

UNIVERSITY OF NAIROBI

THE INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

A COMPARATIVE STUDY ON THE MANAGEMENT OF UNCLAIMED
FINANCIAL ASSETS: KENYA AND OTHER DEVELOPED COUNTRIES:
2000-2010.

KIMOSOP VINCENT KIMUTAI

R50/71687/2008

SUPERVISOR

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MR GERRISHON IKIARA

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A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF
THE DEGREE OF MASTERS OF ARTS IN INTERNATIONAL STUDIES.

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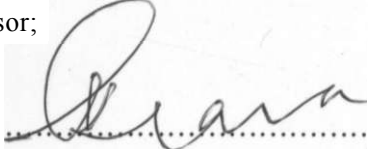
DECLARATION

I, Kimosop Vincent Kimutai hereby declare that this research project is my original work and has not been presented for a degree in any other University.

Signed  Date. 3,01 U I Q o t ©

Kimosop Vincent Kimutai

This project has been submitted for examination with my approval as University Supervisor;

Signed  Date.

Mr. Gerrishon Ikiara

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I thank the almighty God for giving me strength and favour during this period. This made all the difference particularly in times when there were challenges before me.

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DEDICATION

To the Institute for Legislative Affairs (ILA) in its efforts to build a transformed nation governed by laws that reflect Justice, Righteousness and Fairness.

ABSTRACT

The financial sector plays a critical part in a country's development and it is therefore vital to progressively devise policies that support the sector in executing this role. The banking, insurance, capital markets and the pensions are key sectors within the Kenya's financial system and have each undergone through major reforms in the last decade particularly after the year 2003.

A review of the different reform initiatives, indicate that one area within the financial sector that has not been adequately addressed, is on the management of unclaimed financial assets. Kenya does not have a well developed and institutionalized policy framework in place to guide and direct institutions in handing unclaimed assets and this has led to different financial institutions within the sector, devising their own internal policies to manage them. The overall effect of this is that there are varied operational guidelines within the financial institutions to manage unclaimed assets. This research sought to undertake a comparative analysis on the management of unclaimed assets between Kenya and developed countries like the United Kingdom, Ireland, US and Australia with a view of making recommendations on how Kenya can address its unclaimed assets based on the prevailing best practices worldwide.

Both primary and secondary data were used in the study. Due to the nature of the subject, experts operating in public and private sectors in the financial system were interviewed to help provide insights on how best to handle unclaimed assets. Unclaimed financial assets results from untimely death, immigration, loss of contacts, mergers and at times lack of knowledge among the public on how to about in dealing with such assets. Since there are no legal stipulations that require the holders of such assets to disclose them, they have been left to accumulate. This goes against international best practices and also denies rightful owners and dependents access to such resources that they can use to better their livelihoods while at the same time contributing to the country's progress.

The establishment of a legal framework in Kenya will be instrumental in maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and fighting malpractices. The management framework will also support efforts to enhance corporate governance in the financial sector. Corporate governance is associated with the trend towards greater corporate responsibility and the conduct of business within acceptable ethical standards. Transparency, accountability and openness in reporting and disclosure of information, both operational and financial, are internationally accepted to be vital to the practice of good corporate governance.

Proper management of unclaimed assets also presents the government with an opportunity to increase its revenue base. These resources can be used to support the country's development process as this is one of the methods that other countries have employed to widen their non tax-revenue.

ABBREVIATIONS

ADB	Asian Development Bank
BBA	British Bankers Association
BBS	British Societies Association
CBK	Central Bank of Kenya
CMA	Capital Markets Authority
CRB	Credit Reference Bureaus
CUA	Commission on Unclaimed Assets
DFI	Development Finance Institutions
EAC	East African Community
ERS	Economic Recovery Strategy
FSA	Financial Services Authority
FSD	Financial Sector Deepening
GDP	Gross Domestic Product
GJLOS	Governance, Justice, Law & Order Sector
ICPSK	Institute of Certified Public Secretaries of Kenya
IEA	Institute of Economic Affairs
IMF	International Monetary Fund
IRA	Insurance Regulatory Authority
IRD	Inland Revenue Department
IT	Information Technology
KCB	Kenya Commercial Bank
KPLC	Kenya Power & Lighting Company
NARC	National Alliance Rainbow Coalition
NSSF	National Social Security Fund

Organisation for Economic Co-operation and
Development

Policyholders Compensation Fund

Retirement Benefits Authority

Republic of Kenya

Securities Exchange Commission

United Kingdom

United Nations

United States

Uniform Unclaimed Property Act

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CHAPTER ONE

1.1 INTRODUCTION

The critical importance of an efficient and well functioning financial system to a country's economic development today is widely recognised. This was made even clearer during the recent financial crisis that made the world's largest economy and other countries to undertake collective actions to safeguard the sector and bolster public confidence. The financial system plays an important role in the development process, particularly through the financial intermediation process. In recent years, the sector's performance has improved as manifested in increased profitability and financial deepening.

The financial system comprises a number of interrelated components - infrastructure (including legal, payment, settlement and accountancy systems), markets (stock, bond, money and derivatives) and institutions (banks, securities firms and institutional investors). A disturbance in any one of these areas can affect the stability of the system, and risks may arise in any one of these areas. For example, an inefficient payment or settlement system can undermine the speed and accuracy of transactions. The reputational risk of one set of participants can undermine public confidence in the financial institutions.

Kenya's long-term national strategy, Vision 2030, identifies the financial sector as one of the country's key economic sectors. The regulatory bodies within the financial sector are increasingly appreciating the value of closer collaboration and they recently developed a working framework that provide for intra sectoral partnership. Within the eastern region, Kenya's financial sector is the most developed, but it is still far from achieving its full potential.

Many countries, including Kenya, have different regulatory institutions to govern different sub-sectors of the financial sector¹. For example in South Africa, insurance, pensions and securities operate under a consolidated regulator but banking is excluded and remains under the Central Bank. Conversely in the United Kingdom banking, insurance and securities are integrated but pensions are excluded and fall under the independent Pensions Regulator.

In the financial sector, an additional motivation for regulation is maintaining financial stability, which is a clear public good. Financial sector supervision thus requires a more elaborate framework and tends to be more rigorous and intensive than is the case in other sectors. According to Abrahms & Taylor, regulation of the financial sector should achieve Clear objectives, foster independence and accountability; ensure that there are adequate resources; effective enforcement; comprehensive and cost effective regulation. This is why by making a comparative analysis of how advanced countries like the UK, US and Canada have faired in the management of the financial sector is vital for Kenya so as to draw lessons and build upon them in its efforts to develop and reform the sector.

One particular area that these countries have made major strides is in the management of unclaimed financial assets. This was done as part of the efforts to streamline the functioning of the system in order to ensure that it is responsive to the needs of the people. This has been made possible by providing proper definitions and

N. Mutuku (2008) Case for consolidated financial sector regulation in Kenya, RBA, http://www.iopsweb.Org/document/13/0.3343.en_35030657_38606785_39979981_11_1_1.00.html last visited on 18th January, 2010

timelines that explicitly requires surrender by financial institutions to government such assets. The performance of such frameworks over time, can offer crucial insights to policy makers in Kenya in their efforts to devise policies that will guide the management of unclaimed financial assets.

1.2 STATEMENT OF THE RESEARCH PROBLEM

As part of its reform agenda introduced after assuming power at the beginning of 2003, NARC Government launched the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme in November 2003². The purpose of the programme was to reform and strengthen sector institutions in government for enhanced, efficient, accountable and transparent delivery of services. This was the first time that a Sector Wide Reform Programme (SWAP) was being implemented. To help inform and advice the process, a Technical Reference Group was formed. The Reference Group was also responsible for setting targets and standards for the programme.

Within this period, the private sector in Kenya was also carrying out reform initiatives. In the financial sector, the Kenya Commercial Bank (KCB) was seeking to strengthen its governance systems and it sought the support of institutions within the governance cycles to help in undertaking this task. This provided a good opportunity to link the governance reform in the financial institution and overall sector performance. At the time of undertaking the reforms in KCB, the senior management team provided a strong and dedicated leadership and committed to implementing fully

the recommendations from systems review study. The current strides that the institution has made can be traced to this period.

One issue that was identified during this process is that the country lacks a comprehensive policy on managing unclaimed financial assets. This has led to different financial institutions within the sector devising their own internal policies to manage these funds. The effect of this is that there are varied operational guidelines within the financial institutions to manage unclaimed assets. A comparative analysis between Kenya and other developed countries like United Kingdom, Ireland, US and Canada, which have better developed financial sectors, will help inform the process of formulating policy for managing such assets in Kenya.

In June 2003, the Kenyan government launched the Economic Recovery Strategy Paper that is commonly known as the (ERS). The economic policy was aimed at stimulating growth. It outlined the need for an improved public sector performance, efficiency and effectiveness. This was seen as a key pillar towards restoring public confidence and participation in institutions. The government acknowledged the need to pay attention to governance-related problems by taking important steps towards solving institutional governance issues that had stood between Kenya and major bilateral and multi-lateral donors. This led to a number of reforms which included legal reforms in financial management, ethics, procurement, and the introduction of improved audit techniques to promote good governance.

Different reviews that have been conducted by both the private and public sectors indicate that reforms undertaken have not yielded the desired results on the "

part of the people. One of the areas that need attention is in the management of unclaimed financial assets. Savings and deposits institutions, banks, brokerage firms and pensions schemes are the ones that are holding these resources and it is therefore proper to institute mechanisms and measures that will ensure increased access, transparency, accountability and efficiency. This will streamline the process and structures and thus facilitate owners to know and have more so access these resources.

With increased access to information on their resources, the people will be better placed to participate and influence matters in their surrounding in ways that are generally beneficial and acceptable to them. This will provide an enabling environment for good governance to thrive within the financial sector. And as envisaged by international instruments and standards like article 19, of the Universal Declaration of Human Rights (UDHR) of 1948; article 19 (2) of the international Covenant on Civil and Political Rights (ICCPR) and UN Convention to Combat Corruption, the right to information helps enhance rule of law and a participatory development. Kenya is a signatory to both conventions and this has been reinforced by section 79 of the country's constitution. This research hereby seeks to undertake a comparative study between Kenya and developed countries, with a view of making policy proposals on the management of unclaimed financial assets.

1.3 OBJECTIVES OF THE RESEARCH

The coming together of countries to address the recent challenges that rocked the global financial sector, illustrated the value of collective national and global efforts. The strategies that were put in place, helped avert a possible collapse of the

global financial system. The strategies were informed by past best practices and in this study on unclaimed financial assets, one of the objectives is to identify the best practices in the management of such assets. This is will be beneficial to a country like Kenya which does not have a policy in place, when it considers developing one.

The subject being relatively new to developing countries faces many challenges, especially with regard to the management of unclaimed assets. This study seeks to identify these challenges. The policies that are put in place to address the challenges are examined. The study also explores the magnitude of the problem within the Kenyan financial system makes recommendations on how to better manage them.

1.4 JUSTIFICATION OF THE STUDY

The financial system of a country plays an important role in the development process, particularly through the financial intermediation process. In recent years, Kenya' financial sector performance has significantly improved as manifested in increased profitability and financial sector deepening. However, the full potential of the financial services sector has not been exploited due to a number of challenges. Information asymmetry and lack of proper legal and institutional mechanisms that help facilitate dynamic development of the sector particularly on the management of unclaimed financial assets is among this.

Many developed countries have clearly outlined policy frameworks for the management of unclaimed financial assets. Among the countries that have made

tremendous progress and can offer considerable lessons to a country like Kenya, include the US, Canada, Malaysia and the Republic of Ireland. The US for example has established institutions that are vested with the responsibility of managing information and data related to such assets. This is unlike the situation in Kenya where there is lack of mechanisms that obligates institutions holding such assets to declare or take necessary steps to facilitate unification with their rightful owners. With the passage of time, death of owners, loss of records and weak tracking mechanisms, these assets accumulate and amount to billions. With the establishment of a proper regulatory system to guide operations in the financial sector in the management of unclaimed financial assets, the current efforts to reform the sector will go along way in promoting the Kenya growth and development.

There is an increasing appreciation for adoption and use of best practices in the management of sector specific issues and this even exemplified by commonalities among countries. This study attempts to shed light in this area and hopes to help regulatory institutions within the country's financial system as they move towards establishing mechanisms to manage such assets even before an elaborate framework is put in place in the country. To complement the insights that will emerge from this discourse, it is important to study the following areas;

- The Framework and Financial Systems: Knowledge and mastery of the legislative framework governing the banking and financial systems in Kenya.
- The contribution of Reference Bureaus on Unclaimed Financial Assets in the reform process in the Financial Sector in Developed Countries.

- Comparative Analysis of the Corporate Governance examples and experiences of countries; how is corporate governance established and applied, the current status, principles and levels of confidence in the financial system?
- The role of Corporate Governance in preventing frauds, corruption, irregularities, abuse and disputes in Kenya's financial systems

1.5 LITERATURE REVIEW

The literature that is reviewed include publications from financial intuitions like the central bank of Kenya, commercial banks, Insurance firms and non state actors like Institute of Economic Affairs (IEA) and Financial Sector Deepening (FSD) that have a programmatic interest in the financial sector. Policy documents and guidelines from other financial institutions were also reviewed.

The recent Financial Access Survey in Kenya indicates that the proportion of our population accessing banking services increased from 19% to 23% between 2006 and 2009. However, 33% of the population still has no access to any form of financial service and 27% access financial services from the informal financial sector. Considering that credit plays a vital role in supporting productive growth among businesses at all scales, from large to small, and across all sectors from agriculture to services, it is vital to ensure that proper mechanisms are instituted to cushion the clients.

³ Steadman (2007): "Results of a National Financial Access Survey", Financial Access Partnership and Financial Sector Development Trust.

According to Ikiara (2002) good governance depends on impersonal mechanisms that enable rules to be drawn up which meet the need of the greatest number with the guarantee that unbiased administrative bodies will apply such rules to all without distinction⁴. This is reflected in the sentiments of the Permanent Secretary in the Ministry of Finance, when he presided over the opening of the fourth Retirement Benefits in 2006; where he cited the need for an improved standard of governance that entails the protection of the members' interests, accountability and disclosure of material information. This will be achieved through transparent operations.

According to John L Colley⁵, the development of the global economic system has been a result of the progressive move towards embracing free enterprise, competition and capitalism. He argues that this has given countries the sustained energy and provided individuals the opportunity to unleash their creative minds as they pursue their interests. In the realm of business for example, competition for raw materials, labour, customers, and investment capital have made enterprises come up with strategies that enhance efficacy while at the same time increasing returns. The question that the executives have had to answer is how could these enterprises be managed in the best interests of the shareholders?⁶

John further argues that the role of the economic system is to provide goods and services that meet the needs of the people and in the process also provide jobs that

⁴Gerrishon Ikiara. The Kenyan Economy in Transition: The Challenges, Issues and Stakeholder Perspectives, in W. Kioko, L.W. Mute and S. A. A (eds), *Building an Open Society*, Nairobi, ClariPress,

⁵John Colley, Jr. et al. *Corporate Governance* The McGraw Hill Companies, 2003
⁶Ibid pg 2

create wealth with which people buy the needed and or/desired goods and services. An economy that creates wealth does not necessarily meet high moral standards, the manner in which it is created, distributed and the purpose for which is used is vital. Finding the right balance between "goods and goodness" is highly significant and in this a discourse that is ongoing in the corporate circles. Moral and ethical considerations must enter into the governance process in the conduct of both country's affairs and also those of commercial enterprises.

Businesses function in complex economic systems and the rules affecting their functioning are progressively being affected by policies devised by national governments and economic blocs. The rules and policies in the US target at achieving a competitive market, maintaining the balance of power between capital and labour, orderly capital markets, consumer protection from fraud and harm, equal access to opportunities and more so environmental protection. The main focus is that the governance systems should induce purposefulness and a productive behaviour on the part of the individuals and enterprises. What a society does with the largess of its output influences the health of its economic system and this consequently affects its future output⁷.

John further states that activists in the US have been successful in bringing changes in the manner in which corporations are run and managed. In some instances, unbridled greed of capitalists and monopolists who in their pursuit of higher profits, made them to resort to wrong practices and procedures, has led to the setting up of regulatory bodies to ensure compliance. The regulatory bodies are interested in timely

⁷ Ibid pg 8

and complete disclosures of information designed to maintain orderly and fair markets.

The field of legal and regulatory developments for both government and business professionals has for long misunderstood or even underestimated the potential importance of unclaimed property. Interestingly, the underpinnings of unclaimed property law have been in existence since the Roman Empire. For one to better understand modern unclaimed property law, it is necessary to start by examining the origins of unclaimed property law in the Roman Empire and English Common Law⁸. The roots of unclaimed property law are premised on the right of the "sovereign" to certain tangible property. This broad principle was enacted in various American State statutes in the early 19th century and by the turn of the 20th century, the states had began expanding the reach of their statutes on unclaimed property to include intangible property.

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According Blackstone⁹, escheat in the common law related only to land, and a similar concept, bona vacantia, applied to personal property and was subject to claim only by the crown on the basis of the royal prerogative. This was premised on the absence of any other owner as opposed to the escheat rationale that the crown was ultimate heir or was the assignee of the last tenant. The hypothesis here was that possession by the crown was more equitable than that of a stranger and that the crown's ownership would remove the potential for conflicting claims by private

J The Bureau of National Affairs, Inc, Washington D.C. 20037, pg 1
Blackstone, Sir William Commentaries of the Laws of England, 1783 ed. Garland Publishing

parties¹⁰. This rationale of bona vacantia can be found in modern statutory law, which provides that the State is the owner of all property of which there is no other owner.

Anthony A. & J. Brooke (2002) argue that the State is best placed to preserve and protect the interest of the rightful owner of unclaimed property. They propose that the State should proceed to establish mechanisms that will possibly facilitate reunification and if the objective can not be accomplished, the state, rather than the holder should be allowed to use the property while it remains unclaimed by the owner. Laws and policies should therefore be devised by the State, to guide disposition of lost and found property. "Laws should provide a mechanism for returning the property to the owner, or failing that, vesting the title with the finder".

The National Conference of Commissioners on Uniform State Laws summarised the purpose of the 1954 Uniform Act as follows: The Uniform Disposition of Unclaimed Property Act, if adopted by the States, will serve to protect the interests of owners, to relieve the holders from annoyance, expense, and liability, to preclude multiple liability, and to give the adopting State the use of some considerate sum of money that the otherwise would in effect become a windfall to the holders thereof".

According to the Arizona Department of Revenue, unclaimed property is any intangible asset that is held, issued, or owed in the ordinary course of a holder's

Garrison, *Escheats, Abandoned Property and Their Revenue Aspects* in Anthony and J Brooke. ~~*Unclaimed Property*~~ *Compliant and Enforcement* Pg 5

Anthony A. & Brooke Spotswood. *Unclaimed Property Laws and Enforcement*, Chicago, CCG Incorporated, 2002, pg 7

business that has remained unclaimed by the owner after it became payable or distributable. The amount of time property remains unclaimed or abandoned varies from state to state, but generally ranges between three and seven years. Until recently, entrepreneurs gave little thought to what to do with assets that were abandoned or simply forgotten by their owner. Many businesses were unaware that actual unclaimed property laws even existed. While some states, such as New York and Arizona, for example, have unclaimed property statutes stretching back to the 1940's and '50s, other States only recently adopted legislation specifically for unclaimed property

Ronald Burgess Sr., a senior manager in the Unclaimed Property practice at Deloitte & Touche¹², argues that the issue of unclaimed property received added attention in 1999 with the highly public prosecution of senior executives at Bankers Trust. The bank began undergoing prosecution in 1999 and ultimately was fined by state auditors for the flagrant misuse of unclaimed property funds. Among other things, it was reported is that state auditors discovered that company executives failed to accurately report the unclaimed property the bank had in its possession, falsifying and shifting figures in order to make it appear as if the unclaimed property funds were profits instead of liabilities, which clearly violated state laws.

Beck and Levine (2004), state that countries with better developed financial system i.e. financial markets and institutions that effectively channel society's savings to its productive use experience faster economic growth. This is because it helps in

Deloitte and Touche is an international accounting and financial services company headquartered in New York

reducing income inequality. Given the importance of financial development for economic growth and poverty reduction, policy makers and academics and alike should take interest in the building blocks for a sound and effective financial system.

Joseph Lekuton¹³ argues that since unclaimed assets can neither be fully disclosed to potential beneficiaries, they should be surrendered to the treasury to be put in a special account that can be administered by the government for development. He further states that the current levels of poverty in Kenya, which has left 46% of the populace living below that poverty line, should not be tolerated considering that the 2008 Ministry of Finance Taskforce Audit report revealed that there are approximately 200 billion shillings laying as unclaimed assets in different financial institutions.

"After considering these factors, I was convinced that it was necessary and desirable to have in place a legal framework that and regulate financial and assets taking institutions to disclose the unclaimed assets portfolio to the government"

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According to the 2005 UK Pre Budget Report, the government indicated that it had been working with the industry to design a scheme which will both preserve the rights of the individual consumer and at the same time allows unclaimed assets to be reinvented in the community¹⁴. The report went further to point out that the funds should be reinvested in the community with a focus on youth services that are responsive to the needs of the young people, and also on financial inclusion and capability.

¹³ Kenya National Assembly Magazine, Vol. 2, issue 1, May 2010 pg 35

HM Treasury, A UK Unclaimed Asset Scheme: A Consultation. March 2007, pg 3

The scheme was to be backed by legislation to resolve issues concerning financial liability for the participating financial institutions and their customers. It was proposed that the unclaimed assets scheme will apply to bank and building society accounts where there has been no customer-initiated activity for at least 15 years. On this basis, the banks and building societies estimated that a stock of several hundred million pounds may currently lie unclaimed. They also estimate that a further flow of perhaps tens of millions of pounds may become available each year. The estimates were before the impact of a comprehensive reuniting exercise that banks and building societies were to launch in advance of the scheme, building on their existing arrangements to help customers to track down their accounts.

Anthony and Brooke postulate that when there is a non-interest or 'abandonment' of property, the party holding it is obligated to report to the proper State and concurrently or subsequently turn the property over to the State. The
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modern rationale for the establishment of such a provision is that the State can best preserve and protect the interest of the rightful owner and possibly reunite the owner with his forgotten property. At common law, escheat was the concept under which land held by tenure was returned to the lord from whom the tenure was derived upon occurrence of some event which interrupted the normal course of descent, such as death of the tenant without heirs¹⁵. In the modern times, this concept refers to a process by which the state acquires title and/or custody of real or personal property that is unclaimed by, undistributed to, or presumed abandoned by the rightful owner.

¹⁵ Anthony A. & Brooke Spotswood. *Unclaimed Property Laws and Enforcement*, Chicago, CCG Incorporated, 2002, Pg 110

.6 THEORETICAL FRAMEWORK

Economists generally presume that markets are efficient only when they generate no "externalities," costs or benefits not reflected in prices. They recommend that policy makers should seek to encourage innovation so as to augment the efforts of a market-based economy. This will act as an incentive particularly noting that the government has the means of designing linkages that will foster the exploitation of market gains and thus facilitate development in the economy. Policy for financial sector development should seek to improve stability, increase efficiency and expand access¹⁶. The study therefore on the management of unclaimed financial assets will help provide insights on the how to build upon the gains and successes that have been realised, and also using them to improve the financial sector. The experiences of other developed countries will be useful in informing the various options that the Kenya can opt for in the process of strengthening the financial sector.

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In seeking to study this subject, this research adopts the organizational integrity approach also referred to as Ethical Edge. This is the competitive and cooperative advantage a responsible enterprise gains by embracing Organizational Integrity as its fundamental philosophy of organizational purpose¹⁷. According to Lynn Paine, superior performance in today's world has both a moral and a financial dimension. Organizational Integrity helps provide the ethical foundation for organizational design and development. This is an evolving branch of applied

¹⁶ Research paper by Sukhwinder Arora and David Ferrand based on extensive analysis undertaken by Financial Sector Deepening Kenya, pg 1

¹⁷ Ethics and Policy Integration Centre

ethics and it aims to expand the depth and breadth of trust among an organization's stakeholders: leadership, employees, shareholders, suppliers, communities, and the environment. It goes beyond the particular concerns of business ethics, governmental ethics, professional ethics, and environmental ethics to address how people responsibly expand their range of informed choice to achieve shared purposes.

In every organization, there is something that works well, which can serve as a foundation for significant progress toward a desired future. Organizational ethics pays special attention to the best of an organization's past and present to ignite its collective imagination of what might be. It builds from what is working well now toward where the organization and its stakeholders truly desire to go. Organizational ethics sees an organization as a community to be valued and explored. It strives to quicken and intensify existing individual capabilities and organizational capacities, extend their number and scope, organize them so that their conflicts will be

harmonized, and mobilize their energies of will and intellect to bring them to self-realization. Organizational Integrity is the end sought. It is a dynamic state of being and process; it both shapes and improves. It is about moving the organization toward its guiding image of the future.

A company's strategy consists of the competitive moves and business approaches that managers employ to grow the business, stake out a market position, attract and please customers, compete successfully, conduct operations, and achieve

target objectives¹⁸. It achieves sustainable competitive advantage when it has attracted a number of clients that prefer its products or services over those of the competitors. In choosing among strategic alternatives, company managers are well advised to embrace actions that are aboveboard and can pass the test of moral scrutiny¹⁹ - A strategy can not be considered ethical just because it involves actions that are legal. To meet the standard of being ethical, a strategy must entail actions that can pass moral scrutiny and that are aboveboard in the sense of not being shady or unconscionable, injurious to others, or unnecessarily harmful to the environment.

Communication in the responsible business enterprise is mutual—that is, owners and managers strive to make sure employees and agents understand their standards, procedures, and expectations, and owners, managers, supervisors, workers, and agents alike have the information they need when they need it²⁰. Senior executives with strong ethical convictions are generally proactive in linking strategic action and ethics; they forbid the pursuit of ethically questionable business opportunities and insist that all aspects of company strategy reflect high ethical standards. This helps the enterprise in fitting to the internal and external environment, and also fosters the efforts of achieving a sustainable competitive advantage and
in the process improving the entity's overall performance.

The financial sector grows and thrives because of trust that the clientele have on the institutions. This necessitates that the conduct of affairs among these

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Arthur Thompson, J Gamble and Stickland. Strategy: Winning in the Marketplace, New York, McGraw Hill Companies, 2006. pg 3

¹⁹ Ibid pg 10

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[WW, lte, <1K?, ROv/Boodpo^rnance, Hnhp/bem section Vchapter 7.pdf 30th May. 2010](#)

institutions matches and if not goes beyond the expectations of their clients. This can be achieved by investing in strong systems and human resources that guarantee that business affairs will be conducted with integrity. Unclaimed financial assets that accrue due to information gaps and a lack of a proper follow up can be avoided by doing away with procedures that encourage such; and in the process strengthening the resolve of the institutions in addressing the needs of its clients.

Employees and other stakeholders play an important role in contributing to the **long-term** success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance. The degree to which corporations observe basic principles of good corporate governance is an increasingly important factor for investment decisions. Of particular relevance is the relation between corporate governance practices and the increasingly international character of investment. International flows of capital enable companies to access financing from a much larger pool of investors. If countries are to reap the full ^t benefits of the global capital market, and if they are to attract long-term "patient" capital, corporate governance arrangements must be credible, well understood across borders and adhere to internationally accepted principles. Even if corporations do not rely primarily on foreign sources of capital, adherence to good corporate governance practices will help improve the confidence of domestic investors, reduce the cost of capital, underpin the good functioning of financial markets, and ultimately induce more stable sources of financing.

Good corporate governance helps in promoting organizational integrity and puts in place continuous desire to learn by building upon past successes. This also

creates room for adopting emerging international standards of stakeholder engagement, organizational performance, and program evaluation and reporting. These can be implemented by organizations of all sorts and sizes, through corporate responsibility programs unique to each organization, which draw on a developing body of "best practices." The Responsible Business Enterprise (RBE) strives to integrate the myriad perspectives on the role of business with emerging global norms. As such, it looks at business from a number of perspectives: corporate social responsibility, corporate governance, organizational ethics, and business and professional ethics.

A responsible business enterprise also engages its external stakeholders in order to foster reasonable expectations and determine stakeholder satisfaction. The central shortcoming of the current state-of-the-art in terms of corporate social responsibility stems from the weakness of the force that drives and animates it—market-relevant, credible, and comparable information. Without good-quality information, consumers and investors cannot consistently and accurately voice preferences through markets and managers cannot make efficient and strategic decisions about change in production processes and product design.

This therefore necessitates that individuals in an organization who are responsible for strategy formulations, have to improve the value of the organization's strategies and financial implications. They have to structure activities and processes in such a manner that they not only address the needs of the clients but also that they are constantly adjusting to the ever changing environment they are operating in. An example is that those in marketing know that to create a successful "

corporate brand, they need to get the organization behind the delivery of its promise; and thorough understanding of the organization and how it operates, will make their endeavours to align the organization and its brand strategy more feasible and productive.

Information flows through the organization affects work processes and outcomes. The IT specialists need to identify, understand and serve the organization's informational needs as they design and promote the use of their information systems. The same case also applies to those charged with Human Resources roles. Organizational development and change are particularly important elements of Human Resource that demand deep knowledge of organizations and organizing. This is because they determine the level of understanding by employees on how their functions fit into a greater picture within their context.

At the same time, the corporate communication specialists must understand
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the interpretive processes of organizational stakeholders and need to address the many ways in which different parts of the organization interact with each other and the environment in order to design communication systems that are effective or to diagnose ways existing systems are misaligned with the organization's needs. This is where the reputation of the organization is either build or destroyed and for financial institutions, this is indeed a sensitive area.

Corporate scandals raise questions about the nature of ethical action and the pressures managers face when trying to act in socially and organizationally responsible ways. Understanding how different perspectives influence the way they

and others experience, interpret and shape organizational realities, assists in **ensuring** that they are effective members of the organization. It is important to for **organizations** to maintain public confidence particularly **those** operating in the **financial** sector because this is critical to their success

While commenting on financial sector reform following the recent financial crisis, IMF director notes that "It is important to ensure that the process is conducted in a transparent and technically competent manner with accountability to the public and the markets"²¹. To him, this will require close institutional coordination, a highly qualified staff, and a good ability to communicate to stakeholders. Affected institutions have to draw over foreign advisors, experienced in bank restructuring issues and even though these skills are very expensive, not using them would be a far worse experience for the banking sector.

Important to note is that effective leadership is the single most important
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factor in financial crisis management. Those charged with providing developing and executing a crisis management strategy must always act in an equitable and transparent manner. Effective leadership also means acting while the momentum is in your favour, i.e. the sooner the better. During this process, a valuable thing to have is honesty in public pronouncements. This is because public confidence is very fragile and it can be easy to destroy but it is hard to build.

Remark by Stanley Fischer First Deputy Managing Director International Monetary Fund Seminar on Policy Challenges for the Financial Sector in the Context of Globalization Sponsored by the World Bank, IMF, and the Board of Governors of the U.S. Federal Reserve System Washington, D.C., June •4, 2001, available on <http://www.imf.org/external/np/speeches/2001/061401.htm>

This is why holders of unclaimed financial assets should be honest in their disclosures. They should take deliberate steps to seek to unify them with rightful owners because this can be a major source of confidence to the organization. Modern day managers, face various challenges and among them include globalization, intense competition, rigorous ethical scrutiny, the need for rapid response, the digital workplace and increasing diversity. There is then need for each organization to carve a niche for itself through the differentiation of its operation and build a loyal clientele that believe in it and ready to stand with it in times of crises. Honesty in the performance of its activities could be one of the options that a financial entity can adopt in the process securing its niche.

An organization's environment plays a major a role in the organization's health and performance. Other stakeholders have an interest in the operations of another. An example is the way Unclaimed Property Managers are increasingly assuming a
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big role in the financial sector in the US. This can be seen locally by the development of Credit Reference Bureaus in Kenya as part of the ongoing financial sector reform so, that the potential holders of unclaimed financial assets can share information. This is informed by the view that linkages among stakeholders in a sector, helps organizations to complement each other and therefore avoid duplication of efforts.

To effectively and decisively respond to environmental changes, crises or even shifts in customer expectations, organizations have to establish and design systems that will keep operations running smoothly and effectively. Customers to financial

institutions want products and services that are tailored to their needs. This include stability and to a large extent their ability to project their access to their assets both in the short and in the long term. Thus it is vital for managers to devise strategies that will facilitate the organization to satisfy the clients from time to time without compromising their interests.

Redesigning organizational structures and management practices can to a large extent contribute to enhancing effectiveness. Financial institutions can exploit technological advancement to enhance the management of unclaimed financial assets. This will help ensure that there is an efficient and effective means of communication and as a result issues like contact loss will be minimized. Furthermore, regular updates and feedback from their clientele on any changes can easily be facilitated by technology. It is therefore important that organizations invest in technology and qualified manpower so that they can constantly keep up with competition while at the same time ensuring that there clientele's expectations are satisfactorily catered for.

In seeking to responsibly address the expectations of the clientele, it is vital that this is undertaken in a credible process that is full of integrity. This is because it affects the overall view that the other stakeholders have on the institution. Thus, organizational integrity comes in handy in guiding the institution in nurturing loyalty and building trust, which as highlighted before that it forms the chief cornerstone in the process of strengthening and growing a financial institution.

1.7 HYPOTHESES

1.7.1 Effective management of unclaimed financial assets presents a country with valuable source of development resources.

1.7.2 Funds that are unclaimed can be used to supports efforts of strengthening social welfare programmes in Kenya.

1.7.3 Financial literacy is necessary in reducing the amounts of unclaimed financial assets in the financial system.

1.8 OPERATIONALIZATION OF TERMS

Social Security

Social security refers to programmes established to provide social protection to the populace against recognized conditions which range from poverty, old age, disability and unemployment. Services offered to meet these challenges could be in the form of pensions, disability insurance, survivor benefits or unemployment insurance.

Unclaimed Financial Assets

These are tangible or intangible property that has gone unclaimed by its rightful owners, or assets where there has been an absence of owner generated activity for a **defined** period. They include bank account balances, shares, insurance policies **and dividends.**

1.9 METHODOLOGY OF THE RESEARCH

Both primary and secondary data are used in this study. Considering the nature of the subject, primary data involved conducting key informant interviews in Treasury which is responsible for financial policy development and the regulatory bodies. The CBK, CMA, RBA and IRA are the institutions that these interviews were conducted to establish a sectoral approach in the management of unclaimed assets. These interviews were also conducted in other institutions working within the financial sector like FSD, IEA and ICPSK. The NSSF was also visited because at the course of conducting the study, it published a list of unclaimed benefits in the leading dailies calling upon its member to come and collect them.

Secondary data was obtained by examining annual reports from financial institutions, information from the internets, publications from institutions in the financial sector such as economic reviews, journals and financial reports. Both quantitative and qualitative data were obtained, analyzed and presented using bar graphs, pie charts, line graphs and tables. The use of questionnaires faced a non response because some of the institutions wanted to maintain the confidentiality of their clients' information.

1.10 SCOPE AND LIMITATIONS OF THE RESEARCH

The research focuses on the regulation of the financial sector Kenya with a view of making a comparative analysis with that of some developed countries. The existing policy guidelines in the financial sector that guide the management of unclaimed financial assets were analyzed with the objective of identifying the gaps.

The **Banking**, Insurance, Pension, and Capital market were the focus of this study **considering** that they are the key holders of such assets.

Because the study aimed at analyzing the management aspects of the **unclaimed** financial assets, the experiences of the owners were not part of the analysis

1.11 CHAPTER OUTLINE

The rest of this study is organized in the following chapters:

Chapter Two: Trends and Historical Developments

Chapter two delves in detail on the issue of unclaimed financial assets to examine the trends and historical developments regarding the subject. The causes, types and the nature of unclaimed financials assets and the management approaches that have been adopted in different countries like the US, UK, Ireland, Canada, Malaysia, New Zealand, and Australia is examined.

Chapter Three: The Kenyan Experience

The chapter examines the different legal and policy outlines for the different sectors in Kenya on the management of unclaimed financial assets. This helps paint a good picture on what is currently available to address the subject within the financial system and how it fairs compared to other countries discussed in the previous chapter.

Chapter Four: Efficient Management of Unclaimed Assets as a Tool of Good Governance in the Financial Sector

The chapter provides the link between good governance and best practices within the financial sector and how this contributes to the greater development of the sector through increased confidence and stability in the sector.

Chapter Five: Summary, Conclusion and Recommendations

The chapter provides a brief summary on the subject, a conclusion of the discussion and recommendations from the study on the management of unclaimed financial assets.

CHAPTER TWO: TRENDS AND HISTORICAL DEVELOPMENTS

2.1 OVERVIEW

In the event that an owner of a property does not take any action during certain duration defined by law, to indicate his/her ownership, interest, or awareness, that property will be regarded as unclaimed. As a result of such developments, it then becomes a responsibility of the holding institution to report it to the proper State agency. The modern rationale for such an arrangement is that the State can best preserve and protect the interest of the rightful owner and possibly reunite the owner with his/her property.

The existence of unclaimed financial assets in an ownerless state raises a wide range of governance and ethical questions over their management. Some countries regard them as an opportunity to increase revenue through a non-tax measure that puts these assets into constructive social and economic use. In the United States, under the unclaimed property law, financial assets are considered dormant, unclaimed and abandoned when contact with the owner or heir is lost over an extended period. This loss of contact usually happens due to name change after marriage or divorce, unreported change of address or expired postal forwarding order, incomplete or illegible records, and most commonly, after untimely death.

In the modern economy, unclaimed property not only include dormant bank accounts, unclaimed security deposits, unclaimed shares of stock, or uncashed dividend cheques, but may also include unused gift certificates of gift cards, unused

rebates and customer credits, accounts receivable, uncashed vendor cheques, and various types of credits reflected on the books and records of a company. Unclaimed property is any financial asset, usually intangible, being held for a person or entity that cannot be found²². It is not real estate, abandoned personal property, or lost and found items.

Other reasons that make assets become unclaimed include; passage of time, emigration; change of name, address or the change in the national postal address system, missing records and no tracking mechanism, lack of a requirement for holding institutions to declare assets as unclaimed, or a collapse or change in corporate structures, such as with mergers and acquisitions. The assets that remain in an ownerless state range from utility deposits, uncashed dividend, payroll of cashier's checks, stock certificates or accounts, bonds, mutual, fund accounts, life insurance policy proceeds, undistributed wages, gift certificates, checking and savings accounts, travellers cheques, safe deposit boxes, royalty payments to court payments or deposits.

In the United Kingdom, banks describe a 'dormant account' as an account where the customer has lost contact with their bank or building society for a sustained period. To the Government, the most typical reason for an account becoming dormant is a customer failing to inform their bank or building society of a change of address. In other situations the account holder may have died and their legal heirs may be unaware of the account. Poor financial capability, for example lack of customer

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awareness of how to run an account, may sometimes be a factor in explaining the **dormancy** of an account. Banks and building societies wherever possible seek to **retain contact** with their customers. Where an account has become inactive for an **extended period** the account holding institution, writes to the customer seeking to **re-establish contact**. If no response is received, the institutions cease sending out **correspondence** to the contact address and classify the account as 'dormant'. This **ensures that** financial details are not sent to what might be an old address, seeking to **protect the customer** against fraud and identity theft.

2.2 MANAGEMENT APPROACHES IN SOME SELECTED COUNTRIES.

2.2.1 United States

The US National Conference of Commissioners on Uniform State Laws of **1954 made** resolutions that led to the formulation of the country's 1954 Uniform Act. **The Act was** custodial in nature because the State was to act as the custodian of the **property until the** rightful owner was identified. It was comprehensive in scope as it **applied to any type** of unclaimed intangible property. Theoretically, it is right to state **that it was a** consumer protection law because it served to safeguard the owner's **property and provide** a mechanism for reuniting the owner with his property.

Intangible personal property such as bank deposits, dividends, insurance benefits, trust fund distributions, sums owing in on money orders or traveller's that have not been collected or received by the person entitled or has had no contact with the rightful owner are to be reported so as to be administered by the respective State.

The above law stipulates that the report should contain certain information such as the **owner's** name and address. The type and amount property should be specified by the holding entity.

The State administrator is mandated with the responsibility of notifying the owner the existence of the property so that the owner can claim. Before the owner is traced, the State has the use of the property. The State also maintains liability in perpetuity because holders are to act in good faith by delivering or paying the State for such properties. The 1981 Uniform Unclaimed Property Act (UUPA 1981) in the US required that bank deposits held by all banks which the owner had not negotiated in writing, changed the amount, requested an interest on his passbook, or notified the bank of some other transaction, within a period of 10 years in the case of demand deposits, or 25 years for the case of non-demand deposits, be reported annually to the State.

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Holders of unclaimed properties while filing reports in the US, have to do so before November 1st. They are supposed to indicate abandoned property as of preceding June 30th Life Insurance Corporations must file their reports before 'May 1st as of December 31st next preceding'²³. The purpose of this cut-off period is to allow the holder of the asset to close its books, determine what has been abandoned or unclaimed in their custody and therefore prepare and file a report with the State. Some holders also use the time between the close of the books and the report date to attempt

nthony A. & Brooke Spotswood. *Unclaimed Property Laws and Enforcement*, Chicago, CCG Incorporated, 2002, pg 31

to make contact with the owners before the State notification procedures are embarked upon by filing a report.

When the State receives the report from the holders, it is mandated by the US law to publish notices in newspapers and/ or mail a notice to the last known address of each owner of the property specified in the report. Following the filing of the report or publication of notice, the holder must pay or deliver the property listed in the report to the State. If by any chance the owner appears before the specified date for payment and proves ownership to the satisfaction of the holder, the holder need not to pay for the delivery of the asset to the State but it has to file a verified written explanation or some other reason elaborating why the presumption of abandonment is incorrect. It is only when the assets are delivered to the state that it then becomes charged with the custody and safekeeping of the asset. The holder then is relieved from any further liability with respect to the asset.

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The owner is entitled to receive any income or increments accruing from the property. The State agency managing the assets has the authority to conduct examinations of the records of any 'person' i.e. natural or corporate. Banking and financial institutions are urged to work closely with the agency so as to smoothen operations. Failure by the financial institutions to report or delivery such assets is a criminalised offence. Considering that many financial institutions take prestige in their reputations, such a provision can be self enforcing particularly if there is a transparent and competitive environment that the institutions are operating in.

The US UUPA of 1981 defines unclaimed funds as monies held and owing by life insurance corporations unclaimed and unpaid for more than five years after the monies become due and payable as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured or terminated. This clarity has helped in the development of the sector by facilitating ease of exchange and payments. For utilities, a one year period is deemed to be adequate enough and for stocks and dividends, a seven year period where a shareholder has not made correspondence in writing or otherwise indicating interest. The shares must then be reported to the State agency.

As a result of concerns raised regarding the filing of the initial report, many holders have faced challenges and have not filed reports in the US. Recognizing that a holder coming to compliance and reporting in future on an ongoing basis is a good public policy, some amendments have been made. One of those amendments is the localization through the adoption of amnesty programmes that provide that holders who voluntarily come forward and report and remit past due sums be exempted any interest or penalties. This power can be vested in the regulatory authority so as to inculcate them in through subsidiary legislations.

Whereas the State has the sole prerogative of enacting statutes, this has to be followed with a comprehensive follow up in terms of implementation. The US experience demonstrate that some financial institutions reviewed their records in varying degrees of detail and reported some and not all of their unclaimed assets because there were those which were found in their financial books and records. Based on preliminary results from field audit programs, it was discovered that there

oc a substantial non-compliance with the unclaimed property laws and that significant amounts of money awaited recovery by the States²⁴.

The disclosure of records in some instances has proved to be a major challenge due to sensitivity and confidentiality in the holders' organization. Records of dormant accounts registers, aged outstanding unclaimed insurance proceeds and unclaimed trust benefits in many cases provide a serious internal control problem for the holders of such property²⁵. It is recognised in accounting theory and practice that additional internal controls over such assets, which may be easily manipulated, is required. This then necessitates holders to subject them to extra level control within the organization itself.

Confidential or privileged information should be protected from disclosure through internal controls, internal review mechanisms, and codes of conduct that encourage high standards of integrity, honesty, and fair dealing²⁶. The OECD Guidelines suggests that; the governing body should be subject to minimum suitability standards to ensure a high level of integrity and professionalism in the administration of the pension fund²⁷

Examiners from State agencies should be aware of such sensitive restrictions and deal with such information with the diligence that it requires. However, the argument occasionally raised by holders as to the confidentiality of certain records

²⁴ Ibid pg 100

Ibid pg 102

Pension Funds[^] O O ^ 0 0 Guidelines for Pension Fund Governance and Implications for U.S.

" OECD Guidelines for Pension Fund Governance, at 8 (2002).

should not be a barrier that prevents the examinations of such assets. The Financial Post²⁸ notes that:

"Whereas there is a valid argument about the need to maintain confidentiality in matters relating to their clientele, this has however provided room for unethical conduct. It is necessary that banks stop hiding behind the guise of confidentiality and separate between what is legitimately owner's property which they need to be notified about"

The increasing pressure for States in the US to generate more revenue has made the area of unclaimed property to be a major target as a potential source of additional revenue. In some States, office compliance is a very sophisticated process that involves computerized database information on holders that report. Examination helps ensure that there is a uniform application of standards and procedures in the management of unclaimed assets. Organizations have adopted policies and procedures relating to the time period that certain records are retained. The timelines vary widely due to the nature of the holder's operations and type of business.

In the modern economy, unclaimed property includes dormant bank accounts, unclaimed security deposits, unclaimed shares of stock, or uncashed dividend cheques⁹. The development a comprehensive law to guide the management of unclaimed property on the US was a result of the rapid expansion of the economy in the 20th century. This resulted in the expansion of businesses beyond the borders of

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²⁸ Financial Post publication issue No. 264, which seeks to support business in Kenya.

The National Bureau of National Affairs, Inc. *Unclaimed Property*, Washington, 2006.

one State and as a result, there were often conflicting State claims to the same **intangible** personal property.

The Sarbanes-Oxley Act of 2002 in the US was enacted to protect investors by improving the accuracy and reliability of corporate disclosures. Section 404 of the Act provides specific authority for the Securities Exchange Commission (SEC) to prescribe rules requiring management to affirm its direct responsibility for maintaining an adequate internal control structure and procedures of financial reporting and well as assess the effectiveness of that internal structure³⁰. Records are supposed to provide reliable details that accurately reflect transactions and dispositions of assets. They therefore permit preparation of financial statements in accordance with generally accepted accounting principles.

A failure to implement, maintain and apply unclaimed property procedures that comply fully with applicable unclaimed property laws might significantly affect a company's reporting. It may result in imposition of penalties and interest applicable under State's legal provisions. This emphasizes the importance of developing and maintaining unclaimed property procedures that comply fully with applicable law³¹. In the State of Florida, "Due diligence" which means the use of reasonable and prudent methods under particular circumstances to locate apparent owners of inactive accounts using the taxpayer identification number or social security number, if known, which may include, but are not limited to, using a nationwide database, cross-indexing with other records of the holder, mailing to the last known address unless the

¹⁰ ^{1b},d Pg 57

³¹ 'bid pg 60

known address is known to be inaccurate, or engaging a licensed agency or **not capable** of conducting such search and providing updated addresses³².

The unclaimed assets framework of the US includes extensive and **comprehensive** State-level *Uniform Unclaimed Property Acts*. These provide **mandatory** provisions for identifying, reporting, and remitting unclaimed property to State Treasurers. In accordance with individual State laws, property becomes **abandoned** or unclaimed, if the owner cannot be contacted by the holder of the asset within a specified period of time, generally three years. The "holder" (the business which has the asset) must make a reasonable effort to locate the rightful owner before turning the asset over to the Department. If the holder is unsuccessful, it must report the names **and** last-known addresses of the owners to the Department. The Department attempts to locate the owner in various ways.

When owners or rightful heirs fail to claim a forgotten asset over a specified number of years known as the *dormancy period*, those left holding abandoned funds: banks, stock brokers, utilities, employers, life insurance companies and government agencies transfer custody to unclaimed property trust account in a legal process known as *escheat*. Massachusetts enacted a statute in 1908, covering unclaimed bank deposits and this was adopted by California in 1915. The statutes only applied to bank deposits and required a judicial proceeding to be filed by the

³²The State of Florida *Statutes and Constitution*, available on www.flahdc.com/v/tittrVindex.cfm?App_mode=Display_Statute last visited on 5th February,

State attorney general to have the particular deposits declared abandoned and ordered turned over to the State, thus terminating the rights of owners to recover their funds.

In the State of Florida in the US for example, the Bureau of Unclaimed property provides a periodic updates on unclaimed property. The following is a tabulation of the proceeds to the chief finance controller

Figure 1; Unclaimed Property Received

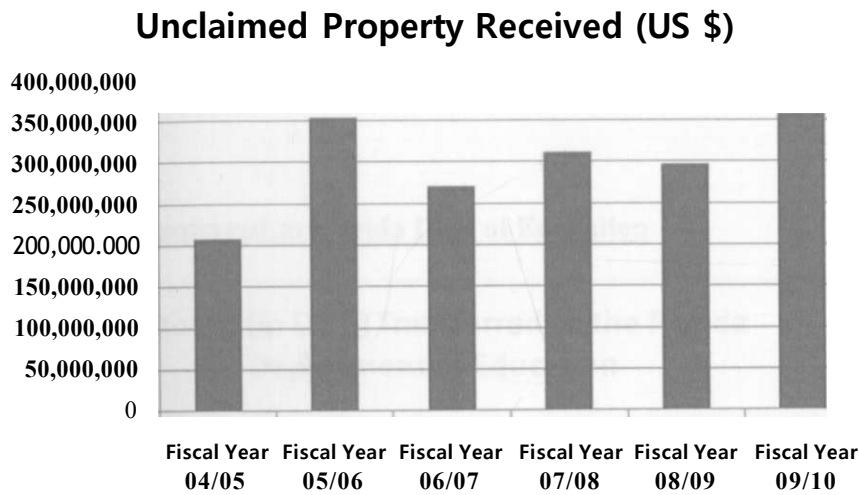


Figure 2: Number of Claims Paid

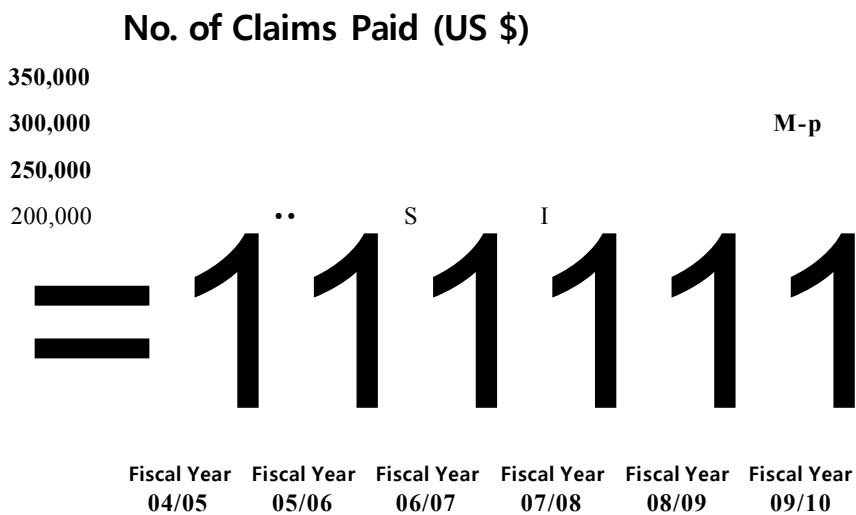


Figure V Amount (in Dollars) of Claims Paid

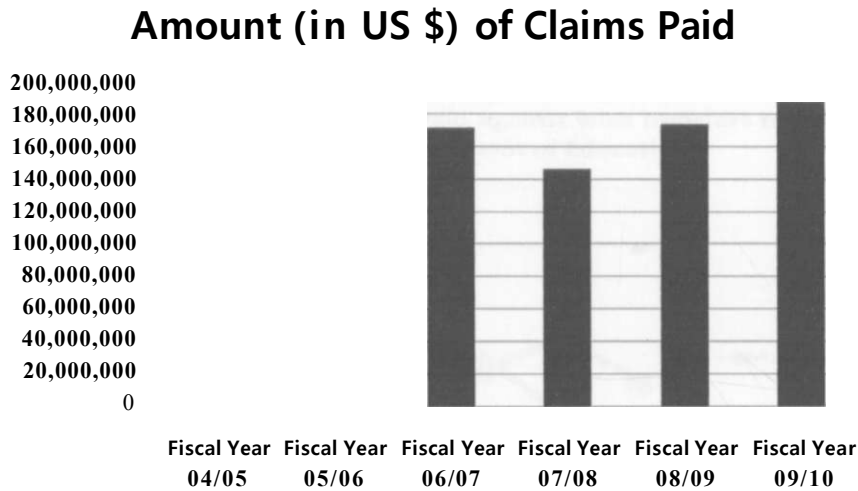
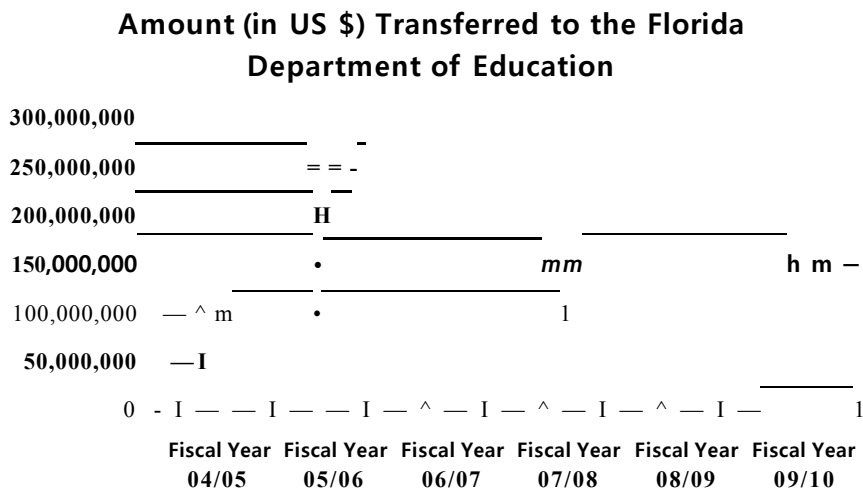


Figure 4: Net \$ Transferred to Florida Dept of Education

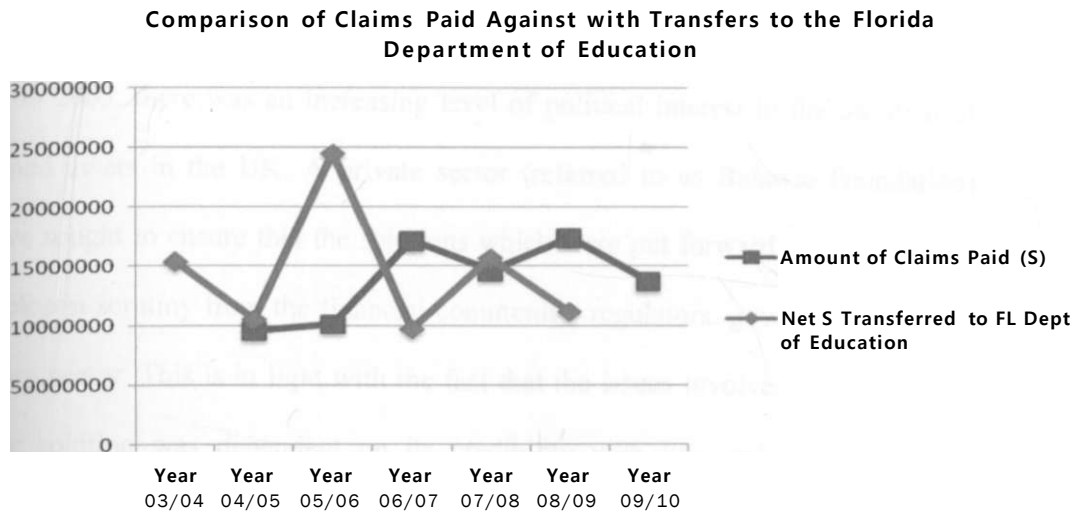


* Source: **Florida** Department of Financial Services (Bureau of Unclaimed Property Fact Sheet **March 31, 2010**)

The **above** figures indicate that in the state of Florida, within a period of **6** years, the **numbers of** claims paid increased by **25%** and the amounts of money paid has increased substantially. The table bellow illustrates the trend on the transfers that

the State has been making to the education sector using the collections from unclaimed property.

Fig Trends on the payments of claims and the transfers to the Florida Department of Education



•Source: Individual analysis of the reports from the Bureau of Unclaimed Property Fact Sheet as at March 31, 2010

2.2.2 United Kingdom

In the UK, the issue of unclaimed assets in the financial sector is not new. With the movement of funds both between customers' accounts and between institutions there is a high risk of a breakdown in communication somewhere along the line³. This can result in the funds becoming separated from their rightful owner and, with the passage of time; it may become increasingly difficult for funds and owners to be reunited. With the high volume of transactions passing through the London financial markets, it is not surprising that significant amounts of unclaimed

Gatsby Charitable Foundation. *Releasing Unclaimed Assets to Charitable Causes*, 2007 pg 8

assets have arisen across a number of financial institutions, banks and building societies. In the absence of any mechanism for dealing with these unclaimed assets, the funds remain in a legal and regulatory limbo within institutions, pending claims being raised by the rightful owners³⁴.

In 2003, there was an increasing level of political interest in the question of unclaimed assets in the UK. A private sector (referred to as Balance Foundation) initiative sought to ensure that the solutions which were put forward would stand up to the closest scrutiny from the financial community, regulators, government and the voluntary sector. This is in light with the fact that the issues involved were complex yet any solution was dependent on its credibility with key stakeholders. In its proposals to the FSA, Balance argued that if unclaimed assets had been outstanding for at least three years and had not yet been reunited with their rightful owners, then, provided that the ongoing rights to claim were recognised by the institutions and protected with the benefit of insurance, they should be able to be applied to charitable causes. Balance argued that the retention of these unclaimed assets in client money accounts could lead to an increased burden of regulatory costs for an institution which in turn could have an impact on the efficient and economic operation of the financial system.

Before releasing funds to charitable causes, any institution would need to wait for a certain period after the last contact with the customer and to satisfy certain other conditions; in particular, taking renewed steps to trace the customer and to reunite them with their assets, and also taking out some form of insurance to provide a source

¹⁴ Ibid

from which to meet claims by customers after funds had been released. In March 2004, following Balance's presentations, the FSA policy committee endorsed the necessary policy change. The FSA confirmed that it would consider, on a release of unclaimed assets which were based on the modified steps and conditions. This policy change by the FSA was crucial to the development of Balance and meant that a viable solution could be presented to individual institutions.

Balance demonstrated that it is possible to release unclaimed assets from financial institutions without prejudicing the ongoing rights of the original owner, and thereby put these assets to better use in the support of charitable causes¹⁵. The banks have applied their released funds to a variety of programmes. For example, Lehman Brothers has been able to expand the work of its European Foundation and help enhance the partnerships which it has established and sustained with a number of not-for-profit organisations, focusing on raising aspirations and supporting the development of young people.

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Work to develop a legal framework to manage unclaimed assets in the UK is ongoing. There is a proposal to establish a scheme and the key principles underlying the proposed UK scheme are: wherever possible, to re-unite account holders with the assets that are rightfully theirs to provide a legal right for account holders to reclaim their money at any time; to take a light touch approach which minimises running costs for the scheme and participating institutions by wherever possible building on the existing infrastructure, in order to maximise the money available for reinvestment in the community; and to take account of better regulation principles. The proposed UK

¹⁵ 'bid pg 24

scheme will therefore differ significantly from other international arrangements in being in Part 7, a self-regulatory scheme. It is proposed that legislation will enable, but not compel, banks and building societies to transfer funds held in dormant accounts. Banks and building societies have committed to work with the Government to design, and participate in the UK scheme.

Banks and building societies individually have set procedures for contacting customers before an account is declared dormant. This contact is normally in addition to other regular customer mailings. Depending on the circumstances, institutions may also undertake other forms of pro-active searches to trace customers who have lost touch with them. Given advances in information technology, institutions are increasingly less likely to lose track of customers and, with the development of multi-product relationships, customers are less likely to lose touch with institutions. This reduces the likelihood of accounts becoming dormant. In the event that an account becomes dormant, customers can reclaim their money, or reactivate their account, by application to their bank or building society or by using the British Bankers Association (BBA) and British Societies Association (BSA) tracing schemes. Once initiated, claims made via the BBA and BSA are treated in the same way as claims made direct to the institution.

Central tracing facilities for tracing dormant accounts and lost savings were introduced by the BBA and BSA in 2001. The service is free of charge and is covered by the Banking Code³⁶. It was designed principally to help customers who believe that

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Association and Code is sponsored by the British Bankers' Association, the Building Societies
and APACS - the UK payments association. It is a voluntary code which sets standards of

they have an entitlement to an account, but are unsure of the specific account holding institution. This includes instances where the bank or building society may have closed or merged. The service may be used by people wishing to trace the accounts of others, but only if they are legally empowered to do so.

The Government considered the scope for non-legislative approaches and concluded that legislation will be required to enable an unclaimed assets scheme to be established. The proposed legislation is primarily concerned with protecting the rights of account holders and safeguarding the position of the participating financial institutions. The UK proposed legislation will include provisions in respect of the following:

- a) definition of accounts to be included in the scheme;
- b) definition of banks and building societies participating in the scheme;
- c) extinguishment of the participating institutions' liability to repay the customer on the transfer of money to a reclaim fund and its replacement with a new liability on the reclaim fund to repay; set up and operation of a reclaim fund; other consumer protections; and
- d) arrangements for small locally-based financial institutions.

The legislation will set out conditions with which a reclaim fund must comply with in order for a bank or building society to be entitled to extinguish its liability to customers on the transfer of assets to such a body. It is proposed that the reclaim fund will be a freestanding body, independent of the Government, the banking industry and

Customers of banks and building societies should follow when they are dealing with personal

from the distribution mechanism. It could either be an existing body or a new body. The banking industry's representative bodies will take the lead in selecting or setting up the body, which will then be wholly independent. In addition, the legislation will impose a specific statutory obligation on a reclaim fund to repay a customer whose assets have been transferred, which will be enforceable by the customer in court.

Interestingly, the UK proposed legislation departs significantly from the precedents set by other countries' unclaimed asset schemes. In the proposed scheme, banks and building societies will be able to choose whether or not to participate. In Ireland, Australia, New Zealand and Canada, participation by banks and building societies is mandatory. One of the key principles underlying the proposed scheme is that "legislation will enable, but not compel, banks and building societies to transfer funds held in dormant accounts". Wherever possible, unclaimed assets should be reunited with their legal owners or those owners' heirs. Where this is not possible—and without prejudice to the rights and entitlements of legal owners—there is a case for those assets to be put to good use³⁷. The Commission on Unclaimed Assets (CUA) was established in November 2005 to develop proposals that would generate the maximum public benefit from the proceeds of the dormant accounts held by banks and building societies based in the UK.

The National Savings & Investments (NS&I) runs its own scheme for reuniting dormant accounts with their owners. The key principle underpinning the existing framework for dormant accounts is that customers are given a clear

House of Commons Treasury **Committee Report on Unclaimed Assets Within the Financial Systems**, Eleventh Report of Session 2006-07, pg 5

understanding of their right to reclaim their money. Customers can reclaim their money, or reactivate their account, by application to their bank or building society at any time. Until dormant accounts are reclaimed, financial institutions use the funds contained to carry out their business, generating profits for shareholders in the case of a bank and rewards to members in the case of a building society.

2.2.3 Ireland

The Republic of Ireland has had an unclaimed assets scheme since 2001. The regulatory framework in place, adopts four main pillars as goals for unclaimed balances namely; consumer protection, orderly regulation of the unclaimed balances held by financial services industry, right to reunification and minimizing risks on institutions holding dormant accounts. The scheme shares many features with the UK Government's proposals, but differs in some important ways. The Irish scheme is mandatory and obliges banks, building societies and also the post office i.e. the Irish post office, to transfer the balance of any account that has not had a customer-initiated transaction for 15 years to the National Treasury Management Agency (NTMA). As in the proposed United Kingdom scheme, customers have the right to reclaim their account in perpetuity, and do so through their account-holding bank rather than through the NTMA. Disbursement of dormant account funds is controlled by the Government, and monitored by an appointed board.

In 2003, unclaimed life assurance policies were added to the Irish dormant accounts scheme. The Unclaimed Life Assurance Policies Act, 2003 requires insurance companies in Ireland to identify and contact the owners of unclaimed life

insurance policies. If the owners cannot be traced, the proceeds of the policies will be transferred to the Dormant Accounts Fund, which is managed by the National Treasury Management Agency. The contents of the Dormant Accounts Fund are invested and the surplus disbursed by the Dormant Accounts Disbursement Fund to be used on programmes or projects to help people with disabilities and people who are economically, socially or educationally disadvantaged in Ireland.

In 1997, prior to the Irish dormant accounts scheme commencing, it was estimated that there were funds with an approximate value of 3 million Euros held in dormant accounts³⁸. During the first year of operation of the scheme - 2003, 196 million Euros was remitted to the Irish Dormant Accounts Fund. The original scope of the scheme included bank and building society accounts, as well as post office savings. Subsequently, life assurance policies were incorporated too: open-ended policies were defined as dormant after 15 years, and fixed-term policies were defined as 5 years after the policy expiration date. The existing framework provides for investment of funds for social and community development and it requires separate funds and reserves to be maintained to satisfy reclaims and expenses of the *Unclaimed Assets Board* and Trust funds. However, Ireland lacks a central national unclaimed assets database and independent consumer search and reunification services.

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Commons Treasury Committee Report on Unclaimed Assets Within the Financial Systems, „**eleventh Report** of Session 2006-07, pg 20

2.2.4 New Zealand

New Zealand established an unclaimed assets regime through the enactment of the Unclaimed Money Act in 1971. The legislation came to support other legislations that were dealing with the issue like the Trustee Act 1956 and the Maori Trustee Act 1953. Other legislations that have been put in place also, to deal with this issue are the Public Finance Act 1989 and the Lawyers and Conveyancers Act 2006.

Unclaimed money can be repaid to the owner of the money, or someone who is authorised to act on behalf or instead of the owner, once a claim has been

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established as valid. One has to provide as much evidence as possible to show that he/she is entitled to the money, including proof of identity. Claims are made depending on the type of money and where it is. The Inland Revenue Department (IRD) publishes an Unclaimed Money List of the unclaimed money that it holds. The list shows the name of the owner or owners of the money, the amounts held, and how the money can be claimed.

The Trustee Act 1956 allows trustees to pay money or securities held by a trust (such as a family trust or a charitable trust) to the Crown, through the Treasury, when they no longer wish to be trustees. This will usually be done when none of the trust's beneficiaries can be found and the trustees wish to wind up the trust. The Treasury holds such monies in a trust account for six years. If the money is not paid out during this time, it will be transferred to the Crown bank account as unclaimed money. The Treasury publishes a statement of the monies held in the trust account in the New Zealand Gazette at the end of each financial year. The public can

<http://www.treasry.govt.nz/services/unclaimedmoney>. visited on 2nd July, 2010

access copies of the New Zealand Gazette from the New Zealand public libraries and at New Zealand Gazette On-Line on the Department of Internal Affairs web site.

Money in bank accounts will become unclaimed if the person who owns the account has not operated the account for a period of six years or, if it is a fixed term deposit, six years after the date the fixed term expires. If the bank where the money is deposited is a "savings bank", then the period of time which the money will be held by the bank is 25 years. These "Savings banks" include most major banks and building societies and the unclaimed money they hold is paid to the Inland Revenue Department (IRD) if its owner cannot be found.

Unclaimed dividends from shares in companies are paid out according to the company's own rules. For example, the rules of some companies may allow the company to pay unclaimed dividends to other shareholders. The dividends can't be claimed if they have been distributed to other shareholders. If a company is liquidated and there are unclaimed assets upon completion of the liquidation, the liquidator may pay the funds to the Public Trust (unless the funds are bona vacantia, in which case they may be paid to the Treasury). If a claim can be established, the Public Trust can make a payment to the person entitled to the money.

The Public Trust Act 2001 allows the Public Trust to be appointed manager of any real (land) or personal (other) property in New Zealand if its owner cannot be found. If the property is land, and no one has established a claim to it within 20 years, then the land will be transferred to the Crown. Any money derived from the land (e.g. rent) is paid to the Treasury. All real property will be transferred to the Crown,

through Land Information New Zealand, after a period of 7 years and any money derived from that property will be transferred to the Treasury. If a person leaves property at a hotel, motel, hostel or similar lodging, the owner of the business may, after 6 months, sell the property and pay the proceeds (less any expenses) to the Inland Revenue Department (IRD). This money will be included in the Inland Revenue Department's Unclaimed Money List.

The treasury through the Departmental Forecast Financial Statements provides an Excel workbook containing details of each department's comprehensive income, financial position, taxpayer's funds, and cash flows as published in the relevant sector's Information Supporting the Estimates of Appropriations. This information is available online (<http://www.treasury.govt.nz>) and the non-tax revenue includes the amounts from unclaimed monies. The following table shows collections for a period of 5 years (2006-2011); the 2011 figure is based on projections arrived from past collections.

Table 1: New Zealand Revenue Projections for Years 2006-2011

Year	Tax-Revenue	Non-Tax Revenue
2006	56,220,410	6,028,297
2007	58,470,702	6,144,179
2008	61,599,236	6,031,455
2009	59,684,325	6,373,047
2010	55,875,224	7,327,784
2011	60,468,512	7,313,554

""Source: <http://www.treasury.govt.nz/budget/2010/data>

2.2.5 Australia

Australia has a more elaborate management framework on unclaimed assets. The country has a separate legislation for each financial sector. Reunification measures include public access to an online, searchable unclaimed assets database and a consumer website (*FIDO*), which is maintained by the Australian Securities and Investments Commission (ASIC), the capital markets regulator. They operate an *unclaimed moneys service unit* as a public service and settlement mechanism for state treasurers. All unclaimed moneys are forwarded to the ASIC independent of the sector from which they originate.

By visiting the Commission's website (*fido.asic.gov.au*), users can research Australian unclaimed funds using three different methods: General Unclaimed Money search⁴⁰, Unclaimed Superannuation search⁴¹ and Advanced Unclaimed Fund search⁴². For names located in the unclaimed money database users can submit an online claim form. Claim forms are also accepted by postal mail. For individuals that suspect there is unclaimed property for them in Australia, but can't be found in the database an inquiry can be made by mail.

2.2.6 Malaysia

Under the Unclaimed Moneys Act 1965 (Malay: *Akta Wang Tak Dituntut 1965*), the registrar of Unclaimed Moneys, is to receive such monies. The owner of

This method will search for funds from all sources, except from Australian pensions,

This method allows a search for pension or superannuation money

This search will find bank accounts, life insurance policies and shares of companies' stocks.

the unclaimed moneys may recover the moneys from the Registrar either in person or in writing. The law mandates entities to comply with the legal provisions by remitting the unclaimed moneys to the Government for safekeeping of the money for the rightful owners. Some of these entities include Companies including foreign companies incorporated under the Companies Act 1965 (Act 125); any Board established to manage employees provident fund superannuation schemes or any other fund relating to retirement benefits; all societies and co-operatives societies registered under any written law relating to societies or to co-operative societies; all corporations, public authorities and trade unions; and unincorporated body of persons (whether consisting of individuals or of corporations or partly of individuals and partly of corporations) associated together for the purpose of carrying on business.

Malaysia's unclaimed financial assets framework provides for reunification measures that include mandatory publication of unclaimed financial assets by *holding institutions* and the *Registrar of Unclaimed Monies* in the national gazette. Its regime

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provides universal coverage over all sectors in the economy and casts the net over unclaimed assets wide enough to include all unclaimed monies held by any person or individual. Every entity holding unclaimed moneys shall maintain a record of all unclaimed moneys in a register to be kept at its principal office or place of business in Malaysia.

At the end of each year, every commercial organisation must check its accounts to see if it is holding any unclaimed moneys. The Act provides a broad definition for unclaimed financial assets, and it includes unpaid wages, dormant bank accounts, unclaimed insurance policies, trade accounts, and much more. Details of the -

individual sums are published in the Malaysian Government Gazette. An individual, who is owed money, can apply to the Registrar, whom upon verification processes the payment within a period of about one month

There is no interest payable or accrued on unclaimed moneys. Section 11(3), Part II of the Unclaimed Moneys Act 1965 states that: "No interest shall be payable on all moneys held in the Consolidated Trust Account or in the Consolidated Revenue Account under this Part". The amount of unclaimed moneys to be refunded by the Registrar of Unclaimed Moneys will be the amount of moneys lodged by the bank or entity without any charge or interest accrued on the moneys received.

2.2.7 Canada

In Canada, banks have a legal obligation to attempt written notification to account owners after the second and fifth year of inactivity. Unclaimed dormant accounts and unclaimed money at Canadian banks are in the custody of the Bank of Canada. Unclaimed funds at credit unions can be under the custody of the credit union itself or at a central location in one of the provinces. The Office of the Superintendent of Financial Institutions (OSFI) also, publishes owner names of all unclaimed balances worth \$10 or more in the year prior to the transfer to Bank of Canada. But due to the passing of Bill C-37⁴³ that came into effect March 29th 2007, the Bank of

⁴³ Bill C-37, An Act to amend the Citizenship Act, was introduced in the House of Commons and received first reading on 10 December 2007. The purpose of the Act is to address the issue of the so-called "lost Canadians," people who think of themselves as Canadians and who wish to participate in Canadian society, but either ceased to be citizens, or never were Canadian citizens in the first place, for

Canada will now hold unclaimed balances for thirty years, once they have been inactive for ten years at the financial institutions

Comparing the dormancy periods indicates that different countries have different timelines. The Table illustrates that the longest period is not more than 15 years.

Table 2: Dormancy periods of selected unclaimed assets schemes

Country	Period
Nevada	3 years
California	3 years
Texas	5 years
Ohio	5 years
New York	5 years
New Zealand	6 years
Australia	7 years
Switzerland	10 years
Ireland	15 years
UK	15 years

*Source: Individual computations from different provisions in the respective countries/states

The different frameworks that have been put in place i.e. in the US, UK, Ireland, Malaysia, Australia and New Zealand, offer vital lessons that other countries including Kenya can borrow from to inform the process of devising mechanisms to address the management of unclaimed financial assets.

various legal reasons

CHAPTER THREE: THE KENYAN EXPERIENCE

Financial management entails planning for the future of a person or a business enterprise to ensure a positive cash flow. This includes the administration and maintenance of financial assets and it requires investment both on good systems and structures that will mitigate against risks. It is therefore vital that a proper regulatory framework is put in place so as to safeguard the interests of the populace. From independence to the late 1980s, the government intervened significantly in the financial sector, through both regulation and direct participation in markets⁴⁴. The country embarked on a general programme of economic liberalisation from the late 1980s. With a weak regulation during this period, combined with poor growth performance, it resulted in a succession of banking crises with the collapse of many small locally owned financial institutions.

One of the strategies of Kenya's Vision 2030 for financial services is to create a vibrant and globally competitive financial sector -as one way of creating jobs and also promoting high levels of savings to finance country's overall investment needs⁴⁵. This objective will be realized through the establishment of credit bureaus to effectively mitigate risks and eliminate information asymmetry; improved financial education on the diversity availability and costs of various financial products beyond the usual advertisements and sale of such products and more so fast tracking of a strategy for development finance institutions (DFIs).

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Sukhwinder Arora and David Ferrand, Research Paper on Financial Sector Deepening Kenya. The paper was commissioned by Financial Sector Team, DFID as background material for the DFID and HM Treasury Financial Inclusion Conference, London (19 June 2007)
Republic of Kenya Vision 2030, Abridged Version, pg 15

Kenya's financial system is more relatively developed than in most countries in the Sub-Saharan Africa Region and compares favourably to other emerging nations of similar development levels⁴⁶. The country has a significantly diversified financial structure and unlike other African countries, and also has developed a vibrant financial market. The economic history of the country is a stable one and the regulator (CBK) is well respected.

To create a competitive financial environment in Kenya, there is need to introduce legal and institutional reforms that will enhance transparency in all transactions, build trust and make enforcement of justice more efficient. The other step is the creation of a critical mass of skills in financial management⁴⁷. The Vision 2030 singles out the transformation of the banking sector to bring about stronger banks, the development of a comprehensive model for pension reform and the pursued of a comprehensive remittance strategy as key initiatives that will help drastically improve the financial sector.

Over time better macro economic management and improved regulatory capacity have been critical in stimulating a private sector driven expansion in financial access. Foreign remittances for example have received growing attention internationally with the realisation of how many low income households depend on transfers from family members working away from home. The government should

⁴⁶ FSD (Financial Sector Deepening). *Costs of Collateral in Kenya: Opportunities for Reform*. Nairobi, September 2009, pg 3.

⁴⁷ Ibid

seek to promote an enabling environment by laying out clear policy direction that the private sector can identify, invest and respond to opportunities in the market.

The flow of information in the financial sector level lies at the heart of market function and recent move to allow sharing of credit information across banks is set to reduce the transaction costs of lending which should directly support increased access. Furthermore, it will also encourage greater competition as consumers are able to switch institutions more readily. This however comes with the challenge regarding the management of information.

The first medium term plan of the Vision 2030 i.e. 2008-2012, recognizes that there is inadequate legislative and regulatory framework to support the growth of the insurance and the capital markets in Kenya. Other challenges facing the sector include corruption and fraud, poor corporate governance, negative public perception of insurance and low level use of Information Technology⁴⁸. Insurance policies normally contain various conditions to payment by the issuer. Apart from occurrence of the basic contingency that gives rise to the insurer's liability such as death, illness or injury, policies may include requirements that policy be surrendered, a release be executed, or proof of death be furnished before the issuer be liable to pay. This then necessitates that proper documentation be undertaken during the lifetime of the policy.

⁴⁸ Republic of Kenya (RoK), The First Medium Term Plan (2008-2012) pg 82.

3.1 SECTORAL REVIEW

3.1.1 Banking

Section 33(4) of the Banking Act empowers the Central Bank of Kenya to issue guidelines to be adhered to by financial institutions so as to maintain a stable and an efficient banking and financial system. As custodians of public funds, banking institutions have the responsibility to safeguard their integrity and credibility in order to maintain public confidence⁴⁹. Institutions are required to periodically publish their financial statements in order to avail timely information to stakeholders. These financial statements and other disclosures should first be submitted to the Central Bank of Kenya for clearance at least two weeks before publication.

The Banking Act does not expressly provide for what duties a bank has in regard to unclaimed deposits held by them. The CBK has also not provided clear policies or guidelines in relation to the governance of such assets. Thus, there is a gap that has allowed banks to devise their internal policies to guide them in dealing with dormant accounts. Other banks report such balances as liabilities that are dues on demand while others stick to the 7 year period as provided by the Statute of Limitation⁵⁰. However, the National Bank of Kenya in its financial report discloses unclaimed dividends that have not been collected by the shareholders.

⁴⁹ Central Bank of Kenya. *Prudential Guidelines* 2006, pg 148

⁵⁰ The Statute of Limitation Act Cap 22 at s.4 (1) defines a 7-year limitation period for initiating a *cause of action*

3.1.2 Companies

The Companies Act Section 334(1) and (3) provides a clear guideline in dealing with the winding up and spells out that any money representing unclaimed or undistributed assets which have remained for six months be paid to the Official Receiver. Any person claiming to be entitled to the money may do so through the official receiver. The stipulated legal framework seeks to protect unclaimed assets held by companies upon winding up by placing them in the Companies Liquidation Account and the challenges comes from the fact they can be mixed with other monies that are received by the Official Receiver. The Law is also silent on the possibility of one making claims or even investment of such assets for the purpose of value addition.

3.1.3 Insurance

Section 43 of the Insurance Act provides .that an insurer makes adequate provision in their accounts for liabilities in respect of unexpired risks outstanding and incurred claims including claims incurred but not reported. This is as far as the law goes and it does not outline the manner in which such assets should be held and for how long. The law does not also obligate the insurer to take reasonable steps to trace the beneficiary so as to make payments. This is a lacuna that needs to be filled by developing comprehensive policies to address the handling of unclaimed assets within the sector.

3.1.4 Co-operatives

The Co-operative Societies Act (1997) does not provide explicit mechanisms for managing unclaimed assets that have been abandoned or forgotten by members. Section 39 of the Act, outlines that in the event of death of a member, a co-operative society has the discretion to transfer the share or interest of the deceased to:

- a) the person nominated in accordance with the law and any rules made under; or
- b) if there is no person so nominated, such person as may appear to the Committee if the society to be the personal representative of the deceased member; or
- c) if either of such persons is not qualified under this Act and rules made thereunder or the by-laws of such a society for membership, such person, specified by the nominee or personal representative, as the case may be, who is so qualified, or may pay to such nominee or personal representative, as the case may be, a sum representing the value of such member's share or interest ascertained in accordance with any rules made or the by-laws of the society.

The law does not obligate a co-operative society to refund or remit the shares of the deceased member and it therefore acts when such circumstances occur on its own discretion, and in most cases out of good will. The challenge here is that such a provision is subject to abuse particularly when you have a big membership and weak systems in place.

3.1.5 National Social Security Fund (NSSF)

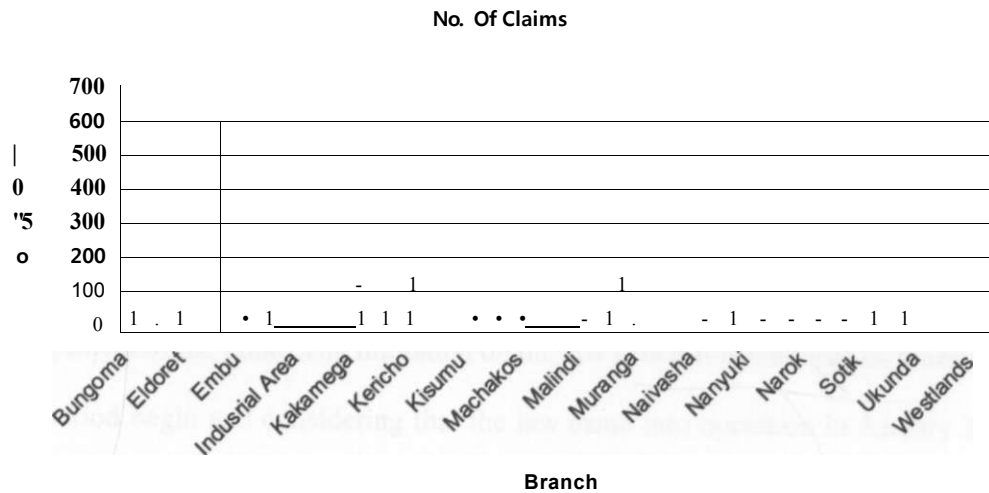
The National Social Security Fund Act establishes the institution and vests the management responsibility on the Board of Trustees. Section 21 of the Act instructs that the dependent relatives of a member of NSSF shall be entitled upon his/her death to the benefits. The benefits are to be apportioned among the dependent relatives of a deceased member of the Fund in accordance with regulations that are to be developed. Once sums have been paid, the law provides that the receipt of a member of the Fund or his/her legal representative or of a person authorised to receive the benefit on his/her behalf shall be a full and sufficient discharge to the Fund for the sum specified therein.

In the financial report for the year ended 30th June, 2009, the NSSF reported that the total amount of Unclaimed Benefits was in the tune of Kshs 334,741,000 for the year 2009 and Kshs 244,133,000 for the year 2008 respectively. This was a 37% rise just within one financial year, and the institution pointed out that some of the reasons why there is a huge accumulation of unclaimed benefits include unreliable information provided by the members in the form of wrong addresses and change of location particularly when those who were previously working in urban areas retreat to rural areas for retirement. The NSSF has 39 branches across the country and 4 sub-branches where they can be able to make payments to their clients upon attaining the age of 50 years. The benefits are paid in various forms but the common one is cheques.

The institution provides a detailed account of unclaimed benefit cheques in its website (<http://www.nssf.or.ke/uncollected-cheques>) so that individuals can refer to. They have simplified it by disaggregating the benefits to the branch level. They however report that this is faced with the challenge that not many Kenyans use the internet. Even with the introduction of technology in the form of mobile banking, their clients still prefer the traditional mode of operations where they have to see a hard copy of the receipt acknowledging that the transaction has been effected. The other challenge that they face is the perception problem that has for long been associated with many government agencies that they are not effective. This has made their some of their clients to lodge their claims and go back only to return after one or even two years.

From the analysis of the information presented in the institution's website (www.nssf.or.ke/uncollected-cheques), Nairobi Hill branch has the highest number of claims totalling to 622 and this due to the high number of members working in the city, it is followed by Kericho with 168, Mombasa 144, Kakamega 105, Bungoma had 102 claims, Homabay 91 claims, Nakuru 94, Sotik 89, Kapsabet 64, Kisumu 57, Kitale 59, Thika 61 and Machakos 54.. The figures below best illustrate the distribution of these unclaimed benefits that the NSSF is currently holding.

Figure 6: Graph indicating the distribution of Unclaimed Benefits held by the NSSF.



*Source: Individual computations from the NSSF Unclaimed Benefit cheques by Branch as provide in the institution's website (<http://www.nssf.or.ke/uncollected-cheques> last visited on 17th August, 2010)

3.1.6 The Investor Compensation Fund (ICF)

The Investor Compensation Fund is established under the Capital Markets Act and the main purpose behind its creation is to grant compensation to investors who suffer pecuniary loss resulting from a failure of a licensed stockbroker or dealer to meet his contractual obligations and to pay beneficiaries from collected unclaimed dividends when they resurface. The ICF was established through an amendment proposed in the Finance Act No.9 of 2007 and monies that form the fund are unclaimed dividends outstanding in listed companies for more than 7 years.

The ICF is administered by a board and it is a body corporate capable of taking, acquiring, holding and disposing movable and immovable property,

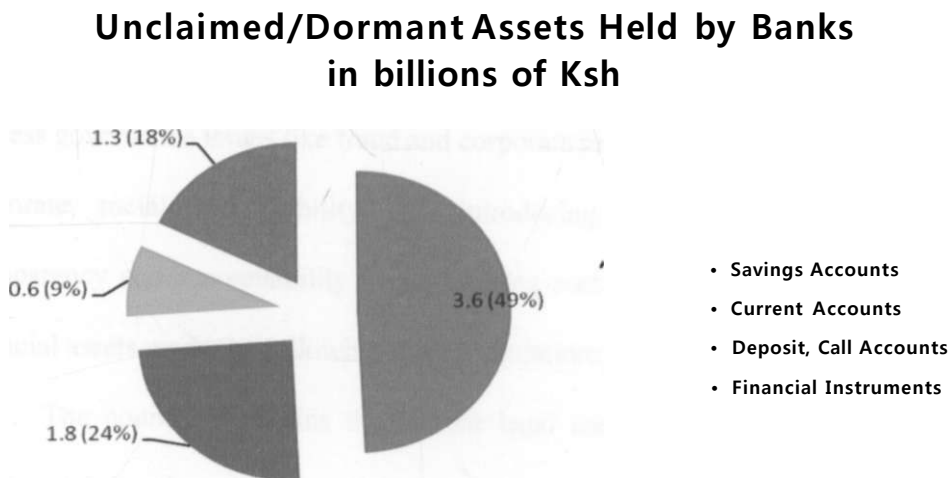
borrowing, lending money and performing such other things as may lawfully be done by a body corporate. The chairperson is appointed by the President on the recommendation of the Minister of Finance and other members of the board include the PS treasury, Attorney General, Public Trustee, CEO of the Capital Markets Authority (CMA), the CEO of the Board and other members appointed by the Minister by virtue of their knowledge and experience in legal, financial, business and administrative matters. The CMA is required to devise further guidelines on the management of the Fund. The limitation on the law is that it is not clear on when the 7 year period begins and considering that the law came into operation in January 2008, by implementing it through a backward count will amount to retrogressive legislation, which is not a common practice in the legal fraternity. The other challenge comes from the fact that this provision singles out dividends leaving out a wide range of unclaimed assets when the country opts to establish a comprehensive legal regime on unclaimed assets.

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In its efforts to address the lack of an elaborate legal regime to manage unclaimed financial assets, the Ministry of Finance appointed a Taskforce in 2008 to carry out a baseline survey to find out the extent of the problem and where possible make recommendations. The Taskforce comprised 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), and the Commissioner of Cooperatives because the entities that fall under them constitute the key holders of unclaimed financial assets in the country.

The Taskforce was set to ascertain the current practice, size and extent of unclaimed financial assets in Kenya and to recommend a national policy framework on unclaimed financial assets based on international best practice. The team was able to estimate the level of unclaimed financial assets held in relevant sectors and also made recommendations on how best to handle them. From the baseline survey, the banking sector was found to be holding unclaimed assets with owners being separated from their owners for periods as long as seven or more years. The table below clearly illustrates this;

Figure 7: Unclaimed monies held by Banks in Kenya



•Source: Individual computations from the report of the Taskforce on Unclaimed Assets.

The Taskforce surveyed institutions in the Banking, Capital Markets, and Insurance sectors. The total amount of reported unclaimed assets amounted to KSh.9.1 billion. Of this total, banks reported KSh.7.4 billion, listed companies

KSh.1.5 billion, insurance companies KSh.283 million, The National Social Security Fund (NSSF), which falls within the Pensions category, reported Kshs. 243 million. The Kenya Power and Lighting Company (KPLC), was categorized within the utility firms and it reported a total of KSh.66.8 million. The Taskforce concluded that the reported totals of unclaimed assets were far below what was estimated. This was attributed to a number of factors among them being the exclusion of *non-financial assets* like land and property, significant under-reporting by holding institutions surveyed particularly in the pensions and insurance sectors, and non-reporting of unclaimed assets by government agencies like the Public Trustee.

The absence of a legal framework provides no incentive for asset-holding institutions to identify, segregate, report or manage unclaimed assets and it is therefore paramount that an unclaimed asset regime be out in place. This will help address governance issues like fraud and corporate malpractices by promoting a sound corporate social responsibility and introducing standards that will address transparency and accountability in the banking sector. The Taskforce on unclaimed financial assets made the following recommendations;

1. The country maintains the current legal and regulatory framework largely unchanged
2. Introduce a voluntary legal and regulatory framework
3. Introduce a mandatory legal and regulatory framework within Regulator(s)
4. Introduce a mandatory legal and regulatory framework with creation of a new Regulatory Agency.

maintaining the current legal and regulatory framework, it implies that the system remains without elaborate guidelines on the management of unclaimed assets. Under the Vision 2030, Kenya seeks to attain a free, equitable, and a society. This is even further elaborated within the economic pillar that spells out the need for increased access to competitive and affordable financial services. The view of the Certified Public Secretaries of Kenya (ICPSK)⁵¹, is of the view that moving with the current framework is not an option for the country as this negates international best practices. Furthermore, the government will also be abdicating its role on the principle of bona vacantia.

The introduction of a voluntary legal and regulatory regime will require institutions holding institutions to volunteer to participate in a self-regulatory framework. Noting that the current framework has made institutions to benefit by managing these assets, it is not proper to allow for such an approach. The experience of the recent financial crisis illustrate that some form of regulation is needed. This could be achieved through the introduction of mandatory legal directives within the regulatory framework that is currently in place. This could imply that the existing infrastructural framework in the financial sector could be bolstered. The Central Bank can handle the banking sector, Capital Markets Authority handling the listed companies, Retirement Funds handling Trust Funds that have become unclaimed. Such an arrangement is similar to what has been adopted in Australia. But a departure from this arrangement could be the setting up of a fully fledged agency that has the responsibility of managing unclaimed assets in the country. Part of its mandate could include developing

⁵¹ Institute of the Certified Public Secretaries of Kenya is a professional membership association established by an Act of Parliament, Cap. 534 of the Laws of Kenya in 1988, for the purpose of regulating and regulating the Company Secretarial Profession in Kenya.

standards on reporting, disclosure and use of such assets. This will closely resemble the current framework in the US.

To ICPSK, the subject of unclaimed assets is first gaining currency in the World and Kenya needs to address the issue and do it comprehensively. There are piecemeal steps that have been taken to address that matter in the country. The Capital Markets Act was amended in March 2007, by providing that unclaimed dividends outstanding in listed companies for more than seven years be remitted to the Investor Compensation Fund. ICPSK is of the view that more needs to be done, and to demonstrate its willingness to contribute to the process, the ICPSK has taken to address this issue. Under its governance project it presented its recommendations on the need for an appropriate legal, regulatory, and institutional framework to govern unclaimed assets in Kenya to the treasury. ICPSK recommended that;

1. Amendments should be made to the various statutes governing holding
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institutions. The purpose of the amendments is to entrench a management scheme for unclaimed assets whilst they are at the holding institutions. They should provide for the identification, segregation, reporting and remitting of unclaimed assets. A strong internal control mechanism in each holding institution should be emphasized and uniform application of international best practices reflected in each sector.
2. The dormancy period should be defined as the period of time, also referred to as the abandonment period, during which an owner of property does not take action on his/her property. It is recommended that the holding institution

continue to hold the asset, this time as an unclaimed asset, for a period of 30 years, after which the amount would be surrendered to the Consolidated Fund.

3. For uniformity purposes, the amendment to the Capital Markets Act which provided for unclaimed dividends to be remitted to the Investor Compensation Fund should be repealed.
4. An Unclaimed Assets Oversight Authority Board should be established for the management of unclaimed assets and supervision of the holding companies. An effective Unclaimed Assets Oversight Authority is one that has a strong legal and regulatory framework, which ensures that monies held in situ by holding institutions are managed in a transparent and accountable manner.

According to ICPSK, the Authority should be tasked with the following key responsibilities:

- i) Monitor unclaimed assets while they are held by holding institutions during the 30 year period. Holding institutions will be required to make regular reports to the Authority of the unclaimed assets they hold. The Authority will be responsible for ensuring that holding institutions manage the unclaimed assets in a transparent and accountable manner.
- ii) Monitor Reunification of assets with their owners or rightful beneficiaries. The Authority should also require that holding institutions keep a physical and electronic database/register of all the unclaimed assets they hold. At the point of remitting unclaimed assets to the Consolidated Fund by holding institutions, there will also be passage of details of the owners or rightful beneficiaries of those assets. The Authority should also make

efforts to alert the public of the assets they hold, by holding campaigns, publishing the information they have in the Gazette and newspapers and availing all the information on a website with easy to use search options.

- iii) Issue guidelines for the Investment of the monies held by Institutions and use of the proceeds and for other designated purposes.
- iv) Ensure accountability and transparency, by requiring that the holding institutions submit audited accounts each year.

During the 30 year period, the holding institutions will be required to make concerted efforts to reunify the assets with their owners or rightful beneficiaries. The holding institutions will be required to keep a database of all the unclaimed assets they hold and to make such database available to the public. The holding institutions will also be required to segregate the unclaimed assets from other assets they hold and to make regular reports to the unclaimed assets oversight authority to be established under the Act.

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The IEA recommends that the dormancy period need to be shorter since a longer duration negates the moral and economic justification of establishing an unclaimed assets regime. IEA is of the view that since there is no legal framework currently in place in the country, private firms have no incentive to make disclosures because they benefit by keeping these monies. Furthermore, the business of unclaimed financial assets has been in place for a long period in other parts of the world, even in those countries that have better developed financial systems. Steps to establish mechanisms in Kenya in IEA's view, should comprehensively address the reasons why assets become unclaimed, and facilitate a phased implementation whereby the -

database is first developed then followed by the establishment of an agency to manage such assets.

The IEA recommends further that the CBK matches the current momentum and support that it has given in the establishment of Credit Reference Bureaus to complement the central role played by banks and other financial institutions in extending financial services within an economy will only be complete; if Unclaimed Assets Reference Bureaus are also set up. This is because CRBs will be of more help to the financial institutions in facilitating their decisions because credit histories provides both necessary input for credit underwriting and also allow borrowers to take their credit history from one financial institution to another. As result, lending markets will be more competitive and in the end more affordable. Credit bureaus will also assist in making credit accessible to more people, and enabling lenders and businesses reduce risk and fraud. IEA is of the view that more will even be achieved if the customers are provided with avenues to obtain information regarding their past financial assets that could have become unclaimed and this will in turn enhance the current efforts to reform the financial sector.

IEA looks at the lack of a comprehensive financial literacy and a lack of a culture of disclosure as the key issues that will have to be addressed in the efforts of reducing the levels of unclaimed financial assets from accumulating in the financial system. This has made banks to thrive on the account of an ignorant public. It will take uncommon knowledge for the regulatory institutions to address this issue, and the move by the Treasury to appoint a Taskforce to look at the issue, is a step in the right direction. The revelations on the levels of unclaimed assets in the financial system

will form part of the first steps to have the banks accord the issue the attention that it requires.

FSD reinforces the need for widening the scope of financial literacy by distinguishing it from financial education. To FSD, financial education teaches the knowledge, skills and attitudes that people can use to adopt good money management practices for earning, spending, savings, borrowing and investing. It is through financial literacy that individuals are able to use resources effectively, choose financial products and services that best meet their needs. At the institutional level, financial education enables them to better meet client demand, gain competitive advantage, foster informed consumers and enhance their standing as good corporate citizens. FSD recommends the adoption of a multifaceted approach to financial education where government, corporate sector and civic organizations work together. The government agencies will include the ministries, regulatory agencies and the central bank through the use of legislative support and school curriculum.

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FSD is of the view that Kenya should build from the experience of the US on what it was able to achieve through legislation. The US established the Financial Literacy and Education Commission in 2003 with the purpose of improving financial literacy in the country including bringing those who are outside the financial stream onboard. The Commission went ahead to craft a National Strategy that incorporated the views of citizens, non-profit making groups, academia and government entities. The final Strategy that was developed addresses financial literacy issues, challenges, and calls for the need to review financial education programmes, widen consumer protection, strengthen the use of schools, and increase research in financial education.

3.2 THE PROPOSED UNCLAIMED ASSETS BILL

The Taskforce appointed by the Minister of Finance in March 2008 on Unclaimed Financial Assets concluded that the current framework in Kenya does not provide for a system of mandatory notification or reminders to potential assets owners nor the disclosure or publication of unclaimed assets. To respond to this lacuna, it recommended that the an effective reunification regime be established to protect the interests of potential owners particularly the most vulnerable owners and beneficiaries such as widows, orphans and dependents and those who are less financially literate. The Taskforce went ahead to suggest that the reunification service should be inclusive of a third-party unclaimed assets service provider who works in the best interest of asset owners as well as the assets holders. This is borrowed heavily from the US framework, and it is believed that it will help foster accountability, transparency and efficiency in Kenya's financial system.

The Taskforce identified four pillars that are essential for an effective Unclaimed Financial Assets regime. They are;

- i) Regulations, policies and procedures governing the management of unclaimed assets while they are held at holding institutions. Strong internal controls at the holding institutions are vital and there is need for uniform application of best practices in each sector.
- ii) A legal and regulatory framework that provides for institutions to regulate, supervise and manage unclaimed assets at holding institutions as well as when they are remitted to new ones.

- iii) Reunification services covering periods of temporary separation i.e. when the assets are transferred to an independent agency or trust fund.
- iv) Investment of unclaimed assets in long- term economic development. Kenya being a developing country will be able to achieve development goals through the use of such resources, unlike the UK that has started exploring the possibility of using such resources to support the work of third sector i.e. charitable courses.

The proposed Bill is summarised as "An Act of Parliament to provide for the reporting and dealing with unclaimed financial assets, to establish the Unclaimed Financial Assets Authority and the Unclaimed Financial Assets Trust Fund and for connected purposes." The Bill provides specific categories of assets ranging from a period of 1 year to 5 years. The Treasury explains that this was done because of the variations that come from the difference in the liquidity of the assets. The time period will also give the holding institutions the opportunity to take steps to trace the owners. The other reason being that the shorter the duration, there will be likelihood of having government interferences and this is bound to affect effective market functioning.

The Treasury points out clearly that it appreciates that there is need for a framework and currently it is working closely with regulatory institutions and currently the "Know Your Customer" policies that are being implemented in the banking sector are part of the steps to guard against contact information loss which has been attributed to be the major cause of the pilling up of

unclaimed assets particularly in the financial sector. With the adoption of the New Constitution, which clearly spells out the need for entrenching values and principles of good governance in the conduct of National affairs, it is expected that the Ministry of Finance will work to establish a policy framework that will guide the management of unclaimed assets. Chapter 12 of the same constitution, Article 201 (a) clearly states that "there shall be openness and accountability, including public participation in financial matters".

With these principles that have enshrined in the country's supreme law, it will be correct to state that the proposed Bill still requires improvement. The Bill needs to come out clearly on the issue of regulation, supervision and management of unclaimed assets while they are still at the holding institutions. This could be through a provision that guides the treatment of such assets and the manner in which they should be treated in the books of accounts of the holders and therefore supporting internal systems to achieve accountability and transparency within the financial system. The Bill should also clearly highlight the necessity of holders making considerable efforts in locating the rightful owners as this helps in promoting confidence within the financial system.

CHAPTER FOUR: EFFICIENT MANAGEMENT OF UNCLAIMED ASSETS AS A TOOL OF GOOD GOVERNANCE IN THE FINANCIAL SECTOR

The financial sector plays a crucial role in supporting the development of global business, and should be supported where possible to grow and develop. This can be through reform and close monitoring in order to devise more business friendly policies from time to another that will respond to the challenges that affect the sector, including efficient management of country's unclaimed assets.

Progressively the world economy is becoming more and more integrated through international production, and this has shifted significant amount of power away from States towards world markets. International Institutions like the IMF are increasingly playing important role in ensuring that there is a conducive and predictable economic environment. According to James A. Dorn, economic freedom and limited government under the rule of law are crucial for peace and prosperity in the 21 st century.

The link between good governance and progressive development, is increasingly gaining currency both at the domestic and international cycles. Studies by McKinsey & Company, Credit Lyonnais Securities Asia, and the World Bank have all shown that there is a strong correlation that exists between good corporate governance practices and improved performance. This has stimulated demand for monitoring the quality of governance across countries and institutions within individual countries over time. Simply put, governance is the set of processes, policies, laws and institutions affecting the way a country, institution, society, etc., is

directed, administered or controlled. Good governance implies that mechanisms function in a way that respects the rights and interests of the stakeholders. It promotes accountability and strengthens confidence in government/management administration.

At the institutional level, good governance is demonstrated and practiced by specifying the rights and responsibilities of different stakeholders. This ensures that there is separation between ownership and control, for the shareholders, managers, Board of Management and the Supervisory Board. Good corporate governance also sets the rules and procedures for making and implementing decisions within an organization and the ultimate aim is to ensure that the institution is being managed in the interests of the shareholders. This minimizes abuse and reduces unforeseen risks, such as those arising from related party transactions, conflicts of interest and inadequate disclosure and transparency standards.

The reforms that the Kenyan government undertook in the financial sector at the beginning of this decade that saw the Retirement Benefits Authority, Insurance Regulatory, and broadening of the mandates of the CBK and CMA, were to a great extent informed by the need to have a properly functioning sector. This was seen to be critical in boosting confidence in the financial system that had been affected by closures of some institutions. This is expected to support efforts of improving the country's economic and financial management so as to achieve macroeconomic stability; commitment to social and economic equity; and the promotion of efficient institutions through structural reforms.

The CMA in its strategic plan for the period 2007-2010 outlines the need for the establishment of a robust, facilitative, legal and regulatory framework that conforms to international standards so as to maintain investor confidence and investor protection. With such a framework in place, it will be possible for the authority to promote corporate governance among licensees and also improve the performance management system and promote market integrity. This will in turn support economic growth through the development of a robust market that functions efficiently.

In the efforts of boosting confidence and supporting the strengthening of the Insurance Sector, the government established the Policyholders' Compensation Fund (PHCF) under Section 179 of the Insurance Act on 24th September, 2004, through the Legal Notice No.105. The purpose of the Fund is to provide compensation to policyholders in the event on an insurer becoming insolvent. The insurance policyholders contribute 0.25% of the premiums payable monthly and the insurance companies also contribute 0.25% of the premiums receivable monthly, resulting in a total of 0.5% from the insurance companies. The Fund has operational features as those of the Deposit Protection Fund. The fund is run by a Board of Trustees that is accountable to the government through the Ministry of Finance. The operations of the Fund commenced on January 1st 2005 and the following is a summary of the financial performance since then.

Table 3: Financial statistics of PHCF

	2005/06	2006/07	2007/08
Levy contributions	190,289,144	164,584,133	190,159,343
Government grant	15,000,000	20,000,000	

*Source: Policyholders' Compensation Fund Annual Reports

The Fund has continued to invest in government securities in accordance with government policy on investments of parastatals assets. The interest earned is channelled to cater for administrative costs so that the Fund can remain growing. This has also seen the government grant to PHCF stop because the interest earned after being in operation for two financial years.

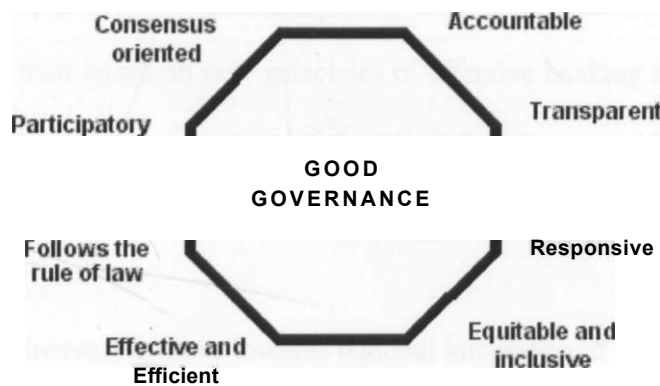
The above scenario clearly demonstrates that though the government may incur costs at the initial stages of setting up an institution within a sector as in the case of PHCF, the benefits far outweigh the costs. So far, policyholders in the insurance sector have a fall back position in the event that an insurer becomes insolvent. The setting up of PHCF ensures that the sector works to advance the interests of stakeholders among them being government which seeks to promote the insurance business in Kenya by safeguarding the interests of policyholders. The establishment of unclaimed assets agency will therefore take care of the management of those assets within the banking, capital, insurance and the pensions sector that have become unclaimed for one reason or the other. »

With good financial management a country's development is assured of progress because it gives assurance to citizens that their taxes are being used appropriately. Donors and lenders also will know that the funds they provide are being used appropriately, and to the private sector that there is an appropriate environment for investment and growth. Sound public financial management ensures that there is accountability and efficiency in the management of resources both in the public and private sectors, and is an essential underpinning to improve governance and fight corruption. Furthermore, good corporate financial reporting standards and ,,

practices support proper functioning of the market economy. As a result there will be effective management and decision-making because entities will have adequate internal financial reporting systems that consist of, timely and regular submission of comprehensive and candid reports on every significant matter of financial administration.

Simple put, good governance is characterised by eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. When these principles form and inform management practices, it ensures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. This then makes organizations to operate in a manner that is also responsive to the present and future needs of society.

Figure 8: Characteristics of good governance



*Source: United Nations Economic and Social Commission for Asia and Pacific (UNESCAP)

Under the political pillar of the Vision 2030, a democratic system that reflects the aspirations and expectations of the Kenyan people is considered a key driver of growth and progress to the country. To realize this, it will be vital to invest in strengthening the systems of governance in all sectors. The financial sector in particular requires fair legal frameworks that are enforced impartially because of the sensitivity of it. With such frameworks decisions will be taken and the enforcement is done in a manner that follows rules and regulations. Information will also be available and directly accessible to those who will be affected by such decisions and their enforcement. Established institutions and processes will serve all stakeholders within a reasonable timeframe. The processes and institutions will therefore produce results that meet the needs of society while making the best use of resources at their disposal.

Kenyans recently ratified a constitution that enshrines the principles of good governance in the country's supreme law. Chapter two⁵² of the document outlines the national values and principles of governance and specifically points out good governance, integrity, transparency and accountability. These are key guidelines that will support the growth of the financial sector because they help in creating confidence and trust based on core principles of effective banking systems, financial institutions and market securities regulations which the government has jurisdiction in spelling out directives for the sector.

With the increasing move towards regional integration, it is paramount that the East African Community member countries establish standards that guide a facilitatory sector like the financial sector. Such developments impacts well on businesses and the

⁵² Republic of Kenya, The Proposed Constitution of Kenya, Art 10 (2) (c)

citizens in terms of the financial facilities and services offered. The establishment of sound corporate practices within the region coupled with investment in innovative and modernized systems of financial management will help ensure that there is stability in financial institutions and thus boosting development; reduce administrative costs and misuse of resources.

It is important to also point that while addressing good governance in the financial sector, it must be not be left to become science caught up. It should be well functioning because complexities get things expensive. The governance framework should encourage efficient use of resources even as it demands accountability from the institutions. When a country achieves to establish sound financial systems, it can easily experience sustainable growth because a healthy financial system bolsters public confidence in governance policies and practices.

The performance of pension funds and mutual funds for instance is vital as it affects the well being of the older citizens. It is advisable that a country ensures that the soundness of pension funds is assured by developing a proper investment climate. With the support also of strong institutions, macroeconomic stability, openness and good infrastructure a country will be able to avoid the challenges that come with improper management of pensions. This is why the regulatory agencies should continually support the development of effective regulatory environment that guarantees the nurturing of best practices that stimulate investor confidence and trust.

James Gwartney, Randall Holcombe, and Robert Lawson in a study of in a study of OECD countries and 60 other nations, published in the *Cato Journal*⁵³, found an inverse relation between the size of government, as a share of GDP, and economic growth — but a "strong positive correlation between the security of property rights and economic growth." There is therefore need to strengthen market based economies by reducing restrictions on trade, labour mobility, capital flows, and prices. This can be achieved by developing the financial institutions and increased knowledge sharing among stakeholders so as to develop and encourage the adoption of best practices.

In August 2000, the World Bank published a study which revealed that, while GDP growth is the single most powerful force in alleviating poverty, growth alone is not enough. This study found that, among other things, countries can double their living standards by improving their legal systems and combating corruption - a particular emphasis should be placed on deepening domestic financial markets, strengthening regulation and financial supervision, and introducing effective corporate governance mechanisms. The findings concur with those of a study that was undertaken by the Asian Development Bank which established that poor enforcement of corporate laws and regulations, underdeveloped capital markets, and high concentration of corporate ownership, as some of the reasons for weak corporate governance in the countries that were most affected by the Asian crisis.

⁵³ *Cato Journal* is America's leading free-market public policy journal. Every issue is a valuable resource for scholars concerned with questions of public policy

The study identified several priority reform areas, including: strengthening banking supervision and regulation, and improving financial reporting standards and their enforcement. It made the following four recommendations:

- (i) corporate ownership structures should be rationalized i.e. ownership concentration should be reduced
- (ii) corporate internal controls and shareholder protection should be strengthened;
- (iii) external monitoring and discipline should be strengthened; and
- (iv) capital markets should be developed and the efficiency of corporate financing improved.

The study concluded that measures aimed at strengthening corporate internal control, improving standards of accounting, auditing and financial reporting systems and their enforcement should be placed at the top of the reform agenda.

Pandey⁵⁴ regards financial management as the managerial activity which is
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concerned with the planning and controlling of the organizational resources. Practising managers are concerned with it because it provides them with the conceptual and analytical insights to make decisions skilfully. The financial policy focuses on wise use of organizational funds and this involves matching of advantages of potential uses against the cost of alternative sources so as to achieve the broad financial goals which the enterprise is set.

At the national level, the synergy between a country's macroeconomic and structural policies is increasingly gaining recognition. OECD member governments

⁵⁴ I M Pandey. *Financial Management*, New Dheli, Vikas, 2004 9th Ed.

appreciates that the two are fundamental in achieving fundamental policy goals. Corporate governance is one key element in improving economic efficiency and growth as well as enhancing investor confidence⁵⁵. To a large extent, corporate governance framework depends on the legal, regulatory, and institutional environment. In addition, factors such as business ethics and corporate awareness of the environmental and societal interests of the communities in which a company operates have an impact on its reputation and its long-term success of a business entity.

To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities. Similarly, governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders. The government and market participants need to work closely in the process of developing policies that are to be applied; this will help in ensuring that the views of all are factored in, when developing frameworks for corporate governance by taking into account the costs and benefits of regulation.

. The current shift in the conduct of affairs by regulatory institutions in the Kenya's financial sector as illustrated by IRA that has gone beyond compliance based supervision of insurance firms, to risk based supervision, is part of the reform initiatives that is geared to improving and growing the sector while at the same time

⁵⁵ www.valuebasedmanagement.net/articles_oecd_corporate_governance_principles_2004.html

ensuring that the interests of the stakeholders are well taken care of. The PHCF was also established as part of the efforts of cushioning policy holders in the event that an insurer is declared insolvent. The management of the PHCF is being benchmarked against some of the best similar arrangements in the world like Canada and so far the results have seen the fund growing impressively.

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY

The existence of unclaimed financial assets within the financials stream illustrates that there are failures within the system that needs to be addressed. This could either be done administratively or by legislation. Proper analysis of the problem helps shed light on how best to address the matter comprehensively. From the analysis of the country's financial sector, it is correct to state that the statutes governing them do not provide the requisite policies, regulations and procedures for the management of unclaimed assets. This is unlike the practices that other developed countries like US, Republic of Ireland, New Zealand and Canada have established to address this subject.

Kenya has not had a policy on the management of unclaimed assets to date. The development of policy framework would therefore have far reaching effects for the country's financial sector. This would also help in achieving financial stability and renewed confidence in the financial sector. With an effective regulatory infrastructure in place, the financial markets will also grow and develop to support other government programmes that heavily rely on the financial sector. Stability in the financial sector is closely associated with efficiency; but this on its own does not guarantee that the all will be well, stronger systems and structures which are supported by good laws and polices are essential. This explains why it is imperative for a country to devise appropriate laws and policies to guide operations in the financial system. An effective framework is useful in ensuring that there is an enabling environment for all players to conduct business

The experience from US, Australia and Malaysia demonstrates that unclaimed financial assets present the country with a good opportunity to strengthen its governance regimes within the financial sector while at the same time enhancing the resource access both for the government and the populace, which is especially important for developing countries. Considering the peculiarity of the issue, it is important to point out that the management of such assets should be in such a manner that supports the greater social welfare. Frameworks that are put in place need to have a legal backing rather than leaving them to administrative options. This in turn helps foster the confidence in the financial system considering that the roles and duties will be outlined.

The legislative framework that a country like Kenya puts in place, should provide for a mandatory compliance by holders of unclaimed assets as this has proved successful in many jurisdictions. Legal bottlenecks that may arise like the constitutionality of State holding individuals' monies can be avoided by ensuring that a regulatory institution and trust fund are established. The role of the institution will be to regulate, supervise, and manage unclaimed assets at all stages of separation of assets from the temporary separation phase to the permanent phase. The owners should have the perpetual right of reclaiming their assets, but before such happens, they can be used for social development as happen in the State of Florida, where such assets are supporting educational programmes.

5.2 CONCLUSION

Reforms undertaken in Kenya in the financial sector in the last decade have brought considerable dividends. When the NARC government in 2003 launched the ERS, it acknowledged that macroeconomic stability and institutional reforms as pertinent components for the economic growth and development. The execution of these reform initiatives led to renewed growth and the financial sector was itself a major beneficiary. Lessons from the ERS implementation, led to the development of the Vision 2030, which is a long term development plan that seeks to transform Kenya into a "middle-income country providing a high quality life to all its citizens by the year 2030". The vision is build upon three pillars: economic, social and political.

Under the economic pillar, the financial sector has been singled out as a critical driver of growth. The sector will be therefore be reformed so as to position it properly to undertake this role effectively. One of the reforms that have already been effected is the establishment Credit Reference Bureaus to support information sharing within the banking sector and the regulatory institutions have also signed a memorandum of understanding that seeks to support closer collaboration through information and knowledge sharing and all these are geared to strengthen the financial sector.

However, one area that has not received an adequate attention in the financial sector is the subject of unclaimed assets. Unclaimed financial assets results from untimely death, immigration, loss of contacts, mergers and at times lack of knowledge among the populace on how to go about in dealing with such assets. Since there are no

legal stipulations that require the holders of such assets to disclose them, they have been left to accumulate. This goes against international best practices and denies rightful owners and dependents access to such resources that they can use to better their livelihoods while at the same time contributing to the country's progress.

The absence of a legal framework has led to institutions developing their own internal policies to address the management of unclaimed assets. There are those that disclose them and those that don't and this is not healthy for the progress of the sectors in the financials system at a time when the global community is moving to adopting best practices in different issues. It is imperative that Kenya moves ahead with the work that it has started in addressing the subject of unclaimed assets, particularly now that it has taken the preliminary steps by appointing a Taskforce to undertake a baseline survey on the issue of unclaimed assets. Furthermore, there is a Bill that has been developed and awaiting to be tabled in Parliament.

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Noting that immigration is one of the reasons that leads to the owners being separated with their assets, it is important to point out that a well established unclaimed assets management framework should be able to serve the people who have moved overseas so that Kenyans in the diaspora can be reunited with their assets left behind. Kenya's Vision 2030 appreciates the role that Kenyans in the diaspora could play in the country's development process if an effective and mechanism is put in place to promote their confidence. This will significantly depend on how well the mechanisms developed approaches best practices globally.

The establishment of unclaimed assets regime in Kenya will go along way in strengthening the governance framework in the financial system. The framework will be instrumental in maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and fighting malpractices. Corporate governance is associated with the trend towards greater corporate responsibility and the conduct of business within acceptable ethical standards. Transparency, accountability and openness in reporting and disclosure of information, both operational and financial, are internationally accepted to be vital to the practice of good corporate governance.

The object of good corporate governance is attained when institutions demonstrate public accountability and conduct their business within acceptable ethical standards. This demonstration will take the form of effective financial reporting, both internally and externally and as a result the work of the unclaimed assets agency will be made easier considering that there is an enhanced culture of disclosure that has been brought about by corporate governance supported by a sound policy framework.

The unclaimed assets agency will be mandated to receive records from records from holding institutions and keep proper records of the owners of such assets. The money should be put on a trust fund because the owners have the perpetual right to reclaim them. To ensure that the funds are not touched, they should be invested and the interest earned used to cater for the administrative requirements of the agency.

During this period of separation, the government should be allowed to access these assets after being with the agency for a specified period of time. Kenya being a

developing country, should invest such resources in long term economic interests like infrastructure, education and health care. This is because they have long term rewards to society where these assets were accessed from in the first place.

5.3 RECOMMENDATIONS

From the analysis of the regimes that have been established in other developed countries and comparing them with the situation in Kenya on the management of unclaimed assets, it is correct to state that more comprehensive mechanisms should be devised to provide guidelines and procedures to deal with this issue. The banking, companies, insurance and pension sector are the entities that are holding these assets and an effective framework should provide for the identification, segregation, reporting and remitting of such assets from these institutions. To attain this, the following should therefore be recommended;

- Various statutes governing the sectors in the financial sector should be amended to provide for the reporting of unclaimed assets. This will progressively build the database and make it possible for the tracking of progress made within the institutions before a comprehensive regime is established.
- The Kenyan government should enact a legislation that will provide for the establishment of unclaimed assets regime in the country. This will be in line with international best practices as demonstrated by the analysis in the previous chapters.
- The legal framework should provide for the setting up of an agency responsible for receiving assets from holding institutions after a defined period. The role of the agency should include reunification of the assets with

the rightful owners and also investing these monies before they are eventually reunited with their owners.

Owners should receive interest on the monies that have been invested by the agency when they come for them.

This law should provide for a long-term investment of such assets. This will ensure that resources that become unclaimed annually can be channelled towards socioeconomic activities like social protection which has not been elaborately developed due resource constraints.

The regulatory institutions within the financial sector, should also work closely with those agencies that are under them, to address the gaps that promote the loss of contacts that have led to the growth of unclaimed assets.

The recent developments in the mobile communications through mobile banking and other new technological innovations can be explored in the payment of dividends by companies, because uncollected dividend cheques constitute unclaimed assets.

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Regulatory institutions should work closely with each other to conduct financial education that targets literacy on the rights of investors, pensioners, policyholders and bank account holders. Information on remedies and options for them to explore should also be incorporated in this programme.

The government through the Ministry of Education should inculcate financial literacy into the syllabus so that matters of financial management can be instilled into the future generation while they are still young. At the same time, the media should also be used as an avenue to promote financial literacy particularly for the adult population.

- Personal data of **clients**/customers/ members captured by financial institutions should be reformed and broadened to enable these institutions to have a wider base of more relatives or contacts that can be use to trace rightful owners of unclaimed assets.

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