licensed by the Authority under Part III to carry on a regulated activity;

“rules” in relation to a securities exchange, means the rules, by-laws or such similar body of statements, by whatever name called, that govern the activities and conduct of –
(a) the securities exchange and its members; and
(b) other persons in relation to it,
whether or not those rules, by-laws or similar body of statements are made by the securities exchange or are contained in its constituent documents;

“securities” means –
(a) shares in the share capital of a company (“shares”);

- (b) any instrument creating or acknowledging indebtedness which is issued or proposed to be issued by a company including, in particular, debentures (“debt securities”);
- (c) loan stock, bonds and other instruments creating or acknowledging indebtedness by or on behalf of a Government, Central Bank, local authority or public authority (“Government and public securities”);
- (d) rights, options, or interests (whether described as units or otherwise) in, or in respect of, such shares, debt securities and Government and public securities;
- (e) any right (whether conferred by warrant or otherwise) to subscribe for shares or debt securities (“warrants”);
- (f) any option to acquire or dispose of any other security (“options”);
- (g) futures in respect of securities;
- (h) units in a collective investment scheme, including shares in an investment company, or other similar vehicles, whether established in Kenya or not;
- (i) interests, rights or property, whether in the form of an instrument or otherwise, commonly known as securities;
- (j) the rights under any depositary receipt in respect of shares, debt securities and warrants (“depositary receipts”);
- (k) asset backed securities; and
- (l) any other instrument prescribed by the Authority to be securities for the purposes of this Act,

but does not include –

- (i) securities of a company that is a private company (other than asset backed securities);
- (ii) futures other than in respect of securities;
- (iii) bills of exchange;
- (iv) promissory notes (other than asset backed securities);
or
- (v) certificates of deposit issued by a licensed bank;

“securities exchange” means a company that is licensed by the Authority as a securities exchange under section 4;

“securities market” means any market, exchange or place at which, or any service or facility (whether electronic or otherwise) by means of which, offers or invitations to sell or purchase securities are regularly

made on a centralized basis, being offers or invitations that are intended or may reasonably be expected, to result, directly or indirectly, in the acceptance or making, respectively, of offers to sell or purchase securities;

“securitisation arranger” has the meaning given in section 82;

“securitisation manager” has the meaning given in section 82;

“self-managed”, in relation to an investment company, means an investment company that is its own fund manager;

“stockbroker” means a person who, by way of business (whether as principal or agent) –

- (a) makes or offers to make with any person, or induces or attempts to induce any person to enter into or to offer to enter into, any agreement for or with a view to buying, selling, exchanging or subscribing for, securities; or
- (b) solicits or accepts any order for, or otherwise trading in, securities;

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

“underwriter” means a person who purchases newly issued securities for the purpose of public resale on behalf of the issuer, or who guarantees to an issuer that the unsold residue of the issuer’s public issue or sale will be taken up, and “underwriting” shall be construed accordingly;

“unit trust” has the meaning given in section 55;

“units” means the rights or interests (however described) of the participants in a collective investment scheme; and

“unrestricted offer” has the meaning given in section 82;

“venture capital company” means a company incorporated for the purposes of providing risk capital to small and medium sized businesses in Kenya with high growth potential whereby not less than 75% of the funds so invested consist of equity or quasi equity in eligible companies.

- (2) Any reference in this Act to “this Act” shall, unless otherwise expressly stated, include a reference to any subsidiary legislation made under this Act.
- (3) In determining whether a person is a fit and proper person for the purposes of this Act, the Authority shall have regard to the criteria specified in section 3 of the Capital Markets Authority Act 2009.

PART II SECURITIES EXCHANGES

3. Licensing requirement

No person shall establish or operate or hold himself out as operating a securities market except under and in accordance with a securities exchange license granted by the Authority under section 4

4. Grant of license

- (1) A company may apply to the Authority to be licensed as a securities exchange in the specified form and in such manner as may be prescribed.
- (2) The application shall be accompanied by the prescribed fee.
- (3) The Authority may require an applicant to provide the Authority with such further information as it considers necessary in relation to the application, in such form or verified in such manner as the Authority may direct.
- (4) The Authority may, in writing, subject to such conditions or restrictions as it may think fit to impose, license a company as a securities exchange if the Authority is satisfied that –
 - (a) the company is fit and proper to be licensed as a securities exchange;
 - (b) the board of directors of the securities exchange is constituted in accordance with subsection (5);
 - (c) it has, and will maintain at all times, a minimum paid-up capital of shillings [??] or such other amount as may be prescribed from time to time;

- (d) the securities exchange will operate a fair, transparent and efficient securities market;
- (e) the securities exchange will manage any risks associated with its business and operations prudently;
- (f) the securities exchange will enforce compliance by its members and listed companies with its rules;
- (g) the securities exchange's rules make satisfactory provision for –
 - (i) a fair, transparent and efficient market in securities that are traded through its facilities;
 - (ii) the proper regulation and supervision of its members and listed companies;
 - (iii) appropriate measures for the protection of investors;
 - (iv) a fair and proper distribution of the dues, fees and other charges levied by the company; and
 - (v) the prohibition of trading in securities by its officers and employees;
- (h) the securities exchange has sufficient financial, human and system resources to –
 - (i) establish and operate a fair and efficient securities market;
 - (ii) meet contingencies or disasters (including events such as technical complications occurring with automated systems);
 - (iii) provide adequate security arrangements;
- (i) the arrangements of the securities exchange with respect to the appointment, removal from office, and functions of the persons responsible for making or enforcing the exchange rules, shall be such as to secure a proper balance –
 - (i) between the interests of the different members of the securities exchange;
 - (ii) between the interests of the securities exchange or its members and the public interest,provided that the arrangements shall not be regarded as satisfying these requirements unless the persons responsible for such matters include a number of persons independent of the company, its members and other regulated persons sufficient to ensure the balance referred to in subparagraph (ii);

- (j) the securities exchange complies with such other requirements as may be prescribed by the Authority; and
 - (k) it would not be contrary to the public interest to license the company.
- (5) The board of directors of a securities exchange shall comprise –
- (a) five persons elected from amongst the stockbrokers which are members of the securities exchange’
 - (b) two individuals elected by the members of the securities exchange to represent listed companies;
 - (c) three individuals who have knowledge and experience of securities investment, appointed by the Authority, to represent individual investors, institutional investors and the general public; and
 - (d) the chief executive of the securities exchange.
- (6) Subject to the provisions of this Act, a securities exchange license shall be granted for a continuous period.

5. Duties of securities exchange

- (1) It shall be the duty of a securities exchange to ensure –
- (a) so far as reasonably practicable, a fair, transparent and efficient market in securities that are traded on its securities market;
 - (b) that risks associated with its business and operations are managed prudently; and
 - (c) compliance with this Act.
- (2) In discharging its duty under subsection (1), a securities exchange shall –
- (a) act in the public interest, having particular regard to the interest of the investing public; and
 - (b) ensure that the public interest prevails where it conflicts with the interest of the securities exchange, its members, shareholders and management.
- (3) A securities exchange shall operate its facilities in accordance with the rules made under section 7 and approved under section 8.

- (4) A securities exchange shall regulate the operations, standards of practice and business conduct of its members (and their employees) in accordance with the rules, policies, procedures and practices of the securities exchange.
- (5) A securities exchange shall regulate the operations, standards of practice and business conduct of its listed companies and their officers in accordance with the rules, policies, procedures and practices of the securities exchange.
- (6) A securities exchange shall preserve confidentiality with regard to all information in its possession concerning its members and their clients, except that such information may be disclosed by the securities exchange when required in writing to do so by the Authority or its clearing house, or if it is ordered to do so by a Court of law.
- (7) A securities exchange shall immediately notify the Authority if it becomes aware of a financial irregularity or other matter which in the opinion of the securities exchange may indicate that the financial integrity of a member is in question, or that a member may not be able to meet its legal obligations.
- (8) A securities exchange shall notify the Authority of any action taken against a member or a listed company within 48 hours of such action.
- (9) A securities exchange shall at all times provide and maintain –
 - (a) adequate and properly equipped premises;
 - (b) competent personnel;
 - (c) automated systems (which shall require the prior approval of the Authority) with adequate capacity, facilities to meet contingencies or emergencies, security arrangements and technical support,
for the conduct of its business.

6. Immunity

No civil liability, whether arising in contract, tort, defamation, equity or otherwise shall be incurred by –

- (a) a securities exchange; or
- (b) any person acting on behalf of a securities exchange, including –

- (i) any member of the board of directors of the securities exchange; or
- (ii) any member of any committee established by the securities exchange,

in respect of anything done or omitted to be done in good faith in the discharge or purported discharge of the duties of the securities exchange under section 5 or in the performance or purported performance of its functions under its rules.

7. Rules of securities exchange

- (1) The rules of a securities exchange shall make provision to the satisfaction of the Authority –
- (a) with respect to the constitution, powers and functions of the governing body of the securities exchange;
 - (b) with respect to the appointment of directors and the proper representation of non-members, issuers and investors on that governing body;
 - (c) with respect to the qualifications for membership;
 - (d) for the exclusion from membership of persons who are not of good character and high business integrity;
 - (e) for the expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles in connection with trading in securities, or for a contravention of the rules of the securities exchange;
 - (f) with respect to the listing of securities;
 - (g) with respect to the terms and conditions under which securities may be traded;
 - (h) with respect to an audit system relating to proprietary trading by members;
 - (i) with respect to the class or classes of securities that may be traded by members and the terms and conditions governing trading in securities by members;
 - (j) with respect to fair and properly supervised trading practices;
 - (k) with respect to the prohibition of trading in securities by stockbrokers and their employees, either directly or indirectly, for their own accounts or accounts of associated persons, except in accordance with the rules of the securities exchange;
 - (l) with respect to measures to prevent manipulation, market rigging and artificial markets in its securities market;

- (m) for preventing the excessive use of credit by way of initial or maintenance margin in respect of the purchase or carrying of any securities;
 - (n) with respect to the recording and publishing of details of trading;
 - (o) with respect to the clearing and other arrangements made, and the financial condition of –
 - (i) the securities exchange;
 - (ii) the clearing house of the securities exchange; and
 - (iii) the members of the securities exchange,such as to provide reasonable assurance that all obligations arising out of the trading in securities on the securities market of that securities exchange will be met;
 - (p) with respect to the equitable allocation of the dues, fees and other charges levied by the exchange company;
 - (q) where a member appears to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts, to enable action to be taken to close out its position in relation to all unsettled market contracts to which it is a party; and
 - (r) generally for the carrying on the business of the securities exchange with due regard to the interests and protection of the investing public.
- (2) The rules of a securities exchange shall apply to the officers and other employees of its members, and the member shall be responsible to ensure their compliance with such rules.
- (3) The Authority may, by notice in writing served on a securities exchange, require it –
- (a) to make rules specified in the notice within the period specified; or
 - (b) to amend rules referred to in the notice in the manner and within the period specified in the notice.
- (4) Where the Authority is satisfied that a securities exchange has not complied with a requirement referred to in subsection (3) within the period specified in the notice, the Authority may make or amend the rules specified in the notice instead of the securities exchange.

8. Approval of rules and amendments

- (1) No rule of a securities exchange or any amendment (whether by way of rescission, substitution, alteration or addition) to a rule shall have effect unless it has the approval in writing of the Authority.
- (2) A securities exchange shall submit to the Authority for approval its rules and every amendment.
- (3) The Authority shall, by notice in writing served on the securities exchange, give its approval or refuse to give its approval (together with its reasons for the refusal) to the rules or amendment of the rules (as the case may be) or any part thereof, the subject of the submission.
- (4) The Authority may give its approval under subsection (3) subject to requirements that shall be satisfied before the rules or amendment of the rules or any part thereof take effect.

9. Statutory obligation of members to comply with exchange rules

Members of a securities exchange shall comply with the rules of that exchange, and shall be responsible to ensure that its officers and employees also so comply.

10. Securities exchange to assist Authority

A securities exchange shall provide such assistance to the Authority as the Authority may reasonably require for the performance of the functions and duties of the Authority, including the furnishing of such returns and the provision of such books and other information relating to the business of the securities exchange or in respect of trading in securities or any other specified information as the Authority may require for the proper administration of this Act.

11. Review of disciplinary action taken by securities exchange

- (1) Where a securities exchange reprimands, fines, suspends, expels or otherwise takes disciplinary action against a member of the securities exchange in accordance with its rules, the securities exchange shall immediately inform the Authority in writing of the name of the member, the reason for and nature of the action taken, the amount of any fine and the period of any suspension.

- (2) The Authority may, on its own motion or on application by an aggrieved person, review any disciplinary action taken by a securities exchange under subsection (1) and may affirm, modify or set aside the decision of the securities exchange after giving the member and the securities exchange an opportunity of being heard.
- (3) Nothing in this section shall preclude the Authority, in any case where a securities exchange fails to act against a member, from suspending, expelling or otherwise disciplining a member of the securities exchange, but before doing so the Authority shall give the member and the securities exchange an opportunity to be heard.
- (4) Any action taken by a securities exchange under subsection (1) shall be without prejudice to the power of the Authority to take such further action as it sees fit with regard to the member or its license.

12. Authority may issue directions to securities exchange

- (1) The Authority may, if it considers it necessary or expedient –
 - (a) for ensuring fair, transparent and efficient securities markets, or for ensuring fair, transparent and effective clearing and settlement of securities transactions;
 - (b) for ensuring the integrity of, and proper management of systemic risks in, securities markets;
 - (c) for ensuring a fair and proper governance structure of the securities exchange; or
 - (d) in the public interest or for the protection of investors,

issue directions to a securities exchange by notice in writing either of a general or specific nature.

- (2) Without prejudice to the generality of subsection (1), any direction issued under that subsection may relate to –
 - (a) the trading or the termination of trading on or through the facilities of that securities exchange;
 - (b) any securities listed or quoted on that securities exchange;
 - (c) the manner in which securities exchange carries on its business, including the manner of reporting off-market trades by members;
 - (d) requiring the removal of a person from an office with, or employment by, a securities exchange; or

- (e) any other matter that the Authority considers necessary for the effective administration of this Act, and the securities exchange shall comply with any such direction.

13. Emergency powers of Authority

- (1) Where the Authority has reason to believe that an emergency exists, or where the Authority considers it necessary or expedient in the public interest or for the protection of investors, the Authority may direct by notice in writing a securities exchange to take such action as it considers necessary to –
- (a) maintain or restore fair, transparent and efficient trading in securities or any class of securities; or
 - (b) liquidate any position in respect of any securities or any class of securities,
- including but not limited to –
- (i) terminating trading on a securities market;
 - (ii) suspending trading on a securities market;
 - (iii) confining trading to liquidation of securities positions;
 - (iv) ordering the liquidation of all positions or part thereof or the reduction in such positions;
 - (v) limiting trading to a specific price range;
 - (vi) modifying trading days or hours;
 - (vii) altering conditions of delivery;
 - (viii) fixing the settlement price at which positions are to be liquidated;
 - (ix) requiring any person to act in a specified manner in relation to trading in securities or any class of securities;
 - (x) requiring margins or additional margins for any securities; and
 - (xi) modifying or suspending any of the regulations of a securities exchange,
- and the securities exchange shall comply with that direction.
- (2) Where the Authority suspends trading on a securities market under subsection (1)(ii), the suspension shall be for a period not exceeding 3 months.
- (3) Where a securities exchange fails to comply with a direction of the Authority under subsection (1), within such time as is specified by the Authority, the Authority may –

- (a) set emergency margin levels in any securities or class of securities;
 - (b) set limits that may apply to market positions acquired in good faith prior to the date of the Authority's direction; or
 - (c) take such other action as the Authority considers necessary to maintain or restore orderly trading in any securities or class of securities.
- (4) In this section, "emergency" means –
- (a) an act of government affecting securities;
 - (b) any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such securities;
 - (c) a threatened or actual market manipulation; or
 - (d) any other situation or practice which in the opinion of the Authority constitutes an emergency.

14. Revocation of securities exchange license

- (1) The Authority may, by notice in writing served on the securities exchange, revoke a securities exchange license granted under this Act with effect from the date specified in the notice if the securities exchange –
- (a) ceases to operate a securities market that it has been licensed to operate under section 4;
 - (b) ceases to have in place satisfactory clearing facilities for the clearing and settlement of securities traded on its securities market;
 - (c) is being wound up;
 - (d) fails to comply with any requirement of this Act;
 - (e) fails to comply with a direction of the Authority;
 - (f) fails to provide the Authority with information required by the Authority, or provides false or misleading information;
 - (g) is operating in a manner detrimental to the public interest; or
 - (h) requests the Authority to do so.
- (2) For the purposes of subsection (1) a securities exchange shall be deemed to have ceased to operate its securities market if –
- (a) it has ceased to operate its securities market for more than 30 days unless it has obtained the prior written approval of the Authority to do so; or

- (b) it has ceased to operate such securities market under a direction issued by the Authority under section 12 or 13.
- (3) The Authority may by the notice served under subsection (1) permit the securities exchange to continue, on or after the date on which the revocation is to take effect, to carry on such activities affected by the revocation as the Authority may specify in the notice for the purpose of –
 - (a) closing down the operations of the securities exchange;
 - (b) protecting the public interest.
- (4) Except where responding to a request under subsection (1)(h), the Authority shall not revoke a securities exchange license without first giving the securities exchange an opportunity of being heard.
- (5) Where the Authority revokes the license of a securities exchange under this section, it shall cause notice of that fact to be published in the Gazette.

15. Effect of revocation

A revocation of license under section 14 shall not operate so as to –

- (a) avoid or affect any agreement, transaction or arrangement entered into on the securities market operated by the securities exchange where the agreement, transaction or arrangement was entered into before the revocation of the license;
- (b) affect any right, obligation or liability arising under such agreement, transaction or arrangement.

16. Accounts and audit

- (1) A securities exchange shall keep proper books of accounts and records of its income and expenditure, assets and liabilities and all other transactions of the securities exchange.
- (2) The securities exchange shall, as soon as practicable after the end of each financial year, prepare a statement of the accounts of the securities exchange for the financial year, including an income and expenditure account and balance sheet.

- (3) The securities exchange shall, within [1] month after the end of each of its financial years, submit the statement of accounts prepared for the financial year under subsection (2) to its auditors for audit.
- (4) The auditors shall prepare a report on the accounts and send the report to the securities exchange that shall forthwith after its receipt send a copy of the report and a copy of the statement of accounts to the Authority.
- (5) The auditors shall include in their report –
 - (a) a statement whether, in their opinion, the income and expenditure account for the financial year to which the report relates gives a true and fair view of the securities exchange's profit or loss;
 - (b) a statement whether, in their opinion, the balance sheet for the financial year gives a true and fair view of the securities exchange's financial affairs at the end of that financial year.
- (6) The auditors shall have a right of access at all reasonable times to the books, accounts, vouchers and other records of the securities exchange and are entitled to require from officers of the securities exchange such information and explanations as they consider necessary for the performance of their duties as auditor.

17. Authority may appoint auditor

Where the Authority is satisfied that it is in the public interest to do so, it may appoint in writing an auditor (at the expense of the securities exchange) to examine, audit, and report, either generally or in relation to any matter, on the books, accounts and records of a securities exchange.

18. Annual report

- (1) A securities exchange shall, within 3 months after the end of its financial year, give to the Authority an annual report that includes –
 - (a) a description of the activities undertaken by the securities exchange in the financial year;
 - (b) the resources (including financial, technological and human resources) that the securities exchange had available, and used, in order to ensure compliance with its obligations and, in particular, its obligation to ensure that the securities market of

- the securities exchange operates in a fair, transparent and efficient manner; and
- (c) an analysis of the extent to which the securities exchange considers that the activities undertaken, and resources used, have resulted in full compliance with all of its obligations under this Act, regulations made by the Authority and the rules of the securities exchange.
- (2) The securities exchange shall provide with its annual report such other information and statements as may be specified by the Authority.

19. Nairobi Stock Exchange

- (1) With effect from the date of commencement of this Act the Nairobi Stock Exchange shall, subject to subsection (3), be deemed to be licensed under this Act.
- (2) The Nairobi Stock Exchange shall, not later than [12 months] after the commencement of this Act, or within such longer period as the Authority may allow –
- (a) take such steps as are necessary to meet the requirements of the Authority as specified in section 26(4);
 - (b) notify the Authority in writing of the steps so taken; and
 - (c) apply for a securities exchange license under section 26.
- (3) If the Nairobi Stock Exchange fails to take action in accordance with subsection (2) within the time limited by or under that subsection, it shall cease to be deemed to be licensed upon the expiration of that period.

PART III REGULATED ACTIVITIES

20. Scope of regulated activities

For the purposes of this Act, a person carries on a regulated activity if he carries on business, or purports to do so, as a –

- (a) stockbroker;
- (b) investment adviser;
- (c) investment manager;

- (d) investment bank;
- (e) bond dealer;
- (f) fund manager;
- (g) fund administrator;
- (h) transaction adviser;
- (i) securitisation arranger;
- (j) securitisation manager
- (k) trustee, including a trustee or authorised trustee in respect of asset backed securities;
- (l) custodian;
- (m) underwriter;
- (n) credit rating agency; or
- (o) person engaging in any other activity that the Authority prescribes to be a regulated activity for the purposes of this Act.

21. Licensing requirement

- (1) Subject to subsections (3) and (4), no person may carry on a regulated activity, or purport to do so, unless the person is a company licensed by the Authority (“a regulated person”) under this Act and operates in accordance with its license.
- (2) A license granted under this Act shall specify the regulated activity or activities that the regulated person is permitted to undertake and it shall be restricted to such regulated activity as so specified.
- (3) A person licensed by the Authority as a stockbroker or investment bank shall be deemed to be licensed under this Act as an investment adviser and bond dealer.
- (4) An individual who performs any regulated function for or on behalf of or by arrangement with a regulated person to which he is accredited, shall be exempt from the licensing requirement of subsection (1):

Provided that such exempt individual shall otherwise be subject to all the other requirements of this Act.

- (5) An exempt individual may be accredited to a regulated person for the purposes of this Act only if –

- (a) the regulated person has taken all necessary steps to ensure that the individual is a fit and proper person to conduct the regulated function on its behalf; and
 - (b) the individual is recorded as being accredited to the regulated person in the register of regulated persons maintained by the Authority under section 26.
- (6) A company that is licensed in respect of a regulated activity shall be exclusively engaged in that securities activity except only in respect of such other matters as are reasonably ancillary or incidental to the regulated activity.
- (7) In the case of a bank, a license under this Part shall be granted only to a subsidiary company incorporated by the bank for such purpose and which subsidiary shall be exclusively engaged in the licensed regulated activity.
- (8) For the purposes of this Act, “regulated function”, in relation to a regulated activity carried on as a business by a regulated person, means any function (including acting as a stockbroking agent) performed for or on behalf of or by arrangement with the regulated person relating to the regulated activity, other than work ordinarily performed by an accountant, clerk or cashier.

22. Application for license

- (1) An application for a license under this Part shall be made to the Authority in the specified form and shall be accompanied by the prescribed fee, and shall –
- (a) give the Authority information it requires –
 - (i) about the services which the applicant will hold himself out as being able to provide if the application is allowed;
 - (ii) about the business which the applicant proposes to carry on and to which the application relates, and about any person whom the applicant proposes to employ or with whom the applicant intends to be associated in the course of carrying on the business; and
 - (iii) to enable the Authority to consider its fitness and properness; and

- (b) specify the location of all premises at which the records or other documents of the regulated activity in respect of which the application is made are to be kept.
- (2) The Authority may require an applicant to provide it with such further information as the Authority considers necessary.
- (3) No person who, in relation to a company –
 - (a) controls or is beneficially entitled directly or indirectly to more than twenty-five percent of the issued share capital or voting rights;
 - (b) is entitled to appoint more than twenty-five percent of the board of directors; or
 - (c) is entitled to receive more than twenty-five percent of the aggregate dividends and interest on shareholders loans to be paid in any given financial year,

shall be appointed as an executive director of that company or to any senior position in the management of the company:

- (4) No individual or corporate person shall, in relation to a company –
 - (a) control or be beneficially entitled directly or indirectly, to more than twenty-five per cent of the issued share capital or voting rights of the company;
 - (b) be entitled to appoint more than twenty-five per cent of the board of directors; or
 - (c) be entitled to receive more than twenty-five per cent of the aggregate dividends and interest on shareholders loans to be paid in any given financial year:

Provided that the provisions of this subsection shall not apply –

- (i) to a corporate entity that is licensed by a banking, insurance, pensions or securities regulator in Kenya or elsewhere, or
- (ii) where the ownership structure of the corporate shareholder is sufficiently diverse and no single person holds or controls more than twenty-five percent of its shares, votes, directorship appointments or dividend or interest on shareholder loans.

- (5) For the purposes of subsections (4) and (5), “company” means –
- (a) a stockbroker;
 - (b) an investment bank; or
 - (c) a fund manager.

23. Grant of license

- (1) Subject to the provisions of this Act, the Authority may, on an application duly made in accordance with section 22 grant or refuse the application.
- (2) The Authority shall refuse to grant a license unless satisfied by the applicant that the applicant –
- (a) is a fit and proper person to be licensed in respect of the regulated activity the subject of the application;
 - (b) will employ a sufficient number of fit and proper exempt individuals;
 - (c) will be able, if licensed, to comply with any financial resources regulations that may apply to it;
 - (d) has specified premises under section 22(1)(b) that are suitable for keeping records or other documents; and
 - (e) satisfies such other conditions as may be prescribed.
- (3) A regulated person shall not change its shareholders, directors, chief executive or other key personnel except with the prior written confirmation of the Authority that it has no objection to the proposed change and subject to compliance with any condition imposed by the Authority.
- (4) A license granted or renewed under this section shall be valid for a period of one year.
- (5) Three months prior to the expiry of the license granted or renewed under this section the holder of the license may apply to the Authority for renewal of the license which application shall be made in the prescribed manner and accompanied by the prescribed fee.

24. Power of Authority to impose conditions

- (1) The Authority may grant a license subject to such conditions or restrictions as it considers necessary.

- (2) The Authority may, by written notice served on the regulated person, amend or revoke any of the conditions or attach new conditions.

25. Power of Authority to issue directions to regulated persons

- (1) The Authority may by notice in writing give a regulated person a direction under this section where it appears to the Authority that –
- (a) it is desirable for the protection of clients; or
 - (b) the regulated person is contravening, has contravened or is about to contravene, or has failed to comply with any provision of or requirement under this Act [or any regulation made by the Authority under this Act,] or, in purported compliance with any such provision or requirement has furnished the Authority with information that is false, inaccurate or misleading.
- (2) A direction under this section may contain all or any of the following prohibitions or requirements –
- (a) require a regulated person to cease and desist from the contravention;
 - (b) require a regulated person to remove a person from office or employment with the regulated person;
 - (c) prohibit a regulated person from entering into transactions of a class or description specified in the notice or entering into them otherwise than in circumstances so specified or to an extent so specified;
 - (d) prohibit a regulated person from soliciting business from a person of a class or description so specified or from persons other than persons of such a class or description; or
 - (e) prohibit a regulated person from carrying on business in a specified manner or otherwise than in a specified manner, and the regulated person shall comply with such direction.
- (3) A direction under this section shall be for such specified period as the Authority may consider necessary (and which period may be extended as considered necessary by the Authority).
- (4) The Authority may, by written notice either of its own motion or on the application of the regulated person on whom a prohibition or requirement has been imposed under this section, rescind or vary the prohibition or requirement if it appears to the Authority that it is no longer necessary for the prohibition or requirement to take effect or

continue in force or, as the case may be, that it should take effect or continue in force in a different form.

26. Register of regulated persons

- (1) The Authority shall maintain a register of regulated persons in the form it considers most appropriate.
- (2) The register shall record –
 - (a) the name and address of the regulated person;
 - (b) the date on which the license was granted;
 - (c) the type of regulated activity permitted by the license;
 - (d) any conditions attached to the license;
 - (e) the name and address of every exempt individual accredited to the regulated person;
 - (f) the location of the premises at which the records or other documents of the regulated person are kept;
 - (g) the name of each director, secretary and other key officers of the company;
 - (h) the names and respective shareholdings of each shareholder;
 - (i) any order of revocation or suspension;
 - (j) any change notified under section 27; and
 - (k) such other particulars as the Authority considers necessary in the interest of the investing or general public.
- (3) The register shall, during usual office hours, be open to inspection free of charge by members of the public.

27. Notification of change in registered particulars

Where –

- (a) a regulated person ceases to carry on the business to which its license relates; or
- (b) a change occurs in any matter particulars of which are required by section 26 to be entered in the register,

the regulated person shall as soon as is practicable, and in any event within seven days, give to the Authority notice in writing of the matter concerned.

PART IV CONDUCT OF REGULATED ACTIVITIES

28. Standards of business conduct

In its conduct of regulated activities, a regulated person shall at all times act according to the principles of best practice and, in particular, shall –

- (a) observe a high standard of integrity and fair dealing;
- (b) act with due skill, care and diligence;
- (c) observe high standards of market conduct;
- (d) seek from clients information about their circumstances and investment objectives which might reasonably be expected to be relevant in enabling the regulated person to fulfil its responsibilities to the client;
- (e) take reasonable steps to give every client it advises, in a comprehensible way, any information needed to enable the client to make a balanced and informed investment decision;
- (f) avoid any conflict of interest with clients and, where such a conflict unavoidably arises, to ensure fair treatment to the client by complete disclosure or by declining to act; furthermore the interests of the regulated person shall never be unfairly placed above those of the client;
- (g) protect properly, by way of segregation and identification, those client assets for which the regulated person is properly responsible;
- (h) maintain adequate financial resources to meet the commitments of the regulated person and withstand the risks to which the business of the regulated activity is subject;
- (i) organize and control internal affairs in a responsible manner;
- (j) keep proper records;
- (k) have adequate arrangements to ensure that all staff employed are suitable, adequately trained and properly supervised, together with well-defined compliance procedures; and
- (l) deal with the Authority in an open and co-operative manner and keep the Authority informed of anything concerning the regulated person that might reasonably be expected to be disclosed to it.

29. Conduct of business regulations

- (1) The Authority may make regulations requiring regulated persons to comply with such practices and standards relating to their conduct in carrying on the regulated activities for which they are licensed as are specified in the regulations.

- (2) Without limiting the generality of subsection (1), the Authority may make regulations for or with respect to –
- (a) contract notes;
 - (b) client agreements;
 - (c) the use of misleading or deceptive advertisements by or on behalf of a regulated person;
 - (d) the disclosure to a client of the financial risks in respect of securities trading recommended by the regulated person to the client;
 - (e) the avoidance of any conflict of interest between the regulated person and a client;
 - (f) recommendations made by a regulated person;
 - (g) the priority to be given to clients' orders;
 - (h) trading against a client;
 - (i) cross trading; and
 - (j) any other matter relating to the practices and standards of conduct required of a regulated person in conducting the regulated activity for which it is licensed.

30. Client property

- (1) A regulated person shall –
- (a) treat and deal with all client assets received by it from a client in respect of any regulated activity as belonging to that client; and
 - (b) account in a separate trust account, designated or evidenced as such, for all client assets received from the client or accruing to the client pursuant to paragraph (a); and
 - (c) shall not commingle those assets with the funds of the regulated person.
- (2) The Authority may make regulations with respect to the segregation and safekeeping of client assets that a regulated person holds on behalf of a client.
- (3) Without limiting the generality of subsection (2), regulations may –
- (a) require client money to be paid forthwith into segregated bank accounts established for client money and designated as trust accounts or client accounts;
 - (b) make provision with respect to the opening and keeping of bank accounts and specify when and how client money is to

- be paid into such accounts and require it to be dealt with, and accounted for, in the specified manner;
- (c) require the maintenance of records in relation to such accounts in the specified manner;
 - (d) require the submission to the Authority, upon request or at specified intervals, of specified information, records and documents for the purpose of enabling the Authority to ascertain readily whether the rules are being complied with; and
 - (e) provide for any other matter relating to client assets.
- (4) Except as provided in the regulations, client assets held by a regulated person on account of a client shall not be available for payment of the debts of the regulated person or liable to be paid or taken in execution under the order or process of any court against the regulated person.
- (5) A payment made in contravention of subsection (4) is void from the outset, and a person to whom the money is paid does not obtain any title to it.

PART V ACCOUNTS AND AUDIT OF REGULATED PERSONS

31. Accounts and records to be kept

- (1) Every regulated person shall keep such accounting and other records as will sufficiently explain the transactions and financial position of all business relating to its license and enable a true and fair profit and loss account and balance sheet to be prepared from time to time, and shall keep those records in such manner and form as to enable them to be conveniently and properly audited.
- (2) Without limiting the generality of subsection (1), such accounts and other records shall be maintained as may be prescribed.
- (3) The accounting and other records required to be maintained under this section shall be preserved by the regulated person for a period of not less than [7] years from the date on which they are made, and shall at all reasonable times be open to inspection by the Authority or by an auditor appointed by the Authority.

- (4) All records shall be maintained in sufficient detail to establish readily whether or not any financial resources regulations are being complied with.
- (5) The accounts and records required to be kept under this section are in addition to any accounts or records that persons are required to keep and maintain in relation to any securitisation trust, special purpose vehicle or a securitisation transaction under Part XI.

32. Financial resources regulations

- (1) The Authority may make regulations requiring regulated persons to have and maintain, in respect of the regulated activity for which they are licensed, the financial resources set by the regulations.
- (2) Financial resources regulations may –
 - (a) require regulated persons to maintain financial resources in accordance with –
 - (i) specified requirements as to the amount in which they are to be maintained;
 - (ii) any other specified requirements;
 - (b) specify the assets, liabilities and other matters to be taken into account under the regulations to determine the financial resources of a regulated person and the extent to which, and the manner in which, they are to be taken into account for that purpose;
 - (c) require regulated persons to submit to the Authority, at intervals set out in the regulations, returns of their financial resources and trading activities in a form set by the Authority;
 - (d) require regulated persons to submit returns to the Authority in response to a request by the Authority for information relating to their financial resources and any trading activities; and
 - (e) provide for any other matter relating to the financial resources of regulated persons.

33. Auditor to be appointed

- (1) Within one month after becoming licensed under this Act a regulated person shall appoint an external auditor to perform the

functions required of an auditor of a regulated person under this Act.

- (2) A person shall not be qualified for appointment as the auditor of a regulated person unless he is qualified and approved as an auditor of a regulated person by the Institute of Certified Public Accountants of Kenya, is approved by the Authority for such purposes and holds a valid practising certificate.
- (3) An auditor shall not be eligible for appointment under subsection (1) if he is –
 - (a) a director, officer, employee, shareholder or partner of the regulated person; or
 - (b) a partner or employee of such person.
- (4) A regulated person shall, within seven days of the appointment of an auditor, notify the Authority in writing of the name and address of the auditor.
- (5) A regulated person shall, within seven days, notify the Authority in writing of the removal or resignation of an auditor.
- (6) The audit requirements under this Part are in addition to any audit requirements prescribed in relation to a securitisation trust, special purpose vehicle or the activities of any party under Part XI.

34. Audited accounts to be lodged with Authority

A regulated person shall for each of its financial years prepare a profit and loss account, a balance sheet and a cash flow statement made up to the last day of the financial year which shall show a true and fair view, contain the information prescribed, and shall lodge those documents with the Authority not later than [4] months after the end of the financial year, together with an auditor's report which shall express opinions on such matters as may also be prescribed.

35. Auditor to report to Authority in certain cases

If, during the performance of his duties as auditor for a regulated person, an auditor –

- (a) becomes aware of any matter which in his opinion adversely affects the financial position of the regulated person to a material extent; or

(b) discovers evidence of a contravention of any financial resources regulations, or of the Capital Markets (Conduct of Business)(Market Intermediaries) Regulations 2009.

he shall as soon as is practicable, and in any event within seven days, report it in writing to the Authority and to the regulated person.

36. Authority may appoint auditor

Where the Authority is satisfied that it is in the interest of a regulated person, its clients or the investing or general public to do so, it may appoint in writing an auditor (at the expense of the regulated person) to examine, audit, and report, either generally or in relation to any matter, on the books, accounts and records of the regulated person, and on money, securities or other property held on account of any other person by the regulated person or by a nominee appointed by the regulated person, if –

- (a) the regulated person has failed to lodge an audited accounts with the Authority under section 34;
- (b) the Authority has received a report under section 35; or
- (c) the Authority has reason to believe that the regulated person has failed to comply with any financial resources regulations, with the Capital Markets (Conduct of Business)(Market Intermediaries) Regulations 2009, or with section 31 (Accounts and records to be kept).

PART VI OFFERS OF SECURITIES

37. Offers of securities

- (1) For the purposes of this Act, a person offers securities if he invites another to enter into an agreement for or with a view to subscribing for or otherwise acquiring or underwriting any securities, or if he invites a person to make such an offer.
- (2) An offer of securities to the public (a “public offer”) includes an offer to any section of the public, however selected.
- (3) An offer is not regarded as a public offer if it can properly be regarded, in all the circumstances, as –

- (a) not being calculated to result, directly or indirectly, in securities of the company becoming available to persons other than those receiving the offer; or
 - (b) otherwise being a private concern of the person receiving it and the person making it.
- (4) Subject to the provisions of this Act, no person shall make a public offer of securities unless the issuer or offeror of the securities has submitted for approval to the Authority, and the Authority has approved, a prospectus that complies with this Act.
- (5) Subsection (4) shall not apply –
- (a) to Government securities;
 - (b) to an offer of securities by the [Central Bank];
 - (c) to an offer of securities wholly guaranteed by the Government;
 - (d) where the securities are offered in connection with a bona fide invitation to enter into an underwriting agreement with respect to them;
 - (e) to securities offered by the issuer to –
 - (i) members or employees of the issuer;
 - (ii) members of the families of any such members or employees; or
 - (iii) holders of its debentures;
 - (f) where the total value of the issue does not exceed shillings [?];
 - (g) where the securities are shares and are offered free of charge to any or all of the holders of shares in the issuer;
 - (h) where the securities are of the same class, and were issued at the same time, as securities in respect of which a prospectus has been published under this Act;
 - (i) to units in a collective investment scheme authorized or recognized by the Authority under this Act; and
 - (j) to asset-backed securities which shall comply with Part XI.
- (6) In the case of securities that are exempt under subsection (5) from the prospectus requirement under subsection (4), the issuer or offeror shall in each case (except in respect of asset-backed securities which shall in lieu comply with Part XI) file an information notice with the Authority that shall contain such information and particulars and shall comply with such requirements as may be prescribed.

- (7) The Authority may prescribe different prospectus and ongoing disclosure requirements in respect of offers of corporate debt securities, asset backed securities or other forms of securities.
- (8) The Authority may from time to time prescribe a different amount of consideration in respect of subsection (5)(f).
- (9) A prospectus approved by the Authority shall be valid only for a period of up to 6 months from the date of such approval.
- (10) The Authority shall not be liable to any action in damages suffered as a result of any prospectus or short-form prospectus approved by the Authority.

38. Offers of corporate debt securities

- (1) In the case of an offer of corporate debt securities –
 - (a) where the offer is restricted to professional investors only; or
 - (b) where the offer is directly communicated to an identifiable category of persons not exceeding [10] in number,
the issuer or offeror may submit for approval by the Authority a short-form prospectus.
- (2) A short-form prospectus shall contain such information and particulars and shall comply with such requirements as may be prescribed.
- (3) In the case of an offer of debt securities –
 - (a) where the minimum amount which may be paid under the offer of debt securities is at least shillings [1 million]; or
 - (b) where the debt securities are denominated in amount of at least shillings [1 million],
the issuer or offeror may file with the Authority an information notice.
- (4) An information notice shall contain such information and particulars and shall comply with such requirements as may be prescribed.
- (5) For the purposes of this Act, “professional investor” means –
 - (a) any person licensed under this Act;
 - (b) an authorized scheme;

- (c) any individual, either alone or with any of his associates on a joint account, having proven liquid assets of not less than shillings [?] million, or its equivalent in any foreign currency;
- (d) any company or partnership having proven liquid assets of not less than shillings [?] million, or its equivalent in any foreign currency.

39. Transaction advisers

- (1) Any person who proposes to make a public offer of securities, or an unrestricted offer or restricted offer of asset backed securities, shall first appoint a transaction adviser who shall be responsible to ensure that the offer is made in accordance with the requirements of this Act.
- (2) No person shall be eligible to be appointed as a transaction adviser unless he is licensed as an investment bank under this Act, or is specifically approved by the Authority to act as a transaction adviser for the particular public offer of securities or for the unrestricted offer of asset backed securities.
- (3) In the case of asset backed securities a licensed transaction adviser may also be appointed as the securitisation arranger.

40. Publication of prospectus

- (1) Where a public offer of securities, or an unrestricted offer of asset backed securities, is to be made in Kenya the offeror shall publish a prospectus by making it available to the public, free of charge, at an address in Kenya, from the time the securities are first offered until the end of the period during which the offer remains open.
- (2) The offeror shall, not less than [21] days before the proposed date of publication of the prospectus, submit a copy to the Authority for approval.
- (3) No person shall publish a prospectus until it has been approved by the Authority, which approval may be subject to such conditions or restrictions as the Authority may consider necessary.
- (4) No person shall issue, without the prior written approval of the Authority, an advertisement announcing a public offer of securities,

or an unrestricted offer of asset backed securities, for which a prospectus is required under this Part unless a prospectus has been published and the advertisement gives an address in Kenya from which it can be obtained.

- (5) For the purposes of this section, “prospectus” includes a short-form prospectus.

41. Content of prospectus

- (1) The Authority may approve a prospectus only if –
- (a) it contains all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of –
 - (i) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities; and
 - (ii) the rights attaching to those securities; and
 - (b) it contains in addition such other information and particulars, and complies with such other requirements, as may be prescribed; and
 - (c) in the case of offers of asset backed securities, it complies with the provisions of Part XI and such other requirements as may be prescribed.
- (2) For the purposes of this section, “prospectus” includes a short-form prospectus.

42. Criminal liability for defective prospectus

- (1) A person who –
- (a) makes a false, misleading or deceptive statement in a prospectus; or
 - (b) omits information or a statement from a prospectus that this Act or any regulation made by the Authority under this Act, requires to be included,
- commits an offence and shall be liable on conviction –
- (i) in the case of an individual, to a fine of shillings[?] or to imprisonment for [?] or to both;
 - (ii) in the case of a company, to a fine of shillings[?].

- (2) For the purposes of this section, “prospectus” includes a short-form prospectus, an information notice and an offering memorandum in respect of asset backed securities.

43. Compensation for false or misleading prospectus

- (1) Every offeror, issuer, director of an offeror or issuer shall be liable to pay compensation to any person who acquires any of the securities, in reliance upon the prospectus, including acquisition in the secondary market, to which the prospectus relates and suffers loss in respect of them as a result of any untrue or misleading statement in the prospectus or the omission from it of any matter required to be included by or under section 41 and, in the case of asset backed securities, by Part XI of this Act.
- (2) For the purposes of this section, “prospectus” includes a short-form prospectus, an information notice and an offering memorandum in respect of asset backed securities.

44. Continuing disclosure obligations of companies and in respect of listed securities

- (1) Every company that has made an offer to the public of its securities shall keep the Authority, members of the company and other holders of its securities, any listing exchange, and the general public informed as soon as reasonably practicable (but in any event no later than the end of the next working day) of any information relating to the issuer and its subsidiaries, if any, that –
- (a) is necessary to enable them and the public to appraise the financial position of the issuer and of its subsidiaries;
 - (b) is necessary to avoid the establishment of a false market in its securities; or
 - (c) might reasonably be expected materially to affect market activity in the price of its securities.
- (2) Without limiting the general effect of subsection (1), the company shall also comply with such further obligations and requirements as may be prescribed.

45. Expert to be independent

No prospectus shall include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion, or in the management, of the company the subject of the prospectus or, in the case of asset backed securities, is not an originator or the securitisation arranger;

46. Expert's consent to issue of prospectus containing statement by him

A prospectus that includes a statement purporting to be made by an expert or to be based on a statement made by an expert shall not be issued unless

–

- (a) the expert has given, and has not before delivery of the prospectus for the approval of the Authority withdrawn, his written consent to the issue of the prospectus with the statement in the form and context in which it is included; and
- (b) there appears in the prospectus a statement that the expert has given and has not withdrawn his consent.

47. Power of Authority to require production of records and documents concerning listed companies or listed securities

(1) Where –

- (a) it appears to the Authority that there are circumstances suggesting that the business of a listed company or the activities or operations of any special purpose vehicle or the arrangements in respect of any securitisation transaction involving listed asset backed securities has been or is being conducted –
 - (i) with intent to defraud its creditors, or the creditors of another person or the creditors of any securitisation trust or special purpose vehicle or investors in any listed securities;
 - (ii) for a fraudulent or unlawful purpose;
 - (iii) in a manner oppressive to any of its members or to the investors in any listed securities;
- (b) it appears to the Authority that there are circumstances suggesting that a company or the special purpose vehicle was formed for a fraudulent or unlawful purpose;
- (c) it appears to the Authority that there are circumstances suggesting that the persons concerned with the formation of a company or the special purpose vehicle or the management of

- its affairs or the operation of a securitisation transaction have in relation to the formation, management or operation been guilty of fraud, misfeasance or other misconduct towards it or its members or the investors in any listed securities; or
- (d) it appears to the Authority that there are circumstances suggesting that the members of a company or investors in listed securities have not been given all the information with respect to its affairs that they might reasonably expect,

the Authority may give directions –

- (i) to the company;
- (ii) to a subsidiary of the company;
- (iii) to a company that is substantially under the control of the same person as is the company,
- (iv) any securitisation arranger, originator, servicer, trustee, securitisation manager, auditor or other party associated with a securitisation transaction or special purpose vehicle, or
- (v) any party associated with the issue, offer or listing of securities,

requiring it, at the time and place specified in the directions, to produce the records and documents specified in the directions.

- (2) The Authority may, when acting under subsection (1), authorize a person, on producing (if required to do so) evidence of his authority, to require a company or other person referred to in subsection (1) to produce to him records and documents specified by him.
- (3) Where the Authority or authorized person may require production of records and documents from a company or other person under this section, the Authority or authorized person may also require production of those records and documents from a person who appears to the Authority or authorized person to be in possession of them.
- (4) A power under this section to require a company or other person to produce records and documents includes the power –
- (a) if the records and documents are produced –
 - (i) to take copies of them or extracts from them; and

- (ii) to require that person, or any other person who is a present or past officer of the company, or is or was at any time employed by the company or other relevant person, to provide an explanation of any of them; or
 - (b) if the records and documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
- (5) In the interest of bank confidentiality, the powers in respect of any documents held by a bank shall be limited to making copies or extracts.

48. Remedy in cases of unfair prejudice by listed companies or in respect of listed securities

- (1) If it appears to the Authority from any information, record or other document obtained under this Act, or any other legislative power, that the affairs of a listed company or of any special purpose vehicle or other issuer of listed securities are being or have been conducted in a manner unfairly prejudicial to the interests of its members or the investors in the securities generally or of some part of the members or investors or other than in accordance with the terms of the transaction documentation and the law, the Authority may make an application to the Court for an order under this section.
- (2) If on an application under this section the Court is of the opinion that the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of its members generally or of some part of the members, whether or not the conduct consists of an isolated act or a series of acts, the Court may, with a view to bringing to an end the matters complained of –
 - (a) make an order restraining the carrying out of the act or conduct;
 - (b) order that the company shall bring in its name the proceedings the Court considers fit against the persons, on the terms, the Court orders;
 - (c) appoint a receiver or manager of the whole or a part of the company's property or business and may specify the powers and duties of the receiver or manager and fix his remuneration;
 - (d) make any other order it considers fit, whether for regulating the conduct of the company's affairs in future, or for the

purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

- (3) If on an application under this section the Court is of the opinion that the management and activities of a special purpose vehicle or of a securitisation transaction are not being conducted in accordance with the terms of the transaction documentation or the law, whether or not the conduct consists of an isolated act or a series of acts, the Court may, with a view to bringing to an end the matters complained of –
- (a) make an order restraining the carrying out of the act or conduct;
 - (b) order that the trustee shall bring such proceedings the Court considers fit against the persons, on the terms, the Court orders;
 - (c) change the trustee, appoint a receiver or manager of the trust and may specify the powers and duties of the receiver or manager and fix his remuneration;
 - (d) make any other order it considers fit, whether for regulating the conduct of the securitisation transaction or special purpose vehicle affairs in future, to recover assets or provide for compensation or otherwise to protect the interests of investors in the asset backed securities.
- (4) Where an order under this section makes an alteration in or an addition to the constitution of a company, the company shall not have power without the leave of the Court to make any further alteration in or addition to the constitution inconsistent with the order.

49. Power of Authority to issue directions to listed companies or in respect of listed securities

The Authority may, where it appears to the Authority that –

- (a) it is desirable for the protection of members or other holders of its securities or for investors in asset backed securities of other listed securities;
- (b) the listed company is in breach of its listing agreement;
- (c) the listed company person is contravening, has contravened or is about to contravene, or has failed to comply with any provision of

or requirement under this Act or rule of its listing exchange or, in purported compliance with any such provision or requirement, has furnished the Authority with information that is false, inaccurate or misleading;

- (d) there is a breach of the listing agreement in respect of any other securities, or
- (e) there has been a contravention or about to occur a contravention, or has failure to comply with any provision of or requirement under this Act or rule of the listing exchange for the securities or, in purported compliance with any such provision or requirement the issuer or other obligated party, has furnished the Authority with information that is false, inaccurate or misleading

the Authority may issue directions to the listed company or in the case of other listed securities to the responsible or relevant party –

- (i) to cease and desist from the breach;
- (ii) to do or not to do any matter as specified; or
- (iii) with regard to or for any other matter that the Authority considers necessary,

and the person shall comply with the direction.

PART VII TAKEOVERS

50. Takeover offers

- (1) In this Act, a "takeover offer" means an offer to acquire by or on behalf of a person ("the offeror") –
 - (a) all the shares, or all the shares of any class or classes, in a listed company ("the offeree company") other than shares which at the date of the offer are already held by the offeror or his nominees (voluntary takeover offer), or
 - (b) all of the remaining shares in the offeree company made to all other members of the offeree company as a result of the offeror acquiring effective control of the offeree company (mandatory takeover offer).
- (2) An offeror acquires "effective control", which requires him to make a mandatory takeover offer under subsection (1)(b), where he acquires shares in an offeree company which (together with shares already held by him or by any concert party) carry the right to exercise, or

control the exercise of, not less than [25%] of the rights attached to the voting shares of the offeree company.

51. Conduct of takeovers

- (1) The Authority may make regulations with respect to the making and conduct of takeover offers.
- (2) Without prejudice to the generality of subsection (1), the Authority may make regulations for or with respect to –
 - (a) the form and manner of offers;
 - (b) announcements;
 - (c) independent advice to shareholders;
 - (d) the obligations of directors;
 - (e) the standard of care and responsibility;
 - (f) the timing and content of documents;
 - (g) the offer timetable;
 - (h) restrictions on trading before and during the offer;
 - (i) mandatory offers;
 - (j) investigation of the conduct of stockbrokers, investment advisers, officers of the offeror and offeree companies and all other parties to the offer;
 - (k) directions by the Authority to any of the parties to the offer where the Authority considers it appropriate in the interests of fairness or equality of treatment; and
 - (l) the exemption from any of the requirements of this Act, or of any regulation made by the Authority under this Act, where the Authority considers it appropriate in the circumstances of a particular case.
- (3) No person shall make or pursue a takeover offer except under and in accordance with regulations made by the Authority under this section.

52. Contravention of takeover regulation

- (1) Where any person fails to comply with, observe or give effect to takeover regulations or any ruling made under the regulations (hereinafter referred to as the “defaulting person”), the Authority may take one or more of the following actions –
 - (a) direct the defaulting person to comply with, observe or give effect to any such provisions of the regulations or ruling;

- (b) impose a penalty not exceeding shillings [?] on the defaulting person;
 - (c) reprimand the defaulting person;
 - (d) direct a securities exchange to deprive the defaulting person access to the facilities of the exchange;
 - (e) where the defaulting person is a listed company, direct the securities exchange –
 - (i) to suspend trading in the securities of the company;
 - (ii) to suspend the listing of the company; or
 - (iii) to delist the company;
 - (f) where the defaulting person is a company that is not listed, direct any securities exchange to prohibit the listing of any of its securities; or
 - (g) direct a securities exchange to prohibit the defaulting person from engaging in transactions to be executed through the use of the facilities of the exchange.
- (2) The Authority shall give written notice to a defaulting person of its intention to take action under subsection (1) and shall give the defaulting person an opportunity to be heard prior to its taking such action.
- (3) The Court may, in a case where the Authority gives a direction under subsection (1) (a), on an application by the Authority, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the regulations or ruling.

PART VIII COLLECTIVE INVESTMENT SCHEMES

53. Collective investment schemes

- (1) In this Act "collective investment scheme" and "scheme" means, subject to the provisions of this section –
- (a) an investment company;
 - (b) a unit trust ;
 - (c) any other arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by

- becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income; or
- (d) any scheme that the Authority may deem to be a collective investment scheme for the purposes of this Act.
- (2) The arrangements referred to in subsection (1)(c) must be such that
- (a) the participants do not have day-to-day control over the management of the property of the scheme, whether or not they have the right to be consulted or to give directions;
- (b) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
- (c) the property in question is managed as a whole by or on behalf of the fund manager of the scheme;
- (3) The following are not collective investment schemes for the purposes of this Act–
- (a) arrangements operated by a person otherwise than by way of business;
- (b) arrangements involving not more than [50] participants;
- (c) asset backed securities or a securitisation trust;
- (d) arrangements the purpose of which is the provision of clearing services and which are operated by a person licensed for that purpose by the Authority;
- (e) contracts of insurance;
- (f) occupational pension schemes; and
- (g) an arrangement which is an arrangement, or is of a class or description of arrangements, specified by the Authority as not constituting a collective investment scheme by notice published in the Gazette.

54. Investment companies

In this Act an investment company is a collective investment scheme under which –

- (a) the property of the scheme belongs beneficially to, and is managed by or on behalf of, the company having as its primary object and business the investment of its funds in securities [or any other form of property]with the aim of spreading investment risk and giving its

members the benefit of the results of the management of those funds by or on behalf of that company; and

- (b) the rights of the participants are represented by shares in or securities of that company which –
 - (i) the participants are entitled to have redeemed or repurchased by or out of funds provided by that company; or
 - (ii) the company ensures can be sold by the participants on the securities market of a securities exchange.

55. Unit trusts

In this Act a unit trust is a collective investment scheme under which the property is held on trust for the participants and where –

- (a) the property of the scheme belongs beneficially to the participants and is managed on their behalf by a fund manager; and
- (b) the rights of the participants are represented by units in the scheme which the participants are entitled to have redeemed by, or out of moneys provided by, the fund manager.

56. Restrictions on promotion

No person shall –

- (a) issue or cause to be issued any advertisement inviting persons to become or offer to become participants in a collective investment scheme, or containing information calculated to lead directly or indirectly to persons becoming or offering to become, participants in such a scheme; or
- (b) advise or procure any person to become or offer to become a participant in such a scheme,

unless the collective investment scheme is authorized or recognized by the Authority under this Act.

57. Applications for authorization

- (1) An application to the Authority for an order declaring a scheme to be an authorized scheme shall be made jointly by the fund manager and the custodian of the scheme.
- (2) The application –
 - (a) shall be made in such manner as the Authority may prescribe;

- (b) shall contain or be accompanied by such information as the Authority may require for the purpose of determining the application;
 - (c) shall be accompanied by the prescribed fee.
- (3) At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it considers necessary.
 - (4) Information to be provided to the Authority under this section shall be in such form and verified in such manner as the Authority may direct.

58. Authorization orders

- (1) The Authority may, on an application made in accordance with section 57, and after being provided with all such information as it may require under that section, make an order declaring a collective investment scheme to be an authorized scheme for the purposes of this Act if –
 - (a) the scheme complies with the requirements of regulations made under section 69;
 - (b) the Authority has been provided with a copy of the formation documents, together with a certificate signed by an attorney to the effect that they comply with the requirements of such regulations; and
 - (c) the scheme satisfies the requirements of subsections (2) to (5).
- (2) The scheme shall have a separate fund manager (except where the Authority authorizes a self-managed investment company) and a custodian who shall be persons who are independent of each other.
- (3) The fund manager and the custodian shall each be regulated persons.
- (4) The name of the scheme shall not be undesirable or misleading.
- (5) The participants shall be entitled to have their units in the scheme redeemed in accordance with the scheme at a price related to the net value of the property to which the units relate and determined in accordance with the scheme; but a scheme shall be treated as complying with this subsection if it requires the fund manager to

ensure that a participant is able to sell his units on the securities market of a securities exchange.

- (6) An order declaring a collective investment scheme to be an authorized scheme may include such conditions as the Authority considers fit.

59. Property of collective investment schemes to be held by custodian

The property of every collective investment scheme shall be held by a custodian on behalf of the participants.

60. Changes of fund manager or custodian

- (1) The fund manager of a collective investment scheme shall give written notice to the Authority of any proposal to replace the custodian of the collective investment scheme.
- (2) The custodian of a collective investment scheme shall give written notice to the Authority of any proposal to replace the fund manager of the collective investment scheme.
- (3) Effect shall not be given to any such proposal unless the Authority has given its approval to the proposal.
- (4) The Authority shall approve or disapprove the proposal not later than one month from the date on which notice was given under subsection (1) or (2).
- (5) Neither the fund manager nor the custodian shall be replaced except by persons who satisfy the requirements of this Act.

61. Avoidance of exclusion subsections

Any provision in the formation documents of a collective investment scheme shall be null and void in so far as it would have the effect of exempting the fund manager or custodian from liability for any failure to exercise due care and diligence in the discharge of their functions in respect of the collective investment scheme.

62. Revocation of authorization

- (1) The Authority may revoke an authorization order made under section 58 if it determines –
 - (a) that any of the requirements for the granting of authorization are no longer satisfied;
 - (b) that it is undesirable in the interests of the participants or potential participants that the scheme should continue to be authorized; or
 - (c) without prejudice to subparagraph (b), that the fund manager or custodian of the scheme has contravened any provisions of this Act, of any regulation made under this Act or, in purported compliance with any such provision, has furnished the Authority with false, inaccurate or misleading information or has contravened any prohibition or requirement imposed under this Act.
- (2) For the purposes of subsection (1)(b), the Authority may take into account any matter relating to the scheme, the fund manager or custodian, a director or controller of the fund manager or custodian or any person employed by or associated with the fund manager or custodian in connection with the scheme.
- (3) The Authority may revoke an order declaring a scheme to be an authorized scheme at the request of the fund manager or custodian of the scheme; but it may refuse to do so if it considers that any matter concerning the scheme should be investigated as a preliminary to a decision on the question whether the order should be revoked or that revocation would not be in the interests of the participants.

63. Representations against revocation

- (1) Where the Authority proposes to revoke an order under section 62 otherwise than at the request of the fund manager or custodian of the scheme, it shall give the fund manager and custodian of the scheme written notice of its intention to do so, stating the reasons for which it proposes to act and giving particulars of the rights conferred by subsection (2).
- (2) A person on whom a notice is served under subsection (1) may within 21 days of the date of service make written representations to the Authority and, if desired, oral representations to the Authority.

- (3) The Authority shall have regard to any representations made in accordance with subsection (2) in determining whether to revoke the order.

64. Winding up

- (1) Where the Authority revokes its authorization of a collective investment scheme under section 62, the Authority may apply to the Court to appoint a person to wind up the collective investment scheme.
- (2) On an application made under this section the Court may make such orders as it sees fit.
- (3) The Authority shall give written notice of the making of an application under this section to the fund manager and custodian and shall take such steps as it considers appropriate for bringing the making of the application to the attention of the participants.

65. Application for recognition of foreign schemes

- (1) An application for an order under section 66 declaring a collective investment scheme to be a recognized collective investment scheme shall be made to the Authority jointly by the fund manager and the custodian of the scheme.
- (2) The application –
 - (a) shall be made in such a manner as the Authority may prescribe and shall be accompanied by the prescribed fee;
 - (b) shall contain the address of a place in Kenya for the service on the fund manager of notices or other documents required or authorized to be served on it under the Act; and
 - (c) shall contain or be accompanied by such information as the Authority may reasonably require for the purpose of determining the application.
- (3) At any time after receiving an application and before determining it, the Authority may direct the application to provide it with such further information as it considers necessary.

- (4) Different directions may be given, and different requirements imposed, in relation to different applications.
- (5) The Authority may require an applicant to present information that it is required to give under this section in such form and verified in such manner as the Authority may direct.

66. Recognition orders in relation to foreign schemes

- (1) The Authority may, on an application made in accordance with section 65, and after being provided with all such information as it may require under that section, make an order declaring an overseas collective investment scheme to be a recognized scheme for the purposes of this Act if –
 - (a) the scheme is managed in a country or territory outside Kenya;
 - (b) the scheme affords adequate protection to the participants;
 - (c) the scheme makes adequate provision for the matters dealt with by regulations made under section 69;
 - (d) the custodian of the collective investment scheme is –
 - (i) licensed by the Authority;
 - (ii) if not so licensed, is a fit and proper person to act as a custodian;
 - (e) the fund manager is not a regulated person he has an agent in Kenya who is a regulated person and has the power to act generally for the fund manager and to accept service of notices and other documents on its behalf; and
 - (f) the participants are entitled to have their units redeemed in accordance with the collective investment scheme at a price related to the net value of the property to which the units relate and determined in accordance with the scheme; but a collective investment scheme is to be treated as complying with this subsection if it requires the fund manager to ensure that a participant is able to sell his units on a regulated market.
- (2) An order declaring an overseas collective investment scheme to be a recognized scheme for the purposes of this Act may include such conditions as the Authority considers appropriate.

67. Revocation of recognition order

The Authority may revoke a recognition order made under section 66 if it appears to the Authority –

- (a) that the fund manager or custodian of the collective investment scheme has contravened a requirement imposed on it by or under this Act;
- (b) that the fund manager or custodian of the collective investment scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular;
- (c) that one or more of the requirements for the making of the order are no longer satisfied; or
- (d) that none of the subparagraphs (a) to (c) applies, but it is undesirable in the interests of participants or potential participants that the collective investment scheme should continue to be recognized.

68. Directions by Authority

- (1) If it appears to the Authority that –
 - (a) any requirement for the authorization or recognition of a collective investment scheme is no longer satisfied;
 - (b) the exercise of the power conferred by this section is desirable in the interest of participants or potential participants in the collective investment scheme; or
 - (c) the fund manager or custodian of the collective investment scheme has contravened any provision of this Act or, in purported compliance with any such provision, has furnished the Authority with false, inaccurate or misleading information, or has contravened any prohibition or requirement imposed under this Act,the Authority may give a direction under subsection (2).
- (2) A direction under this section may –
 - (a) require the fund manager of the collective investment scheme to cease the issue or redemption, or both the issue and the redemption, of units under the scheme on a date specified in the direction until such further date as is specified in that or another direction;
 - (b) require the fund manager and custodian of the scheme to wind it up by such date as is specified in the direction or, if no date is specified, as soon as is practicable.

69. Regulations for the establishment and operation of collective investment schemes

The Authority may make regulations for or with regard to –

- (a) applications for the authorization and recognition of collective investment schemes;
- (b) the criteria for and conditions of the authorization of collective investment schemes;
- (c) the constitution, management and operation of collective investment schemes;
- (d) the powers, duties, rights and liabilities of the fund manager and custodian of any such scheme;
- (e) the rights and duties of the participants in any such scheme;
- (f) the winding up of any such scheme;
- (g) the appointment, removal, powers and duties of an auditor for the scheme;
- (h) the expenses of the scheme and the means of meeting them;
- (i) the promotion, marketing and distribution of units;
- (j) the issue and redemption of units;
- (k) the valuation and pricing of units;
- (l) the provision of management or custodian services, or any other services for or in connection with a scheme;
- (m) restricting or regulating the investment and borrowing powers exercisable in relation to the scheme;
- (n) requiring the keeping of records with respect to the transactions and financial position of the scheme and for the inspection of those records;
- (o) requiring the preparation of periodical reports with respect to the scheme and the submission of those reports to the participants and to the Authority;
- (p) any fee, remuneration or reward payable or receivable for any services referred to in subsection (d);
- (q) amendment of the scheme; and
- (r) the exemption from any of the requirements of this Act, or of any regulation made under this Act, where the Authority considers it appropriate in the circumstances of a particular case.

PART IX INSIDER TRADING

70. Application of this Part

- (1) This Part applies only to listed securities and their derivatives.
- (2) For the purposes of this Part –
 - (a) “derivatives” means futures, contracts for differences and options in relation to listed securities; and
 - (b) “insider” means a person in possession of inside information.

71. Offence of insider trading

- (1) A person who is an insider commits the offence of insider trading if he deals in listed securities or their derivatives that are price-affected in relation to the information in his possession.
- (2) A person who is an insider also commits the offence of insider trading if –
 - (a) he encourages another person to deal in securities or their derivatives that are (whether or not that other person knows it) price-affected securities in relation to the information in the possession of the insider, knowing or having reasonable cause to believe that the trading would take place; or
 - (b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.
- (3) For the purposes of subsections (1) and (2), a person deals in securities or their derivatives if, whether as principal or agent, he sells, purchases, exchanges or subscribes for, any listed securities or their derivatives or acquires or disposes of, or agrees to acquire or dispose of, the right to sell, purchase, exchange or subscribe for, any listed securities or their derivatives
- (4) No contract shall be void or unenforceable by reason only of an offence under this section.

72. Inside information, etc.

- (1) For the purposes of this Part, "inside information" means information which –

- (a) relates to particular securities or to a particular issuer of securities and not to securities generally or to issuers of securities generally;
 - (b) has not been made public; and
 - (c) if it were made public would be likely to have a material effect on the price of any securities;
- (2) For the purposes of this Part, securities are "price-affected securities" in relation to inside information if and only if the information would, if made public, be likely to have a significant effect on the price of the securities.
- (3) For the purposes of this Part, information shall be treated as relating to an issuer of securities not only where it is about the company but also where it may affect the company's business prospects.

73. Information "made public"

- (1) For the purposes of section 72, "made public", in relation to information, shall be construed in accordance with the following provisions of this section, but these provisions are not exhaustive as to the meaning of that expression.
- (2) Information is made public if –
- (a) it is published in accordance with the rules of a securities exchange for the purpose of informing investors and their professional advisers;
 - (b) it is contained in records which by virtue of any enactment are open to inspection by the public;
 - (c) it can be readily acquired by those likely to deal in any securities –
 - (i) to which the information relates; or
 - (ii) of an issuer to which the information relates; or
 - (d) it is derived from information which has been made public.
- (3) Information may be treated as made public even though –
- (a) it can be acquired only by persons exercising diligence or expertise;
 - (b) it is communicated to a section of the public and not to the public at large;
 - (c) it can be acquired only by observation;

- (d) it is communicated only on payment of a fee; or
- (e) it is published only outside Kenya.

74. Penalty for offence of insider trading

A person who commits the offence of insider trading is liable on conviction –

- (a) on a first offence –
 - (i) in the case of an individual, to a fine of 2.5 million shillings or to imprisonment for [?] or to both;
 - (ii) in the case of a company, to a fine of 5 million shillings;
- (b) on any subsequent offence –
 - (i) in the case of an individual, to a fine of 5 million shillings or to imprisonment for [?] or to both;
 - (ii) in the case of a company, to a fine of 10 million shillings.

**PART X
OTHER MARKET ABUSES**

75. Market manipulation

- (1) A person commits an offence if he enters into or carries out, directly or indirectly, two or more transactions in the securities of a company, or in other listed securities, that by themselves or in conjunction with any other transaction –
 - (a) increase, or are likely to increase, their price with the intention of inducing another person to purchase, or subscribe for, or to refrain from selling, securities issued by the same company or a related company, or such other listed securities;
 - (b) reduce, or are likely to reduce, their price with the intention of inducing another person to sell, or to refrain from purchasing, securities issued by the same company or a related company, or such other listed securities; or
 - (c) stabilise, or are likely to stabilise, their price with the intention of inducing another person to sell, purchase, or subscribe for, or to refrain from selling, purchasing or subscribing for, securities issued by the same company or by a related company, or such other listed securities.

- (2) For the purposes of this section, “securities” includes futures contracts, and options on futures contracts, in connection with securities.

76. False trading and market rigging transactions

- (1) A person commits an offence if he creates, or does anything that is intended or likely to create, a false or misleading appearance –
- (a) of active trading in securities on the securities market of a securities exchange; or
 - (b) with respect to the market for, or the price for dealings in, securities traded on the securities market of a securities exchange.
- (2) Without limiting the general nature of what constitutes a false or misleading appearance of active trading under subsection (1), a false or misleading appearance of active trading in securities is created for the purpose of this section if a person –
- (a) enters into or carries out, directly or indirectly, any transaction for the sale or purchase of securities that does not involve a change in the beneficial ownership of the securities, or offers to do so;
 - (b) offers to sell securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to buy the same or substantially the same, number of them; or
 - (c) offers to buy the securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to sell the same or substantially the same, number of the securities.
- (3) For the purposes of this section, “securities” includes futures contracts, and options on futures contracts, in connection with securities.

77. Fraudulently inducing trading in securities

A person commits an offence if he induces or attempts to induce another person to subscribe for, sell or purchase securities –

- (a) by making or publishing any statement, promise or forecast that is false, misleading or deceptive;
- (b) by any concealment of material facts;
- (c) by the reckless making or publishing, dishonestly or otherwise, of any statement, promise or forecast that is misleading, false or deceptive; or
- (d) by recording or storing in, or by means of, any mechanical, electrical or other device, information that is false or misleading in a material particular.

78. Use of manipulative or deceptive devices

A person commits an offence if he, directly or indirectly, in connection with any transaction with any other person involving the subscription for, the purchase or sale of, securities –

- (a) uses any device, scheme or artifice to defraud that other person; or
- (b) engages in any act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, on that other person.
- (c) makes any untrue statement of a matter of fact, or omits to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

79. False or misleading statements inducing securities transactions

A person commits an offence if he, directly or indirectly, for the purpose of inducing the subscription for, sale or purchase of securities by others of any company, or of any other listed securities, or to maintain, increase, reduce or stabilise the price of such securities, makes with respect to those securities –

- (a) any statement which is, at the time and in light of the circumstances in which it is made, false or misleading with respect to any material fact and which he knows or ought reasonably to have known is false or misleading; or
- (b) any statement which is, by reason of the omission of a material fact, rendered false or misleading and which he knows or ought reasonably to have known is rendered false or misleading by reason of omission of that fact.

80. Liability to pay damages

- (1) A person who is convicted of an offence under this Part shall, in addition to criminal liability for the offence, be liable, at the suit of any person who has sustained pecuniary loss as a result of having purchased or sold securities at a price affected by the act or transaction which comprises or is the subject of the offence, to an action for damages in respect of the loss concerned.
- (2) Nothing in subsection (1) limits or diminishes any civil liability which any person may incur under any other Act or law.

81. Penalty for offences under this Part

A person who commits an offence under section 75, 76, 77, 78 or 79 is liable on conviction –

- (a) in the case of an individual, to a fine of shillings[?] or to imprisonment for [?] or to both;
- (b) in the case of a company, to a fine of shillings[?]

PART XI

ASSET BACKED SECURITISATION

82. Interpretation in respect of securitisation

In this Act–

“asset backed securities” means –

- (a) any securities excluding shares or entitlements under a collective investment scheme to which Part VIII applies but including promissory notes;
- (b) any rights or interests, debentures or certificates evidencing the legal, equitable or beneficial interest or entitlement of its holder to a share of the assets of a special purpose vehicle or to entitlement to payment from such assets where payments or distributions of capital, income, principal or interest to investors comes principally from assets of the special purpose vehicle as a consequence of the establishment or operation of a securitisation transaction; and
- (c) any other right, interest, instrument of security or class of securities prescribed to be asset backed securities;

“asset” means any asset or property whether moveable or immovable, tangible or intangible, financial or non-financial, including any rights, benefits or entitlements sold, transferred or to be transferred or assigned

by an originator or seller to an SPV or originated into an SPV, including where permitted by the law future assets, and includes any and all other assets, rights, benefits and entitlements in law or in equity of the SPV supporting the asset backed securities or the payment of any obligations or expenses in respect thereof or in respect of the SPV or the securitisation transaction and anything else prescribed to be an asset;

“investment grade” means a rating of BBB or its equivalent or a higher rating provided that where the rating is below BBB or its equivalent then the asset backed security or the party as the case may be shall be considered not to be investment grade;

“limited investor” means any qualified investor which is not –

- (a) a retirement benefit fund or pension fund formed or established under the laws of Kenya; or
- (b) an insurance company formed or established under the laws of Kenya, or a collective investment scheme formed or established under the laws of Kenya; or
- (c) any other person who is prescribed.

“limited restricted offer” means an issue or offer made only to a limited investor;

“obligor” means any person having an obligation to make a payment in relation to or connection with the assets sold, transferred or assigned to an SPV and may where permitted by law include persons having a future payment obligation;

“offer” in relation to asset backed securities, except where the context otherwise requires, includes sales or transfers of asset backed securities by the originator but shall not include the issue of asset backed securities to an originator or seller in exchange for or consideration for the sale, transfer or assignment of assets to the trustee for the purpose of establishing or maintaining the operation of the securitisation trust or in accordance with the transaction documents;

“offering memorandum” means any notice, circular, material, advertisement, publication or other invitation offering for subscription or purchase any asset backed securities in respect of restricted or limited restricted offers;

“originator” means any person or persons who directly or indirectly originates assets into an SPV or arranges for the acquisition or the sale, transfer or assignment of the assets previously owned by that person to the SPV and may where the context permits include a seller of the assets;

“qualified investor” means in relation to asset backed securities –

- (a) any originator or seller of the assets of the securitisation trust;
- (b) any professional investor as defined in section 38 (5);
- (c) a bank;
- (d) pension fund or retirement benefit fund;
- (e) a corporation or authority which meets the asset tests provided for in section 38 (5);
- (f) the Central Bank,
- (g) the Government, and
- (h) any person prescribed to be a qualified investor.

“restricted offer” means an issue or offer made only to a qualified investor;

“rating” means a public rating issued from time to time by a credit rating agency and where the context permits includes any subsequent review, update or modification;

“securitisation arranger” means a person, not being an employee of the originator or seller or who is acting solely in the capacity of a legal adviser or the auditor of the originator or the seller or who sponsors or assists in the formation of a securitisation trust, the preparation of the structure of a securitisation transaction, its financial or cash-flow models or of a prospectus or of an offering memorandum in respect of asset backed securities;

“securitisation manager” means any other person appointed by the trustee to assist in the administration of the assets or the management or operation of the securitisation transaction;

“securitisation transaction” means any transaction which involves the offer or issue of asset backed securities to any investor other than to a seller or originator and includes all the ancillary, incidental or related arrangements which are entered into in relation to, or in connection with,

the sale, transfer or assignment of assets, the appointment of a trustee, the establishment of a trust, the appointment of a servicer, the entering into of all and any arrangements necessary or desirable to provide any structural or credit support or manage risks or other arrangements to operate or give effect to the securitisation transaction or issue or offer of asset backed securities;

“securitisation trust” means a trust settled, formed or established to act as the SPV for a securitisation transaction;

“seller” means the person or persons who sells, assigns or transfers any assets into a SPV and who may be the originator of the assets;

“servicer” means the person appointed under the transaction documents to be primarily responsible for the day to day administration functions of cash flow of the securitised assets, the ongoing relationship with any obligor, the provision of service to obligors, cash management and the collection and remission of funds to the trustee and to conduct such other activities as are specified in the transaction documents, and includes any successor or alternative servicer from the time that such alternative servicer becomes primarily responsible as servicer and trustee if it undertakes those functions and may include a securitisation manager;

“special purpose vehicle” or “SPV” means a securitisation trust in respect of which are issued or an entity which issues asset backed securities which comply with the requirements of this Act;

“stop order” means an order made by the authority pursuant to section 95(3);

“transaction document” means the trust deed and such other documents as are prescribed by the regulations to be transaction documents;

“trustee” means the person appointed under the trust deed as trustee of the securitisation trust and any successor, and

“unrestricted offer” means any issue or offer which is not a restricted offer or a limited restricted offer.

83. Restrictions on issues, offers etc. of asset backed securities

- (1) No person shall issue, offer for subscription or purchase, or invite to subscribe for or purchase, either privately or publicly, asset backed securities to any person, except under and in accordance with the provisions of this Act.
- (2) No person shall act as an originator, seller, issuer, securitisation arranger, transaction adviser, trustee, securitisation manager or servicer of asset backed securities except in under and in accordance with the provisions of this Act.
- (3) No person shall act as an agent in the sale or purchase of asset backed securities unless he is a regulated person and otherwise complies with the provisions of this Act.
- (4) For the purposes of this Act, a person offers asset backed securities if he invites another to enter into an agreement for or with the view to subscribing or for or otherwise acquiring or underwriting any asset backed securities, or if he invites another person to make such an offer.
- (5) The provisions of this Act shall not operate to invalidate a securitisation transaction or any issue of asset backed securities or otherwise operate in such a manner as to adversely impact on the rights of the trustee or of investors in asset backed securities or their rights under any transaction documents.
- (6) No issue or offer of any asset backed security other than to a seller or originator shall be made to any person except pursuant to a prospectus or offering memorandum which complies with the provisions of this Act.
- (7) The Authority may prescribe the contents of a prospectus or offering memorandum which may vary depending on the classification of the issue or offer and the nature of the assets backing the securities or other factors

84. Issuer or offeror of asset backed securities

For the purposes of compliance with this Act the originator or seller of assets to a securitisation trust and any securitisation arranger and the

transaction adviser but not the trustee shall be deemed to be the offeror or issuer of asset backed securities.

85. Special purpose vehicle

The special purpose vehicle for a securitisation transaction shall be a trust established pursuant to a trust deed and subject to the laws of Kenya.

86. Form of asset backed securities to be issued or offered

- (1) Asset backed securities issued or offered shall consist of beneficial entitlements to a unit in, participation, share of or interest in assets of the trust established as the special purpose vehicle for the purposes of undertaking a securitisation transaction and issuing asset backed securities to investors who must be beneficiaries of the trust.
- (2) Different classes and or tranches of asset backed securities may be issued or offered reflecting beneficial entitlements with differing rights including, as to priorities of payments from the income or capital of the trust or to distribution of assets or as regards voting entitlements and provision may be made for a beneficiary to be entitled to a residual interest.

87. Nature of the assets that may be sold, transferred or assigned

Assets which may be originated into a securitisation trust or sold, transferred or assigned to the trust must –

- (a) generate or result in a cash flow;
- (b) not, at the time at which an issue or offer of asset backed securities is made, be encumbered to a third party, or
- (c) be capable of being legally originated or sold, transferred or assigned; and
- (d) otherwise comply with any regulation made under this Act.

88. Origination of assets for sale, transfer or assignment

- (1) It is the objective of this Act that, except to the extent provided for in any regulation, all securitisation transactions must involve either one or a combination of –
 - (a) the direct origination of the assets into the securitisation trust, or
 - (b) the sale, transfer or assignment of the assets to the trustee to be held under the terms of the securitisation trust in a manner

which constitutes a true sale according to the laws of Kenya in relation to the particular type of asset or the laws governing the transaction or the jurisdiction or location of the assets.

- (2) Assets may be transferred to a securitisation trust by more than one seller or originator;
- (3) Provided the sale, transfer or assignment of the asset is recognised as such by the appropriate law or laws governing the asset or assets then it is not necessary in order to achieve a true sale and to satisfy the requirements of this Act that off balance sheet treatment is achieved under accounting rules by the originator or the seller nor is it essential that capital relief be provided by any other regulator.
- (4) Except if provided for in a regulation in relation to specific assets or a specific securitisation transaction and subject to such conditions, if any, as the Authority may impose the sale, transfer or assignment shall be a legal and not an equitable sale, transfer or assignment of the asset or assets.
- (5) The failure to achieve a true sale shall not as a consequence of the operation of this Act operate to invalidate the sale, transfer or assignment, the issue or offer of asset backed securities or otherwise adversely affect the rights of the investors in the asset backed securities.

89. Trustees

- (1) A person shall not be appointed or accept appointment as the trustee of a securitisation trust unless that person is –
 - (i) company incorporated or a corporation established under the laws of Kenya;
 - (ii) a regulated person; and
 - (iii) complies with any regulations as are prescribed from time-to-time.
- (2) The role of the trustee in a securitisation transaction is not that of a mere custodian of the assets but extends to the management of the operation of the securitisation trust and the securitisation transaction in fiduciary capacity to give effect to the objectives and purposes of

the trust for the benefit of the beneficiaries in accordance with law and the transaction documentation.

- (3) The obligations of the trustee imposed by this Act are in addition to the fiduciary obligations of a trustee under the trust deed and the laws of Kenya.
- (4) All assets of the securitisation trusts are to be held by the trustee on trust for the investors in asset backed securities as the beneficiaries of the securitisation trust.
- (5) Except as specifically provided in the trust deed and to the extent that they relate to the implementation and operation of the securitisation trust and securitisation transaction, the preservation of the assets and the fulfilment by the trustee of its fiduciary obligations the assets of the securitisation trust shall not be available to the trustee or to any creditors of the trustee or to any other claimants against the trustee or to satisfy and liabilities of the trustee and shall not be included in the assets of the trustee in the event of the insolvency of the trustee or its winding up, being placed in administration dissolved or its amalgamation or restructuring.
- (6) The regulations may make provision as to the contents of trust deeds and to the roles and duties of the trustee and shall apply in addition to any obligations or duties imposed on a trustee by any other law.

90. Appointment of and liability for securitisation managers

- (1) The transaction documentation may provide for the appointment by the trustee of a securitisation manager to assist the trustee with the operation and management of the securitisation transaction and of the assets.
- (2) The appointment of a securitisation manager shall not operate to reduce or alleviate any obligor, seller, servicer or trustee of any of its obligations under the trust deed, the transaction documentation, this Act or under the laws of Kenya and where the trustee appoints a securitisation manager and delegates any functions then the trustee shall be and remain liable for any actions or omissions of the manager,

- (3) The Authority may prescribe regulations in relation to the securitisation manager and the role of a manager.

91. Securitisation arrangers

There is no mandatory requirement for the appointment of a securitisation arranger and where no arranger is appointed then the issuer will assume liability to the investors in the asset backed securities in respect of all matters relating to the structure, conduct of due diligence, the cash flow and financial modelling and the material in respect of such included in any prospectus or offering memorandum.

92. Servicers, alternative servicers and successor servicers

- (1) Subject to the provisions of this Act any company incorporated in or corporation established or registered in Kenya or Kenyan government body or authority in respect of which a prohibition order has not been made under section 101 and is still in force may be appointed as the servicer or alternative servicer in respect of a securitisation transaction.
- (2) Subject to the provisions of this Act a seller or an originator may be appointed to act as the servicer.
- (3) In the event that no servicer is appointed or the servicer has retired or been removed then the trustee or securitisation manager appointed by the trustee shall carry out the functions of the servicer until another servicer is appointed.
- (4) Where the proposed servicer is not rated or if rated is not rated as investment grade in respect of its own borrowings then the transaction documents in respect of the securitisation transaction shall identify and provide for the appointment of an alternative servicer which shall meet any criteria provided for in the regulations.
- (5) In addition to any contractual obligations which it may have under the transaction documents the servicer in conducting its role as servicer owes a fiduciary duty to the trustee and to the investors in the asset backed securities as beneficiaries of the securitisation trust.
- (6) Where any payments, including monies in respect of realisations or recoveries, in respect of any assets are not made directly to the

trustee or to a segregated account in the name of and under the control of the trustee then the servicer shall be obliged to remit any funds received to the trustee within a maximum of 3 working days of receipt.

- (7) The servicer shall provide timely access to such of obligor files, and other documents, records data, systems, software, documentation and personnel as may be required by trustee or any auditor to fulfil its obligations under the securitisation trust, the transaction.

93. Classification and requirements for issues or offers of asset backed securities

- (1) All issues or offers of asset backed securities shall fall into one of three offer classifications but may subject to compliance with the Act consist of a combination of issues or offers and or tranches of different classifications.
- (2) The offer classification shall be determined by the category of investor to whom the offer is made and the issue or offer shall be regulated under this Act according to the classification into which it falls.
- (3) An issue or offer may be classified as –
 - (a) an unrestricted offer;
 - (b) a restricted offer, or
 - (c) a limited restricted offer.
- (4) All offers which are not restricted offers or limited restricted offers shall be classified as an unrestricted offer and no issue or offer of asset backed securities shall be made to a person who is not the originator or seller of the assets or a qualified investor or limited investor unless the requirements of this Act in relation to unrestricted offers or the conversion to an unrestricted offer have been complied with.
- (5) Subject to the provisions of this Act, no person shall make an unrestricted offer of asset backed securities unless the issuer or offeror has submitted for approval to the Authority, and the Authority has approved, a prospectus which complies with this Act,

including the provisions of Part VI as they relate to asset backed securities and a prospectus.

- (6) The Authority shall not approve a prospectus in respect of an unrestricted offer unless the Authority is satisfied as to the existence of binding listing arrangements with a securities exchange.
- (7) An unrestricted issue or offer of asset backed securities may be made in conjunction with a restricted issue or offer or a limited restricted offer of asset backed securities provided that where more than one category of offer is made in conjunction with an unrestricted issue or offer then the offer in its entirety shall be subject to the approval of the Authority as provided for in subsection (5).
- (8) Subject to the provisions of this Act, no person shall make a -
 - (a) restricted offer of asset backed securities, unless the issuer or offeror has filed with the Authority an offering memorandum which complies with this Act and the Authority has not issued a stop order, or
 - (b) a limited restricted offer, unless the issuer or offeror has filed with the Authority an offering memorandum which complies with this Act.
- (9) The Authority shall not be liable to any action in damages suffered as a result of any prospectus approved by the Authority, or any offering memorandum lodged or filed with the Authority or in respect of the issue or failure to issue a stop order.
- (10) The Authority may make regulations in respect of issues or offers of asset backed securities and the requirements of the various classifications.

94. Conversion to restricted or unrestricted offer

A securitisation transaction that has been classified as a restricted offer or a limited restricted offer or any tranche or portion of an offer so classified may with the consent of the trustee and, where provided for in the transaction documents, with the consent of the investors in the asset backed securities, be converted to an unrestricted or a restricted offer by complying with the requirements specified in the regulations.

95. Content of prospectus or offering memorandum, Authority's power of approval and to issue stop order

- (1) Every prospectus or offering memorandum shall contain –
 - (a) all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of the securitisation transaction, the cash flows and the risks associated with investment in the asset backed securities; and
 - (b) in addition such other information and particulars, and comply with such other requirements, as may be prescribed.
- (2) The Authority may approve a prospectus only if it contains the information required by this Act provided that the approval of the prospectus shall not operate to waive, relive or reduce any obligation by any party to make a disclosure or provide any defence to any action under this Act or under any other law.
- (3) The Authority may within 21 days of the date of filing with the Authority issue a stop order in respect of an offering memorandum for a proposed issue or restricted offer of asset backed securities if it is of the opinion that the offering memorandum does not include the information required by this Act provided that the issue or failure to issue a stop order in respect of an offering memorandum shall not operate to waive, relive or reduce any obligation by any party to make a disclosure or provide any defence to any action under this act or under any other law.

96. Secondary sales or transfers of asset backed securities

All secondary sales or transfers of asset backed securities shall comply with the provisions of this Act and any Regulations made pursuant to the Act.

97. Additional liability, powers of Authority and remedies in respect of issues and offers of asset backed securities

- (1) A reference in this Act to a false, untrue, misleading or deceptive statement in a prospectus or to the omission of information or of a statement when applying in relation to or in connection with any securitisation transaction or any issue or offer of asset backed securities shall –

- (a) include any statement made in or any representation or warranty included in any prospectus or offering memorandum, transaction document or made to any credit rating agency in relation to or in connection with the rating of any asset backed securities or the review of such a rating and includes any omission;
 - (b) include any information, statement in or omission from the continuing disclosure obligations of this Act, and
 - (c) the person shall be liable for such statement or omission under sections 42 and 43 as if it were included in or omitted from the prospectus.
- (2) Where an issue or offer involves a restricted offer whether or not it is made in combination with, or is a tranche of, another issue or offer then sections 42, 43, 44, 45 and 46 apply to the offering memorandum as if it had been a prospectus.
- (3) The powers of the Authority contained in section 47 to require production of records and documents shall apply to restricted issues or in the same manner as if the asset backed securities had been listed.
- (4) The powers of the Authority contained in section 48 to make an application to Court in cases of unfair prejudice shall apply to restricted issues or offers in the same manner as if the asset backed securities had been listed.
- (5) The powers of the Authority contained in section 49 to issue directions shall apply to restricted issues or offers in the same manner as if the asset backed securities had been listed

98. Obligation to conduct due diligence and defence

- (1) The issuer, originator, seller and securitisation arranger and any transaction adviser in respect of any issue or offer of asset backed securities and any other party involved in or connected with the issue or offer or named as an expert in the prospectus or offering memorandum are obliged to conduct or cause to be conducted reasonable independent verification and due diligence in respect of

the assets, and the issue of the asset backed securities and all statements included in the prospectus and offering memorandum and the representations and warranties included in any transaction document.

- (2) A person shall not commit an offence under this Act and is not liable for a statement in or omission from a prospectus or offering memorandum or in respect of a representation or warranty in a transaction document if that person proves that prior to making such statement, omission representation or warranty they –
 - (a) made all inquiries, if any, that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that the statement, representation, warranty or omission was not misleading, deceptive or material.
- (3) The credit rating agency shall include prominently in any credit rating report issued in respect of asset backed securities details of the due diligence or verification of facts, data or assumptions or other information or statements, if any, that it has undertaken.
- (4) The Authority may prescribe by regulation requirements relating to verification or due diligence to be undertaken by any person.

99. Rating requirements and obligations of credit rating agencies

- (1) Where a rating is required under this Act it shall be the duty of the trustee to ensure that a rating is obtained and is maintained and to provide the rating agency with the necessary information for the purposes of maintaining the rating.
- (2) Any auditor, servicer or securitisation manager or other party to the securitisation transaction is obliged to provide such information as is necessary to enable the trustee to fulfil its obligations.
- (3) Credit rating agencies will comply with any requirements prescribed by the Authority in relation to asset backed securities.

100. Continuing disclosure obligations – general

- (1) In addition to complying with the requirements of section 44 as it applies to asset backed securities the servicer and trustee of any

securitisation trust whether the asset backed securities are listed or not, and any other specified or prescribed person, shall also comply with such further obligations and requirements as may be prescribed.

- (2) The continuing disclosure obligations provided for in this Part and as provided for in any regulations shall apply in addition to any disclosure requirements provided for in the transaction documents or the requirements of any listing body.

101. Authority may issue prohibition orders

- (1) Based on the prior performance of a party associated with a securitisation transaction the Authority may issue a prohibition order prohibiting or limiting such a person from subsequently selling, assigning or transferring assets to a securitisation trust or undertaking any roles in respect of a securitisation trust.
- (2) Any trustee, securitisation manager, servicer or securitisation arranger convicted of an offence under this Act shall be prohibited from action or being appointed to act in any such capacity in respect of a securitisation transaction for a period of not less than 3 years from the date of such conviction.
- (3) Failure by a servicer to remit funds as required by subsection 92(7) may constitute grounds for the Authority to issue a prohibition order.

102. Summary of transferred assets

- (1) Irrespective of the classification of the issue or offer of asset backed securities within 7 working days of the latter of the issue or offer of asset backed securities to a person other than a seller or originator or the sale, transfer or assignment of assets of assets to a securitisation trust the trustee shall file with the Authority –
 - (a) a summary of the assets transferred which discloses the nature of the assets, the number of assets transferred;
 - (b) details the consideration for the sale, transfer or assignment;
 - (c) details of the nature of the sale, transfer or assignment, and
 - (d) such other information as may be prescribed.
- (2) The purpose of the filing is to assist in guarding against fraud and to provide additional transparency and it is not intended that the filing will operate to effect the sale, transfer or assignment.

103. Maintenance of register of documents filed with the Authority and access

The Authority shall maintain a register of all documents required to be lodged or filed with it under this Act and except where otherwise provided the documents filed shall be readily available and accessible for public inspection on a timely basis.

104. Securitisation regulations

- (1) The Authority may make regulations for carrying out the purposes and provisions of this Part.
- (2) Without prejudice to the generality of subsection (1), the Authority may make regulations for or with respect to –
 - (a) applications for approval to issue or offer asset backed securities;
 - (b) inclusions in or exclusions from the definition of assets;
 - (c) when prior consent of another regulator is required is required in respect of the sale, transfer or assignment of assets or the participation in a securitisation transaction;
 - (d) the form or structure of special purpose vehicles and documentation requirements;
 - (e) the classification of issues or offers with respect to unrestricted, restricted or limited restricted issues or offers and the requirements to be met for each;
 - (f) the conversion of issues or offers from one classification to another;
 - (g) the issue of stop orders;
 - (h) the nature of assets that may be originated into a securitisation trust or be sold, transferred or assigned to a trust and the making of different regulations based on the type or characteristics of the asset or the specific transaction;
 - (i) the preparation of reports, accounts and financial statements;
 - (j) rating requirements and the obligations and liabilities of credit rating agencies;
 - (k) the registration of details of transfers of assets;
 - (l) the content of the prospectus or offering memorandum as the case may be to be published in connection with the issue or offer of asset backed securities and the requirements for supporting data and verification;

- (m) the initial, continuing and ongoing disclosure, audits and compliance statements and provision of data on the performance of assets;
- (n) civil liability regimes for offering memoranda and prospectus;
- (o) the filing of reports and information and inspection and copying of and access to such reports and information and fees payable in relation thereto;
- (p) the activities, appointment, removal, liability and regulation of securitisation arrangers, originators, sellers, servicers, trustees, securitisation managers, auditors and other parties involved in or associated with the promotion, management or operation of a securitisation transaction or proposed securitisation including the imposition of economic sanctions and the issuing of prohibition orders in respect of parties associated with securitisation transactions;
- (q) the rights of investors in asset backed securities and requirements for trust deeds and transaction documents including, the powers and obligations of trustees, the holding of meetings and voting rights and the obligations of other parties;
- (r) fees payable in respect of the making of any application or the filing, lodgement or inspection of any documents or reports filed or lodged with the Authority and in respect of the provision of copies of such documents and reports;
- (s) listing on a securities exchange;
- (t) the provision of data, including pricing, on post issuance trading;
- (u) takeover offers in respect of listed asset backed securities;
- (v) advertisements; and
- (w) all matters or things which by this Part are required or permitted to be prescribed or which are necessary or expedient to be prescribed to give effect to this Part and to the regulation of asset backed securities under this Act.

PART XII OFFENCES

105. Offences and penalties

- (1) Except where specific provision is made in this Act for the creation of offences and the imposition of penalties for such offences, a person who contravenes or fails to comply with any other provision of this Act commits an offence and is liable on conviction –
 - (a) in the case of an individual, to a fine not exceeding shillings [?] or imprisonment for a term not exceeding [?] or to both;
 - (b) in the case of a company, to a fine not exceeding shillings[?].
 - (c) in the case of a continuing offence, to a further fine not exceeding shillings [?] for every day or part thereof during which the offence continues after conviction.
- (2) Any person convicted of an offence under this Act may be ordered by the court to pay compensation to a person who suffers loss by reason of the offence and the compensation may be in addition to or in substitution for any other penalty or remedy available to the party.

PART XIII MISCELLANEOUS

106. Act to override other laws

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.