

CHANGES TO CAPITAL MARKET REGULATIONS

The Cabinet Secretary Finance recently gazetted the Capital Markets (Whistleblower Regulations) 2022 to give effect to the amendments to the Capital Markets Act (the Act) in 2018 by setting up a framework for the payment of rewards to whistleblowers. The amendments to the Capital Markets (Conduct of Business) (Market Intermediaries) Regulations 2011, will enhance access to investment advice as set out in the Budget Statement FY 2022/23 and also respond to the increasing number of Investment Advisers licensed under the Investment and Financial Analysts Act but who found compliance with the Act costly or out of reach. We expect to see further changes in the medium term particularly on the role of “Financial Advisors” a term used by most financial service firms for members of their distribution teams particularly if the regulation of financial service firms is housed under one body. The changes through the Capital Markets (Licensing Requirements) (General) Regulations, 2002 are on the other hand expected to enhance the ease of doing business for market intermediaries whose Holding Companies are listed entities. It is expected that the regulations were laid before parliament as prescribed under the Statutory Instruments Act and there were no objections from parliament.

The key changes made by these regulations are as highlighted below.

Capital Markets (Whistleblower Regulations) 2022.

| Regulation(s) | Regulation Item | Provision |
|----------------------|------------------------|--|
| 5 | Reporting Channels | Anonymously to the Capital Markets Authority(CMA), in person or through CMA’s communication channels. |
| 5(2) & (3) | Reportable misconduct | Failure to comply with the legal and regulatory obligations under the Act or regulations, offences under the Act and Capital Markets Fraud subject to the reasonable belief that the misconduct has or will occur. |
| | Funding of the Reward | The reward is to be financed from the proceeds recovered by the CMA on account of penalties imposed or sums recovered from any illicit gains made by the wrongdoer |
| 6 | Information threshold | The information to be submitted to the CMA should be new (not known to the CMA) and timely, authentic, complete and relevant, obtained because of the whistleblowers’ independent knowledge. |
| 8 | Action after Reporting | CMA conducts its investigation and may impose sanctions, penalties or other appropriate administrative measures in accordance with the Act |
| 9 &10 | Confidentiality | CMA has an obligation to keep the Whistleblower’s identity and the information disclosed confidential except where disclosure is subject to the law, court order or the Witness Protection Act. Information disclosed to the CMA is not subject to any confidentiality requirements in an employee’s contract. |
| 12 | Reward | The reward is set at three percent (3%) of the recovered sums subject to a maximum of KES 5,000,000.00 .Subject to the applicable tax rates. |

| | | |
|-------|-------------------|---|
| 11(b) | Time Limits | Whistleblowers' whose information lead to successful recovery of sums are entitled to apply within 90 days of the conclusion of the enforcement action. |
| 13 | Eligibility | Public officers, persons convicted as a result of the information they provide as well as auditors are not eligible to the reward. |
| 15 | Appeals on reward | Any aggrieved person with the decision of the CMA can appeal to the Capital Markets Tribunal within thirty (30) days from the date of the decision. |

Capital Markets (Conduct of Business) (Market Intermediaries) (Amendment) Regulations, 2022

| <i>Regulation</i> | <i>Regulation Item</i> | <i>Provision</i> |
|--------------------------|--------------------------------------|--|
| 2 | Term of service of external auditors | Market intermediaries who are subsidiaries of listed companies can now have auditors serve for the term prescribed at group level as opposed to the maximum of four consecutive years previously prescribed. The Code of Corporate Governance that sets the limit at 9 years, unless departure from this limit is approved by the authority and the shareholders now fills in the gap. |

Capital Markets (Licensing Requirements) (General) (Amendment) Regulations, 2022

| <i>Regulation</i> | <i>Regulation Item</i> | <i>Provision</i> |
|--------------------------|--|---|
| 2 | Application for licence | Opens up the persons who can apply for an Investment Advisor licence to include a sole proprietor partnership or limited liability partnership |
| 3C | Minimum paid up share capital requirements | The requirement to present the evidence of having a minimum paid up share capital of KES 2,500,000.00 is removed and replaced by an obligation to obtain a professional indemnity insurance the value of which shall not be less than five hundred thousand shillings |
| 6 | Reporting Requirements | Investment advisers are exempted from the requirement to submit quarterly management accounts and reports of the portfolio under its management, half yearly reports of the portfolio under its management and annual reports of the total value of the portfolio under its management. |
| 12 | Licence and renewal fees | Investment advisers licence and renewal fees have been reduced to KES 50,000 from KES 100,000. |