REPUBLIC OF ZAMBIA

REPORT OF THE PLANNING AND BUDGETING COMMITTEE

ON

THE SECURITIES (AMENDMENT) BILL, N.A.B. NO.23 OF 2022

FOR THE

SECOND SESSION OF THE THIRTEENTH NATIONAL ASSEMBLY

Printed by the National Assembly of Zambia

FOREWORD

Honourable Madam Speaker, the Planning and Budgeting Committee has the honour to present its Report on the consideration of the Securities (Amendment) Bill, N.A.B. No 23 of 2022, for the Second Session of the Thirteenth National Assembly. The Committee is mandated to consider any Bills that may be referred to it by the House as per Standing Order No 198(j) of the National Assembly Standing Orders, 2021.

The Committee held ten meetings to consider the Securities (Amendment) Bill, N.A.B. No 23 of 2022. In order to acquaint itself with the ramifications of the Bill, the Committee sought both written and oral submissions from various relevant stakeholders. The stakeholders who appeared before the Committee are listed at Appendix II.

Madam Speaker, the Committee is grateful to the stakeholders who tendered both written and oral submissions. It also wishes to thank you, for affording it an opportunity to scrutinise the Securities (Amendment) Bill, N.A.B. No 23 of 2022. Appreciation further goes to the Clerk of the National Assembly and his staff for their assistance and advice throughout the Committee's deliberations.

Mr Fred C Chaatila, MP
CHAIRPERSON

November, 2022
LUSAKA

TABLE OF CONTENTS

Item		Page
1.0	Composition of the Committee	1
2.0	Background	1
3.0	Objects of the Bill	1
4.0	Salient Provisions of the Bill	2
5.0	Summary of Submissions by stakeholders	5
6.0	Committee's Observations and Recommendations	15
7.0	Conclusion	20
Appendix I – List of National Assembly Officials		22
Appendix II – List of Witnesses		23

List of Acronyms

Eastern and Southern African Anti-Money Laundering Group (ESAAMLG)
Financial Action Task Force (FATF)
Money Laundering/Combating and the Financing of Terrorism/Combating Proliferation Financing (ML/CFT/CPF)
Capital Market Operators (CMO)
Anti-Money Laundering/ Combating Financing of Terrorism (AML/CFT)

1.0 COMPOSITION OF THE COMMITTEE

The Committee consisted of:

Mr Fred C Chaatila, MP, (Chairperson); Ms Jean C Chisenga, MP (Vice-Chairperson); Mr Machila Jamba, MP; Amb. Robert K Kalimi, MP; Mr Koonwa Simunji, MP; Mr Brian Kambita, MP; Mr Gystave Chonde, MP; Mr Davison Mung'andu, MP; Mr Lloyd Lubozha, MP; and Mr Peter Phiri, MP.

2.0 BACKGROUND

The *Securities Act, No. 41 of 2016* was enacted to, *inter alia* protect capital markets investors; regulate the activities of capital market operators; ensure the orderly growth; integrity and development of the capital markets and continue the existence of the Securities and Exchange Commission.

In 2019, Zambia was assessed through a Mutual Evaluation under the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), a regional Financial Action Task Force (FATF) which recommended a review of laws in order to ensure that Zambia conformed to international standards as outlined in the FATF Recommendations. Among the laws that needed to be amended was the *Securities Act, No. 41 of 2016.*

In view of the foregoing, the Government introduced the Securities (Amendment) Bill N.A.B. No 23 of 2022 (herein referred to as the bill), to amend the *Securities Act, No. 41 of 2016* (herein referred to as the "principal Act"), so as to provide for a risk-based approach in the supervision and regulation of capital markets by the Commission. Furthermore, the amendment was aimed at addressing and encompassing the vetting of beneficial owners of capital market operators and the enhancement of enforcement powers to effectively deal with offences for Money Laundering/Combating and the Financing of Terrorism/Combating Proliferation Financing (ML/CFT/CPF) and information disclosure requirements that could be used to detect whether or not an entity had been involved in illegal activities including ML/TF/PF, among others.

3.0 OBJECTS OF THE BILL

The objects of the bill were to amend the *Securities Act, No. 41 of 2016* so as to: -

(a) implement a risk-based approach in the supervision and regulation of capital markets;
(b) revise the supervisory powers of the Commission;
(c) provide for the appointment of an auditor by a licensed person;

(d) revise the powers of the Capital Markets Tribunal;
(e) provide for the immunity of a member of the Capital Markets Tribunal, a member of staff of the Tribunal, and a member of staff of the Commission;
(f) provide for the regulation of a private fund; and
(g) Provide for matters connected with, or incidental to, the foregoing.

4.0 SALIENT PROVISIONS OF THE BILL

The salient provisions of the Bill were as set out below.

Clause 2 Amendment of section 2

Clause 2 sought to amend section 2 of the principal Act, to revise the definition of "capital markets operator. Furthermore, Clause two provided for insertion of new definitions, including: "debt fund"; "hedge fund"; "muted return"; "private equity fund"; "private fund"; "sandbox framework"; "social venture fund"; and "sophisticated investor".

Clause 3 Amendment of section 9

The clause sought to amend section 9 of the principal Act by insertion of new subsections so as to revise the functions of the Commission, to empower it to implement a risk-based approach in the supervision and regulation of capital markets in combating money laundering and countering the financing of terrorism, proliferation financing or any other sources.

Clause 4 Repeal of sections 11 and 12

Clause 4 sought to repeal sections 11 and 12 of the principal Act which had authorised the Commission to prohibit certain activities by licenced persons and also exercise power over their assets.

Clause 6 Insertion of Part II A

Clause 6 sought to amend the principal Act by insertion of a new Part immediately after section 19 of the Act so as to provide for supervisory powers of the Commission over capital markets operators. The specific supervisory powers of the Commission were provided for in 19A, 19B, 19C, 19E, 19D, 19E, 19F,19H, and 19I.

Clause 7 Amendment of section 22

Clause 7 sought to amend section 22 of the principal Act by insertion of a new subsection immediately after subsection (2) to provide for when an appointment of a director or senior management members of a licence holder would take effect, where that appointment had taken place after the securities exchange licence had already been issued.

Clause 8 Amendment of section 23

Clause 8 sought to amend section 23 of the principal Act by insertion of a new subsection (3) to provide for when an appointment of a director or senior manager of a holder of a licence of clearing and settlement agency would take effect where the appointment had taken place after the grant of a clearing and settlement agency licence.

Clause 10 Insertion of section 46A and 46B

Clause 10 sought to amend the principal Act by the insertion of sections 46A and 46B immediately after section 46. Section 46A provided for the appointment of the auditor by the licenced person while 46B provided for mandatory submission of a report by an auditor to the Commission, of a licensed person's failure to provide audited results within four months of the end of a financial year, stating the reasons for the delay.

Clause 11 Amendment of section 49

The clause sought to amend section 49 of the principal Act by the insertion of two new subsections immediately after subsection 2. The subsections provided for among other things, the mandate of the Commission not to grant a credit rating agency licence to a credit rating agency without the Commission's approval of the appointment of the directors and senior management of the credit agency in writing.

Clause 13 Amendment of section 81

The clause sought to amend the principal Act by the deletion of subsection (1) and substitution therefor of a new subsection to compel an insurer once registered to keep the public informed of all matters which affect the value of the securities in a newspaper or in other media approved by the Commission.

Clause 14 Amendment of section 128

The clause sought to empower the Commission to issue rules relating to the formulation of a key facts statement relating to each collective investment scheme summarising the key features of the scheme.

Clause 15 Amendment of section 130

Clause 15 sought to amend the principal Act by insertion of a new section immediately after section 130 so as to exclude the application of the part to a pension fund established under any written law.

Clause 16 Amendment of section 148

Clause 16 sought to amend the principal Act by deletion of subsection (3) and (4) and the substitution thereof with a new provision in order to, inter alia, mandate an auditor to provide a report to the Commission, in writing, on the failure by a listed company or a company whose securities are registered with the Commission to produce audited reports within four months of the end of a financial year, stating the reasons for the delay.

Clause 18 Insertion of section 194A

The clause sought to insert a new section 194A immediately after section 194 in order to provide for the orders that the Tribunal might make where on the application of the Commission it appeared to the Tribunal that a person had contravened the Act or any conditions of the licence.

Clause 19 Insertion of section 195A

The clause sought to provide for immunity of members and staff of the Tribunal in respect of, an act or thing done or omitted to be done in good faith in the exercise or performance of any of the powers, functions or duties conferred under the Bill.

Clause 22 Insertion of sections 218A and 218B

The clause sought to insert new sections 218A and 218B immediately after section 218 so as to provide for general offences and a general penalty, respectively.

Clause 23 Amendment of First Schedule

The clause sought to delete paragraph 7 of the First Schedule in order to provide for immunity against a member of the Board or committee of the Board, or a member of staff of the Commission for, or in respect of, an act or thing done or omitted to be done in good faith in the exercise or performance of any of the powers, functions or duties conferred under the Act.

Clause 24 General amendment

Clause 24 sought to delete the words "venture capital fund" and "venture capital funds," wherever the words appeared and substitute the words with "private fund" and "private funds", respectively.

5.0 STAKEHOLDERS' SUBMISSIONS AND CONCERNS

Many stakeholders who appeared before the Committee supported the Bill with a lot of reservations and expressed disappointment that they were not consulted as main players in the market. Stakeholders expressed their concerns as listed hereunder.

5.1 Clause 2 Amendment of section 2

Stakeholders submitted that the definition of Capital Market Operators (CMO) should be maintained as contained in the principal Act. Stakeholders expressed concern that the new definition would include all listed companies, quoted companies as well as companies that simply had securities such as bonds registered with the Securities and Exchange Commission.

Other stakeholders expressed concern that the inclusion in the definition of CMO, persons conducting professional development programmes was not clear as to whether the Commission would regulate such institutions. Furthermore, this would curtail the industry practice which was critical for refreshing, updating and upskilling industry practitioners. They proposed that the definition of "Person conducting a professional development Programme" should be deleted in the definition of CMO.

In addition, other stakeholders also expressed concern that the proposed definition of CMO intended to define a company over and above the definition provided in the *Companies Act, No. 10 of 2017* and that it was not clear what mischief was intended to be cured by the amendment.

Further, some stakeholders welcomed the insertion of the definition of "sophisticated investor". However, they proposed that a document should be signed by both the

investor and the CMO showing that an assessment had been done to meet the criteria of "sophisticated investor". Others expressed concern that ''Investor Companies" was not defined in the Bill as well as the principal Act.

5.2 Clause 3 Amendment of Section 9

Stakeholders expressed concern that the insertion of a new provision to introduce vetting of substantial shareholders, including substantial shareholder's source of funds and beneficial ownership of a company whose securities were registered, was a fundamental flaw as it failed to recognise the important principles on which trading and transactions were conducted both on the stock exchange and in the capital market as a whole. Stakeholders submitted that after investors had submitted orders to buy or sell securities on the stock exchange they did not expect to be vetted before submitting their orders. In this regard, stakeholders recommended that there should be a way to allow CMO to carry out their due processes especially when conducting "Know Your Customer'' processes or due diligence on their customers and potential business associates

Other stakeholders welcomed the vetting of substantial holders as it was key to '' Know Your Customer" process and integral to Anti-Money Laundering/ Combating Financing of Terrorism (AML/CFT), compliance in line with the FATF. On the other hand, stakeholders expressed concern on how the vetting would be operationalised, especially for offshore clients or global custodians who held assets on behalf of underlying clients. They further proposed that there was need to harmonise the threshold of 15 per cent for substantial shareholders as provided for under the principal Act among financial sector supervisors. In addition, they recommend that a legal framework must be put in place for the Commission to obtain, verify and retain records on the beneficial ownership and control information. Furthermore, a state-run beneficial ownership register should be established and that the Patents and Companies Registration Agency was best suited to establish and maintain the register.

With regard to section 9(3) in clause 3, stakeholders welcomed the expansion of the Commission's functions to implement a risk-based supervision approach. However, they recommended that if this approach was adopted, the Commission had to do away with internal controls provided for in the Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines 2019. They contended that the implementation of both internal controls and risk-based supervision approach would place onerous requirements on market players.

Others recommended that the Bill should have provisions on systematic planning for risk-based supervision approach; identification and assessment of relevant risk, and appropriate allocation of supervisory resources.

5.3 Clause 5 Amendment of Section 19

Some stakeholders observed that while the clause sought to empower the Minister responsible for finance and national planning to prescribe a code of ethics and corporate governance for CMO, section 84(1) of the Act empowered the Commission to prescribe the code of ethics and corporate governance for the capital markets. Stakeholders recommended that section 84(1) should be repealed and that the proposed amendment should be moved to Part V of the Act which dealt with the licensing and regulation of CMO. Furthermore, section 19 (1) of the Act should be left to deal with the Board of the Commission only.

Other stakeholders further recommended that section 19(1) should read "The Minister may, by statutory instrument prescribe a code of ethics and corporate governance for the Boards of CMOs".

5.4 Clause 6 Insertion of new Part IIA (other provisions)

(a) Stakeholders supported the insertion of section 19A (1) on prohibition of certain activities in the capital markets, but expressed concern that the proposal was not clear with respect to what circumstances would lead to prohibit a CMO from undertaking the outlines actions.

Stakeholders recommended that the Bill should specify what circumstances and events would trigger prohibition.

Others recommended that section 19A (1) should read "The Commission may in writing issue industry wide directives to prohibit capital market operators from doing any of the listed actions". They were of the considered view that the proposal, if not changed would allow the Commission to issue directives which could be construed to be tailored to a specific CMO as opposed to industry-wide directives.

(b) Stakeholders observed that section 19 A (1) sought to extend the scope of the Commissions supervisory power to all CMOs and not only the licensed persons. Stakeholders noted that the section 19A(10(a) referred to the "notice" which was missing in the opening statement of the proposed provision. Stakeholders recommended that the opening statement should be revised to read as follows:

''(1) The Commission may, by notice in writing , prohibit a capital markets operator from doing any of the following''

(c) Stakeholders further observed that section 19A (2) limited the issuance of a prohibition notice to licensed CMOs only while section 19 (1) extended the scope of the Commission's supervisory power to all CMOs. Stakeholders recommended that section 19 A (2) should be redrafted as follows:

> "(2) A prohibition notified in accordance with this section may relate to a transaction entered into for, or in connection with, the purpose of business of the capital markets operator"

(d) Stakeholders observed that the term "supervisory action'', in section 19 B (1) was not defined in the Act and the Bill. Stakeholders recommended that the word "shall'' should be replaced with ''may'' as this would allow the Commission to take corrective action to strengthen CMO.

(e) With respect to section 19B(1)(a) stakeholders expressed concern that the provision gave the Commission unlimited power to take over a CMO which might include a listed company, without looking into the reasons for the failure of the CMO to comply with the directive. Stakeholders recommended that the section must be removed altogether.

(f) With respect to section 19B(1)(b), stakeholders recommended that in an effort of fair play and market operator protection, privacy and confidentiality, the section should be re-couched as follows "the capital CMO without reasonable cause or justifiable reason obstructs, or refuses to permit, an inspection or review in accordance with this Act.

(g) Stakeholders submitted that section 19B(1)(c) could be abused by the Commission as they could take supervisory action against capital market players for unintentional omissions of written law. They recommended that to ensure fairness and prevent arbitrariness the provision should either be removed or be re-couched as follows: "following an inspection, review or investigation of the CMO and after the market operator has been accorded an opportunity to be heard."

(h) Stakeholders submitted that while they supported the insertion of section 19B (2), they had reservations as set out below.

(i) Taking Possession of a CMO

Stakeholders recommended that taking possession should be defined in the Act with clear timeframes. They expressed concern that if not changed, possession could be in perpetuity. Stakeholders further recommended that possession should be removed altogether from the Act. Stakeholders recommended that the Commission should focus on ensuring compliance with the set regulatory requirements and not to take possession of CMOs or to appoint to run the affairs of the CMO. Stakeholders were of the view that this would create a perception of the Commissions being biased towards or against certain CMOs.

(ii) Appointing a manager to run the affairs of the CMO
Stakeholders recommended that the Manager contemplated in the provision should be defined, the duties, the role and the relationship with the Board and shareholders of CMO. They further recommended that to avoid a conflict of interest, such a manager should be independent of the regulator and the qualifications should be similar to those of an administrator/receiver/liquidator in the Insolvency Act.

(i) Stakeholders expressed concern with regard to section 19B(3) where the costs of the manager, appointed under subsection 2(b), of managing possession, would be borne by the CMO. Stakeholders were of the view that this was self-defeating as a company under possession was restricted and did not conduct business to generate revenue to meet the costs. They further submitted that there was a substantial difference between a receiver and a liquidator in company law where costs were met from the entity.

(j) Stakeholders expressed concern that section 19B(4)(a)(i) gave the Commission unfettered powers to close a business and company. Others wondered how a license or registered person who was a CMO would close. In this regard, they recommended that (4)(c) be revised to state as follows "deregister, withdraw or revoke the licence of capital markets operator."

Some stakeholders recommended that subsections 4(a) to (i) should be deleted in their entirety as they did not encourage market growth and development. Others recommended that with regard to the transfer of all or part of the business of the CMO to another CMO, the Commission should create a process or terms of reference for transferring to one competitor as opposed to the other to show fairness in the process as this would show transparency around the process of transfer.

A number of stakeholders recommended that the wording in section 73(d) of the *Banking and Financial Services Act No 7 of 2017* be adopted and adapted to section 19 (B) (4) and (e).

(k) Stakeholders observed that there was an error in spelling for ninety days which reflected as "nety" days in section 19B(4)(5).

(l) Stakeholders expressed concern with regard to section 19C and questioned what basis the powers would be exercised by the regulator; what contraventions would necessitate the Commission's power over assets of CMO. Stakeholders stated that the provision seemed to imply that CMOs were not subject to corporate insolvency.

Other stakeholders recommended that the proposed amendment must only apply to wholly owned investor assets in the possession of the CMO and only to the extent that the said assets were a danger and would work to the detriment of the investor. They were of the considered view that anything to the contrary would amount to limiting the powers of a market operator to manage their assets in line with their Articles of Association and company polices.

(m) Stakeholders welcomed the inclusion of anti-money laundering, terrorist and proliferation financing with respect to section 19D. Others expressed concern that the Bill was not clear with respect to what extent the Commission could enforce what was in the mandate of the Financial Intelligence Centre.

(n) Stakeholders expressed concern with regard to section 19E (1) to (5) as outlined below.

i. Capital adequacy was not defined in the Act or the Bill. It was, therefore, recommended that it should be defined and harmonised so that there was no conflict with other existing legislation.
ii. The thirty days requirement to submit a capital restoration plan was not sufficient. In that regard, ninety days was recommended to be more practical.
iii. The ninety days requirement to increase the capital to prescribed levels was not reasonable considering that most capital raising ventures could take a very long period. Stakeholders recommended that the matter could be addressed in the capital restoration plan which the Commission could either accept or reject depending on the strength of the plan.
iv. With regard to the appointment of a suitably qualified and competent person to advise the CMO in designing and implementing a capital

restoration plan, stakeholders recommended that the regulator should not have business in awarding consultancy contracts on behalf of the CMO and that there should be a separation of duties between those relating to regulation and supervision from those relating to the management of CMOs.

v. Removal of senior management from office should be a responsibility of the Board of the CMO. Stakeholders submitted that the regulator had powers to revoke the licence from a licensed employee, should they find it fit to do so. Therefore, the proposed amendment must be removed altogether.

(o) Stakeholders expressed concerns with regard to that section 19F (1) to (3) as outlined below.

i. Stakeholders noted with concern that the Bill did not provide for a clear-cut difference between an under-capitalised and a significantly under-capitalised CMO. Stakeholders recommended that the Act should spell out a clear threshold for both and the determination of each one of them. Furthermore, a universal guideline or benchmark should be adopted to enable operators gauge themselves and take corrective action, if they fell in the bracket of undercapitalisation, as opposed to when the Commission decided so.

ii. Stakeholders observed with concern that section 19F(3) did not provide a timeframe within which the Commission would prepare and submit to the Minister a state of affairs statement or report on the supervisory action taken by the Commission. Stakeholders recommended that a timeframe for the preparation and submission of the statement or report should be stipulated as this would enhance accountability on the part of the Commission

Other stakeholders expressed concern that the Bill did not specify which "Minister" was referred to and recommended that to avoid uncertainty and for completeness, it was necessary to define the Minister in reference.

(p) Stakeholders observed with concern that section 19H gave the Commission unfettered power to recommend the winding up of a company without establishing the possibility of business rescue. Stakeholders recommended that the provision with regards to winding up of a company as contained in the *Corporate Insolvency* Act was exhaustive and sufficient and that the amendment must not be approved.

(q) Stakeholders expressed concerns with regard to the provisions of section19l (1) to (3) as outlined below.

i. Some stakeholders observed that section 19l (1) conferred a CMO the right to appeal to the Capital Markets Tribunal against a decision of the Commission. However, stakeholders were concerned with the use of the word "shall" instead of the word "may'' as this took away the discretion of the CMO to choose not to appeal if it was dissatisfied. Stakeholders recommended that the word "shall'' should be replaced with the word "may.''

   Other stakeholders submitted that with regards to a "stay" of decision of the Commission and all other decisions for which the Capital Markets Tribunal had jurisdiction, the Securities (Capital Markets Tribunal) Rules 2021, Statutory Instrument No 32 of 2021 already provided for this. Therefore, the proposed amendment would usurp the powers of the Tribunal to exercise its discretion to decide whether the circumstances before it was ideal for granting a stay.

5.5 Clauses 7, 8, 9 and 11 - Amendment of Sections 22, 23, 37 and 49

Stakeholders noted with concern the requirement for the Commission's approval of appointed directors and senior management. Stakeholders submitted that the power to appoint senior management was vested in the Boards of Directors who were capable of doing so in line with their established policies. Stakeholders submitted that while the proposal was a necessary safe guard in combating money laundering and financing terrorism, subjecting the appointment of senior management to the Commission would interfere with the day-to-day operations of the CMO.

Some stakeholders recommended that if the Commission would be exercising supervisory roles in terms of approving the appointments of senior management and CMO board members, the Commission should provide the minimum qualifications for the board members and senior management. Others recommended that the amendment of section 23 should provide that such a director would be appointed in terms of the guidelines and not an arbitrary determination of fitness which would be subjective.

5.6 Clause 10 Insertion of Sections 46A amd46B

Stakeholders expressed concern that the proposal would be a source of confusion. They submitted that *the Accountant's Act, No. 13 of 2008* gave the Zambia Institute of Chartered Accounts (ZICA) the power to establish the minimum requirements for someone to qualify as an auditor. Once someone had met the ZICA criteria to be an auditor, they were free to audit any institution in Zambia. Stakeholders further

submitted that if the Commission had proposals on the as to minimum requirements for an auditor, those proposals should be submitted to ZICA for consideration accordingly. In this regard, they recommended that the provision be dropped.

Other stakeholders submitted that the accounting standards which auditors used to audit entities, including CMOs, were not prescribed by the *Accountants Act* of 2008 but were issued by the International Federation of Accountants (IFAC) from time to time. Therefore, they recommend that the provision be amended to read; *"An auditor shall audit the annual financial statements of a licensed person in accordance with the provisions of the Accountant's Act, 2008".*

With regard to section 10(46B) (1) on the duty of auditor to report a licensed person, stakeholders submitted that the provision was misleading. They further submitted that it was not the duty of an auditor to investigate reasons why a client had delayed to prepare a set of financial statements. In this regard, stakeholders recommended that the provision be amended to read: *"The management of a capital markets operator shall provide a report to the Commission, on its failure to provide audited results in a prescribed manner and form within four months of the end of a financial year, stating the reasons for the delay".*

With respect to section 10(46B) (2), stakeholders submitted that the auditor should not be absorbed in the responsibility to report to the Commission on the delay by a capital markets operator to submit financial statements. The issue of submission of financial statements was one between the capital markets operator and the Commission and had nothing to do with the auditor. Stakeholders recommended that this provision be amended to read: "*The Directors of a capital markets operator shall provide a report to the Commission, on its failure to provide audited results in a prescribed manner and form within four months of the end of a financial year, stating the reasons for the delay".*

5.7 Clause 16 Amendment of section 148

Stakeholders recommend that the auditor should be removed from the issue of failure to produce the audited results and recommend that this provision be amended to read; *"A listed company or company whose securities are registered with the Commission who fails to provide audited results, after due investigation by the Commission, commits an offence and is liable to the penalty provided in section 159"*

5.8 Clause 18 Insertion of section 194A

Stakeholders noted that clause 18 sought to empower the Capital Markets Tribunal to make certain orders in relation to alleged contraventions of the Act or licence conditions. The stakeholders expressed the concerns outlined below.

(a) It was not clear whether the intention was for the application by the Commission to the Capital Markets Tribunal was to be an originating one or one that was to be made in the course of on-going proceedings.
(b) The right to make an application to the Capital Markets Tribunal was not extended to other persons and only the Commission was given the right to make the application. Stakeholders recommended that the right to make the application should be available, in the interest of justice, to any party to proceedings before the Tribunal.
(c) The grounds upon which the application could be made excluded an alleged contravention of any condition of an authorisation, a recognition or registration under the Act. Stakeholders recommended that the application should be interlocutory because the prospective orders, other than the one in the proposed paragraph (c), of the Bill were interim in nature. In that regard, it was recommended that paragraph (c) be deleted because it was a relief of a final nature.

5.8.1 Clause 18 Insertion of Section 194A (4)

Stakeholders expressed concern that the proposed section 194A (4) did not clearly specify how the discretionary power intended to be bestowed on the Capital Markets Tribunal would be exercised. Stakeholders recommended that the discretionary power should only be exercised on application by a party so that none of the parties felt prejudiced by the decision of the Capital Markets Tribunal.

5.9 Clause 19 Insertion of section 195A

Stakeholders observed with concern that the proposed section195A provided for immunity of members and staff of the Tribunal. The stakeholders noted that the Bill provided for a number of sensitive matters which the Tribunal would preside over. In this regard, the stakeholders recommended that immunity should not be absolute, and that the Commission should provide for procedures for lifting immunity, to ensure that the Act was fair and members of staff could be held accountable for their actions.

Other stakeholders submitted that the provision would allow the Capital Market Tribunal and the staff to avoid taking responsibility of their actions. They submitted

that there were sufficient relevant laws and regulations that guided their conduct and hence there was no need for the proposed amendment.

5.10 Clause 22 Insertion of sections 218A and 218B

Stakeholders submitted that there was no justification for making imprisonment a penalty for failure to generally comply with any of the directives, orders or requests provided for in the Act. Stakeholders recommended that the Commission must state clearly the offences and penalties as stipulated in section 140 of the Act with regards to the offences of insider trading. Furthermore, criminal sanctions must not be used for civil offences.

With regard to the proposed section 218 B on general penalty, stakeholders submitted that the fine not exceeding one million penalty units or imprisonment for a term exceeding ten years or both was too punitive, particularly where it related to small offences. In that regard, stakeholders recommended that the Commission should consider rephrasing the section to assure fairness, reduce the fees and remove the punitive imprisonment sentences.

5.11 Clause 23 Amendment of First Schedule

Stakeholders submitted that First Schedule should be left as it was in the principal Act. The rationale was that the Board and the committees were not in charge of the day-to-day affairs of the Commission and as such they were entitled to immunity. Stakeholders submitted that to allow the provision to apply to members of staff of the Commission who were in charge of the day-to-day activities of the Commission would be to provide unfettered powers to the Commission particularly considering that the determination of whether a member of staff of the Commission acted in good faith was a subjective test. Further, considering that the *Securities Act* imposed punitive sanctions on members of staff of capital market players, such as in section 207 (2) of the *Securities Act*, it would be bias to place immunity on members of staff of the Commission. Stakeholders therefore recommended that the section should thus rather provide immunity to only Board and committee members and not members of staff. In the alternative, if the proposed section was maintained, it should also be applied to members of staff of capital market players.

6.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

The Committee observes that the amendment of the *Securities Act No. 41 of 2016* is consequential, following the 2018 Mutual Evaluation Report by the assessors from the Eastern and Southern Africa Anti-Money Laundering Group, which identified a number of lacunas in the Anti-Money Laundering/ Countering the Financing of

Terrorism, Proliferation and Proliferation Financing regime of the Republic of Zambia. The Committee also recognises that the *Financial Intelligence (Amendment) Act, No 11 of 2020* designated the Securities and Exchange Commission as a supervisory entity and introduced a risk-based approach to anti-money laundering and counter-terrorist financing. Consequently, it has become necessary to amend the *Securities Act* in order to align it with the risk-based framework introduced by the *Financial Intelligence Act*. However, the Committee notes that the current Act is stifling market development as it is too punitive for an emerging market. The Committee further notes that in as much as the Bill has progressive amendments, it is equally seeking to impose additional and unbearable regulations on the market players.

Arising out of the above, the Committee does not support the Bill and makes its observations and recommendations outlined below.

i. The Committee observes that clause 3 proposes the introduction of vetting of substantial shareholders, including substantial shareholder's source of funds; and beneficial ownership of a company whose securities are registered. The Committee observes that the proposal does not recognise the important principles on which trading and transactions are conducted both on the stock exchange and in the capital market as a whole. The Committee is of the considered view that after investors have submitted orders to buy or sell securities on the stock exchange, they do not expect to be vetted before submitting their orders.

   The Committee recommends that the Bill should provide a leeway to allow CMOs to carry out their due processes especially when conducting "Know Your Customer" processes or due diligence on their customers and potential business associates. The Committee further recommends that mechanisms should be put in place on how the vetting will be operationalised, especially for offshore clients or global custodians who hold assets on behalf of underlying clients.

ii. The Committee notes with concern that there is no legal framework for the Securities and Exchange Commission to independently ascertain and verify the information disclosed by legal entities whose securities are registered or which is authorised or licensed under the Act and to timely access adequate, accurate and up-to-date beneficial information so as to properly vet beneficial owners.

   In light of the above, the Committee recommends that a legal framework must be put in place for the Commission to obtain, verify and retain records

of the beneficial ownership and control information. Furthermore, a state-run beneficial ownership register should be established. The Committee is of the view that the Patents and Companies Registration Agency is best suited to establish and maintain the register.

iii. It was observed that a risk-based approach in the capital markets is meant to protect the integrity of the financial system by providing the Government with stronger tools to take-action against financial crime. However, the implementation of both a risk-based approach and internal controls provided for in the Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines 2019, will place onerous requirements on market players.

The Committee therefore, recommends that if this approach is adopted, the Commission has to do away with internal controls provided for in the Securities (Internal Control Reporting Framework for Issuers of Registered Securities) Guidelines 2019. The Committee further recommends that the Bill should have provisions on systematic planning for risk-based supervision approach; identification and assessment of relevant risk, and appropriate allocation of supervisory resources.

iv. Under clause 6 which proposes the insertion of section 19B (2), the Commission may take supervisory action which may include taking possession of a CMO. The Committee observes that taking possession is not defined in the Act and no clear timeframes for possession are provided. While the Committee notes that the Bank of Zambia has power to take over financial institutions which may be performing poorly to the detriment of customers, it is of the view that the Commission should focus on ensuring compliance with set regulatory requirements as opposed to having unfettered powers to close a business and company.

The Committee therefore, recommends that the Commission should create a process or terms of reference for transferring to one competitor as opposed to the other CMO to show fairness in the process as this would show transparency around the process of transfer. In the alternative the Committee recommends the deletion of the proposal in its entirety as it does not encourage market growth and development.

v. With regard to the proposed section 19B(3) under clause 6, the Committee observes that where the Commission appoints a manager under subsection 2(b), the costs of managing possession shall be borne by the CMO. The Committee is of the view that this is self-defeating as a company under

possession is restricted and does not conduct business to generate revenue to meet the costs.

The Committee recommends that this provision should be recast as there is substantial difference between a receiver and a liquidator where costs are met by the entity.

vi. With respect to clause 19F (a), the Committee observes that capital adequacy is not defined in the Act or the Bill and the thirty days requirement to submit a capital restoration plan is not sufficient.

The Committee recommends that capital adequacy should be defined and harmonised with other existing laws so that there is no conflict with other existing legislation. The Committee further recommends that the proposed thirty days should be increased to, ninety days to be more practical.

vii. The Committee observes that the requirement for the Commission's approval of appointed directors and senior management, as proposed in clause 10, is not in tandem with the provisions of the *Companies Act, No 10 of 2017* and respective Articles of Association. The Committee notes that while the proposal is a necessary safeguard in combating money laundering and financing terrorism, subjecting the appointment of senior management to the Commission will interfere with the day-to-day operations of the company.

The Committee recommends that instead of the Commission approving the appointments of senior management and board members of CMOs, it should provide the minimum qualifications for the board members and senior management and such directors should be appointed in terms of the fit and proper guidelines and not an arbitrary determination of fitness which will be subjective.

viii. Clause 10 provides that an auditor shall not provide auditing services to the licensed person unless the auditor meets the minimum criteria specified by the Commission. The Committee observes that this proposal could be a source of confusion because the *Accountants Act, No. 13 of 2008* gives the ZICA the power to establish the minimum requirements for someone to qualify as an auditor, and once someone has met the ZICA criteria to be an auditor, they are free to audit any institution in Zambia.

The Committee recommends that if the Commission has proposals for additional minimum requirements for an auditor, these should be

submitted to ZICA for consideration. In light of this, the Committee recommends that the provision be recast.

ix. The Committee observes with concern that the proposed section 195A under clause 19 provides immunity for members and staff of the Tribunal. The Committee notes that the Bill provides for a number of sensitive matters which the Tribunal would preside over. The Committee is of the view that the provision may allow the Capital Market Tribunal and the staff to avoid taking responsibility of their actions.

In this regard, the Committee recommends that immunity should not be absolute, and that the Commission should provide for procedures for lifting immunity, to ensure that the Act is fair and members of staff can be held accountable for their actions. The Committee further recommends that the Executive should review most Acts of Parliament that have an element of providing immunity to substantive office holders.

x. The Committee observes that the proposal under clause 22 which seeks to create to section 218 B which provides for a general penalty or fine not exceeding one million penalty units or imprisonment for a term exceeding ten years or both is too punitive, particularly where it relates to small offences. Further, there is no justification for placing imprisonment as a penalty for failure to generally comply with the Act, directives, orders or requests.

The Committee therefore, recommends that the Commission must state clearly the offences and penalties as stipulated in section 140 of the Act with regards to the offences of insider trading. Furthermore, criminal sanctions must not be used for civil offences.

xi. The Committee observes that the proposed Bill has provisions in clauses 6 section 19H, clause 10 section 46A and clause 11 section 3 that are likely to infringe on other existing legislation among them, the *Corporate Insolvency Act, No. 9 of 2017*; and the *Companies Act, No 10 of 2017*, among others.

The Committee recommends that the refinement of the Bill must not undermine the roles and functions created in other subsisting legislation.

xii. Clause 6 proposes the insertion of section 19I (2) which provides that the decision of the Commission shall not be stayed by reason only of an appeal having been lodged with the Tribunal. The Committee observes that decisions for which the Capital Markets Tribunal has jurisdiction is already

established in the Securities (Capital Markets Tribunal) Rules 2021, Statutory Instrument No 32 of 2021. The Committee further observes that the proposed amendment will usurp the powers of the Tribunal to decide whether the circumstances before it are ideal to grant a stay. In addition, a stay at law is paramount to maintain the status quo whilst an appeal is being heard.

In this regard, the Committee recommends that the clause proposing the insertion of 19I (3) should be rephrased to read "The Tribunal may stay the Commission's decision."

7.0 CONCLUSION

Capital markets play a critical role in economic development as they help to mobilise savings and promote investment. More importantly they support mobilisation of long-term capital, which is critical for long term investment and therefore economic growth and transformation.

The *Securities Act, No. 41 of 2016* has been in operation for six years and has had its own strengths and weaknesses, as demonstrated by the way in which the Securities and Exchange Commission exercises its authority over the regulated entities.

While acknowledging that there has been a change in trends and amending of the *Securities Act* is aimed at, among other things, implementing a risk-based approach in the supervision and regulation of capital markets; and revising the supervisory powers of the Securities and Exchange Commission, the Committee is of the considered view, that the Bill contains provisions that maybe detrimental to the proper functioning of capital markets. This is because it will expand the Commission's powers while reducing its accountability mandate. Furthermore, the Bill contains numerous administrative sanctions which impose liability on personnel of licensees in the capital market.

In view of the numerous concerns raised by the stakeholders as well as the observations made by the Committee it does not support the Bill with

This opportunity to amend the *Securities Act No. 41 of 2016* needs to be properly utilised to ensure that a law that will adequately; fairly; efficiency; and effectively regulate Zambia's capital markets is promulgated. This will enable the nation to leverage on the capital markets so as to drive economic growth and national development.

In light of the above, the Committee opines that some provisions of the Securities (Amendment) Bill, N.A.B. No. 23 of 2022 are not in the best interest of the market. It is the hope of the Committee that the Government will consider withdrawing or deferring the Bill for further public consultation.

We have the honour to be, Madam, the Planning and Budgeting Committee mandated to scrutinise the Securities (Amendment) Bill, N.A.B No 23 of 2022.

Mr Fred C Chaatila, MP
CHAIRPERSON

November, 2022
LUSAKA

APPENDIX I– List of National Assembly Officials

Mr Charles Haambote, Principal Clerk of Committees (FC)
Mrs Doreen N C Mukwanka, Deputy Principal Clerk of Committees (FC)
Mr Charles Chishimba, Senior Committee Clerk (FC)
MrElijah I C Chilimboyi, Committee Clerk
Mrs Edna K Zgambo, Budget Analyst
Ms Luyando N Chilala, Administrative Assistant
Mr Daniel Lupiya, Committee Assistant

APPENDIX II– List of Witnesses

Ministry of Finance and National Planning
Ministry of Justice
Bank of Zambia
Zambia Institute of Chartered Accountant
Zambia Institute for Policy Analysis and Research
Drug Enforcement Commission
Financial Intelligence Centre
Anti-Corruption Commission
Madison Financial Services
Securities and Exchange Commission
Pension and Insurance Authority
Capital Markets Tribunal
Capital Markets Association of Zambia
Lusaka Securities Exchange
Bankers Association of Zambia
Zambia Centre for Accountant Studies
Member of the Public -Mr M Kafwaya, Member of Parliament