Calibrating Regulatory Disclosure in Kenya's Securities Markets: Challenges and Opportunities for Investors

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Abstract

Investor protection is incontrovertibly one of the hallmarks of deep and vibrant securities markets. Effective investor protection mechanisms play an indispensable role in bolstering investor confidence and retention. This paper argues that although the disclosure philosophy is the most ubiquitous investor protection mechanism in many jurisdictions and boasts of innumerable advantages including simplicity, its effectiveness in developing securities markets is severely circumscribed by prevailing market realities. With exceedingly low levels of financial literacy and a multiplicity ofother challenges,most retail investors are incapable of accessing the potential benefits of this internationally acclaimed investor protection device.Relatedly, the language and methodology of disclosure is predominantly non local and exceptionally sophisticated. The need to review and domesticatethe various precepts of disclosure cannot be gainsaid.

Investor protection is the cornerstone of securities regulation.[1] It is the bedrock of securities markets because investors constitute a major constituency of the markets. Its ubiquitous in securities legislation across the globe vindicates this proposition. Deep and vibrant securities markets are characterized by effective investor protection frameworks. It is therefore indispensable for developing jurisdictions to devise and institutionalize mechanisms that foster investor protection. The Securities Act, 1933 of the United States for instance, was enacted with its primary objective as investor protection.[2]Investor protection is one of three salient objectives of the International Organization of Securities Commission's (IOSCO). In Kenya, one of the principal regulatory objectives of the Capital Markets Authority (CMA) is protection of investor's interests. Noteworthy, ensuring that securities markets are fair, orderly, efficient and transparent as underscored by the CMA's strategic objective, provide protection for investors.[3]Investor protection is a dominant theme in the securities markets regulatory paradigm because it promotes market confidence and growth. Absent investor protection, securities markets would be incapable of performing their intermediative role. Investor protection mechanisms are abounding. For optimal results, most jurisdictions adopt heterogeneous approaches to complement and reinforce each other. For instance, reducing systemic risk and promoting investor awareness facilitates investor protection.

Although the principal investor protection mechanisms in Kenya include the disclosure philosophy, proscription of insider trading and other forms of market abuse and investor remedies, this paper interrogates the impact of disclosure exclusively. The underlying argument is that as currently constituted, the operative mechanisms are ill-equipped to champion investor interests and are thus incapable of galvanizing market confidence, integrity and growth.

Consequently, the paper progresses as follows: Part 1 contextualizes regulatory disclosure in securities regulation. The discussion illuminates the centrality of regulatory disclosure as an investor protection mechanism.

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[1] See Andrew Guzman & Stephen J. Choi, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903,941 (1998); Toan Le Minh & Gordon Walker, *Investor Protection: Case Studies of the Vietnamese Securities Market*, 38 HONG KONG L. J. 713, 713-14 (2008).
[2] See Friedrich Kessler, *The American Securities Act and its Foreign Counterparts: A Comparative study*, 44 YALE L.J. 1133, 1134 (1935).
[3] See Minh & Walker, supra note 1 at 714.

Part 11 chronicles and critiques the postulations relied upon by commentators on securities markets to justify disclosure. From the analysis, it is evident that the basic assumptions on which regulatory disclosure is founded arenonexistent in most developing markets. Part 111 elucidates the workings of regulatory disclosure in Kenya's securities markets. The discussion demonstrates beyond peradventure that notwithstanding its deficiencies, the disclosure philosophy is the indispensable investor protection paradigm. The paper concludes with proposal for an appraisal of the fundamentals of disclosure so as to enhance its utility in investor protection.

Philosophy of Disclosure

Disclosure is one of the fundamental pillars of securities regulation.[4] It is regarded as an essential component for the operation of securities markets.[5] This is because whereas issuers need capital, investors require information about the issuer and the securities.[6] As an important public policy instrument in securities regulation, disclosure is designed to provide timely, accurate and complete information to the market.[7] It is contrasted with the merit based regulation under which regulators assess the appropriateness and fairness of all issues of securities to the public and either approves or rejects them. The regulators act as gate keepers and investor protectors in the primary market.[8] This system is justified on the premise that regulators are better placed to champion investor interest. While the merit based regulatory system may be suitable for developing markets[9] where ordinary investors are unsophisticated and uninformed, it is criticized as slow and paternalistic.[10]

Mandatory disclosure on the other hand entails the provision of information which enables prospective investors to make informed investment decisions on the securities offered by issuers. The rough logic is the availment to the investing public of as much quality information as possible to facilitate the making of optimal investment choices.[11] Investors are therefore empowered to make their own evaluations of available investments and take responsibility for their decisions. As a foundational form of securities regulation, mandatory disclosure has been hailed as a simple way to regulate complex markets.[12]It is a light-handed regulatory methodology and comports with the notion of investor autonomy.[13] The disclosure philosophy is predicated on the theory that in democracies, regulation of securities markets should not be too paternalistic. Mandatory disclosure as contrasted with voluntary disclosure is the most pervasive securities regulatory methodology.[14] It has been the hallmark of United States securities regulation since its inception in early 1930s.[15]

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[4] Zohar Goshen & Gideon Parchomovsky, The Essentials of Securities Regulation, 55 DUKE L. J. 711, 711 (2006); Lin-Wen Lin, Corporate Social and Environmental Disclosure in Emerging Securities Markets, N. C. J. INT'L L.& COM. REG. 1, 2 (2009); AhalBesorai, Disclosure of Tentative Information by Listed Companies, 16(8) COMP. L. 236 (1995).

[5] See Joel Seligman, The Historical Need for a Mandatory Corporate Disclosure System, 9 J. CORP. L. 1 (1983) (on the essence of mandatory regulatory disclosure in the United States); Mahmood Bagheri& Chizu Nakajima, Competition and Integration Among Stock Exchanges: The Dilemma of Conflicting Regulatory Objectives and Strategies, 24 OXFORD J. LEGAL STUD. 69 (2004).

[6] See Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 YALE L.J.2359, 2374 (1998).

[7] See Janis Sarra, Disclosure as a Public Policy Instrument in Global Capital Markets, 42 TEX. INT'L L. J. 875, 876 (2007).

[8] See generally Nancy L. Wong, Easing down the Merit-Disclosure Continuum: A Case Study of Malaysia and Taiwan, 13 LAW &POL'Y INT'L BUS. 49 (1996).

[9] See Low C.K., Revisiting the Regulatory Framework for Capital Markets in Malaysia, 14 COLUM. J. ASIAN L. 277 (2001).

[10] Id.; Solaiman S.M., Disclosure Philosophy for Investor Protection in Securities Markets: Does one size fit all? 28 (5) COMP. L. 135, 136 (2007);

[11] See Friedrich Kessler, The American Securities Act and its Foreign Counterparts: A Comparative study, 44 YALE L.J. 1133, 1133 (1935).

[12] Michael D. Guttentag, An Argument for Imposing Disclosure Requirements on Public Companies, 32 FL. ST. U. L. REV. 123, 123(2004).

[13] Iris H-Y Chiu, Delegated Regulatory Administration in Mandatory Disclosure-Some Observations from EU Securities Regulation, 40 INT'L L. 737, 742 (2006).

[14] Paula J. Dalley, The Use and Misuse of Disclosure as a Regulatory System, 34 FLA. ST. U. L. REV. 1089, 1089 -92(2007). See also, John C. Coffee, Jr., Market Failure and the Economic Case for Mandatory Disclosure System, 70 VA. L. REV. 717 (1984) (making the case for mandatory disclosure).

[15] See Merritt B. Fox, Retaining Mandatory Disclosure; Why Issuer Choice is not Investor Empowerment, 85 VA. L. REV.1335 (1999); Robert S. Adler & David Pittle, Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation? 1 YALE J. ON REG. 159, 159-60 (1984); Cass R. Sunstein, Information Regulation and Informational Standing: Akins and Beyond, 147 U. PA. L. REV. 613, 613 (1999).

To constitute an effective communication tool, disclosure methodology must pay attention to the discloser and recipient of the information. However, greater focus should be on the recipient because therein lies the utility of the information. Whereas to the issuer the information must be clear, to the recipient it must be comprehensible and usable.

Role of Disclosure in Securities Markets

Contemporary securities regulation scholars' rationalize mandatory regulatory disclosure on multiple grounds. A noticeable feature of these justifications is that they are not mutually exclusive. Although there is no consensus on the number, most scholars justify disclosure on one or more of the following grounds.

First, by availing information about the issuer and the securities being offered, disclosure provides the necessary ingredients to enable prospective investors evaluate the risks of possible investments.[16] Disclosure reduces information asymmetry in the market enabling investors to access information about corporations and their securities.[17] Improved decision making ultimately protects investors.[18] This is consistent with the sagacious aphorism that to be forewarned is to be forearmed. Information is power and its availment is a formidable investor protection mechanism.[19]

Second, disclosure plays a central role in promoting and enhancing corporate governance.[20]It influences corporate governance.[21] It enable investors exercise their basic individual and corporate membership rights, such as participating in annual meetings and voting on mergers and amendments to the articles of incorporation. It could also facilitate their involvement in monitoring the company's management.[22]More importantly, it can reduce the private benefits of control.[23]Arguably, disclosure is instrumental in influencing corporate behavior. On the one hand, it encourages diligence, honesty and forthrightness on the part of corporate managers while on the other it acts as a deterrence mechanism. It has a "prophylactic effect by deterring corporate insiders from engaging in fraudulent or corrupt behavior or mismanagement."Louis Brandeis proposition on the role of disclosure in discouraging corporate misconduct is worth recapitulating. "Sunlight is said to be the best of disinfectants, electric light the most efficient policeman."[24]The fear of disclosure deters fraud.Thus, disclosure plays an important role in dealing with the agency problem. Studies have shown that historically, disclosure developed as a mechanism to control agency problems associated with promoters and company managers.[25]

Third, studies have shown that disclosure is fairly central in improving transparency and price accuracy enhancement. Improving the price-setting function of the market determines its resource allocative efficiency.[26]

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[16] Caroline Bradley, *Information Society Challenges to Financial Regulation*, 37 TOL. L. REV. 307, 315 (2006).

[17] See Marcel Kahan, *Securities Law and the Social Costs of Inaccurate Stock Prices,*DUKE L. J. 977 (1992); see also, Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 649-50 (1969).

[18] Iris H-Y Chiu, *The Role of Disclosure Regulation in Investor Protection Relating to Corporate Insolvency: Some Observations on the US, EU and UK Regulatory Frameworks,* 29(2) COMP. L. 35, 35-36 (2008).

[19] Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK L. REV. 77 (1989); Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 417 (2003); Donald Langevoort, *Ego, Human Behavior and Law,* 81 VA. L. REV 853 (1998).

[20] See Hans Tjio, *Enforcing Corporate Disclosure,*SING. J. LEGAL STUD. 332 (2009); Allen Ferrell, *Measuring the Effects of Mandated Disclosure* 1 BERKELEY BUS L. J. 369, 383 (2004).

[21] Merritt B. Fox, *Rethinking Disclosure Liability in the Modern Era,* 75 WASH. U. L. Q. 903 (1997); Merritt B. Fox, *Required Disclosure and Corporate Governance*, SUM LAW &CONTEMP PROBS. 113

[22]*Id*. at 120-123.

[23] Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 87-89 (2007).

[24]LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 62 (2nd ed. 1933).

[25] See Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problem*, 62 U. CHI. L. REV. 1047, 1054-1065 (1995).

[26] See generally Edmund W. Kitch, *The Theory and Practice of Securities Disclosure,* 61 BROOK. L. REV. 763 (1995); Mitu Gulati, *When Corporate Managers Fear that a Good Thing is Coming to an end: The Case for Interim Disclosure*, 46 UCLA.L. REV. 675, 705 (1999); Ronald J. Gilson et al., *The Mechanisms of Market Efficiency,*70 VA. L. REV. 549 (1984); John C. Coffee Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System,* 70 VA. L. REV. 717 (1984).

Increased share price accuracy improves the selection of new investment projects in the economy.[27] Additionally, price accuracy promotes fairness and reduces uncertainty because investors pay what the securities are worth.[28]This enhances investor confidence in the markets.[29]Apart from acting as an instrument of corporate control, it also, monitors and controls the management's agency problem.

Fourth, it bolsters investor trust and confidence in the securities market by minimizing fear of exploitation and expropriation.[30] It is a cardinal precept of securities regulation that adequate flow of information about the company enhances investor confidence. By disclosing, issuers are presumed to be according investors equal treatment which is typically perceived as fairness.[31] This is particularly important in jurisdictions characterized by concentrated ownership such as Kenya.

Related to the foregoing argument is the fact that since disclosure involves positive and negative information about the company, listed companies are typically more inclined to disclose positive information while reluctant to disclose negative information. Mandatory disclosure reconciles the tension by ensuring that negative information is also disclosed.

Another aspect which is intertwined with disclosure and corporate governance is investor awareness and education. It is an important public policy matter in relation to securities regulation.[32] Investor education is intertwined with disclosure because of its ability to enhance investor knowledge and skill to access and optimize value from disclosures.Since training and education can improve decision making, they enhance the utility of disclosure.[33]

Although mandatory disclosure is the esteemed methodology of securities regulation, it has numerous challenges to contend with. On the one hand it is predicated on multifarious material assumptions.

First, it assumes that the information is disclosed in a usable manner.[34] Typically, disclosure in the primary market is by way of a prospectus containing the mandated information. It is a lengthy and detailed booklet with engrossing diagrammatic illustrations and financial information which seldom inspire ordinary investors. Furthermore, the language used is technical. Abridged prospectuses are equally technical and largely unappealing. The law should require issuers to use plain English in prospectuses. In the United States for example, the law is explicit that risk factors must be in plain English.

Second, it presumes that investors have capacity to comprehend, synthesize and apply the information availed to them in decision making. Ordinary investors have capacity to neither comprehend nor synthesize or apply the information. Limited cognitive abilities and a host of biases[35] interpose in decision making thus undermining the utility of the information disclosed.[36] Investors end up "satisficing"[37] as opposed to "optimizing."[38]

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[27]See Allen Ferrell, *Measuring the Effects of Mandated Disclosure,* 1 BERKELEY BUS, L. J. 369, 371-373 (2004).

[28] See Merritt B. Fox et al., *Law, Share Price Accuracy and Economic Performance: The New Evidence,*102 MICH. L. REV. 331 335-6 (2003).

[29] Iris H-Y Chiu, *Examining the Justifications for Mandatory ongoing Disclosure in Securities Regulation,* 26(3) COMP. L. 67 (2005).

[30] David J. Schulte, *The Debatable Case for Securities Disclosure Regulation*, 13 J. CORP. L. 535,539 (1988); Raymond H. Brescia, *Trust in the Shadows: Law, Behaviour and Financial Regulation*, 57 BUFF. L. REV. 1361(2009).

[31] Susanna Kip Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Towards a more Substantive Approach to Securities Regulation,* 58 BAYLOR L. REV. 139, 152-56 (2006).

[32] See Lawrence A. Cunningham, *Behavioral Finance and Investor Governance,* 59 WAS. & LEE L. REV. 767, 790-92 (2002).

[33] See generally Sarah E. Bonner et al., *Using Decision Aids to Improve Auditors' Conditional Probability Judgments,* 71 ACCT. REV. 221 (1996).

[34] See generally Robert H. Mundhiem, *The Securities Markets: Operations and Issues,* 114 U. PA. L. REV. 1101 (1996).

[35] See RazeenSappideen, *The Paradox of Securities Markets Efficiency: Where to Next,* SING. J. LEGAL STUD. 80, 87-91 (2009).

[36] See Lynn A. Stout, *Are Stock Markets Costly Casinos: Disagreements, Markets Failure and Securities Regulation,* 81 VA.L.REV. 611; Robert Prentice, *Whither Securities Regulation: Some Behavioral Observations Regarding Proposals for its Future,* 51 DUKE L. J. 1397, 1459-60 (2001); Christine Jolls et al., *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471 (1995).

[37] Satisficing is an escape out of a complex decision making process whereby the decision maker relies on a few facts ignoring the bulk of available information and options which would otherwise make the task complicated.

Third, it assumes that the necessary disclosure infrastructure is in place. This would include receptive public, information analysts, financial journalists and other market intermediaries. Analysts and financial journalists synthesize and simplify the information for investors and advice on investment. While this is typical in developed jurisdictions, it is incontrovertibly not the case in Sub-Saharan Africa securities markets where financial illiteracy is pervasive.

Fourth, that decision makers are rational.[39] Studies have shown that most decision makers are in many instances irrational.[40]The irrationality is more pronounced in developing jurisdictions where investors are generally illiterate and unsophisticated. The pyramid and Ponzi schemes which proliferated in Kenya, Uganda and South Africa in 2007/08 exemplify how extraneous factors impair inventors' ability to maximize investment returns.[41]
Finally, mandatory disclosure assumes monitoring by investors and other gate keepers, such as institutional investors which is seldom the case.[42]

In the context of Sub-Saharan African countries, none of these assumptions is borne by facts. The bulk of the investing public is uneducated, largely uninformed and apathetic in their capacity as shareholders of public companies.[43] In the primary market for instance, less than a critical mass of prospective investors read or understand the contents of prospectuses. The mode of dissemination, length, technical detail and language are sufficiently discouraging.[44] This is compounded by the fact that securities markets in these countries are still dominated by speculators whose concerns are short term gains. Participation in IPOs is euphoric and they are overwhelmingly oversubscribed because of the prospects of after the market gain.[45] The offerings are enveloped in a high degree of investor intoxication and there is no incentive to read prospectuses. Company fundamentals seldom count. This can also be explained by the fact that most companies being listed in these markets are government owned and the general perception is that divesture enhances the prospects of these companies.[46] This phenomenon has extended to the few private companies that go public. In the secondary market, the herd behavior is prevalent.[47]From the foregoing, it is arguable that in the primary market disclosure by way of prospectuses is of little value to retail investors. In the secondary market, periodic and continuing disclosure of material information to the securities exchange, regulatory agency and the public through the media and in the company's web page is also sub-optimal. These disclosures pass unnoticed by the majority of the investing public.

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[38] See Herbert A. Simon, *A Behavioral Model of Rational Choice,*69 Q.J. ECON.99, 99 (1955); Russell Korobkin, *TheEfficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality and Market Failure*, 85 CORNELL L. REV. 1, 48(1999) (explaining that satisficing can be seen as "globally rational").

[39] See Jill E. Fisch, *Regulatory Responses to Investor Irrationality: The Case of the Research Analyst,*10 LEWIS & CLARK L. REV. 57, 57 (2006).

[40] See Donald Langevoort, *Organized Illusions: A Behavioral Theory of why Corporations Mislead Stock Market Investors and cause social problems*, 146 U.PA.L.REV. 101 (1997).

[41] Mercy Gakii, *The Inverted sense of Pyramid Schemes*, DAILY NATION, Jan. 19, 2010, at 15; John Kariuki, *Retirees beware! Fraudsters are targeting your pension*, THE STANDARD, Mar. 8, 2010, at 28.

[42] See John C. Coffee Jr., *Liquidity versus Control: The Institutional Investors as a Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991).

[43] Geoffrey A. Manne, *The Hydraulic Theory of Disclosure and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 503-04 (2007); Henry G. Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427, 1439-44 (1964); Stephen Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J. L. & PUB. POL'Y 671, 696 (1995).

[44] See KihiuWangosho, *Capital Markets Regulators to blame for Illiteracy*,BUSINESS DAILY, Mar. 28, 2008, at 19.

[45] See Beatrice Gachenge, *Caught in the Market Trap,*BUSINESS DAILY, Mar. 28, 2008, at 1. (on the challenges facing retail investors in Kenya); James Anyanzwa, *IPO leaves Investors in debt*,THE STANDARD, June 3, 2008, at 1-2; Jackson Okoth, *Safaricom IPO sucks cash from money market*,FINANCIAL POST, May 18, 2008, at 1; Jackson Okoth, *Retail Investors: Why the Sudden Stock Market craze?* FINANCIAL POST, Feb. 25, 2007, at 17; Michael Omondi, *Playing Stock Market Game,* THE STANDARD, May 23, 2006, at 18 (reporting how a secretary based in Nairobi borrowed Kshs. 120,000 ($1,500) to participate in the Kengen IPO and consequently made Kshs 137, 000 ($1,712) after repaying the loan); Theresa A. Gabaldon, *John Law, with a tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J.CORP. L. 225 (2001) (discussing the various types of euphoric market transactions such as, chasing the market, day trading and buying the public fancy).

[46] See Chris Sagers, *The Myth of Privatization*, 59 ADMIN. L. REV. 37 (2007).

[47] See Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis,* 68 U. CIN. L. REV. 1023, 1037-8 (2000). See also Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation,* 81 VA. L. REV. 611 (1995).

On the other hand, regulatory disclosure implicates costs, is characterized by complexities and information overload.Relatedly, it cannot remedy fraud and other forms of market abuse which typically require substantial regulation.

Mandatory disclosure is not a cost free regulatory mechanism. Issuers incur enormous direct and indirect costs of compliance.[48] Creating, gathering, analyzing and summarizing the data to generate the required information involve substantial cost.Moreover, because of the level of diligence necessary, external experts are generally contracted which increases compliance costs.[49]Finally, dissemination of information to a wide spectrum of investors and potential investors has cost implications too.[50]

Another factor which greatly undermines the efficacy of regulatory disclosure is complexity.[51] Whereas the management of the corporation is presumed to understand the information disclosed, most investors do not. Majority cannot decipher the meaning or implications of the detailed and technical data availed to them.[52]The situation is excercabated by the fact that disclosure documents are drafted by experts who use legalese and other formalized language which ordinary investors are unaccustomed to.[53] Furthermore, business organizations are becoming increasingly complex and it is exceedingly difficult to describe them and their activities with any remarkable degree of simplicity.[54] Warren Buffet's lamentation of the complexity of prospectuses is a dramatic illumination of the predicament facing investors: "For the more than forty years, I have studied the documents that public companies file. Too often I have been unable to decipher just what is being said."[55] Relatedly, the fact that many jurisdictions do not have an integrated disclosure system and information is disclosed and posted in multiple places complicates access.[56]

The notion of complexity of information is interwoven with the broader challenge of complexity of the financial markets generally.[57] These markets are complex institutions and less than a critical mass of investors understands neither their operations nor their products. However, it is important to acknowledge that complexity can deepen the securities markets.[58]

In sum, although mandatory disclosure is not a flawless securities regulatory mechanism, it is increasingly becoming the most preferred regulatory approach among "a set of imperfect alternatives." It wouldnot be injudicious to surmise that its benefits outweigh its shortcomings.

Disclosure in Kenya

The disclosure philosophy which is now indelibly ingrained in Kenya's securities law is traceable to the British Joint Stock Companies Act, 1844 and the Limited Liability Companies Act, 1855.[59]

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[48] See Frank H. Easter brook & Daniel Fischel, *Mandatory Disclosure and the Protection of Investors,* 70 VA. L. REV. 669, 707-09 (1984); Jose M. Mendoza, *Securities Regulation in Low-tier Venues: The Rise and fall of the Alternative Investment Market*, 13 FORDHAM J. CORP. & FIN. L. 257 (2008).

[49] See SUSAN M. PHILLIPS & RICHARD ZECHER, THE SEC AND THE PUBLIC INTEREST, 41 (1981).

[50] Note, *Should the SEC Expand Non-Financial Disclosure Requirements*? 115 HARV. L. REV. 1433, 1444(2002).

[51] See generally Steven Schwarcz, *Regulating Complexity in Financial Markets*, 87WASH. U. L. REV. 211 (2009).

[52] Homer Kripke, *The SEC, The Accountants, Some Myths and some Realities,*45 N.Y. U. L. REV 1151, 1153-54 (1970).

[53] See Alan B. Levenson, *The Role of the SEC as a Consumer Protection Agency*, 27 BUS. L. 61, 68 (1971) (suggesting that companies often disclose not to better inform investors, but to reduce the risk of liability for omitting a material fact or disclosing a "half truth.")

[54] See Federal Securities Act: Hearing on the H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 1st Sess. 92 (1923), reprinted in the Legislative History of the Securities Act of 1933 and the Securities Exchange Act of 1934 (Ellenberger & Ellen P. Mahar eds., 1973) (Dept. of Commerce Study of the Economic and Legal Aspects of the Proposed Federal Securities Act).

[55] Warren E. Buffet, Preface to Off. Inv. Educ. & Assistance, Sec. & Exch. Comm'n, A Plain English Handbook: How to Create Clear SEC Disclosure Documents 1 (1998) in Alicia Davis Evans, *A Requiem for the retail investors*, 95 VA. L. REV. 1105, 1112 (2009).

[56] Tom C.W. Lin, *Undressing the CEO: Disclosing Private Material Matters of Public Company Executives,* 11 U. PA. J. BUS. L. 383, 382 (2009).

[57] See generally Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity,*U. III. L. REV. 1 (2004).

[58]*Id*.

[59] Gordon Walker, *Securities Regulation, Efficient Markets and Behavioral Finance: Reclaiming the LegalGenealogy*, 36 HONG KONG L. J. 481, 509 (2006); Ben Pettet, *Towards a Competitive Company Law*, 19 (5) COMP. L. 134, 139 (1998).

While the former introduced incorporation of companies by registration, the latter pioneered the concept of limited liability incorporate law. These statutes were the harbingers of the Companies Act, 1948 which Kenya adopted in 1962. The price of limited liability is arguably the burden of complying with a plenary of disclosure requirements and a significant loss of privacy.[60] The Companies Act, 1948, was based on the disclosure philosophy. It provided for substantial disclosure in the primary market but limited and indirect disclosure for the secondary market. For instance, all registered companies were required to file annual returns with the Registrar of Companies. In the case of public companies, financial statements sent to members had to give a "true and fair view" of the state of affairs and profit or loss of the company and its subsidiaries, if any.[61] Similarly, since Kenya adopted the International Accounting Standards in 1999, auditors are required to satisfy themselves that the financial statements of listed companies conform to the International Financial Reporting Standards.[62]

Puzzlingly, the provisions of the Capital Markets Act contain no substantive provisions on disclosure. The closest is the requirement that an offer of securities to the public must be preceded by an information memorandum and a copy must be filed with the CMA. Disclosure is substantively provided for by the Regulations.[63] A panoramic view of the regulations reveals that their underlying objectives were price accuracy enhancement and agency costs.

As already observed, disclosure by listed companies is governed by the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002. Part A and B of the Third Schedule to the Regulations prescribe the form and content of prospectuses for companies seeking to list in the Main and Alternative investment market segments of the Nairobi Securities Exchange respectively.[64] Additional issues of securities such as rights issue, capitalization (bonus) or script dividend by listed companies must comply with the disclosure requirements.[65]Significantly, the regulations provide for continuing disclosure.[66]

Disclosure in the Primary Market

Securities issuers seeking to mobilize funds through the securities markets are required to prepare an information memorandum or prospectus. Contents of prospectuses[67] for companies seeking to list in the Main or Alternative market segments of the Nairobi Stock Exchange are essentially similar.[68] The salient ingredients include: offer statistics and time table, information about the issuer, controlling shareholder and changes, if any, recent changes in the issued capital, material contracts, activities of the issuer including product, turnover, legal or arbitral proceedings, main investments, policy on research and development, prospects for the current financial year, risk factors, profit forecast and assumptions made, directors opinion on the company's prospects, directors and employees, aggregate remuneration of directors, loans to directors, directors interest, major shareholders and related party transactions, financial information, minimum subscription, amount paid to any promoter or vendor, allotment policy etc.[69]In addition, issuers must ensure that the prospectuses contain "all such information as investors would reasonably require and reasonably expect to find therein."[70] This requirement sounds superfluous because the contents of prospectuses are prescribed by law. More importantly, it is problematic for the issuer to fathom the investor contemplated by this requirement.

[60]*Id.* at 493.
[61] §§152 & 158
[62] Tom Mogusu, *Listed Firms urged to adopt Standards*, THE STANDARD, May 16, 2006, at 10.
[63] Capital Markets (Securities) (Public 0ffers Listing and Disclosures) Regulations 2002 at www. cma.org.
[64]*Id*. Reg. 10.
[65] Fourth Schedule to the Regulations. The regulations are categorical that holders of securities of the same class must be treated equally. A company proposing to make rights, bonus or script issue of securities must make a public announcement within twenty four hours after the board of directors has approved the issue and seek approval of the company in general meeting and the Capital Markets Authority.
[66] Fifth Schedule.
[67] Supra note 63 Reg. 10(1).
[68]*Id.* Part A and B of the Third Schedule respectively.
[69]*Id.*
[70] See supra note 63, Reg. 12(1).

Noteworthy, the CMA has discretion to expand or constrict the contents of prospectuses to safeguard the interests of investors.[71]Thus, the contents of prospectuses in any particular case are dependent on the disposition of the CMA. This is an important addition to the Authority's arsenal to protect investors.

Significantly, the regulations partially domesticate the duty to update and correct by requiring preparation of supplementary prospectus in the event of material changes, inaccuracies or emergence or discovery of new facts. The update or correction may be at the instigation of the issuer with consent of the CMA or by the CMA.[72]

Although an attempt was made to balance between information about the company activities and the agency problem, there is an observable bias towards the latter. But more importantly, the information is essentially historical and generally unhelpful in determining the company's prospects.[73] The regulations do not encourage companies to make forward looking statements other than in relation to profit and prospects for the current financial year. Similarly, directors are only required to give an opinion on the company's prospects. It is exceedingly difficult for an investor to appraise the company from the prism of the management.

It is essential to emphasize that unlike the United States securities markets where institutional investors, hedge funds and other sophisticated investors purchase IPOs on a firm commitment basis, in primary distributions in Kenya, there are no market intermediaries who put capital at risk. Securities are available to all interested purchasers depending on the allocation for the various categories of investors. Simply put, there are no underwriting arrangements.

Finally, although Kiswahili is the language understood by the bulk of the population in East and Central Africa, the CMA regulations are unequivocal that a prospectus must be published in the English language.[74] As intimated above, ordinary investors lack motivation and sophistication to comprehend the bulky and meticulously written contents of prospectuses. As the primary disclosure instrument for IPOs, prospectuses are of limited use in retail investment decision making.

Disclosure in the Secondary Market

To facilitate efficient functioning of the secondary market, certain information must be disclosed to investors on a regular basis. Dissemination of material information to the investing public is therefore an important continuing obligation of listed companies.[75] Companies are required to ensure that the market is informed of any changes and occurrences likely to impact on the prices of the company's securities. The primary objective is to promote liquidity and protect investors and the market.[76]

The Companies Act provide indirectly for periodic disclosure by requiring all companies to file annual returns with the Registrar of Companies.[77] These disclosures become part of the company's public documents which are open to public scrutiny.[78] Similarly, all resolutions (other than ordinary) passed by members in general meeting are registrable within thirty days. The office of the Registrar of Companies acts as a repository for the information. The objective of these requirements is to ensure that company information on its past and current membership, directors, capital structure, major decisions, indebtedness and financial reports is available for inspection.

The downside of annual returns as an avenue for disclosure is that most companies file them as a matter of routine.[79] Relatedly, it is an indirect method of disclosure which is largely ineffectual as most investors are unaware of the existence of the information. Moreover, the historical character of the information undermines its utility. Noteworthy, it is only accessible at a fee. Another disclosure technique ordained by the Companies Act is to members in general meeting.

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[71]*Id*.
[72]*Id.* Reg. 13(1).
[73] Sophisticated investors are generally interested in the prospects of the company, the plans and strategies the company is putting in place to realize its goals and its view of the industry as a whole.
[74] See supra note 63, Reg. 6(4).
[75]*Id.* Fifth Schedule.
[76]See Olayiwola O. Oladele, *Disclosure in Secondary Transactions in Nigeria*, 19(8) I.C.C.L.R. 254 (2008).
[77] See §§125- 128, the returns return must be made within forty two days after holding the annual general meeting for the year.
[78] § 384
[79] Reliability of the information contained in these documents is highly questionable. See WachiraKang'aru, *Financial Reports: Firms not showing the real picture,* DAILY NATION, Feb 20, 2007, at 13.

Companies are required to keep proper books of accounts to facilitate the preparation of financial reports which must be laid before the annual general meeting.[80] Failure to keep books of accounts or laying financial reports before the general meeting is a criminal offence punishable by imprisonment or fine or both.[81]

The CMA regulations and Listing Manual of the NSE prescribe elaborate continuing disclosure obligations for all listed companies. The underlying principles of these regulations and Manual are to ensure: (a) timely, accurate and complete disclosure of relevant information and (b) equal treatment of all shareholders. While the former guarantees that the market is kept abreast of developments affecting the company and its business, the latter ensures equity.[82] Listed companies are required to disclose information on major developments in their "sphere of activity" or expectation of performance not in the public domain within twenty four hours of the event.[83] This disclosure obligation is undoubtedly broad since it encompasses information not only about the company but its competitors. It is a humongous task for the issuer to deduce its outer limits. Strikingly, the continuing disclosure regulations are not subjected to any business confidentiality rule.[84]

Continuing disclosure obligations of listed companies may be categorized as periodic and event based.[85] Noteworthy, unlike prospectuses which must be delivered to potential investors directly, continuing disclosures is made to the CMA, NSE and announced to the public generally through the print media.

Periodic disclosure obligations assume various forms. First, all listed companies are required prepare and publish interim[86] and final reports.[87] These reports must set out the detailed information prescribed by the regulations. The annual report must disclose whether the issuer is complying with the Guidelines on Principles of Corporate Governance and if not what measures are being taken to ensure full compliance. A second form of periodic disclosure relates to notices, circulars, reports, announcements, other documents[88] and resolutions passed by the issuer in general meeting.[89] At the end each calendar quarter, issuers are required to disclose to the NSE, every person who holds or acquires 3% or more of the issuer's ordinary shares, names of the largest ten shareholders and the distribution of shareholding.

Interestingly, the regulations indirectly create another layer of disclosure. Issuers that had adopted a quarterly reporting practice before the regulations were promulgated in 2002 are obligated to continue issuing such reports for consistency.[90] Whereas quarterly reporting ensures that more information is available more frequently and by extension facilitate informed decision making, the reports have the tendency of encouraging short-termism, are expensive to produce and are of little benefit to unsophisticated investors.

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[80] §§ 147- 149

[81]*Id.*

[82] See OluOmoyele, *Continuing Obligations of Listed Public Companies: A Critical Analysis,* 26(12) COMP. L. 355 (2005).

[83] See supra note 63, Reg. A. 01.

[84]*Id.* Reg. 19.

[85] The former include annual, interim and quarterly reports where applicable and takes place with defined regularity. The latter takes place occasionally and the contents are undefined.

[86]These are half year financial reports which must be prepared in accordance with the International Accounting Standards and include as a minimum: condensed balance sheet, income statement, cash flow statement and explanatory notes. The report must be prepared and published within sixty days of the respective interim reporting date. However, the regulations do not require the financial reports be audited.

[87] These are annual or end year financial reports which all issuers must prepare within four months of the close of the financial year. The report must include the auditors and directors' reports. Unlike the interim report, the final report must contain complete financial statements including the balance sheet, income statement changes in equity accounting policies. In addition, the report must contain the distribution of shareholding in the company including the percentage shareholding tabulated in accordance with the regulations. The regulations are very particular on consistency in the preparation of the annual report. Issuers are obligated to notify the media, NSE and the CMA of its annual report within twenty four hours of approval of the same for submission to members in general meeting. In addition, issuers must distribute notices of general meetings, annual financial statements and the auditor's report at least twenty one days before the date of the annual general meeting. Notices of general meetings must be sent to all shareholders and debt securities holders and must specify the date, place, hour and agenda of the meeting.

[88] These documents must be delivered to the NSE and the CMA at the same time as they are issued by the issuer.

[89] Copies of these documents must be delivered to the CMA and the NSE within ten days after the general meeting.

[90] This requirement applies to listed banks only. See Joe Munene, *Pros and Cons of Quarterly Reporting for Listed Firms,*BUSINESS DAILY, Apr. 4, 2007, at 22.

The CMA regulations are however silent on the mode of issue, contents and duration within which the reports must be issued or whether they should be delivered to the NSE or the CMA or both.

The other form of mandatory disclosure is event-based or episodic. Listed companies are required to disclose and publicly announce within twenty four hours, other specified or material information concerning the company such as: proposed merger, acquisition or joint venture, earnings or dividend of an unusual nature,[91] discovery of a new product, significant labor dispute or law suit against the issuer, alteration of memorandum or articles, change in directorship, company secretary or auditor, presentation of winding up petition and such other peculiar circumstances that may prevail with respect to the issuer or the relevant industry.[92] Once again this open ended formula of disclosure leaves the issuers in a quandary since it could exposes them to liability.

Consistent with the need to safeguard investor interest, additional securities by way of rights, script dividend, capitalization and open offers is subject to stringent disclosure and approval requirements. Company decision to issue any of these categories of securities must be announced to the public within twenty four hours of approval by the board of directors.[93]Additionally, a detailed application must be submitted to the CMA for approval of the issue. The Authority is empowered to impose such conditions as it may deem necessary for the protection of existing shareholders and potential investors. Some commentators on securities markets have questioned the rationale of subjecting secondary issues of securities to overly stringent regulations given that the securities are being issued to existing shareholders whose authorization is a prerequisite. Furthermore, it is asserted that rights and capitalization issues are the principal capital raising avenues for listed companies. This argument has little practical appeal because the regulations do not appear to have discouraged publicly held companies from raising further capital as exemplified by the proliferation of rights and capitalization issues since 2006.[94]

Other disclosure requirements in the secondary market are imposed on the NSE and selected market intermediaries such as stock brokers and investment banks. First, the NSE is required to disclose certain information about listed companies to investors by publication in at least two daily newspapers of national circulation.[95]

Second, as alluded to in Chapter One, Stock brokers, Investment banks, Fund managers and Collective Investment Schemes are required to publish their half year unaudited financial statements and their full year audited accounts in daily newspapers of national circulation.

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[91] Joseph Bonyo, *Sameer issues Profit warning,*DAILY NATION, May 27, 2008, at 23.

[92] See supra note 63, Reg. G. 05.

[93] The announcement must state that the issue is subject to approval by security holders and the Capital Markets Authority.

[94] See Johnstone Ole Turana, *Corporate Kenya takes to Rights Issue for Growth Financing*, BUSINESS DAILY, July 7, 2010, at 12; John Gachiri, *Companies bet on Rights Issues for Long term funds,*BUSINESS DAILY, Nov. 1, 2010, at 27; Johnstone Ole Turana, *Kenya Commercial Bank Limited plans to rise 15 billion Shillings for Business Growth*, BUSINESS DAILY Feb26, 2010, at 11; Joseph Bonyo, *Standard Chartered Bank Limited Seeks 2.5 billion Shillings in Rights Issue,* DAILY NATION May 29, 2010, at 13; James Anyanzwa, *Housing Finance Rights Issue gets CMA Approval,*THE STANDARD May 6, 2009, at 6; Morris Aron, *Housing Finance Rights Issue Raises Shs 2.3 billion*, BUSINESS DAILY July 8, 2008, at 21; *Diamond Trust Bank Rights Issue begins Trading,*DAILY NATION, Dec. 30, 2006, at 28; Joseph Bonyo, *National Industrial Credit Bank (NIC)in Shs. 1 billion Rights Issue,*DAILY NATION, Oct. 16, 2006, at 28 ;MwangiMaingi, *CMA Approves Olympia Capital Rights Issue*, THE FINANCIAL POST, Aug. 26, 2007, at 7; Peterson Githaiga, *Equity Bank to Issue Bonus Shares*, DAILY NATION, Mar. 31, 2007, at 23; Tabitha Areba, *Kenya Commercial Bank gears for awaited Kshs 5 billion Rights Issue,*THE FINANCIAL POST, Apr. 27, 2008, at 3; Moses Michira, *TPS Serena Rights Issue Oversubscribed by 35%*, BUSINESS DAILY, Sept. 22, 2010, at 20; *CIC Insurance Seeks to raise Shs 1.2 billion for Expansion*, BUSINESS DAILY, Sept. 22, 2010, at 14; Moses Michira, *Investors snap up Standard Chartered Bank Rights Issue*, BUSINESS DAILY, 0ct. 15, 2010, at 17; MwanikiWahome, *KPLC to seek Kshs. 10 billion ($ 125, 000,000) in Rights Issue*, DAILY NATION, Oct. 29, 2010, at 12; Joseph Bonyo, *Rights Issues at NSE break record*, DAILY NATION, Oct. 30, 2010, at 28; John Gachiri, *Shs. 28 billion ($356, 000,000) offers to test depth of the market,*BUSINESS DAILY, Dec. 15, 2010, at 19.

[95] Regulation 12(1) of the Licensing Regulations 2002 require the NSE to furnish the CMA and investors with a summary of published accounts, particulars of directors, securities transacted, earnings and dividend per share, total number of shareholders , shareholding structure and the controlling or principal shareholder of all listed companies within four months after the end of the year. In addition, by the last day of March in each year, the NSE is t=required to furnish the CMA with a report of its activities during the preceding calendar year. Regulation 12(5) require the NSE to publicly report market statistics on securities transacted, price movements, including high, low and average prices, and the total volume transacted.

Needless to emphasize, only those who are able to read and understand the English language and are skilled in basic accounting or finance can access and utilize this information.

With regard to take-overs and mergers, the Capital Markets (Take-overs and Mergers) Regulations 2002, makes elaborate disclosure provisions. A company or person who intends or proposes to acquire effective control of a listed company is required to announce the proposed offer by a press notice in at least two English language newspapers of national circulation and serve a written notice of the take-over to the target company, NSE, CMA and the Commissioner of Monopolies and Prices within twenty four hours of the resolution by the board or making of the decision.[96] However, the CMA is empowered to exempt the offeror from complying with the regulations.[97] Whereas the disclosure requirements prescribed by the regulations would facilitate informed decision making if the affected shareholders were sophisticated, they have little effect on retail investors in Kenya. Almost invariably, the decision of the affected shareholders is informed by the circulars of the board of directors and the independent adviser. Curiously, the regulations make no provision for a meeting of the holders of the securities to which the take-over offer relates.

Mandatory disclosure is principally enforced through criminal sanctions. For instance, it is a criminal offense to authorize the issuance of a prospectus containing any untrue statement.[98] However the defendant escapes culpability by proving that the statement was immaterial or he had reasonable ground to believe and did believe up to the date of issue of the prospectus that the statement was true.

Similarly, it is unlawful to issue any form of application for company securities without a prospectus which complies with the provisions of the Companies Act. The person in default is liable to a fine not exceeding Kshs 10,000 ($ 125).[99] Another offence relates to the issue of prospectuses before a copy has been delivered to the Registrar for registration.[100]

Furthermore, the Act criminalizes the issuance of a prospectus containing any statement purporting to have been made by an expert without such person's written consent.[101] The effectiveness of these provisions remains uncertain because there are no reported cases in which they were invoked.

With regard to continuing disclosure, provisions of the Capital Markets Act constitute the failure to make full disclosure of required information or the publication of untrue, incorrect or misleading statements in relation to an issuer a criminal offense.[102]

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[96] Reg. 4

[97] See KaburuMugambi, *Takeover Rules to be ignored in KPLC plan*, BUSINESS DAILY, Nov. 18, 2010, at 22.The take-over offer must be served upon the offeree within ten days of the announcement and service of notice to the regulators. On receipt of the offer, the offeree is required notify the NSE, CMA and make a public announcement by a press notice within twenty four hours. Additionally, the offeree must appoint a stock broker or an investment bank as an independent adviser on the transaction. The offeror is required to lodge the take-over offer with CMA for approval within fourteen days of its submission to the offeree and the approved document must be served upon the offeree within five days of approval. The offeree must circulate the approved take-over offer to its shareholders and furnish a copy to the independent adviser within fourteen days from the date of receipt. Within a similar number of days, the board of directors of the offeree must issue a circular to the holders of voting shares to which the take-over offer relates indicating whether or not they recommend that the holders accept the offer. The Independent adviser's obligation is to *inter alia* advise the board of directors of the offeree company through a circular whether to accept or reject the take-over offer. The circular must be sent to the board of directors of the offeree and CMA. The two circulars must be posted to the affected shareholders within fourteen days of receipt of the take-over offer by the offeree. Unless otherwise provided, a take-over offer must state that it is open for acceptance by the offeree within thirty days from the date of service. Under regulation 18, a take-over offer closes on the last day of the offer period. Within ten days of closure of the offer, the offeror must inform the Authority and the NSE the results of the offer and a press notice of the same must be made in at least two English language newspapers of national circulation. Requirement of advice from an independent adviser ensures that the decision of the board of directors of the offeree is supported by an outsider.

[98] §46

[99] §40 (3). §40(4) prescribe two exceptions: (i) where the application form is issued in connection to *bona fide* invitation to a person to underwrite the issue. (ii) Where the securities were not offered to the public.

[100] §43(5)

[101] § 42(2)

[102] §34

Criminal enforcement of non-disclosure and publication of misleading statements is supplemented by the CMA regulations and Listing Manual of the NSE which provide for issuing of notices for non-compliance, reprimands and imposition of financial penalties for late submission of annual accounts and financial reports.[103] Persistent violations of the regulations and Listing Manual may lead to suspension. The harshest penalty is delisting from the NSE by the CMA. Suspensions and delistings are uncommon perhaps because the CMA appreciates their implications on the securities markets. Ultimately, it depends on the egregiousness of the violation. In 2001, for example, the CMA suspended Hutchings Biemer Co. Ltd from the NSE for non-compliance with the continuing disclosure obligations. The company was subsequently delisted. In 2007, A. Bauman Co. Ltd was suspended for non compliance with continuing reporting obligations and has not been re-admitted.[104] Regrettably, information on enforcement actions taken by the NSE against listed companies for contravening the continuing disclosure obligations imposed by the Listing Manual is unavailable.

Questions of civil liability arising from misrepresentation and non-disclosure in the primary and secondary markets will be analyzed in the succeeding sections of the chapter.

As already observed, the objective of continuing disclosure regulations is to ensure that listed companies disclose certain information about their activities and performance to the market. Additionally, it is intended to promote market efficiency, minimize opportunities and temptation for corporate managers to engage in insider trading and keep corporate managers in check. While this is laudable, it is apparent that the regulations predicate is that “more information is always better than less.” The regulations were “copy and pasted” from the United Kingdoms’ disclosure regulations of 2002. Conceivably, no attention appears to have been given to the recipient of the information, the uninformed individual retail investor who has neither access to the information nor capacity to analyze it and understands neither English nor accounting or finance. The regulations are premised on the untenable notion that investors can fend for themselves.

Another daunting challenge is accessing the information which is published in local newspapers and companies’ web pages. The latter is a fairly recent phenomenon. Most investors in both urban and rural areas have access to neither mode of communication. Majority of those who can access the information lack cognitive capabilities to bring the information to bear on decision making. Adoption of International Accounting Standards (IAS), now International Finance Reporting Standards (IFRS) excercabated the challenge because disclosure based on IFRS implies the inclusion of items which the typical Kenyan investor does not comprehend. The regulations should be amended to require issuers to publish prospectuses and other disclosures in plain English and Kiswahili. Similarly, material information disclosed by companies should be disseminated through local radio stations whose coverage is much wider than newspapers and the internet. Most importantly, they use local languages. Additionally, the regulations should require listed companies to incorporate all previous event based disclosures into their interim or quarterly reports.

Conclusion

On balance, it is arguable that neither the instruments of disclosure, nor the language or content appeals to the ordinary investor in Kenya.[105] Although mandatory disclosure is the most common regulatory methodology for the securities markets, its utility in Kenya is severely circumscribed thereby undermining its role in share price accuracy enhancement, corporate governance and ultimately investor protection.[106]

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[103] Schedule 8 of the Listing Manual.

[104] See Washington Gikunju, *NSE raises red flag on A. Bauman’s Share Sale,*DAILY NATION July 4, 2006, at 7.

[105] See Kanga’ru, supra note 79 (explaining how listed companies in Kenya routinely ignore disclosure regulations. The commentary is based on a 2006 United Nations Conference on Trade and Development (UNCTAD Report on the implementation of International Financial Reporting Standards (IFRS) in Kenya. The report opines that weaknesses in corporate governance, lack of pressure from users of financial statements and lack of transparency are the principal culprits); Joseph Bonyo, *Come for your pay, Company asks Shareholders,*DAILY NATION, Dec. 4, 2010, at 15 (explaining how a company which exited the NSE in 2003 was calling on its minorities to collect the amount due to them which has been outstanding. The 132 members include a former managing director of a stock broking firm. Some members may not have been aware that the company ceased to be a public in 2003 since the information was published in local Newspapers); David Mugwe, *EAPI Minority shareholders targeted in buyout,*BUSINESS DAILY, Dec. 21, 2010 at 18; OdhiamboOchola, *Companies should disclose numbers investors can trust*, THE STANDARD, Jan. 11, 2011, at 22.

[106] See Anne Kiunuhe, *Why abiding by Company Law must be consistent,*BUSINESS DAILY, Sept. 21, 2010, at 12. (arguing that because reporting requirement provisions of the Companies Act are not enforced, it is difficult to access credible information on companies): Manning Gilbert Warren, *Legitimacy in the Securities Industry: The Role of Merit Regulation,* 5 BROOK. L. REV. 129 (1987).

Overreliance on disclosure in many respects is thus questionable. In the short term, a case may be made for the adoption of a hybrid between the merit-based and disclosure-based regulatory systems.The mechanisms from both systems would complement each other in safeguarding investor interest since the current system appears incongruous with markets realities.

Finally, it is critical to accentuate the fact that although periodic and episodic disclosures have definite advantages such as, promoting market efficiency, minimizing opportunities and temptation for insider trading, and keeping investor informed and corporate managers in check, challenges are abound. For instance, it may compromise confidentiality, precipitate premature disclosure, promote market volatility, has cost implications[107] and could overwhelm shareholders with information.[108] Different jurisdictions have addressed the challenge differently. What is consequential is that whatever approach is implemented, it should be based on a cost and benefit analysis.

[107] See generally Kenneth B. Firtel, Plain English: *A Reappraisal of the intended Audience of Disclosure under the Securities Act of 1933*, 72 S. CAL. L. REV. 851 (1999).

[108] See Paredes, supra note 19