

2015

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Unclaimed Financial Assets Regulations, 2015 – Regulatory Impact Assessment Statement



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DOCUMENT CONTROL SHEET

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| Process Area | |
| Main Process | Regulations and Rule-making |
| Scenario(s) | One |
| Main Process Owner | The Unclaimed Financial Assets Authority, supervised by The National Treasury |
| Reference Documents | <ul style="list-style-type: none"> • The Constitution of Kenya (2010) • The Statutory Instruments Act (No. 23 of 2013) • The Unclaimed Financial Assets Act (No. 40 of 2011) • The 2008 Taskforce on Unclaimed Financial Assets Final Report and PowerPoint Presentation Briefing • The Draft Unclaimed Financial Assets Regulations, 2015 |

1.0 Introduction

1.1 Background: Legislative and Policy Context

In July 2007, the macro-economic committee of the National Economic & Social Council (NESO) received a report presented by the Unclaimed Property Assets Register (K) Limited estimating unclaimed financial assets in Kenya to be about **KShs. 200 Billion**. A subsequent meeting was held between the then Permanent Secretary of the Treasury (now Chief of Staff at The Presidency) and his team at the Ministry of Finance and the private sector working group on unclaimed assets on the 14th of September 2007. It was agreed at the meeting that the Ministry establish a Taskforce to look into the unclaimed assets issue.

The then Minister for Finance, represented by the Economic Secretary (currently the National Treasury's Principal Secretary), inaugurated the *Taskforce on Unclaimed Financial Assets* on 19th of March 2008. The aim of the Taskforce was to ascertain the nature, extent and value of unclaimed financial assets in Kenya. The *Taskforce* members were drawn from the key sectors of Kenya's financial system. It comprises representatives of key regulatory bodies, including the Central Bank of Kenya (CBK), the Insurance Regulatory Authority (IRA), the Capital Markets Authority (CMA), the Retirement Benefits Authority (RBA), the Commissioner of Cooperatives, and a Consultant, the Unclaimed Property Assets Register (K) Limited (UPAR).

The mandate of the Taskforce included a review of practices in Kenya: a comparative with practices in selected international *best practice* jurisdictions; ascertain or estimate unclaimed financial assets held in relevant sectors by conducting appropriate inventories of these assets, and recommendations for an appropriate *legal, regulatory, and institutional framework* to govern unclaimed financial assets in Kenya. The Taskforce found out through a baseline survey that the situation in Kenya contrasted sharply with the best international practice. It was estimated that the overall universe of unclaimed financial assets in the financial system, the corporate sector and other institutions, including utilities, had a range of between **KShs.19.9 billion** to **KShs.46.3 billion** in the private sector alone. Actuaries estimate that about **60%** or more of these unclaimed assets may never be reunited with their owners or beneficiaries. Reasons behind this lack of reunification included the passage of time, death of owners, missing records, lack of asset tracking mechanisms and the absence of legal and regulatory requirements compelling institutions to declare the unclaimed assets that they held.

The Taskforce established that the framework in Kenya did not provide for a system of mandatory notification or reminders to potential unclaimed financial asset owners nor the disclosure or publication of unclaimed financial assets. Implementing an effective reunification system would help *protect the interests of potential unclaimed financial asset owners*, particularly the *most vulnerable owners and beneficiaries* such as *widows, orphans, dependents and others who are less financially literate (strong consumer and stakeholder protection)* in society. They recommended a robust reunification service that would include third-party unclaimed financial assets service providers working in the best interests of asset owners as well as financial asset holders.

The Taskforce established that there was considerable variation in the treatment, accounting and reporting of unclaimed financial assets within sectors, as well as across different sectors. Many holding institutions have weak-to-no policies on unclaimed financial assets that do not conform to best

practice. This gave rise to the need for setting uniform rules, definitions and accounting and reporting requirements on dormant and unclaimed assets across the financial system.

Respondents to the 2008 Taskforce's survey on the proposed structure of an unclaimed financial assets framework indicated broad support for the introduction of *uniform best practices* within industries as well as the *creation of an independent unclaimed financial asset agency and trust fund*, particularly by large banks, insurers and other listed entities. The respondents noted that transferring the unclaimed financial assets minimized the risks of holding the assets in their books.

The Taskforce established that in the absence of a *mandatory regulatory framework* (as opposed to a voluntary regime) holding institutions had no legal compulsion or commercial incentive to *identify, segregate, report and manage unclaimed assets with due consideration to the interests of asset owners*. An unclaimed financial assets regime would assist the financial system to *minimize fraud* by employees of holding institutions, *curb corporate malpractices* by holdings institutions, and *promote sound corporate social responsibility (CSR)* through reunification. It would also raise standards of *corporate governance (CG)* through *increasing transparency and accountability in the management of third party assets*.

The Taskforce *established, and recommended* that **reunification services are critical in both the temporal and permanent phases of separation**, particularly the **reunification of financial assets with widows, orphans, dependants and beneficiaries** of these assets. In addition, the Taskforce recommended that a long-term investment policy and strategy be part of the *overall unclaimed financial assets framework*. This will increase buy-in by other stakeholders and, in addition, accord the Government an opportunity to exercise its responsibility as "*Bona Vacantia*" holder of assets in the public interest.

FOUR possible options emerged from the assessment by the Taskforce on unclaimed financial assets in Kenya. These were:-

Option 1: Maintain the current legal and regulatory framework largely unchanged. The Taskforce viewed this option as unfavourable given *Vision 2030's* social and economic pillars of a *free, equitable, and just society* with access to *world-class, inclusive, affordable and competitive financial services*. In addition, from international best practice, the government would be abdicating its mandate as "*Bona Vacantia*" holder of unclaimed asset in trust. Moreover, there was convergence of opinion on the matter that these assets should be under regulatory oversight.

Option 2: Introduce a voluntary legal and regulatory framework. This option required all participating institutions holding unclaimed financial assets volunteer to participate in a self-regulatory regime. This option would imply that institutions holding unclaimed financial assets exercise their discretion either to participate or not as they are not compelled to do so either by law or principle. This option was also rejected given that the holding institutions have been beneficiaries of the absence of statutory requirements.

Option 3: Introduce a mandatory legal and regulatory framework within an existing regulator(s). This option would have entailed use of existing systems and infrastructure of regulators to domicile the unclaimed financial assets agency. Given the Government policy stance of not creating new agencies but rather consolidating agencies, this option required that such an agency be domiciled in an existing regulator. This option would be consistent with the trend towards consolidation of the regulation of financial services under a unified financial sector regulator.

Option 4: Introduce a mandatory legal and regulatory framework with creation of a new Regulatory Agency. The option entailed establishment of an *unclaimed financial assets agency* tasked solely with the responsibility of regulating, supervising, and managing unclaimed financial assets across all sectors in Kenya. The framework would address the most common causes of dormancy, provide for uniform definitions and standards of accounting and disclosure, and establish regular reporting requirements.

Out of Four (4) possible options, the Taskforce recommended the option 4 as the ideal structure that took into consideration the critical pillars of a robust unclaimed financial assets framework, namely:-

- a) introduction of accounting and reporting obligations on holding institutions;
- b) indefinite right of reunification for owners;
- c) a mandatory legal framework that included creating a regulatory agency and trust fund, and
- d) Provisions for investment of unclaimed financial assets for long-term socio-economic development.

In this regard, the Taskforce developed a draft unclaimed assets bill for consideration by the Ministry of Finance. The draft bill contained guidelines for a regulatory and institutional structure for the administration of unclaimed financial assets.

By way of summary, a version of the Ministry of Finance’s draft was introduced as a private member’s motion by *Hon. Joseph Lektun*, (MP, Laisamis) in March 2010, went through the Parliamentary Bill stages and was eventually promulgated into what is now referred to as the *Unclaimed Financial Assets Act (No. 40 of 2011)* on the 2nd of December 2010 on receiving Presidential Assent. This Act came into force on the 16th of December 2010.

The Unclaimed Financial Assets Authority (“UFAA or the Authority”) is a State Corporation established under the National Treasury pursuant to Section 39 of the Unclaimed Financial Assets Act. The primary mandate of the Authority is to receive unclaimed financial assets from the holders of such assets; safeguard and re-unite the assets with their rightful owners.

The Authority worked with consultants to develop draft regulations that would be used to enforce certain provisions of the Unclaimed Financial Assets Act in 2014, which have been reviewed by the National Treasury team, together with the State Law Office. In conformity with the Statutory Instruments Act, a Regulatory Impact Assessment Statement (RIA) is required for any statutory instruments consideration by the National Assembly’s Committee on Delegated Legislation for review, approval and eventual gazettment.

1.2 Process and Consultation

The Ministry of Finance in 2008 through the Taskforce recruited a consultant whose main responsibility under supervision was to:-

- Consult with financial and corporate entities.
- Determine extent of unclaimed assets.
- Study selected jurisdictions that had international best practice.

The Ministry of Finance, *reconstituted the Taskforce in 2013* with the aim of ensuring that *a set of minimum regulations* were developed to *facilitate enforcement and compliance* with the Unclaimed Financial Assets Act. The task was undertaken by the consultant with the assistance of the Board of the Unclaimed Financial Assets Authority that had been gazetted in December 2012. Below is a brief enumeration of the process and the stakeholders that were consulted in the process of crafting the regulations:-

- **Phase One** – The consultant used the segmentation approach as devised for the 2008 baseline survey in reaching out to financial service industry players in the various sectors. The consultant’s team was to liaise with regulatory agencies, in addition to the financial service sector trade associations as well – Kenya Bankers Association (KBA), Association of Kenya Insurers (AKI), Kenya Association of Stockbrokers and Investment Banks (KASIB), Association of Retirement Benefit Schemes (ARBS) to mention a few. The consultant was to devise a market survey for the selected participants and share the approach with the Taskforce and the Authority’s Board.
- **Phase Two** – This entailed the development of a database of responses. With the assistance of regulatory agencies as represented on the Taskforce and the Treasury, establish language that made it compelling for the selected regulated institutions to provide feedback with the survey.
- **Phase Three** – The consultant analyzed survey responses, researched and reviewed Kenya’s existing financial service policies, procedures, regulations and legislation, determined the suitability and applicability of findings for implementation within existing framework and recommended regulatory and operational structures for implementing an unclaimed asset regime in Kenya. The Taskforce and consultant subjected the findings and recommendations to *public review and critique* to validate the final recommendations through workshops with various stakeholders as mentioned above. There were five meetings held at:-
 - the **KCB Training Centre** in Karen with Authority’s staff and Board,
 - The **Boma Nairobi** with invited stakeholders across all sectors,
 - the **Norfolk Fairmont Nairobi** with the Kenya Bankers Association,
 - the **Kenyatta International Convention Centre** with the Board after stakeholder input had been incorporated, and finally with
 - the National Treasury team at the **Boma Nairobi** before the document was passed on to the State Law Office

- **Phase Four** – From the findings and stakeholder feedback and selected interviews with industry and asset owners, the Taskforce provided the rules and regulations for operationalizing the Unclaimed Financial Assets Act to the Authority's Board after thorough review by the State Law Office. The final phase before gazettelement is the provision of the regulations for consideration by the Committee on Delegated Legislation.

2.0 Issue Analysis and Risk Assessment

2.1 Issue(s) that the regulations address and the sectors concerned

The Draft Unclaimed Financial Assets Regulations 2014 have been crafted in adherence to Section 53 of the Act in an endeavour to provide direction to entities categorized as holding institutions to comply with the following aspects taken into account:-

- i. **Reporting** – the data elements and aspects as indicated in the Act have been crystallized into various forms that will be used by the stakeholders
- ii. **Asset Examination & Delivery** – assets of a physical nature that are in safe keeping or stored in safe deposit boxes that have financial value are provided for, inclusive of the time threshold and the conversion process into cash
- iii. **Cost, Charges & Deductions** – The Regulations provide for what is considered as reasonable cost and charges for the opening, assessment of assets held in a safe deposit box
- iv. **Process of Due Diligence** – The main area of focus here (Regulation 9) is life assurance/insurance policy owner due diligence efforts
- v. **Claim on Assets, and Payment of Claims**
- vi. **Indemnity Agreement** – This is a requirement on transferring the financial asset to the claimant, to absolve the Authority from future liability with respect to the paid out value
- vii. **Availability and Access of information to the public** – The proviso elaborates on Sections 36 and 38 of the Act that require information on unclaimed financial assets is made available to the public with the deliberate aim of facilitating the reunification of these assets with their owners, and/or beneficiaries.
- viii. **Investment of Funds** – The provision establishes the investable asset categories and percentage thresholds that the Trust Fund should conform to.

The sectors that were consulted and are to be affected by the Unclaimed Financial Assets Act and the proposed Regulations are as follows:-

| Industry/Sector | Line/Main Regulator | Statute(s) | Stakeholder Representation |
|-----------------------------|---|--|--|
| Banking | Central Bank of Kenya | Banking Act, Regulations & Prudential Guidelines | Kenya Bankers Association (KBA) |
| Capital Markets | Capital Markets Authority | Capital Markets Act, Regulations, CDSC Act & Regulations | Kenya Association of Stockbrokers and Investment Banks (KASIB) |
| Insurance | Insurance Regulatory Authority | Insurance Act & Regulations | Association of Kenya Insurers (AKI) |
| SACCOs | Societies & Savings Regulatory Authority | SACCOs & SASRA Act & Regulations | Kenya Union of Societies', Savings & Co-operatives Organization (KUSSCO) |
| Pensions | Retirement Benefits Authorities | RBA Act & Regulations | Association of Retirement Benefits Schemes (ARBS), NSSF |
| Public Pension | Directorate of Pension - Treasury | | |
| Utilities | Energy Regulatory Commission, Water Services Management Authority | ERC Act, Water | Kenya Power & Lighting Co. Limited, Nairobi Water & Sewerage Co. Limited |
| Shareholders | Capital Markets Authority | Capital Markets Act, Regulations, CDSC Act & Regulations | Kenya Shareholders Association |
| Consumers | Competition Authority of Kenya | Competition Act & Regulations, Consumer Protection Act | Federation of Kenya Consumers (COFEK)/ Kenya Consumer Organization (KCO) |
| Bail and Bond Monies | Chief Registrar, Judiciary | Penal Code, Traffic Regulations | |

2.2 The Risks (Probability and Severity)

The Taskforce observed in its Final Report that transfer of unclaimed financial assets could result in a *liquidity crisis*, particularly for banks while companies could resort to selling of assets to meet such requirements leading to *unanticipated financial burdens*. In addition, the penalties for non-compliance with the Act are punitive, and thus there was the Taskforce recommendation to define dormancy, dormancy periods and the best practices for accounting, reporting and disclosure of unclaimed financial assets while held *in situ* at holding institutions. An appropriate unclaimed financial assets regime for Kenya would need to include regulatory requirements for reunification that adequately cover unclaimed assets separated from their owners temporarily as well permanently. This minimum set of regulations provides the beginning of a compliance initiative by the Authority, given the reluctance by a number of sectors and players to report and remit these assets as advertised in the media by the Authority.

3.0 Objectives of developing the Draft Unclaimed Financial Assets Regulations, 2015

The Draft Unclaimed Financial Assets Regulations 2015 have been crafted in adherence to Section 53 of the Unclaimed Financial Assets Act in order to provide direction to legal entities categorized as “holding institutions” to comply with provisions of the Act.

4.0 Analysis of Impact

Below is a brief description of the costs, benefits and impact of the Unclaimed Financial Assets Regulations 2015

| ITEM | COSTS | BENEFITS | IMPACT |
|------|--|--|--|
| | Annual administrative expenses of the Authority amounting to KShs. 36 Million for establishment, KShs. 64 Million recurrent expenditure in the 2013/2014 Budget, KShs. 189.74 Million in the 2014/2015 Budget as approved by the Treasury, and KShs. 515 Million as indicated in the Authority’s Strategic Plan budget | A critical component and intervention to ensure peoples assets can be accessed and kept in safe custody. The perpetual right to access these assets by beneficiaries’ regardless of time is a benefit that is now available to the citizenry Government is seen as holder of last resort, as it will outlive citizenry. | Social: reduced net social protection cover as provided by Government because of citizens’ access to the assets as owners and/or beneficiaries. The unlocked value would facilitate citizenry’s ease and access to basic utilities such as health, and education to mention a few. Political: Government seen to not only fulfil its pledge of the “ <i>Bona Vacantia</i> ” legal framework and principle, but also enforcing good corporate responsibility through due diligence before transfer |

| | | |
|--|---|--|
| <p>by holding institutions. A critical anchor of a <i>free, inclusive, progressive and fair country as per Kenya's Vision 2030 blue-print.</i></p> | | |
| <p>Corporate Governance & Social Responsibility: Institutions writing back of assets into income will become a thing of the past financial and management malpractices.</p> | <p>Insistence on holders to undertake due diligence and keep accurate records an important aspect of the unclaimed financial assets regime.</p> | |

| <p>Impact</p> | <p>Provision(s) of the Unclaimed Financial Assets Act</p> |
|---|---|
| <p><i>The Unclaimed Financial Assets Regulations, 2015 will not decrease a person's right to property nor impose liabilities within the meaning of section 9(b) of the Statutory Instruments Act. To the contrary, the Regulations will enable owners/beneficiaries of unclaimed assets to be reunited with their assets.</i></p> | <p>Section 53 The Cabinet Secretary may, on the recommendation of the Board, make regulations necessary to carry out the provisions of this Act.</p> |

| Part III – Dealing with Unclaimed Financial Assets, Duties of Holders and certain Powers of the Authority, etc | |
|--|---|
| <p>Section 28</p> <p>28. (1) A person claiming an interest in any assets paid or delivered to the Authority under this Act, may file with the Authority a claim on such form as may be prescribed for that purpose by the Authority.</p> <p>Regulations 11 through 13 prescribes and outlines the documentation required for claimants to submit together with the Forms as outlined in the Sixth, Seventh, Thirteenth, Fourteenth, Fifteenth, Seventeenth and Eighteenth Schedules.</p> <p>Section 27</p> <p>The Authority, shall upon payment of an inspection fee as the Authority may from time to time determine, make available to the public inspection at all business hours, only the name of the owner or the apparent owner and a general description of the assets delivered to it under this Act.</p> <p>Regulation 14 provides the amount (KSh.100) to be paid by any person who wish to access records’ pertaining to unclaimed financial assets held by the Authority.</p> | <p><i>The requirements contained in these regulations will enable the claimants’ to submit the information necessary for them to be reunited with their assets.</i></p> <p><i>The fee goes towards partially defraying the cost of maintaining the database and providing online and hard copy information to the person requisitioning the information .</i></p> |

5.0 Impact on regulatory co-ordination and harmonisation

As the Government moves towards consolidating financial service regulatory agencies, the Unclaimed Financial Assets Authority is the single state agency that has not been incorporated into the merger of these regulatory agencies.

As the Authority moves towards enforcing provisions of the Act, an important component of the regime will require close collaboration and partnership with the merged Financial Services Authority to get the regulated entities designated as holders by the Unclaimed Financial Assets Act to conform to the rules and regulations as drafted, in addition to working towards developing of guidelines in the accounting and reporting of these unclaimed assets whilst still being held in the institutions.