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REGULATING CROSS-BORDER SECURITIES ADVERTISEMENT IN THE COMESA REGION—SOME GAPS IN THE LAW

By Samamba, Lennox Trivedi*[1]

ABSTRACT

Foreign Portfolio Investment (FPI) flows to Sub-Saharan Africa—in form of listed equity—have been steadily increasing over the past decade.Despite this positive outlook, evidence shows that most equity funds for Sub-Saharan Africa are located in South Africa and restrict their investment to that jurisdiction. An efficient legal framework for efficient advertisement of securities across international border—a legal framework that facilitates cross-border advertisement of securities to a larger section of the investing community—could serve to increase the competitive edge of COMESA securities markets as they compete with other markets for portions of FPI inflows to Sub-Saharan Africa.An efficient legal framework for cross-border securities advertisement could also give a competitive edge to COMESA frontier securities markets against those markets which are located within South Africa—such as the Johannesburg Stock Exchange. The article examines the legal framework for the public distribution of securities across international borders so as establish whether or not it has provided adequate incentives for efficient advertisement of securities across international border and protection of investors. The research employs a doctrinal approach drawing upon both

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primary and secondary sources of data. The main finding of the research was that the legal framework for the public distribution of securities across international borders has not provided adequate incentives for efficient cross-border advertisement of securities and investor protection. In particular the article shows that (i) although the legal framework permits cross-border securities advertisements, it does not provide an international passport to multiple region-wide cross-border securities advertising thereby increasing costs for licensees and hindering the growth of cross-border securities advertisement, (ii) although the legal framework empowers the SEC to commence representative civil action for and on behalf of injured investors, the power of the SEC does not extend to causes of action arising in connection to securities advertisements thereby compromising investor protection.

I

1. INTRODUCTION

The object of this article is to examine the legal framework for public distribution of securities across international borders so as to establish whether or not it is efficient, and provides adequate incentives for effective protection of the interest of foreign investors who purchase the advertised securities on the strength of statements made in the advertisement.[2]The central premise of this article is that well-regulated cross-border securities advertisement serves to create demand for local securities in even larger, broader and deeper foreign markets. An argument is made that the cross-border securities purchases that may result of such advertisement are likely to increase cross-border trade in securities in the region. The article also argues that although it is desirable to increase cross-border trade in securities through cross-border securities advertisement, there is need to pitch this desire against the desire to protect the interests of one of the key players in cross-border trade in securities—the investor.

1.1.MEANING OF EFFICIENT LEGAL FRAMEWORK FOR CROSS-BORDER ADVERTISEMENT OF SECURITIES

A legal framework for advertisement of securities is efficient if it facilitates advertisement of securities to a larger section of the investing community locally and across international borders

[2]The edifice of this article is a segment of my PhD research work in law revolving around "Legal aspects of Cross-border Trade in Listed Securities in Eastern and Southern Africa'. The segment examines constraints relating to lack of an efficient legal framework for efficient advertisement of securities across international borders.

at minimum cost. The legal framework must also balance the desire to reach a wider and deeper pool of investors with the need to protect the interests of investors who purchase securities on the strength of securities advertisements.

II

2. BACKGROUND TO THE PROBLEM

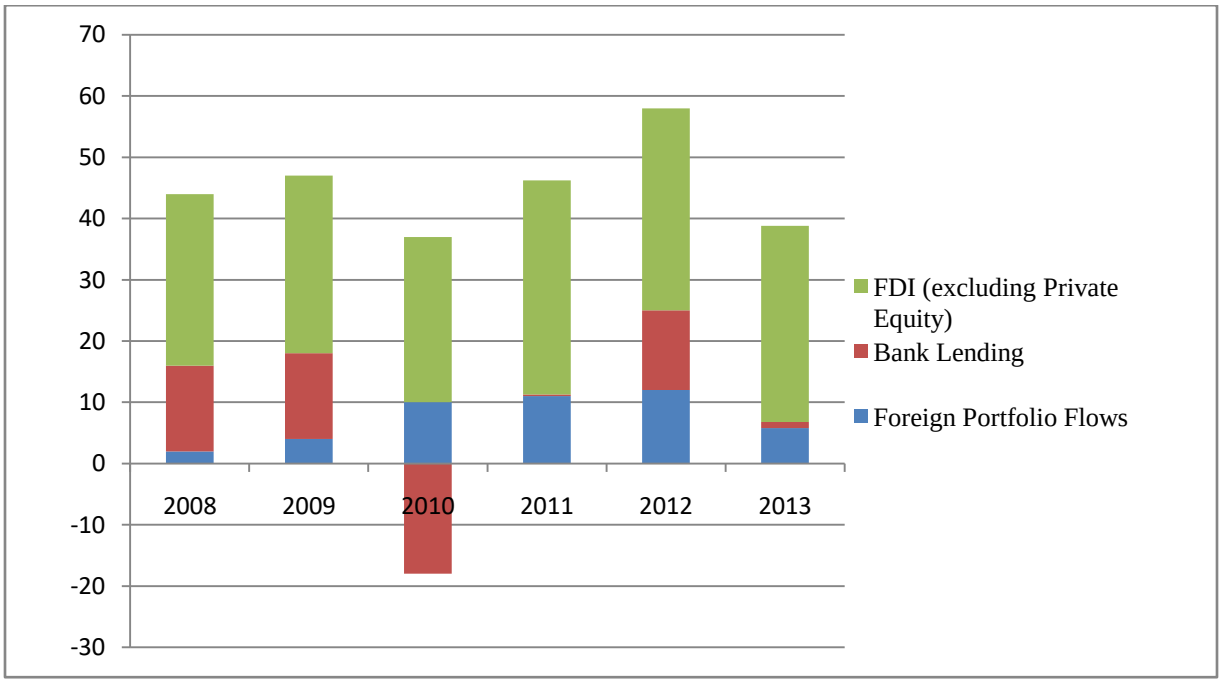
Empirical evidence shows that foreign portfolio investment flows to Sub-Saharan Africa—in form of listed equity—havebeen steadily increasing over the past decade.As can be seen from **Graph 1** below, for the period under consideration (2008—2013), FDI inflow has been relatively stable making for the major source of international private capital for Sub-Saharan Africa bringing in USD 183.65 billion or 65.74% of the total international private capital flows for the period under consideration.

In contrast to the FDI impressive trend, bank lending fell in 2010. Though it has contrived to toll the post-2010 line, it still has lost its second place to FPI since 2010. Bank lending attracted USD 42.2 billion or 15.1% of the total cross-border private capital flows to the region during the period under consideration.

In contrast to bank lending, foreign portfolio flows—comprising bonds, listed private equity and private equity (unlisted)—have been phenomenal in their steady growth over the period under consideration. They have risen from about USD 1.5 billion in 2008 to USD 53.5 billion at the close of the period in 2013. This growth accounts for 19.15% of the total international private capital flows to Sub-Saharan Africa in the period under consideration.

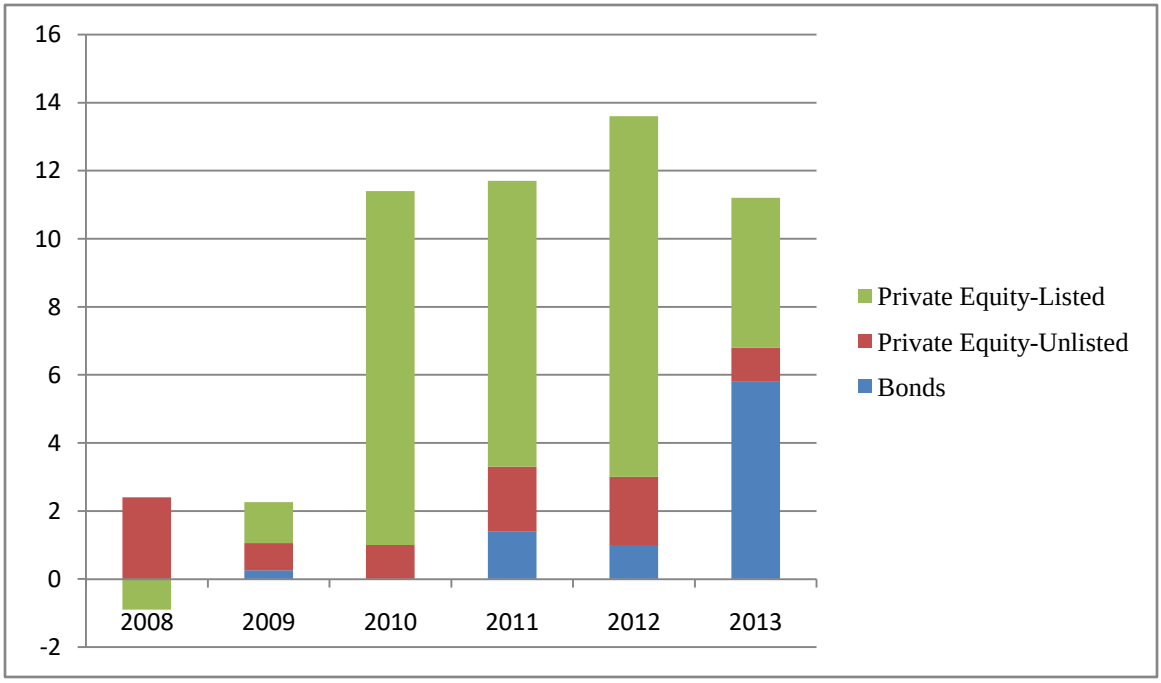
This tremendous growth has propelled foreign portfolio flows into the rank of the second-major source of international private capital in the region, the place previously occupied by bank lending until 2010. As can be collected from **Graph 2** below, of the portfolio inflows total (USD 53.5 billion) listed private equity accounted for USD 34.3 billion or 64.1% of the total portfolio flows to the region. Private equity raked in USD 10.2 billion or 19.06% of the total, while bonds brought in USD 9.0 billion or 16.82% of the total.

Graph 1: Net Private Capital Flows to Sub-Saharan Africa (USD Billions) (2008—13).



Source: International Monetary Fund, World Economic Outlook Database, 2014.

Graph 2: Net Portfolio Flows to Sub-Saharan Africa (USD Billions) (2008—2013)



Source: International Monetary Fund, World Economic Outlook Database, 2014.

Despite this positive outlook, evidence shows that most equity funds for Sub-Saharan Africa are located in South Africa and restrict their investment to that jurisdiction.[3]The article argues that an efficient legal framework for efficient advertisement of securities across international borders in the region could serve to sharpen the competitive edge of Eastern and Southern African securities market as they compete with other markets in Sub-Saharan Africa for portions of FPI inflows to Sub-Saharan Africa.[4]An argument is also made that an efficient legal framework for cross-border securities advertisement could also give a competitive edge to COMESA frontier securities markets against those markets which are located within South Africa—such as the Johannesburg Stock Exchange. Regrettably, the in-force legal framework for the advertisement of securities across international borders—the Securities (Advertisement Rules)—were made under the repealed Securities Act of 1993 which Act of Parliament was overly inward-focused. The enactment of the Securities Act of 1993 and rules thereunder made, was driven by Governmental desire to fulfil the International Monetary Fund and World Bank restructuring programme. Consequently out-focused concepts like cross-border advertisement and trade in securities could not receive thoughtful consideration.

2.1. STATEMENT OF THE PROBLEM

In light of the background to the problem under investigation, the statement of the problem may be made as follows:

"Has the legal framework for the public distribution of securities across international borders provided adequate incentives for efficient cross-border advertisement of securities and investor protection?"

[3] See, Samamba, Lennox Trivedi, 'Legal Constraints on the Growth of Cross-border Cross-listings in COMESA Region—The Case of Zambia,' African Law Journal, 4thEdn, Vol. 4, 2018

[4] For further suggestions for strategies for increasing the attractiveness of COMESA Frontier Securities Markets in this regard, see, (i) Samamba, Lennox Trivedi, 'Eastern and Southern Frontier Stock Markets: A Case for their Attractiveness and Growth Potential,' African Law Journal, 3rdEdn, Vol. 3, 2017, (ii)Samamba, Lennox Trivedi, 'Strategies for Increasing Liquidity of Eastern and Southern African Stock Markets,' African Law Journal, 3rd Edn, Vol. 3, 2017, and (iii) Samamba, Lennox Trivedi, 'Enhancing the Attractiveness of Eastern and Southern African Stock Markets Through Demutualization,' African Law Journal,' 3rdEdn, Vol. 3, 2017.

III
METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach to evaluating legal rules. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling. Both primary and secondary sources of date were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal framework for the public distribution of securities across international borders has provided adequate incentives for efficient cross-border advertisement of securities and investor protection. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.

The research questions used were:

a) Does the law permit cross-border securities advertisement?

b) Does the law provide for an international passport to multiple region-wide cross-border securities advertising?

c) Does the law provide for SEC's representative civil actions for and on behalf of injured investors?

d) Does SEC's representative action power cover causes in action relating to traditional securities advertisements?

IV
RESULTS

The results of the study may be summarised in tabular form as follows:

QUESTION	**ANSWER**	
	National Law	**Regional Law**
1. Does the law permit cross-border securities advertisement?	YES	YES
2. Does the law provide an international passport to multiple region-wide cross-border advertising?	NO	NO
3. Does the law empower SEC to commence representative civil action for and on behalf of investors?	YES	N/A
4. Does SEC's representative action power cover causes of action relating to traditional securities advertisements?	NO	NO

NOTE: N/A stands for 'Not Applicable'

V

5. DISCUSSION

The central premise of this sub-section is that well-regulated securities advertising is likely to contribute to the growth of the local and cross-border market segment consisting in investors who may otherwise not know of the investment opportunities available in respect of the advertised securities. An argument is made that the resulting growth in the foreign segment of the market is likely to stimulate growth in cross-border trade in securities in the region.

5.1. THE LEGAL CHARACTER OF SECURITIES ADVERTISEMENTS

The term 'advertisement' has not been defined in the Securities Act 2016 nor the Companies Act 1994 nor the Banking and Financial Services Act 1994.[5] A definition of the term is found in the Securities (Advertisements) Rules 1993 made under the repealed Securities Act of 1993[6]. Thus, 'advertisement' includes every form of advertising, whether in a publication,brochure or hand-out, or by the display of notices or by means of circulars or other documents, or by an exhibition of pictures or photographic or cinematographic films or videos, or by way of sound broadcasting or television or by the distribution of recordings or in any other manner.[7] Securities advertisement is defined as advertisement for or relating to securities or securities business.[8]

All commercial advertisements of subscribable or tradable securities are made with sole objective of enhancing chances of subscribing for or trading in the advertised securities. They are essentially invitations to the public to hold it; an issuer or allottee need not advertise the securities which they do not want to sell or to have taken up by subscribers. To this end, Rule 3 of the Schedule to the Securities (Advertisement) Rules 1993 provides that:

"The terms of a securities advertisement and the manner of itspresentation shall be such that it appears to be an advertisement [issued with the object of promoting the securities, securities business or licensee to which it relates]."[9]

On the legal character of advertisements in circulars, periodicals, newspapers, et cetera, Lord Parker in Partridge vs Crittenden[10], observes: "I think that if one is dealing with advertisements and circulars, unless indeed they come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale."[11]

[5] By section 5 of the Securities Act 2016, words and expressions used in the Securities Act but not defined therein are to assume meanings assigned to them in the Companies Act or the Banking and Financial Services Act.
[6] A Statutory Instrument made under a repealed statute continues in force until repealed by the successor Parent Act or subsequent statutory instrument: See, section 15 of the Zambian Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.
[7] See, definition of the term in Rule 2 of the Securities (Advertisements) Rules, Statutory Instrument No. 166 of 1993. This definition is broad enough to ensure effective regulation of securities advertising.
[8] See, definition of the term in Rule 2 of the Securities (Advertisements) Rules 1993
[9] Rule 3(1) of the Schedule to the Securities (Advertisement) Rules 1993
[10] [1968] 2 ALL ER 421
[11] Ibid, at pp. 431-7

Thus, a company inviting the public through a securities advertisement to subscribe for its shares does not make an 'offer' to the public to hold it. That is an invitation to treat—an invitation for offers—and the company can accept or reject offers at its discretion.[12]

In Canada, there is judicial authority to the effect that an advertisement designed to accomplish the purpose designed to be served by prospectuses in the Companies Act is a prospectus.[13] Similarly, in India, the High Court of Calcutta has held that even if a prospectus in not issued but an advertisement is run in a newspaper inviting the public to subscribe for shares or debentures in a company, such an advertisement is a prospectus.[14] Thus, these authorities seem to suggest that where an advertisement for securities in run in the media or other medium, and the Securities and Exchange Commission gathers that the advert is essentially defined to achieve the object of a prospectus, it may issue a directive directing the issuer or its agent to comply with the prospectus requirements over and above those relating to ordinary advertisements under the Securities (Advertisement) Rules 1993.[15]

5.1.1.REQUIREMENTS OF A COMPLIANT SECURITIES ADVERTISEMENT

It is an offence to issue a securities advertisement in Zambian or elsewhere that does not comply with the requirements of the Schedule to the Securities (Advertisement) Rules 1993 punishable upon summary conviction of the offender to a fine not exceeding one hundred thousandpenalty units.[16]The said Schedule prescribes benchmarks for a compliant securities advertisement with the underlying object of ensuring that the advertisement is not misunderstood.[17]

The Prescribed Benchmarks for Compliant Securities Advertisements

Some of the main benchmarks prescribed for compliant securities advertise are:[18]

a) The content of a securities advertisement and the manner of its presentation shall be such that the advertisement is not likely to be misunderstood;

[12]Hebb's Case (1867) L.R. Eq. 9; Harri's Case (1872) L.R. 7 Ch. App. 587
[13]R vs Garvin (in re), (1909) 18 OLR 49, 53-56
[14]PramathNathSanyalvs Kali Kumar Dutta, AIR 1925, Cal. 714
[15] See, Section 214(3)(a)(4)(a) of the Securities Act 2016 and Rule 6(2)(b) of the Securities (Advertisement) Rules 1993
[16] Rules5 and 8 of the Securities (Advertisement) Rules 1993
[17] Rule 2(1) of the Schedule to the Securities (Advertisement) Rules 1993
[18] See, the Schedule referred to in Rule 5 of the Securities (Advertisement) Rules 1993

b) A securities advertisement shall not contain any statement, promise or forecast that is misleading. The licensee making the advertisement has a duty to take all reasonable steps to ensure the information contained in the advertisement, as aforesaid, is not misleading;

Civil Remedies for Breach of the Duty to take reasonable Steps to Avoid Making Misleading Statements in 'Prospectus'Securities Advertisements

Where a securities advertisement takes the form of a prospectus or is simply designed to achieve the object of a prospectus, a person who purchases securities on the strength of the misleading statements made in the advertisement may invoke the civil liability provisions under Part XV of the Securities Act 2016—since it is a prospectus in the eyes of the courts. Thus, a purchaser of securitiesdistributed under a prospectus has a right of action for damages for any loss or damage sustained by reason of a misrepresentation in the prospectus. In that case, the following shall be liable for any loss or damage:

(i) the issuer or the securities holder, selling securities, on whose behalf the distribution is made;

(ii) a person who is a director of the issuer at the time offiling of the prospectus;

(iii) a person who is authorised, or is named in, the prospectusas a director or as having agreed to become a director,either immediately or after a specified time;

(iv) where the issuer is not a reporting issuer prior to thedistribution, any person who was a promoter of the issuerwithin the twenty-four month period immediatelypreceding the date of filing of the prospectus;

(v) a person whose consent has been obtained to include arepresentation made by the person with respect to amisrepresentation in a prospectus derived from, or basedon, reports, opinions, valuations or statements that havebeen made by such person; and

(vi) any other person who signed a certificate in the prospectus,other than a person referred to in paragraphs (i) to (v) above.

However, if the advertisement is a traditional one—that is one that does not amount to a prospectus nor is not designed to serve the purpose of a prospectus, the injured person may take action of deceit only against the licensed person making the advertisement. Where the licensed

person has caused the advertisement to be issued by another person and any person acting on it suffers loss, that other person may be sued also.[19]

(c) A securities advertisement shall not contain any statement, purporting to be a statement of fact unless the licensee issuing it reasonably believes at the time, on the basis of evidence of which he has a record in his possession, to be true;

This requirement is an embodiment of the rule in Derry vs Peek[20] and relates to the requirement of proof of fraud before an action of deceit can succeed. The rule in Derry vs Peek holds that 'if the false statementis made with the honest belief that it is true, it is not fraudulent, and does not give ground for action of deceit.[21]

(d) The terms of a securities advertisement and the manner of its presentation shall be such that it appears to be an advertisement issued with the object of promoting the securities, securities business or licensee to which it relates;[22]

(e) Where the medium in which the advertisement is carried contains or presents other matter the advertisement shall be distinguished from that other matter so that the part that is an advertisement clearly appears as such;

(f) Except in the case of a short form advertisement or an image advertisement, the nature of the securities or securities business to which the advertisement relates shall be clearly described;

(g) A securities advertisement shall not be issued with the intention ofpersuading persons who respond to the advertisement to pursue agreements, or use business services of other description than the one mentioned in the advertisement;

(h) A securities advertisement shall not contain any matter that states orimplies that the securities or securities business which is the subject of theadvertisement or any matter in the advertisement has the approval of anyGovernment department or of the Commission.

[19] The law requires that only licensed persons—dealers, investment advisors and their representatives, participants and clearing and settlement agencies—issue or cause other persons to issue securities advertisements: Rule 3 of the Securities (Advertisement) Rules 1993. The only exception to this requirement are securities advertisements run by the Zambian Government or Central Bank or a foreign Government or Central Bank: Rule 4(a)(b) of the Securities (Advertisement) Rules 1993

[20] Derry vs Peek (1889) 14 App Cas 337, HL

[21] A false statement is made fraudulently if it is made knowingly, or without belief in its truth or recklessly, without caring whether it is true or false: *Derry vs Peek*

[22] This character would in effect satisfy the requirement that the false and fraudulent statement be the inducement for subscription or purchase of the advertised securities. The other requirements are (i) that the statement be false, (ii) that the false statement be made fraudulently, and (iv) loss suffered by the injured person as a result of subscription or purchase of advertised securities: *Derry vs Peek*

5.2. CONSTRAINTS RELATING TO LACK OF ADEQUATE PROVISIONS ON REGULATION OF CROSS-BORDER SECURITIES ADVERTISEMENTS

A number of gaps in the legal framework for the regulation of cross-border securities advertisement have been identified as legal constraints on the effective regulation securities advertisements made across international borders in the region. The following subsections discuss these constraints, in turn.

5.2.1. CONSTRAINTS RELATING TO LACK OF PENALTIES FOR NON-REGISTRATION OF SECURITIES ADVERTS BY OTHER ISSUERS THAN PUBLIC COMPANIES

Although the obligation to register publicly advertised securities goes to issuers generally, the penalty for breach of the obligation is only stipulated in relation to public companies. Thus, a public company which directly or indirectly advertises, promotes or offers for sale to the public its securities without registering them with the SEC commits an offence.[23] On conviction the public company is liable a fine not exceeding two hundred thousand penalty units.[24]

There is no penalty prescribed in respect of breach by a private company or any other style of issuer for that matter.[25]A question may be asked, 'in the event that a private company or any other style of issuer directly or indirectly advertises its securities to the public in violation of the requirement to register the securities with the SEC, what penalty would fall onto them?'[26] Would

[23] Sections 75(1)(3) of the Securities Act 2016
[24] Ibid
[25] It should be noted in this regard that the restriction imposed by Companies Act on the nature of companies that could make invitations to the public only prevents private companies from making invitation to the public in respect of share, stocks, equity shares and debentures: section 122(1)(a)(3)(a)(i) and (4) of the Zambian Companies Act 1994. The offence for breach of section 122 of the Companies Act as stipulated in subsection (8) thereof should be construed as limited to invitation to the public by private companies and other issuers in relation to shares, equity shares and debentures and no more. In face of a new host of new kinds of securities introduced by the definition of 'securities' in section 2 of the Zambian Securities Act 2016, it would be open to a private company or any other issuer for that matter to issue [only] the newly introduced securities (other than shares, stock and debentures) as a way of evading the requirements of the Companies Act. The administrative penalties under section 218 of the Securities Act 2016 cannot apply either because their quantum and applicability depends on the existence and quantum of the fine as imposed by the Act. Absent that, it cannot apply: see section 218(2)(b)(c) of the Securities Act 2016 as read in light of Article 18(8) of the Zambian Constitution.
[26] There are two statutory obligations on issuers and licensees, respectively, in respect of which criminal sanctions have been prescribed in the event of breach. These are the obligation to register a securities advertisement, and the obligation to comply with the prescribed format for a securities advertisement. The former is addressed only in respect of 'public companies' to the exclusion of all other styles of eligible forms of issuers and licensees: See, section 75(1)(3)(a) of the Securities Act 2016. Regarding the latter obligation—the obligation to comply with the

it not be open to the private company issuer or any other issuer for that matter, to argue that in terms of Article 18(8) of the Zambian Constitution a person cannot suffer a penalty which is not expressly provided for a stipulated crime or stipulated in respect of a defined class of persons?' We think the answer is tilted in the affirmative given the clear distinction between a 'public company' and a 'private company' under Division 2.2 of the Companies Act 1994.[27]

Private companies limited by shares and other entities may make invitations to the public to acquire securities in these entities provided the invitation is supervised by the court.[28] This possibility is also reflected in section 75(1) of the Securities Act 2016.[29]Thus, they may evade the provisions of Division 6.2 of the Companies Act 1994 and avoid the consequences of breach of the same. This may be achieved by simply issuing other kinds of securities than shares, stock, equity shares and debentures.

Since registration of registrable securities is critical to subsequent listing and on-market trading of securities, such a weakness in the law is likely to encourage non-compliant securities advertisements by private companies and other issuers than public companies. It is also likely to encourage off-market sales and discourage listing of securities on securities exchanges.[30]

As a possible solution to this shortcoming, proposals are made for the introduction of a new section 75A into Part VIII of the Securities Act 2016. The following is the proposed section:

s. 75A(1). A person who directly or indirectly promotes or, advertises or, offers for sale registrable securities to the public in contravention of section

prescribed securities advertisement format—has been broadly addressed in respect of 'persons' as opposed to a single style of issuers—public companies—as is the case under the former obligation—the obligation to register a securities advertisement with the SEC: See, section 214(6) of the Securities Act 2016, Rules 5 and 8 of the Securities (Advertisement) Rules 1993. What action could SEC met out against a licensee of a style other than a public company who fails or neglects to register a securities advertisement which complies with the prescribed format for securities advertisements under the Securities (Advertisement) Rules,1993. As a possible solution to this shortcoming, proposals are made for imposition of the obligation to register securities advertisement on all forma of licensees and their agents.

[27] See sections 5 of the Securities Act 2016, and 13(a) and (b) Companies Act 1994

[28] Section 122(2)(b) of the Companies Act 1994

[29] Note the use of 'a person' as opposed to 'public company' or simply 'company' therein

[30] See sections 75(5), 78, 79(1) and 80(1)(2) of the Securities Act 2016. Why should there be a penalty for off-market sales of registered registrable securities and no such penalties for off-market sales of un-registered registrable securities? Would that not amount to putting a premium on breach of regulatory rules with inevitable end of encouraging non-compliance with regulatory rules?

75 and the securities are not guaranteed by Government or exempted from compliance in accordance with the Act, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand penalty units;

(2). Notwithstanding the provisions of sub-section (1), the Commission may impose exemplary administrative in accordance with section 218.

It would also be helpful to ensure that the obligation to register securities statements with the Zambian SEC is imposed on issuers, allottees and subsequent holders of securities. Such a measure is likely to ensure allottees or subsequent holders who wish to advertise their securities positions for sale to the public do so provided they register their securities with SEC prior to their advertisement. This could be achieved by repealing and replacing section 75(1) of the Zambian Securities Act 2016 with the new section 75(1) as follows:

"An issuer or allottee or subsequent holder of securities or its representative shall filewith the Commission, a statement, in the prescribed form, for the registration of the securities it proposes to issue or sell to the public in Zambia,which shall be accompanied by the prescribed fee, and such registration shall be valid for such period as may be prescribed."

An argument is made that such a provision is likely to ensure well-regulated advertisement of securities and facilitate a wider market for subscription for securities or subsequent secondary trading. A corollary argument is made the resulting growth in the cross-border market for subscriptions and subsequent purchases of securities, is likely to increase cross-border trade in securities in the region.

There is also need to seal the loophole relating to the possibility of public advertisements of securities by private companies and other issuers without the necessity of court supervision by way of issue of other securities than shares, stock and debentures. The words 'shares' and 'company' as used in section 122(1) or any other part of Division 6.2 of the Companies Act 1994 should be replaced with the words 'securities' and 'entity', respectively, so that the section reads as follows:

s. 122(1). A person shall not an invitation to the public to acquire

securities in the **entity**unless—

(a). the **entity** is a public company, or

(b). the invitation is supervised by the court.

Such provisions will not only allow private companies and other entities to raise capital from the public but also make them subject to registration requirements and securities advertisement regulations and penalties for breach.[31] The raising of capital from the public results in issue of more securities out of the issuer. Thus subsequent listing of the issuer is likely to increase the supply of securities to listing exchange thereby increasing its capitalization and liquidity.

5.2.2. CONSTRAINTS RELATING TO THE LIMITED SCOPE OF SEC'S POWER TO COMMENCE REPRESENTATIVE CIVIL ACTIONS

It has been established above that the underlying object securities advertisement is to persuade investors to subscribe for or purchase the advertised securities. An argument is, however, made that response to those securities advertisements—participation of investors on a securities market—by rational investors is partly influenced by effective enforcement of regulatory rules against market participants who commit market misconduct.[32]

Regulatory rules are likely to be breached if they are perceived to be too weak or where the regulator is perceived to lack capacity to effectively enforce them. It is also the case where the regulator or market players are perceived to condone certain market conduct. Violations are also likely where the market regulator or a certain class or category of investors or issuers are perceived as unable to commence actions against certain classes of market misconduct.

With the underlying objective of dispelling the perception of laxity in the enforcement of regulatory rules for securities markets, the Zambian SEC has the right to bring representative

[31] See sections 122(8), 124(1)(a)-(c), 129(1)(2) and 130(1) of the Companies Act 1994, and the proposed section 75A of the Securities Act and the Securities (Advertisements) Rules 1993—made under the repealed Securities Act of 1993

[32] Market misconduct is defined as " (a)the use or disclosure of price-sensitive information contrary to this Act, (b) engaging in improper trading practices as provided in Part XVIII, (c) failure to comply with any provision of this Act, and (d)a conviction of an offence under this Act": See, the definition of the phrase in section 2 of the Zambian Securities Act 2016

civil actions in the name of, and on behalf of investors who have failed or are unable to commence action.[33] Thus the SEC may, with leave of the High Court, bring such representative civil actions provided three conditions are met, namely:

(i) the Commission has reasonable grounds for believing that a cause of action exists under Part XV of the Securities Act 2016;
(ii) the issuer or securities holder has failed or is unable to commence an action; and
(iii) the Commission has given sixty days written notice to the issuer or securities holder who has refused or failed to commence an action;[34]

Where the perpetrator is sophisticated, small and medium scale and individual investors may not have the same capacity as institutional investors to get to the bottom of the activities of the perpetrator. Thus, the former category may not gather enough information about the activities of the perpetrator for the purpose of a case worth taking to the Capital Markets Tribunal. Geographical location and the biting cost of cross-border litigation may also work an added disadvantage to small and medium scale individual investors. Thus, such representative civil actions are heaven send for this category of issuers and investors.

In addition to the right to bring representative actions on behalf of investors, the SEC has also the right of intervention in cases where security holders do commence civil recovery actions.[35]This is exercisable in circumstances where the intervention of the SEC is necessary to realize the end of justice. For instance, documents and records relevant to the case of an injured investor may be in the custody of foreign branches of the respondent. In such cases, the applicant or plaintiff may not be possessed of adequate means to gather the required information. Thus, the intervening SEC could use its foreign relations with foreign regulators and request an investigation on its behalf. The foreign regulators may respond by invoking their power to act in support of foreign

[33]Section 175(1) of the Zambian Securities Act 2016
[34] See, section 175(1)(a)(b)(c) of the Securities Act 2016
[35]Section 175(2) of the Zambian Securities Act 2016

regulators and demand production of the relevant documents by those foreign branches of the respondent.

An argument is made the express conferment of right to commence civil recovery actions and intervene in such actions is likely to encourage both local and foreign participation ofinvestors—that is, increase response to securities advertisement. A further argument is made that increased participation of foreign issuers is likely to increase cross-border cross-listings and with that, the supply of securities to local securities markets.

Limited Scope of SEC's Power to Commence Representative Actions on Behalf of Injured Investors

It should be noted that civil liability imposed under Part XV of the Securities Act 2016 relates to misrepresentations in prospectuses or other documents issued by the issuer or any other person with actual, implied or apparent authority to act on behalf of the issuer.[36] An argument is made that the power of SEC to commence representative civil actions on behalf of injured investors does not extend to causes of action arising purely out of traditional securities advertisements—securities advertisement which do not amount to prospectuses or designed to achieve the object of a prospectus. The following are the reasons, namely:

(i) a document carrying a traditional securities advertisement differs from a prospectus both in form and in content. Consequently, misleading statements made in a traditional advertisement cannot competently be said to be 'a misrepresentation in a prospectus' for purposes of civil liability under section 166(1) of the Securities Act 2016;

(ii) Liability for misrepresentations made in any other document than a prospectus under section 167(1) of the Securities Act 2016—such a document carrying a traditional securities advertisement—will only attach where the issuer or any other person with actual, implied or apparent authority to act on behalf of the issuer, has issued that document. A question may be asked, does a licensee making a traditional securities advertisement act on behalf of the issuer for the purposes of liability?While section 167 imposes liability on the issuers, its officers and experts to the exclusion of the licensee, the securities advertisement regime imposes civil

[36] Sections 166(1) and 167(1) of the Securities Act 2016 as read together

liability on the licensee to the exclusion of all others. Thus, Rule 3 of the Securities (Advertisement) Rules 1993 imposes restricts issue of securities advertisements to licensees or persons acting on behalf of licensee, while section 214(5) of the Securities Act imposes civil liability for breach of securities advertisement rules exclusively on the licensee. This position is in line with the philosophy that 'one cannot be accountable unless s/he is responsible'.[37] Since the law places the power to issue securities advertisements in licensees as opposed to issuers, the latter cannot be said to have capacity to issue a securities advertisement himself—the capacity residing in the former. Therefore, the Latin maxim 'qui facitper aliumfacit per se'—which is to say 'if one has the capacity to do an act, he can do it through another'—does not apply in the absence of capacity on the part of the issuer to issue the advertisement himself. An argument is made that in the absence of capacity on the part of the issuer to issue or cause to be issued a securities advertisement, the licensee cannot be said to be acting on behalf of the issue for the purposes of liability under section 167(1) of the Securities Act 2016. An argument is also made that SEC's power to commence representative actions for misrepresentations in prospectuses and other documents under Part V of the Securities Act 2016 does not extend to misleading statements under traditional securities advertisements.

It should be noted that section 167(1) of the Securities Act introduces the 'Fraud on the Market Theory' which consists in presumption of reliance on the misleading statement by an injured investor. To this effect, section 167(1) of the Securities Act 2016 in part provides that:

"…an individual or a company who acquires or disposes of the issuer's securities, during the period between the time when the document was released and the time when the misrepresentation contained in the

[37]Rule 3 of the Securities (Advertisement) Rules 1993 restricts the authority to issue securities advertisements to 'licensee' when it provides that: "No person other than a licensee shall issue or cause to be issueda securities advertisement in Zambia."The law also restricts liability for damages for loss caused by a false or misleading advertisement to licensees. To this end, section 214(3)(4)(5) of the Securities Act 2016, provides that: s. 214(3) Where, it appears to the Commission that a securities advertisement—(a)does not comply with any requirement imposed in the rules made in terms of this section; or (b)is false or misleading;the Commission shall give such directives to the person who has published or caused to be published the securities advertisement as it considers appropriate in the circumstances. S. 214(4) A directive given, in terms of subsection (1), may require—*(a)* a person to modify, in whole or in part, the advertisement; *(b)* the publication of the securities advertisement to cease. s. 214(5) Nothing in this section shall prejudice any remedy that an aggrieved person may have against a person who published or caused to be published an advertisement contrary to the requirements of the rules made in accordance with this section.

document was publicly corrected, has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages…"

Under an action of deceit, the injured investor would have to prove that they there induced to purchase the securities by the misleading statement in the securities advertisement failing which the action cannot succeed. Section 167(1) of the Securities Act 2016, therefore, introduces a much lower standard/burden of proof for injured investors thereby enhancing their legal. An argument is made that the much higher standard of proof under an action for deceit and lack of power on the part of the SEC to commence representative civil actions on behalf of investor who suffer loss as a result of misleading statements in traditional securities advertisements is likely to compromise investor protection. This is more so for foreign investors—especially individual and small and medium scale investors—for whom the cost of cross-border litigation could be prohibitively higher than the cost of purely domestic litigation. As a possible solution to this shortcoming in the law, proposals are made for amendments aimed at ensuring that not only are causes of action arising under Part V of the Securities Act 2016 fall into the representative action net but also those other actions arising under other Parts of the Securities Act 2016 and rules and regulations thereunder made. Such a provision would enhance investor protection by ensuring that claims of investors who suffer loss or damage as a result of misleading statements in a traditional securities advertisement also fall within the representative action power of the Zambian SEC.

5.2.3. CONSTRAINTS RELATING TO LACK OF AN INTERNATIONAL PASSPORT TO MULTI-JURISDICTIONAL SECURITIES ADVERTISEMENT

The central premise of this subsection is that compiling a securities advertisement that complies with the regulations of a particular jurisdiction costs both time and money in registration fees and post registration compliance fees.[38] By Rule 2(2) of the Securities (Advertisements) Rules 1993, an advertisement issued outside Zambia is be treated as issued in Zambia if—

[38]If the if the Zambian SEC considers that any securities advertisement issued, caused to be issued or proposed to be issued by a licensee is misleading or is otherwise in breach of Securities (Advertisement) Rules, the SEC may by notice in writing give the licensee a direction under the said rules to correct the error in the securities advertisement:

a) it is directed to persons in Zambia; or

b) it is made available to persons in Zambia as a newspaper, journal,magazine or [illegible word] published and circulating principally outsideZambia or in a sound or television broadcast transmitted principally forreception outside Zambia.

A question may be asked in this regard, in the event that a licensee seeks to make a multi-jurisdictional advertisement of an issuer's issued securities, would it not be cumbersome and prohibitively costly for it to achieve its aim in the absence of national or regional rules for exempting licensees who have complied with advertisement rules in one COMESA jurisdiction from further compliance in other jurisdictions? An argument is made that the cost of making such a multi-jurisdiction securities advertisement—the cost consisting in registration and post-registration compliance fees in each and every target jurisdiction—and the time of preparing an advertisement for each jurisdiction is likely to discourage multi-jurisdictional securities advertisements. An argument is also made that such a shortcoming in the law is likely to hinder the growth of foreign demand for securities and the overall growth of cross-border trade in securities in the region. As a possible solution to this adequacy in the law, proposals are made for introduction of an international passport to multi-jurisdictional securities advertisement in the region. Under this proposed arrangement, once an licensee complies with the securities advertisement rules of one jurisdiction, the approval of a regulatory authority in that jurisdiction will serve as an international passport to advertising in other jurisdictions without having to comply with requirements of those other jurisdictions. Similarly, compliance with the corrective direction or order of the regulatory authority of one jurisdiction would exempt the licensee from further compliance withcorrective directions or orders issued by regulatory authorities in other jurisdiction with regard to the same matter.

Constraints Relating to the Impact of Digital Satellite Television on Effective Regulation of Multiple Cross-border Securities Advertisements.

Let us consider the plight of a licensee who complies with the Zambian Securities Advertisement Rules for purposes of a securities advertisement to air on Zambia National Broadcasting

See, Rule 6(1)(2)(a)-(e) of the Securities (Advertisements) Rules 1993. No doubt complying with such a direction would make for additional compliance costs for issuers.

Corporation (ZNBC) for a certain period of time. This channel could be accessed by viewer-investors in other COMESA jurisdictions via Digital Satellite Television (DSTv) by subscribing for specific bouquets offered by various DSTv companies.

An argument is made that the capability of DSTv to facilitate the availability of securities advertisements to a broader section of the investing community in the COMESA Region and beyond. An argument is also made that this positive feature is likely to enhance the efficacy of the legal framework to ensure efficient securities advertisement in the region. However, there are bottlenecks to this positive feature. Since the current national and regional legal framework requires that the licensee complies with the requirements of each and every jurisdiction in which the securities advertisement airs via DSTv, how would a willing licensee know with reasonable certainty and predictability the COMESA jurisdiction or beyond, in which ZNBC would air via DSTv so that they could comply with the regulations of those other jurisdictions before-hand? It is no doubt there is no knowing or means of doing so. It is submitted that this practical hurdle serves to highlight the dire need for an international passport to region-wide cross-border securities advertising.

5.2.4. CONSTRAINTS RELATING TO UN-HARMONIZED SECURITIES ADVERTISEMENT RULES IN THE REGION

The fact that each jurisdiction in the COMESA region has diverse rules for the regulation of securities advertisements implies that an issuer seekingmulti-jurisdictional securities advertisement would be obligated to make radically distinct advertisements in terms of content. This condition of the law is likely to create regulatory gaps in the regional securities markets as well as increase compliance costs for licensees seeking multi-jurisdictional securities advertisements in the region. This is likely to be time-consuming and costly for licensees undertaking multi-jurisdictional securities advertisements in the region. Given the varying degrees of protection given to investors in different jurisdictions in the region, extending an international passport to jurisdictions which accord a lower standard of protection to investors would in effect jeopardize the interest of investors in the jurisdiction giving such recognition. An argument is made that harmonization of securities advertisement rules in the region is likely prevent such a risk, and achieve the following, namely:

a) reduce regulatory gaps thereby facilitating cooperation among securities market regulators in the region;

b) reduce compliance costs for issuers since post-registration compliance in one jurisdiction would be recognised in other COMESA jurisdictions in case of multi-jurisdictional advertisements;

c) the minimum standard of investor protection that comes from harmonization of regulatory rules is likely to ensure equal protection of investors and general acceptance of the measure in the region;

5.2.5. REGULATION OF OFFERS, INVITATIONS TO THE PUBLIC OR PUBLIC ADVERTISEMENT OF SECURITIES IN THE UNITED STATES OF AMERICA

The United States of America has ensured comprehensive regulation of public offers, invitations or advertisements of securities by imposing the obligation to register the securities on all issuers whatever their style of existence. Breach of the obligation to register such advertisements has been criminalized in respect of all kinds of issuers.

Thus, in the United States of America, a person who advertises securities to the public for offers to sell or buy securities is under an obligation to register a statement, relating to the securities proposed to be issued or sold, with the United States SEC.[39] In order to ensure rounded enforcement of breach of the obligation to register the publicly advertised securities, criminal and civil penalties have been imposed on any person who violates the requirement.[40] It is submitted that the imposition of both criminal and civil penalties on 'any person' is likely to ensure that all issuers be they public or private companies, cooperatives, other forms of bodies corporate, associations are liable for breach of the duty to register. It is also likely to ensure that allottees or subsequent holders who advertise their positions to the public without prior registration of a statement with the SEC are also liable.

[39] See, section 6(a) of the United States Securities Act 1933
[40] See, sections 5 and 20 of the United States Securities Act 1933

VI

CONCLUSION

The general conclusion reached in this article is that the legal framework for the public distribution of securities locally and across international borders has not provided adequate incentives for efficient cross-border securities advertisement and investor protection. In particular, the article has established that the current legal framework does not provide for an international passport to multiple region-wide cross-border securities advertisement. It has also established that the power of the Zambian SEC to commence representative civil actions on behalf of investors who are unable to so, does not extend to causes of action arising in connection with traditional securities advertisements—that is advertisements which do not amount to prospectuses nor intended to serve the object of prospectuses. Necessary proposals for remedial measure have been made in both cases.