



INVESTIGATION AND ENFORCEMENT MANUAL

(Revised 2020)

Investigations & Enforcement Department

Directorate of Market Operation

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DEFINITIONS

The Act	The Capital Markets Act
Authorized	Means licensed or approved by the Regulator to carry out certain functions with respect to the financial markets.
Confidential information	Means information that the Regulator receives in confidence in the course of regulating financial services in its jurisdiction.
Constitution	The Constitution of Kenya, 2010
Decision-Making Body (DMB)	The Board of Directors or Chief Executive of the Capital Markets Authority or the Director Market Operations, having appropriate mandate (depending on the delegation Matrix) to decide whether or not to make a finding of contravention of the capital markets regulatory framework (including deciding the appropriate regulatory sanction, if any).
Department	Means the Department of Investigations & Enforcement
Document	a piece of written, printed, or electronic matter that provides information or evidence or that serves as an official record . References to its production include references to producing a copy of the information in legible form, or in a form from which it can readily be produced in visible and legible form.
FAAA	Fair Administrative Actions Act.

First Enforcement Notice	Notice to Show Cause formally issued to a person/firm, setting out the facts of the matter, based on inter alia investigation findings, findings arising from the supervisory function of the Authority (inspections, financial analysis, and compliance reviews) noted omissions or commissions and the specific provisions of the capital markets regulatory framework they are alleged to have contravened. [A template First Enforcement Notice is set out in Appendix 3.]
Final Enforcement Notice	Formal Notification of Enforcement Action issued upon according a person issued with a Notice to Show to Show Cause an opportunity to be heard. [A template Final Enforcement Notice is set out in Appendix 5.]
Informant	A person who voluntarily provides the Authority with information regarding a matter under investigation or which he/she has a reasonably good faith expectation that the Authority should investigate.
Infringement Notice	A formal notice issued to a person alleged to have contravened provision(s) of the capital markets regulatory framework regarding strict liability offenses which can be characterized as minor regulatory obligations[regulatory obligations whose contraventions do not of themselves lead to material adverse impact], such as submission of regulatory reports, providing the recipient an opportunity to accept liability and satisfy the provided regulatory sanctions (usually financial penalty). [A template Infringement Notice is set out in Appendix 4.]
IOSCO's Investor Alerts Portal	The list of alerts and warnings provided by IOSCO members to IOSCO voluntarily which is made available to members of the public via IOSCO's website at https://www.iosco.org/investor_protection/?subsection=investor_alerts_portal

IOSCO MMoU	The Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of the International Organisation of Securities Commissions dated May 2002, as amended from time to time.
IOSCO Principles	IOSCO's Objectives and Principles of Securities Regulation dated May 2017, as amended from time to time.
IOSCO Methodology	IOSCO's Methodology for assessing the implementation of the IOSCO Principles dated May 2017, as amended from time to time.
No Contest Settlement	An agreement entered into between the Capital Markets Authority and a person under the No Contest Settlement Policy.
No Enforcement Action	A determination by the Capital Markets Authority not to take enforcement action for regulatory breach, as provided for under the No Enforcement Action Policy
Notice to Show Cause	A formal communication issued to a person/firm, setting out inter alia investigation findings, findings arising from the supervisory function of the Authority (inspections, financial analysis, and compliance reviews) noted omissions or commissions and the specific provisions of the capital markets regulatory framework they are alleged to have been contravened. See also First Enforcement Notice.
Person	A natural or legal person, or unincorporated entity or association, including corporations and partnerships.
Preliminary Findings Report (PFR)	The report or letter which is sent to the person under investigation once the investigators have an initial idea of the evidence and the breaches/contraventions, before submitting either to the settlement procedure (if appropriate) or the formal procedure for a final decision][A template PFR is set out in Appendix 2.]

The Regulator	The Capital Markets Authority
Settlement Decision Maker (SDM)	The Board of the Capital Markets Authority or the Chief Executive of the Capital Markets Authority, as is applicable to determine whether a matter can be subject of settlement under the No Contest Settlement Policy.
Tribunal	Capital Markets Tribunal.

ABBREVIATIONS GLOSSARY

CBMI:	Capital Markets (Conduct of Business) (Market Intermediaries) Regulations 2011-Schedule of Breaches
CGMI:	The Capital Markets (Corporate Governance) (Market Intermediaries Regulations),2011
GFRR:	Guidelines on Financial Resources Requirements for Market Intermediaries
FIR:	Capital Markets (Foreign Investors) Regulations, 2002
TMR:	Capital Markets (Take-overs and Mergers) Regulations, 2002
CIS:	Capital Markets (Collective Investments Schemes) Regulations, 2001
DMR:	Capital Markets (Derivatives Markets) Regulations, 2015
CMLR:	Capital Markets (Licensing Requirements) (General) Regulations
CMA:	The Capital Markets Act, Cap. 485A
LRGR:	Capital Markets (Licensing Requirements) (General) Regulations
POLD:	Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations2002
P	Paragraph
Reg/R	Regulation
S	Section
I & E	Investigations & Enforcement Department
IOSCO	International Organization of Securities Commissions

INTERNATIONAL STANDARDS

As stated by IOSCO, the overarching objectives of securities regulation are protecting investors, ensuring that markets are fair, efficient, and transparent and reducing systemic risk. To achieve these objectives, the IOSCO Principles must be practically implemented under the Regulator's legal framework. All of the IOSCO Principles are relevant but in the context of this manual, the following are especially relevant:

- a) Principle 2. The Regulator should be operationally independent and accountable in the exercise of its functions and powers.
- b) Principle 4. The Regulator should adopt clear and consistent regulatory processes.
- c) Principle 5. The staff of the Regulator should observe the highest professional standards, including appropriate standards of confidentiality.
- d) Principle 8. The Regulator should seek to ensure that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed, or otherwise managed.
- e) Principle 10. The Regulator should have comprehensive inspection, investigation, and surveillance powers.
- f) Principle 11. The Regulator should have comprehensive enforcement powers.
- g) Principle 12. The regulatory system should ensure effective and credible use of inspection, investigation, surveillance, and enforcement powers and implementation of an effective compliance program.

In May 2017, the FSB stated "ethical conduct, and compliance with both the letter and spirit of applicable laws and regulations is critical to public trust and confidence in the financial system. Misconduct is also relevant to prudential oversight as it can potentially affect the safety and soundness of an individual financial institution and in turn, the financial system more broadly".

1. INTRODUCTION

1.1 Investigation & Enforcement Department Vision

To attain effective and credible deterrence.

1.2 Investigation & Enforcement Department Mission

To enhance investor protection and regulatory compliance.

1.3 Investigation & Enforcement Department Objective

To effectively investigate suspected security law violations and impose proportionate and dissuasive sanctions on proven contravention.

1.4 Investigation & Enforcement Department Philosophy

The Authority shall implement regulatory responses to any contravention of the Capital markets' legal and regulatory framework. The level or nature of the Authority's response will be informed by the deemed seriousness of the contravention.

Taking cognizance that publicity of enforcement actions can be an effective way of raising awareness of regulatory standards and promoting deterrence, by demonstrating that there are tangible consequences for those engaging, or contemplating engaging, in misconduct, enforcement determinations (where applicable) shall be published. The scope of details for publication shall depend on the impact of the publication. In some instances, for example in settled cases, the publication will be subject to disclosure restrictions detailed in the settlement agreement between the Authority and the person/ entity that has agreed to settle the enforcement matter.

1.5 Investigation & Enforcement Department Strategy

Infractions of securities laws are easily detected, vigorously pursued/investigated and rigorously enforced / effectively dealt with

1.6 Investigation & Enforcement Department Agenda

The department has 6 agendas in alignment with the CMA Strategic Plan. These are:

- a) Bold Investigation and Enforcement;

- b) Investigate/ Enforce to Litigate;
- c) Follow the Money/ Proceeds of Regulatory Sins;
- d) Leveraging on Technology;
- e) Intelligence-Led Investigation;
- f) Dissuasive and Proportionate Enforcement Actions

DISCLAIMER

This manual is a reference point prepared for providing general guidance to the **Authority and Regulated Community on** the Regulator’s approach to Investigation and Enforcement but decisions about particular investigations and enforcement cases, shall be made based on the specific facts, evidence obtained, and circumstances presented. A preliminary draft of this Investigation & Enforcement Manual was exposed to capital market stakeholders in May 2019.

This Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. The Authority may deviate the application of these manual discretionally on need basis.

This manual will be kept under review and amended as appropriate in the light of further experience and developing law and practice.

2. THE CMA'S APPROACH TO INVESTIGATION AND ENFORCEMENT

The CMA's effective and proportionate use of its investigation and enforcement approaches plays an important role in its vision to credibly deter misconduct and thereby to foster investor confidence and maintain orderly, fair, and efficient capital markets.

Several principles underlie CMA's approach to investigation and enforcement:

- a) Dependent to a significant extent on the regulated community:
 - i. Responding openly and cooperatively to requests from the CMA; and
 - ii. Maintaining an open and cooperative relationship between the CMA and those it regulates i.e. proactive and unsolicited provision of information by regulated persons.
- b) Conducted in a manner that is transparent, proportionate and responsive to the issue
- c) Focused on changing behaviour and to deter future non-compliance by others, to remove wrong-doers from the capital services markets or impose restrictions on their licenses to bring them into compliance, and to eliminate any financial gain or benefit from non-compliance, and where appropriate, to remedy the harm caused by the non-compliance.

As a risk-based, Regulator with limited and finite resources, the CMA prioritizes its resources to focus on the areas which are priority areas for its supervisory objectives whenever it deploys any of its regulatory tools. Therefore, where a person has failed to comply with the requirements of relevant laws or rules, it is encouraged to address this without further need for formal disciplinary or other enforcement action. However, in circumstances where the CMA decides to pursue a disciplinary process in respect of the contravention of the requirements, proportionate and dissuasive use of investigation and enforcement powers will play an important role in supporting the CMA's pursuit of its regulatory objectives.

CMA encourages a regular, on-going open dialogue between supervisory areas and investigation and enforcement so that there is a greater likelihood of issues being addressed early without the need for a formal investigation and enforcement approach. Conversely, having a holistic overview of an authorized entity will also provide greater insight into whether

a matter, given all the background knowledge and circumstances known about the authorized entity among the different regulatory areas within the Regulator, is sufficiently serious to merit being referred to investigation and enforcement.

On the other hand, circumstances may give rise to an urgent need for CMA to take interim action before opening a full investigation or enforcement proceedings, to protect the integrity of the capital markets, to protect the interests of investors or to protect the reputation of the CMA.

3. SOURCES OF CASES

CMA may be alerted to possible contraventions or breaches in the following ways:

- I. by complaints from members of the public, affected or injured parties or firms;
- II. by anonymous and other tips, including (without limitation) by the media;
- III. citizen reports forwarded from the Commission on Administrative Justice;
- IV. by referrals from other authorities including self-regulatory organizations and other regulators both domestic and foreign; or
- V. through its motions, through its supervisory functions such as surveillance reports, Issuer financial statements review and financial analysis reports of regulatory filings submitted by licensees.

Complaints, tips, and referrals are **dated, logged, and recorded** when received, and cross-checked against existing complaints, tips and referrals to identify repeat issues of concern. The complaint is then assigned to an officer for the case selection and intake process.

4. CASE INTAKE AND SELECTION

The selection method for cases to be taken to investigation occurs at two main levels:

- I. At the strategic planning level; and
- II. Case-by-case decisions in response to specific facts or circumstances.

The areas and issues which the CMA regards as threats at the relevant time are key to determining at a strategic level how the investigation and enforcement resources should be allocated. Besides, if the misconduct or breach at issue is one which is a priority for the CMA to address to reinforce a particular rule or piece of guidance this will inform its decision as to whether to investigate and initiate enforcement proceedings.

This does not necessarily mean that the CMA will only investigate and initiate enforcement proceedings in priority strategic areas. There will always be particularly serious cases where intervention is necessary, for example, *ad hoc* cases of particular significance in a market, investor protection or financial crime context, or cases that the CMA believes are necessary to achieve credible deterrence.

The CMA will assess on a case-by-case basis whether to open a formal investigation, having regard to the nature and seriousness of the suspected contravention or breach, after considering all the available information. Factors it will consider in making that assessment of the Strategic Priority area include:

- I. the ability and extent to which remedial action will rectify the contravention;
- II. the compliance history and previous good standing (if applicable)¹ of the person concerned, for example, if the infraction is minor but forms part of a series of minor infractions this might be an indication of more fundamental issues meaning that the concerned person's overall conduct needs to be addressed;
- III. the amount of the profit made, or loss avoided as a result of the contravention;

¹ If a person has previously had a clean compliance history and this appears to be an inadvertent, one-off breach it may lead the Regulator to use tools other than Enforcement, or the Regulator might determine that someone with a hitherto exemplary record needs swift, sharp action to deter any further misconduct.

- IV. the nature and extent of any crime facilitated or otherwise attributable to the contravention;
- V. the actual or potential impact of the contravention on the reputation of the Capital Markets];
- VI. the degree of threat or harm to investors;
- VII. whether the contravention is of a new rule or regulation where enforcement action would reinforce key messages about compliance with that rule or regulation;
- VIII. whether the contravention involves novel or innovative subject-matter or technology²;
- IX. the nature and extent of civil and/or criminal proceedings in which the person concerned might be involved;
- X. the extent to which senior management is suspected to have been involved in the misconduct or breach;
- XI. the extent to which enforcement action against the entity concerned might pose a systemic risk;³
- XII. whether another agency (domestic or international) may be better placed to take the matter forward; and
- XII. whether the matter should be referred to a competent law enforcement agency.

4.1 Case Intake and Assessment Process

When a matter is received at the Investigations section, preliminary assessment should be conducted to check whether the issue requires a full-scale investigation. The checkoff below highlights the areas of consideration; -

- I. Has the allegation been received at the Authority and recorded in the database of matters for investigation consideration?
- II. Has the allegation been responded to or otherwise acknowledged?
- III. Does the matter in question fall within the mandate of the Authority?

² This sub-paragraph targets cyber-crime and crypto-currencies and the like, however, the wording is left sufficiently generic to allow for future, unforeseen types of breaches.

³ Use caution with this; it could raise concerns about some entities being “too big to fail”.

- IV. Does the matter involve a contractual dispute, or does it affect the Capital Market as a whole?
- V. Has the matter been reported to the NSE and the relevant market intermediary?
- VI. Does the matter potentially contravene the Capital Markets' legal and regulatory framework?
- VII. Has the matter been assessed for strategic priority purposes?
- VIII. Has the case officer disclosed any conflict of interest in the matter before the commencement of review and/or investigation?

The case is then categorized whether it should be investigated or subjected to Alternative Dispute Resolution and thereafter prioritized to inform the allocation of resources and timeliness. The Manager responsible for investigations and enforcement will have the latitude to guide on the categorization of the matters to be investigated.

Categorization may also involve introducing investigation matters in the class of **Confidential, secret, top secret**. In this circumstance, such investigation assignments will be contacted by the appointed person and only report to the appointing person. Such cases are not reported through the established reporting lines.

4.2 Conflicts of interest

Authority staff handling an investigation will be required to disclose any conflict however remote in terms of relationships, associations, affiliations, or mere acquaintance. Disclosed conflict will be recorded in the conflict of interest register and notified to the Director Market Operations and the Chief Executive. A final decision is made by the MIE/DMO/CE on whether the officer(s) will be allowed to carry on with the investigation depending on the level of conflict.

The contracted professional service provider will equally be expected to disclose such conflict on the subject matter or related party that may influence the outcome/ decision.

4.3 Prioritization

All matters received at the Investigations and Enforcement department will be prioritized depending on the urgency and importance of the matter and the greater market interest so that the Authority may take a dissuasive action.

Such priority is guided by the following considerations; -

	Not so important	Important
Not so urgent	Low Priority	Medium Priority
Urgent	Do these later	High Priority

a) High Priority;

- A matter of great interest whose effect and impact would negatively affect the integrity of the Capital Markets and that of the Authority.
- Matters that need to be addressed within strict and definite timelines in line with set deadlines either internal or external;
- The matter requires to be addressed within a period short period as possible and not more than six months.
- Matters that impute upon the Authority an obligation of issuing a public statement or caution that may include an update on the status;
- Matters that require the Authority to undertake a timely deterrence action and secure investor interest.
- Matters that emanate from Treasury, CAJ, DPP and the Media;
- Both senior management and the Board of the Authority are constantly updated on the status of investigations

b) Medium priority

- These are matters that fall within the mandate of the Authority and rank second in the priority order.

- They are recurrent and the Authority may issue sanctions upon conclusion of investigations. Publications are made in the annual reports or through the website.
- They are time-bound and require to be addressed as soon as practical but not more than within 9 months.
- The Chief Executive gets updates on the matter and may terminate the issue at his level.

c) Low priority

- Include matters that fall within the mandate of the Authority and not strategic. Their effect and impact on the market are either low or non-existent.
- The matter may be terminated at the DMO/ I&E level without escalating to the CEO in the delegation matrix.
- The matter is routine and no one has lost value of their investment.

d) Do later

- Matter not within the mandated of the Authority.
- Include general inquires not related to the Authority.
- Not strategic and not a priority in nature are majorly closed or terminated at the I&E level.
- Updates made in the monthly /quarterly reporting

5. OPENING AN INVESTIGATION

An investigation is formally initiated by the Manager Investigation and Enforcement upon authorization by the Chief Executive Officer and /or /through/ by the Director of Market Operations. The Manager Investigation and Enforcement in conjunction with the Head of the Investigation Unit will establish an investigation team and develop an investigation plan. The investigations plan is shared with the Manager Investigations and Enforcement / Director Market Operations and the Chief Executive to document the terms of reference, depth of information required and the persons to be interviewed because of allegations adduced. The investigations team is supervised by the Head of Investigations and reports to the Manager Investigations & Enforcement.

Public complaint on market investor will however not attract equal standard and detailed approach as other investigations including the need for investigations plans. Such will be assigned by the CE/DMO to MIE and addressed under the direct supervision of the Head of Investigations.

Conflict of interest is disclosed by all persons in whose knowledge or management a matter is under investigation. Any Investigator/ officer or person who has had any conflicts with the subject of the investigation will not be assigned as an investigator unless the identified conflicts are fully mitigated. Also, the staff appointed to the investigation team will not be involved in supervising the subject of the investigation (where a subject is a regulated person). Contracted service providers will equally be subjected to strict review and disclosure on any real or perceived conflict of interest.

The investigation team will, where possible, have a balanced composition with several members of the team possessing legal qualifications and other team members possessing forensic accounting and other investigatory qualifications. Members of the investigation team will at all times adhere to the principles of good conduct applicable to investigators and comply with the Bill of Rights as set out in the Constitution.

The CMA may give written notice of the opening of an investigation to the person under investigation unless the CMA believes that giving notice would be likely to result in the investigation being compromised or frustrated, for example by the destruction of evidence, suspect, or witness flight, or risk to victims. Where the CMA has given notice to a person that an investigation has been opened in respect of that person, if the CMA subsequently decides to discontinue the investigation with no further action it will confirm this decision to the person concerned as soon as it reasonably considers it appropriate to do so.

Even though notified, the CMA will not usually publicize the fact that it is or is not investigating a matter (unless it is in the public interest to disclose) and it expects that the person under investigation will also to treat the matter and the fact of the investigation as confidential. This restriction does not prevent the person under investigation from seeking professional advice or from making notifications required by law or contract.

6. USE OF INFORMATION GATHERING AND INVESTIGATION POWERS

The CMA has various powers under the Act to gather information. In any case, the CMA will decide which powers, individually or in combination, will be the most appropriate to use having regard to all the circumstances.

Information may also be provided to the CMA voluntarily. For example, firms may at times commission an internal investigation or a report from a professional adviser and decide to share a copy of this report with the CMA.

7. SUMMONS

7.1 Summon for information and documents

The Act empowers the CMA to require any person including an authorized person, a connected person, a person engaging in an activity that is subject to regulation in the Regulator's jurisdiction (whether or not authorized to do so), or a person reasonably expected to have information relevant to an inquiry by the CMA:

- I. to provide specified information or documents;
- II. to produce specified information or documents;
- III. to give to the CMA such assistance in connection with those inquiries, as the CMA may specify.

7.2 Summon for Interview

For reasons of fairness, transparency, and efficiency, the CMA practice is to use its compulsory powers to require the production of information and documents, the provision of information or documents, or assistance such as answering questions in an interview. However, it will sometimes be appropriate not to use compulsory powers and instead to seek such information, documents, or answers voluntarily. For example:

- I. Where a case involves suspicions of criminal or quasi-criminal (e.g. market abuse) misconduct, the CMA may prefer to question the person under investigation voluntarily. In such cases, the interviewee does not have to answer but if they do, those answers may be used against them in subsequent criminal or quasi-criminal proceedings.
- II. It may not be appropriate to apply compulsory powers to third parties with no professional connection with the capital markets industry, such as victims of the alleged fraud or misconduct.
- III. If the CMA is asked by foreign regulators to obtain documents or information or to conduct interviews on their behalf, the CMA will discuss with the foreign regulator the most appropriate method for obtaining evidence for use in the foreign jurisdiction.

The individual being interviewed may be accompanied by a legal adviser if they so wish. But the legal advisor will only intervene on matters of law. The CMA will explain to the individual the basis for the interview, and what use, will be made of the information submitted.

Where the CMA has opened an investigation in response to a request from a foreign regulator it may allow a representative of that regulator to attend and take part in an interview conducted for the investigation. However, the CMA may only use this power if it is satisfied that any information obtained by a foreign regulator as a result of the interview will be subject to safeguards to preserve the privilege against self-incrimination.

Failure to attend summon for documents or interviews is an offense which is actionable or negative inference will be imputed.

8. ASSISTING FOREIGN REGULATORS

The CMA considers cooperation with its foreign counterparts to be an essential part of its regulatory function. In accordance with the terms of the IOSCO MMoU, the Act allows for assistance to be provided to foreign regulators who need to make inquiries in the discharge of their functions and exercise of their powers. In fulfilling this part of its function, the CMA may share information that it is not prevented from disclosing, including information obtained in the course of the Regulator's investigations, or exercise certain of its powers under the Act and other relevant legislation.

At the request of a foreign regulator, the Act empowers the CMA to require a regulated person, a connected person, a person engaging in an activity that is subject to regulation in the Regulator's jurisdiction (whether or not authorized to do so) or a person reasonably expected to have information relevant to an inquiry by the foreign regulator:

1. to provide specified information or documents;
2. to produce specified information or documents; and
3. to give to the Regulator such assistance in connection with those inquiries, including by answering questions in an interview, as the Regulator may specify.

The information contained in a request from a foreign regulator, the request itself and the identity of the foreign regulator is confidential and may only be disclosed with the foreign regulator's prior consent.

9. SEARCH AND SEIZURE POWERS

The CMA may, through a duly authorized officer, apply under Section 13 A of the *Act* to a Magistrate for a warrant to enter premises where documents or information is held, if:

1. A person on whom an information requirement has been imposed fails to comply with it; or
2. There are reasonable grounds for believing that if an information requirement were to be imposed, it would not be complied with or that the documents or information to which the requirement relates would be removed, tampered with or destroyed.

A warrant obtained under Section 13 A of the Act authorizes a member of the CMA investigation staff to enter and search the premises specified in the warrant and take possession of any documents or information or assets appearing to be responsive to the information request for which the warrant was issued or to take any other steps which may appear to be necessary for preserving or preventing interference with them.

10. ASSET TRACING AND FREEZE

The CMA may apply to the court under Section 11 (3) (t) & (u) of the Act to exercise its jurisdiction to make an interim order, restraining a person from disposing of, or otherwise dealing with, assets where it has evidence showing that there is a reasonable likelihood that a person will contravene a requirement of the Act and that the contravention will result in the dissipation of assets belonging to investors.

Assets within the Jurisdiction of the Authority can be traced and frozen in the interim without a need for a court order.

11. CONFIDENTIALITY

The CMA will keep confidential and limit the disclosure of confidential information to what is required for lawfully ensuring compliance with and enforcement of applicable capital markets or through a court order.

The CMA adheres to international best practice standards, including those set by standard-setting organizations such as IOSCO. In its adherence to these standards, the CMA has as its guiding principles that it will:

1. seek to ensure that the laws or regulations in the CMA jurisdiction about confidentiality or secrecy do not prevent the CMA from obtaining, securing or disclosing confidential information where required for lawful regulatory purposes;
2. limit the disclosure of confidential information to other financial services regulators and enforcement agencies to what is required for lawfully ensuring compliance with, and enforcement of, applicable financial services and criminal legislation;
3. apply international best practices, including those set out in the IOSCO MMoU, in obtaining and disclosing confidential information; and
4. adopt internal control systems and procedures that meet international best practices, including those set out in the IOSCO MMoU, for the handling, storing, processing and securing of confidential information;
5. The Authority will restrict confidentiality to non-public information and will have no control in instances where the matter is already public knowledge.

12. REPORTING ON INVESTIGATION FINDINGS

The investigation team submits a preliminary investigation report to the Manager Investigation and Enforcement containing details of the factual findings, evidence in support, potential contravention, and recommendation of enforcement considerations for review and guidance. The investigation report is then shared with Director Market Operation for quality review and the Chief Executive for approval.

The investigation findings report touching on the potential illegal gains will then be informally shared with a potential Notice to Show cause recipient to provide comments on its content and consider whether he or she will be contesting the findings or settle under No Contest Settlement Framework.

The CMA will consider any response and comments received. The investigation findings and any response and comments received to them will be incorporated into an investigation report, which will be submitted to the CMA Chief Executive and Board for Consideration.

In exceptional circumstances the CMA may decide it is not appropriate to informally share preliminary findings to the potential Notice to Show recipient, including where:

1. It is not practicable to share, for example where there is a need for urgent action to protect investors, restore market confidence or reduce financial crime, or if the subject cannot be located; or
2. The CMA believes that no useful purpose would be achieved, for example where it has already substantially disclosed its case to the subject and the subject has had an opportunity to respond to that case.

13. NO CONTEST SETTLEMENT

The CMA resolves many investigation cases by settlement. An early settlement has many potential advantages as it can result, for example, in investors obtaining compensation earlier than would otherwise be the case, saving the CMA resources, messages getting out to the capital market sooner, and public perception of timely and effective action. The CMA, therefore, considers it is in the public interest for matters to be settled.

However, the possibility of settlement does not change the fact that enforcement activity is necessary for the CMA to secure its regulatory objectives. The CMA seeks to change the behaviour not only of those subject to the immediate action but also of others who will be alerted to the CMA's concerns in each area and deterred from misconduct. Where the subject of the enforcement action has made repeated infractions and previously been subject to sanctions for that misconduct, a settlement might not be appropriate. In each case, the CMA must be satisfied that its decision is the right one, both in terms of the immediate impact on the subject of the enforcement action but also in respect of the broader message and the drive to achieve credible deterrence.

Settlements in the regulatory context are a decision taken by the CMA at the end of the investigation and before the commencement of enforcement proceedings, once it has a sufficient understanding of the nature and seriousness of the suspected misconduct or issue to make a reasonable assessment of the appropriate outcome, the terms of which are accepted by the firm or individual concerned.

When agreeing to the terms of a settlement the CMA will carefully consider its regulatory objectives as well as other relevant factors, such as the importance of sending clear, consistent messages through enforcement action, and will only settle in appropriate cases where the agreed terms of the decision result in acceptable regulatory outcomes. The settlement is confidential, and publication is restricted as to the identity of the person concerned.

The CMA would expect to hold any settlement discussions on the basis that neither the CMA staff nor the person concerned would seek to rely against the other on any statements made if the matter is considered subsequently by the Tribunal or the Courts. However, if any such statements reveal new issues of regulatory concern the CMA may follow up on these issues through other means. If a matter is concluded via settlement based on the facts and evidence as known to the Regulator at the time of settlement, the Regulator notes that if any additional facts or evidence subsequently come to the knowledge of the Regulator beyond those specified in the settlement, the Regulator reserves the right to re-open the matter.

14. CAPITAL MARKETS FRAUD INVESTIGATION UNIT

The CMFIU is a criminal investigation team that is comprised of senior police officers seconded to the Authority from the Directorate of Criminal Investigations (DCI).

The CMA's investigation team works closely with the CMFIU for the seamless execution of various investigation assignments.

- I. CMFIU may receive direct assignments from the CE to pursue an investigation on criminal matters. The CMFIU investigate the matter and prefer charges directly or in liaison with the Office of the Director Public Prosecution (ODPP). The CMFIU report administratively to the Director, DCI and CMA CE.
- II. The matters received by the investigations team that contain penal code offenses are forwarded to the officer in charge of the CMFIU through a brief by the CE.
- III. Matters investigated by the CMFIU may be forwarded to the investigations team for further administrative investigations and administrative enforcement action.

15. OFFICE OF DIRECTOR OF PUBLIC PROSECUTION

The core role of the Office of Director of Public Prosecutions (ODPP) includes charging and prosecuting cases forwarded by investigative agencies while upholding, protecting, and promoting human and constitutional rights.

- The Authority may on completion of an investigation on market infractions with criminal elements and determination of the breach administratively refer the matter to the DPP for criminal investigation/prosecution of persons perceived to have committed offenses that have criminal inclination;
- The DPP will closely work with both the CMA and the DCI to finalize the criminal investigation and prefer charges;
- The Authority impending team of gazette prosecutors may also assist the DPP in prosecuting matters that are capital market related and attract criminal sanctions.

16. RELATIONSHIP WITH OTHER STATE AGENCIES

The Authority will work closely with other state agencies and may refer to such agencies cases that do not directly relate to the Authority.

17. CLOSING AN INVESTIGATION

An investigation will be closed once all remedies and obligations are concluded and fulfilled.

In some cases, an investigation may conclude there is no case to answer/ no reasonable cause of action, as the evidence is insufficient to establish the alleged misconduct or breach. In such an event the investigation is terminated with no further action and no enforcement proceedings are recommended. In the usual course of events, the investigation will not have been made public, but if the CMA has announced the investigation in the exceptional circumstances then it may announce that the investigation has concluded with no further action. If an investigation is terminated in these circumstances, the CMA will make clear to the person concerned (and in any announcement made under this paragraph) that the termination of the investigation does not necessarily imply good compliance in all areas by the person concerned, and will reserve the right to investigate the person concerned for misconduct or breaches concerning other matters or concerns

However, the Authority will not be debarred from re-opening an investigation in instances of further evidence coming to light.

18. ENFORCEMENT PROCEEDINGS

18.1 The CMAs approach to decision making

The CMA may make its decisions to take enforcement action in the following ways:

- I. by agreeing to settle the matter with the individual or firm the subject of the investigation at the end of the investigation through NCSA, or
- II. by referring the matter to the Enforcement Unit for enforcement consideration.

The key elements of the CMA approach to decision making include:

- I. Having in place adequate systems and controls to ensure that those making decisions on behalf of the CMA are impartial and not affected by conflicts of interest;
- II. Giving a person in respect of whom the CMA proposes to take action advance notice about the CMA's allegations (other than in exceptional cases where the CMA may take immediate urgent action because any delay would be prejudicial to the interests of investors in the market);
- III. Providing clear basis of CMA's allegations;
- IV. Giving the person concerned a suitable opportunity to make representations (in person and writing) about the CMA's allegations;
- V. Considering any representations made before making a final decision;
- VI. Promptly giving the person concerned a clear statement in writing of the CMA final decision, including the reasons for that decision and the effective date (if applicable);
- VII. Informing the person concerned about their rights to have the CMA decision reviewed.

The key elements set out above will be reflected in the Notice to Show Cause and the Enforcement Notification, which should be drafted according to the templates set out in Appendix 3 and 5 respectively.

The Board of CMA is the decision-maker for all major enforcement matters [other than those which have been concluded by settlement at the end of the investigations and compliance breaches which are done by the Chief Executive or Director Market Operations based on Approved Enforcement Delegation Matrix]. When the CMA Board sits to consider whether the CMA should take enforcement action its member(s) save for the CEO should have had no previous direct involvement in establishing the evidence upon which the proposed decision is based.

The CMA Board will first review the evidence supporting the allegations and decide whether, in light of the evidence, a Notice to Show Cause should be issued to the affected person. The CMA Board upon having reviewed the evidence available may decide not to proceed with any action. If Notice to Show Cause is issued, the CMA Board will be responsible for hearing and considering the concerned person's representations made in response to the Notice to Show Cause and deciding whether to issue the Enforcement Notification.

19. URGENT ACTION

The CMA may exercise the urgent action powers without conducting a full investigation, as a matter of urgency where:

- I. the information available to it indicates serious concerns about the person or its business that need to be addressed immediately; and
- II. circumstances indicate that it is appropriate to use its urgent action powers to require and/or prohibit certain actions by the person concerned to ensure that the person addresses these concerns.

Given the unforeseen nature of such situations, it is not possible to provide an exhaustive list of the instances that will give rise to such serious concerns. But they are likely to include one or more of the following characteristics:

- I. the CMA receives information indicating significant loss, risk of loss or other adverse effects for investors, where the action is necessary to protect their interests;
- II. the CMA receives information indicating that a person's conduct has put it at risk of being used for capital market offense, or of being otherwise involved in a capital market offense;
- III. the CMA receives evidence that the person has submitted to the Regulator inaccurate or misleading information so that the Regulator becomes seriously concerned about the person's ability to meet its regulatory obligations;
- IV. circumstances exist suggesting a serious problem that calls into question the person's ability to continue to meet the conditions for being licensed/authorized.

The CMA will consider the full circumstances of each case when it decides whether urgent action is appropriate. The following is a non-exhaustive list of factors the CMA may consider:

- I. The extent of any loss, risk of loss, or other adverse effects on consumers.
- II. The extent to which customer assets appear to be at risk.
- III. The nature and extent of any false or inaccurate information provided by the person.

- IV. The seriousness of any suspected breach of the requirements of the legislation or the rules and the steps that need to be taken to correct that breach.
- V. The risk that the person's business may be used or has been used to facilitate the capital market offense, including money laundering.
- VI. The risk that the person's conduct or business presents to the capital market and confidence in the capital market.
- VII. The person's conduct. The Regulator will consider:
 - a. whether the person identified the issue (and if so whether this was by chance or as a result of the person's normal controls and monitoring);
 - b. whether the person brought the issue promptly to the Regulator's attention;
 - c. the person's history, management ethos and compliance culture;
 - d. steps that the person has taken or is taking to address the issue.
- VIII. The impact that the use of the Regulator's urgent action powers will have on the person's business and its customers. The Regulator will consider the impact that a suspension, variation or revocation of permission may have on a person's business and its customers' interests, including the effect on the person's reputation and market confidence.

20. PUBLICITY

The CMA will not normally make public the fact that it is or is not investigating a matter other than in the exceptional circumstances, in which case it may make a public announcement that it is or is not investigating a matter.

The circumstances in which the CMA may make a public announcement that it is or is not investigating a matter are those where the CMA considers that such an announcement is desirable to:

- I. Maintain public confidence in the capital market; or
- II. Prevent or eliminate public uncertainty, speculation or rumour in the capital market; or
- III. Protect consumers or investors; or
- IV. Prevent widespread malpractice; or
- V. Help the investigation for example by encouraging witnesses to come forward; or
- VI. Maintain the smooth and efficient operation of the capital market.

The CMA will take into consideration the potential prejudice that may be caused to any persons who are likely to be the subject of the investigation when making its decision whether to make a public announcement.

20.1 Publicity during or upon the conclusion of regulatory action

The CMA is required to publish either immediately or on a monthly or annual basis information to which the Enforcement Notification relates to. However, the Regulator may not publish the information if publication would be unfair to the person in respect of whom the action was taken, prejudicial to the interests of investors, or detrimental to the stability of the capital market.

21. INVESTOR ALERTS

Nothing in the publication restriction shall prevent CMA from publishing alerts and warnings about firms and entities which are not authorized to provide investment services in the jurisdiction, or from announcing that it is investigating such firms and entities. In some cases, concerns may also be raised by unauthorized firms and entities using names similar to those of authorized firms and entities, or unauthorized firms and entities falsely claiming to be associated with authorized firms or entities. The CMA may publish such information as it deems necessary about such unauthorized firms and entities in the form of alerts and warnings or confirming that it is investigating them, to protect the interests of investors, to maintain confidence in the capital market and to maintain its smooth and efficient operation. The CMA may also submit its alerts and warnings to IOSCO's Investor Alerts Portal to ensure broad coverage.

22. PROCEDURE BEFORE TAKING OF ENFORCEMENT ACTION

To comply with the Constitution of Kenya, the Capital Markets Act, and the Fair Administration Actions Act, the CMAs Enforcement procedures shall be guided by the provisions of Article 47 of the Constitution of Kenya on Fair hearing as well as Section 26(8) of the Capital Markets Act and Section 4 of the Fair Administrative Actions Act.

Section 26(8) of the Capital Markets Act provides that, in cases that the Authority takes action, the Authority shall give the person affected by such action an opportunity to be heard. Section 4 of the Fair Administrative Actions Act provides that: -

1. Every person has the right to administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair;
2. Every person has the right to be given written reasons for any administrative action that is taken against him;
3. Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:
 - a) Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b) An opportunity to be heard and to make representations in that regard;
 - c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d) A statement of reasons for the administrative action;
 - e) Notice of the right to legal representation, where applicable; or
 - f) Notice of the right to cross-examine, where applicable; or
 - g) Information, materials, and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to: -
 - a) Attend proceedings, in person or the company of an expert of his choice;
 - b) Be heard;

- c) Cross-examine persons who give adverse evidence against him (where necessary),⁴; and
 - d) Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

⁴ Except in instances of protection of whistleblowers and informants whose evidence has been corroborated by the Authority.

23. MODE OF INITIATION OF ENFORCEMENT PROCEEDINGS

The CMA issues Infringement Notices in connection with acts of omission and strict liability offenses whereas Notices to Show Cause are issued in cases where an entity or individual is required to provide a written response giving details of circumstances that led to a breach of the regulatory framework. Strict liability offenses are statutory obligations for which offenders become automatically culpable when the act or omission amounting to a breach occurs. For infringement notices, the principles for identifying a strict liability offense are: -

- I. It should be an act of omission, to notify, report, submit, publish or seek approval of the Authority; and
- II. The omission is defined by specified timelines; that is, there are timelines within which the action should be done.

Strict liability offenses selected by the identified criteria will lead to the issuance of an Infringement Notice instead of a Notice to Show Cause. The Infringement Notices will require the affected entity to pay an automatic financial penalty in respect of the breach or where they seek to contest the facts, they may table mitigating or contradictory evidence that the identified breach has not occurred.

If a market intermediary or a public issuer of securities commits any of the below breaches, they will be issued with an Infringement Notice as opposed to a Notice to Show Cause in the interest of timely administration of justice. The breaches identified below are illustrative and they are subject to change from time to time.

	Listed Companies	Market Intermediaries
	Late submission/ failure to submit half-year accounts.	Late submission/ failure to submit quarterly and half-year accounts.
	Late submission/ failure to submit audited financial accounts.	Late submission/ failure to submit audited financial accounts.

Late submission/ failure to submit of the shareholding status report.	Late submission/ failure to submit management accounts and Risk-Based Capital Adequacy Return (RBCA).
Delay/failure to disclose material issues including profit warning within 24 hours.	Delay/ failure to notify changes in key personnel.
Issuing public announcement without the approval of the Authority/ unauthorized publication.	Issuing public announcement without the approval of the Authority/ unauthorized publication.
Failing/ late publication of full year audited accounts/ financial statements.	Failing/ late publication of full-year audited accounts/ financial statements.
Failing/ late publication of half-year unaudited accounts/ financial statements.	Failing/ late publication of half-year unaudited accounts/ financial statements.
-	Failing to notify the Authority of change in the capital structure.

24. ENFORCEMENT SANCTIONS AND ACTIONS

The CMA has a range of powers to impose sanctions, including financial penalties and to publish a public censure or reprimand. The CMA may need to consider which power to use either alone or in combination with one or more of the powers.

24.1 Enforcement Powers of the Authority

The Capital Markets Authority derives its powers to take enforcement action from Section 11 (1) (a), 11 (3) (cc) and Section 25A of the Capital Markets Act which provides *inter alia* that the Authority is required to ensure the orderly, efficient and fair operation of the capital markets and that for purposes of executing its objectives, the Authority may exercise, perform or discharge various functions including the imposition of sanctions for breach of the provisions of this Act or the Regulations made thereunder, or for non-compliance with the Authority's requirements or directions.

24.2 What Informs Application of Administrative or Criminal Sanctions

The CMA will apply administrative action for any breach of the Act, Regulations, and Guidelines, and where the breach contains ingredients of criminality, the Authority may recommend criminal investigation and prosecution in addition to or in the alternative to any administrative sanction following a determination of a regulatory breach.

The sanctions stated below are not exhaustive and are subject to change from time to time. The actions that the CMA may take include:

- i. Levying of financial penalties;
- ii. Ordering a person to remedy or mitigate the effect of the breach;
- iii. Make restitution orders or orders to pay compensation to any person aggrieved by the breach;
- iv. Publishing findings of malfeasance by any person;
- v. Suspending or canceling the listing of any securities or exchange-traded derivative contracts, or the trading of any securities or exchange-traded derivative contracts for the protection of investors;

- vi. Intervene in the operations of a securities exchange or a derivatives exchange as per Section 22B;
- vii. Withdraw an approval granted for the trading of an exchange-traded derivative contract as per Section 22C;
- viii. A public reprimand
- ix. Suspension in the trading of a listed company's securities for a specified period;
- x. Suspension of a licensed person from trading for a specified period;
- xi. Restriction on the use of a license;
- xii. Recovery from a person of an amount equivalent to two times the amount of the benefit accruing to such person by virtue of the breach;
- xiii. Revocation of the license;
- xiv. Requiring the licensed or approved person to take disciplinary action against the employee;
- xv. Disqualification of an employee of a licensed listed or approved person from employment in any capacity for a specified period;
- xvi. Disqualification of a director from appointment as a director of a listed company or licensed or approved person including, a securities exchange;
- xvii. Recommending criminal prosecution and conducting any such prosecution after obtaining consent from Office of the Director of Public Prosecutions per Article 157 (6) of the Constitution of Kenya and Section 38 of the Capital Markets Act.

24.3 The characteristic of financial penalty and its legal foundation under the Capital Markets Act and FAA Act

In instances where no specific penalty is stipulated the Capital Market Act provides, for financial penalty limits of Kenya shillings five million for individuals and Kenya shillings ten million for corporates per offense subject to recovery and/or disgorgement of two times the financial benefit attributable to the offense. Levying of financial penalties under Section 11(3)(cc)(i) should be proportional to the gravity or severity of the breach.

24.4 Specified Statutory Penalties for Specific Offenses

The following penalties shall apply: -

1) Administrative actions were taken by the Authority

- a. A breach of trading rules of a securities exchange by a licensed person shall be double the brokerage commission payable to the licensed person on the relevant trade, or double the annual fees, whichever is higher;
- b. Failure to comply with a reporting requirement by a listed company or a licensed person shall be double the applicable prescribed annual listing fee or license fee, whichever is higher, for every calendar quarter during which the reporting requirement remains outstanding;
- c. Failure on the part of the securities exchange to enforce and ensure compliance with this Act and the rules of the exchange as approved by the Authority shall be equal to the annual license fee of the securities exchange.
- d. Issuing of a defective/ misleading prospectus⁵: -
 - a fine not exceeding ten million shillings; and
 - in the case of a company, a fine not exceeding thirty million shillings.
- e. Being involved in insider trading: -
 - on a first offense, in the case of: -
 - i. an individual, to a fine not exceeding two million five hundred thousand; and/or payment of the amount of the gain made or loss avoided; and
 - ii. a company, to a fine of up to five million shillings and payment of the amount of the gain made or loss avoided;
 - on any subsequent offense, in the case of: -
 - iii. an individual, to a fine not exceeding five million shillings; or payment of twice the amount of the gain made or loss avoided; and

⁵ Category (d), (e), (f) also attract administrative sanctions determined on reference to the criminal sanctions set out under the Act

iv. a company, to a fine not exceeding ten million shillings and payment of twice the amount of the gain made or loss avoided.

f. Market abuse and Manipulation:

- an individual, to a fine not exceeding five million shillings; or payment of twice the amount of the gain made or loss avoided;
- a company, to a fine not exceeding ten million shillings and payment of twice the amount of the gain made or loss avoided.

When deciding on the appropriate sanction, the CMA will consider all relevant facts and circumstances. Set out below is a list of factors that it may consider. Not all factors may be applicable in a particular case and there may be other factors, not listed, that are relevant. The factors include:

1. the deterrent effect of the proposed sanction on the persons subject to the sanction and other persons who may commit similar contraventions;
2. the nature, seriousness, and impact of the contravention, including whether it was deliberate or reckless;
3. the benefit gained or loss avoided as a result of the contravention;
4. the conduct of the person after the contravention, including whether the person has made any attempts to rectify the damage or harm, and the extent to which the person has cooperated with the Regulator during the investigation, or conversely obstructed the investigation;
5. whether the senior management was involved in the contravention;
6. the complex nature of the contravention and the resulting complexity of the investigation;
7. whether the person committed the contravention in such a way as to avoid or reduce the risk of discovery;
8. the disciplinary record and compliance history of the person on whom the sanction is imposed, including where the infraction is minor whether it forms part

of a series of minor infractions over a period that might indicate more fundamental compliance issues;

9. the economic capacity of the person concerned to pay the financial penalty;
10. whether the person concerned has recognized the allegations or charges, and admitted guilt;
11. the action was taken by the Regulator in previous similar cases; and
12. the action was taken by other domestic or international regulatory authorities in respect of the contravention.

25. RESTITUTION AND REDRESS

The Regulator has the power to apply to the court, *for* a restitution order. When deciding whether to exercise these powers the Regulator will consider whether this would be the best use of its limited resources considering, for example, the likely amount of any recovery and the costs of achieving and distributing any sums.

The factors which the Regulator will consider may include, but are not limited to, the following:

- I. Are the profits quantifiable?
- II. Are the losses identifiable?
- III. The number of persons affected.
- IV. The Regulator's costs of securing redress compared against the benefit to injured persons.
- V. Is redress available elsewhere? (for example, an ombudsman scheme or a compensation scheme).
- VI. Is redress available through another regulatory authority?
- VII. Can affected persons bring their proceedings?
- VIII. Is the firm solvent?

The CMA may consider taking action for a financial penalty or public censure as well as seeking restitution if a person has breached certain requirements of the Act.

**26. CRIMINAL PROCEEDINGS (AFTER DETERMINATION OF ADMINISTRATIVE BREACH)
SUBJECT TO THE CIRCUMSTANCES OF EACH CASE.**

The CMA is mandated to undertake administrative actions for regulatory breaches. Under the Capital Markets Act, where a party is in breach of the provisions/requirements set out, in addition to administrative action they can be criminally investigated and prosecuted.

Under Section 34 and 34A, where a person commits an offense under this Act and no specific penalty is provided for, that person shall be liable on conviction:

- a. on a first offense, in the case of: -
 - i. an individual, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years and pay two times the amount of any gain made or loss avoided as a result of the contravention; or
 - ii. a company, to a fine not exceeding ten million shillings and to pay two times the amount of any gain made or loss avoided as a result of the contravention;
- b. on any subsequent offense, in the case of: -
 - i. an individual, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years and pay three times the amount of any gain made or loss avoided as a result of the contravention; or
 - ii. a company, to a fine not exceeding thirty million shillings and to pay three times the amount of any gain made or loss avoided as a result of the contravention.

Under Section 32E and 32F, where a person is involved in insider trading and or market manipulation, that person shall be liable on conviction:

- a. In the case of insider trading: -
 - i. on a first offense, in the case of an individual, to a fine not exceeding two million five hundred thousand or to imprisonment for a term of two years and payment of the amount of the gain made or loss avoided.
 - ii. On any subsequent offense, in the case of an individual, to a fine not exceeding five million shillings or to imprisonment for seven years and payment of twice the amount of the gain made or loss avoided.

- b. In the case of market abuse and market manipulation, a fine not exceeding five million shillings or to imprisonment for a term of two years and payment of twice the amount of the gain made or loss avoided.

27. ASSESSMENT OF PROPORTIONALITY

Assessment of proportionality applies to all actions to be imposed by the Authority on a case by case basis and depending on the circumstances of the case.

The assessment of the appropriate penalty is a matter of good faith judgment and is based on the following principles: -

1. Disgorgement- a firm or individual should not benefit from any breach;
2. Discipline- a firm or individual should be penalized for wrongdoing;
3. Deterrence- any penalty imposed as a discipline should deter the firm or individual who committed the breach and others, from committing further or similar breaches.
4. In determining the penalty/ sanction to be imposed on a person who has contravened the legal and regulatory requirements, the following factors shall be taken into consideration:
 - a. Actual benefits derived from the breach;
 - b. The seriousness of the breach;

27.1 Factors for Assessment of Proportionality

The Authority has categorized breaches into Serious Breach (SB) and Less Serious Breach (LSB) based on the following non-exhaustive criteria.

	Serious Breach (SB)	Less Serious Breach (LSB)
1	Intentional or reckless act (willful neglect of duty) resulting in the breach	Self-Reported (irrelevant if it has the characteristics of SB)
2	Evidence attempts to conceal the breach	Isolated conduct/ is not continuing
3	Damage or threaten the integrity of or affect the fair and orderly operation of the market	Conduct is inadvertent, accidental or unintentional
4	Causes loss/ damage to, or imposes costs on others	A technical breach with no market impact
5	Provide a financial benefit to the person engaged in the misconduct	No damage or loss occasioned to clients or third party

	Serious Breach (SB)	Less Serious Breach (LSB)
6	Reveal serious or systemic weakness/ problem in respect of management systems or internal controls	Conduct not indicative of systemic failings in the compliance process
7	Indicative of pattern of non-compliance and repeat breaches	Immediate rectification
8	Display disregard to the requirements and failure to rectify or address the breach	No financial gain by errant party

Less serious breaches may lead to the issuance of a no enforcement action communication, reminder, warning, or caution.

- I. Mitigating or aggravating circumstances of the breach; and
- II. The deterrence effect of the sanction on the likelihood of a future breach.

27.2 Steps to Assess Proportionality

In assessing the above factors, the following steps should be undertaken:

STEP 1: DISGORGEMENT

The Authority will seek to deprive a firm/ an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The financial benefits derived by an individual and targeted for disgorgement for purposes of individuals serving on boards of issuers may be assessed to extend to board sitting allowance and performance bonuses, in addition to any other classes of remuneration or financial benefit or loss avoidance arrangements.

STEP 2: SERIOUSNESS OF THE BREACH COMMITTED

- 1. In determining the seriousness of the breach, the Authority will consider the following factors: -

- a) **Impact of the breach**

- i. The level of benefit gained or loss avoided or intended to be gained or avoided, by the individuals/ entity from the breach, either directly or indirectly;
- ii. The loss or risk of loss caused to investors in general; and
- iii. Whether the breach harmed the perception of confidence in the orderliness, fairness, integrity, or efficiency of the capital markets, and if so, how serious that effect was deemed to be.

b) Nature of the breach

- i. The rules, requirements or legal provisions breached;
- ii. The frequency of the breach;
- iii. Whether the breach revealed serious or systemic weaknesses in the firm's procedures/ management systems/ internal controls relating to all or part of the firm's business;
- iv. The nature and extent of any financial crime facilitated, occasioned or attributable to the breach;
- v. Whether the firm failed to conduct its business with integrity;
- vi. Whether the firm/ individual, at any point, took any steps to comply with the Authority's legal and regulatory framework, and the adequacy of those steps.

c) The culpability of the offender: -

- i. The extent to which the firm's senior management/ responsible individuals were aware or ought to have assessed the likely or actual consequences of their actions or inaction;
- ii. The extent to which the firm's senior management, or responsible individuals, knew or ought to have known that their actions were not following the firm's internal procedures;
- iii. The extent to which the firm's senior management, or responsible individuals, sought to conceal their misconduct after becoming aware of the same;
- iv. The extent to which the firm's senior management, or responsible individuals, committed the breach in such a way as to avoid or reduce the likelihood that the breach would be discovered;

- v. The extent to which the firm's senior management or responsible individual, were influenced to commit the breach by the belief that it would be difficult to detect;
 - vi. The extent to which the firm obtained reasonable professional advice before the contravention occurred and failed to follow that advice. (Obtaining professional advice does not, in any case, remove a person's responsibility for compliance with applicable regulations and requirements);
 - vii. The extent to which the firm's senior management or responsible individual, appreciated that there was a risk that their actions or inaction could result in a breach and failed adequately to mitigate that risk; and
 - viii. The extent to which the firm's senior management or responsible individuals were aware there was a risk that their actions or inaction could result in a breach but failed to check if they were acting per the firm's internal procedures.
2. When assessing financial penalties, the quantum will be based on a percentage of the firm's revenue "relevant Revenue". **Relevant revenue is the revenue derived by the firm during the 12 months preceding the occurrence of the breach. Where the firm was in existence for less than 12 months, its relevant revenue will be calculated on a prorated basis to the equivalent of 12 months' relevant revenue.** For individuals, the penalty will have regard to their salary, alternative remuneration or commission earned for the last 12 months net of taxes together with any benefit gained or loss avoided as a consequence of the breach.

Having determined the relevant revenue, the Authority will assess the percentage of that revenue which should form the basis of the penalty. The percentage will vary between 0.1% and 10%. This range is up to a scale of five (5) levels that reflect the seriousness of the breach. This percentage applies only to breaches where the amount to be disgorged cannot be quantified. In the case of quantified disgorgement, the CMA will recover two times of the benefit derived/loss avoided by the contravention. The five levels are as follows:-

- a) Level 1- 0.1%;
- b) Level 2- 0.5%;
- c) Level 3- 1%;

- d) Level 4- 5%; and
- e) Level 5- 10%

3. Assessment of factors: - Level 1, level 2 and level 3 shall be applicable where: -

- i. Little or no profits were made or losses avoided as a result of the breach, either directly or indirectly;
- ii. There was little loss or risk of loss to consumers, investors or other market users individually and in general;
- iii. There was no, or limited, actual or potential effect on the orderliness of, or confidence in, markets as a result of the breach;
- iv. There is no evidence that the breach indicates widespread problem or weakness at the firm; and the breach was committed negligently or inadvertently.

4. Assessment of factors: - Level 4 and level 5 shall be applicable where: -

- i. The breach caused a significant loss/ risk of loss to investors and market users;
- ii. The breach revealed serious systemic weaknesses in the firms' procedures/ management controls/ internal controls relating to all or part of the firm's business;
- iii. The financial crime was facilitated, occasioned or otherwise attributable to the breach;
- iv. The breach created a significant risk that financial crime would be facilitated, occasioned or otherwise occur; and
- v. The firm failed to conduct its business with integrity; and the breach was committed deliberately or recklessly.

STEP 3: MITIGATING AND AGGRAVATING FACTORS

The Authority may increase or decrease the amount of the financial penalty arrived at after Step2, but not including any amount to be disgorged as set out in Step 1, to take into account factors which aggravate or mitigate the breach. Any such adjustments will be made by way of a subjective percentage adjustment to the figure determined in Step 2.

Factors that may have the effect of aggravating or mitigating the breach:

1. The conduct of the firm in bringing, delaying or failing to bring quickly, effectively and completely the breach to the Authority's attention (or the attention of other regulatory authorities, where relevant);
2. The degree of cooperation the firm showed during the investigation of the breach by the Authority, or any other regulatory authority allowed to share information with the Authority;
3. Where the firm's senior management was aware of the breach or the potential for a breach, whether they took any steps to stop the breach, and when these steps were taken;
4. Any remedial steps taken since the breach was identified, including whether these were taken on the firm's initiative or that of the Authority or any other regulatory body;
5. Whether the firm has arranged its resources in such a way as to allow or avoid disgorgement and/ or payment of a financial penalty;
6. Whether the firm had been previously told about the Authority's concerns about the issue, through a private warning or in supervisory correspondence; and
7. Whether the firm concerned has complied with any requirements or rulings of another regulatory authority relating to the breach.

STEP 4: DETERRENCE

If the Authority considers that the figure arrived at Step 3 is insufficient, to deter the firm/individuals who committed the breach, from committing further or similar breaches than the Authority may increase the penalty by **a subjective percentage** under the following circumstances: -

1. Where the Authority considers the absolute value of the penalty too small in relation to the breach to meet its objective of credible deterrence;
2. Where the Authority's action in respect of similar breaches is assessed not to have improved industry practices and standards;

3. Where the Authority considers it likely that similar breaches will be committed by the firm or by other firms in the future in the absence of such an increase in penalty; and
4. Where the Authority considers that the likelihood of the detection of such a breach is low.

There may be cases where revenue is not an appropriate indicator of the harm or potential harm that a firm's breach may cause, in such cases, the Authority may use an appropriate alternative.

For a repeated breach, the financial penalty will attract between 25% - 100% premium depending on the gravity of the breach which may warrant a higher escalation of the penalty to be imposed.

The minimum financial penalty to be charged for offenses whose penalties are not specifically provided for in the Act shall be Kshs.100, 000/= for corporate entities and Kshs. 50,000/= for individual offenders.

28. HYPOTHETICAL CALCULATION OF FINES

Scenario 1: Where there is financial gain by an Entity or Individual

Step 1: Disgorgement - two (2) times the amount of gain made/loss avoided

Step 2: Seriousness of the Breach = % of the affected company's revenue

- a) Level 1- 0.1%; of the revenue or salary or commission of the previous year;
- b) Level 2- 0.5%; of the revenue or salary or commission of the previous year;
- c) Level 3- 1%; of the revenue or salary or commission of the previous year;
- d) Level 4- 5%; of the revenue or salary or commission of the previous year; and
- e) Level 5- 10% of the revenue or salary or commission of the previous year.

Step 3: Aggravating/ Mitigating factors %

Step 4: Deterrence Adjustment

Scenario 2: Where there is no financial gain or loss by an Entity

Step 1: Seriousness of the Breach = % of the affected company's revenue

- a) Level 1- 0.1%; of the revenue of the previous year;
- b) Level 2- 0.5%; of the revenue of the previous year;
- c) Level 3- 1%; of the revenue of the previous year;
- d) Level 4- 5%; of the revenue of the previous year; and
- e) Level 5- 10% of the revenue of the previous year.

Step 2: Aggravating/ Mitigating factors % as per the sliding scale of 0% to 10%

Step 3: Deterrence Adjustment Discretionary

Scenario 3: Where there is no financial gain or loss by an Individual

- Step 1: Seriousness of the Breach =% of the affected employment income
- a) Level 1- 0.1%; of the salary or commission of the previous year;
 - b) Level 2- 0.5%; of the salary or commission of the previous year;
 - c) Level 3- 1%; of the salary or commission of the previous year;
 - d) Level 4- 5%; of the salary or commission of the previous year; and
 - e) Level 5- 10% of the salary or commission of the previous year.
- Step 2: Aggravating/ Mitigating factors % as per the sliding scale of 0% to 10%
- Step 3: Deterrence Adjustment Discretionary

DISCOUNT FOR EARLY SETTLEMENT OF FINANCIAL PENALTIES

The Authority may discount or reduce the amount of financial penalty paid by a person/entity following enforcement action. The proposed discounts in financial penalties apply to penalties paid from the date of issuance of enforcement action by the Authority as follows: -

Payment of penalty	Percentage discount
Within 7 days	25%
Within 14 days	20%
Within 21 days	15%
Within 30 days	10%

The above discounts will apply to financial penalties of a minimum of Kshs 1 Million for individuals and Kshs 5 Million for corporate entities and the rates stated may be varied by the Authority's based on circumstances of each case. Any penalties below the stated minimum will not apply to discounts

APPENDIX

Appendix 1: Formal notification/resolution for opening an investigation

Date:

To: *[Firm or other person]* of *[address]*.

TAKE NOTICE: The Capital Markets Authority (the “**Regulator**”) has opened an investigation under section 13 of the Capital Markets Act (the “**Act**”).

The Regulator has appointed *[insert names of individual investigators]* to conduct the investigation.

Please contact *[contact name and details of most senior person on the investigation team]* at the Regulator for more information.

[signature]

[name and title of person authorized to open an investigation]

Appendix 2: Preliminary Findings Report

Date:

To: [Firm or other person] of [address].

PRELIMINARY FINDINGS REPORT (“PFR”)

The Capital Markets Authority (the “**Regulator**”) opened an investigation under Section 13 of the Capital Markets Act (the “**Act**”) on [insert date investigation was opened].

The Regulator appointed [insert names of individual investigators] (together the “**investigation team**”) to conduct the investigation.

The investigation team has made the following preliminary findings:

[insert details of the contravention(s) found].

Next steps:

You are now invited to provide your comments on these preliminary findings by [insert date falling [7] days after the date of the PFR]. The Regulator will take into account any response and comments received from you within that period. Your response and comments will be taken into consideration and will, together with our preliminary findings, be incorporated into an investigation report. The investigation report will then be forwarded to a legally qualified staff member independent of the investigation team for review. Following that review, the investigation report may be submitted to the [insert name of DMB at the Regulator] [or [insert name of SDM at the Regulator]].

Please contact me should you require more information.

[signature]

[name and title of most senior person on the investigation team]

Appendix 3: Template Notice to Show Cause

Our ref: CMA/CMD/xxx/E.xxx /xx

Date

Addressee

Dear Mr./ Ms. xxx,

RE: NOTICE TO SHOW CAUSE

[reference to subject matter of investigation/relevant contravention alleged]

We refer to the above matter.

...

The Authority has undertaken a review/investigation, which has that:-

[...set out the relevant findings/facts and documents/records relied upon]

Following a consideration of the investigation findings highlighted above, the Authority alleges that: -

1. Xxx may have engaged in ***[set out irregular/illegal conduct/practise]*** by ***[set out relevant actions/omissions]***. This conduct contravened the provisions of ***[the provisions of the regulatory framework which are alleged to have been contravened]***.
2. ...

In this regard, pursuant to Section 26(8) of the Capital Markets Act and Section 4 of the Fair Administrative Actions Act, you are required to respond in writing **within Xx (Xx) days** of this letter, and in any case **not later than [indicate deadline for response]** giving a detailed explanation to enable the Authority arrive at an objective assessment of your culpability, if any,

for the alleged contraventions cited above, and in the event of the establishment of the contravention, determination of the appropriate enforcement action to be taken against you, as provided for in Section 11(3)(cc) and Section 25A of the Capital Markets Act.

In the event that you do not respond to the Authority as indicated, **PLEASE NOTE** that the Authority will proceed to consider the matter and determine your culpability and the appropriate regulatory action, if any with regard to the above, without further recourse to you.

[signature]

[insert name and title of senior official authorized to issue formal Notices/Resolutions of the Regulator]

Encls *[enclose copies of the supporting documents relied upon by the Authority]*

Appendix 4: Template Infringement Notice

Our Ref: CMA/CMD/000/E.000/00

Date

Addressee

Dear Mr./ Ms. ABC,

RE: INFRINGEMENT NOTICE
[INDICATE THE APPLICABLE CONTRAVENTION]

The above matter refers.

The Capital Markets Authority (the Authority) notes that *[set out the contravention indicating specific facts/finding of the irregular commission/omission and providing the provisions of the capital markets regulatory framework whihc have been breached]*

In this regard and pursuant to Section 11(3) (cc) (i) *[indicate the alternative applicable statutory provision of the Capital Markets Act – e.g. Section 25 A], Xxx is liable to pay a financial penalty of Kshs. 000 for the failure to comply with the provisions of [indicate the breached provision of the capital markets regulatory framework].*

Please note that the said financial penalty should be made out in favor of the **CMA Investor Compensation Fund** and be **paid within ABC (000) days from the date hereof and in any event not later than [indicate the deadline for payment]**. The details of the CMA Investor Compensation Fund Account are as follows:-

Account Name:	CMA Investor Compensation Fund
Bank:	Kenya Commercial Bank
Branch:	S& L Salama House Branch
Account No:	1100110496

According to the provisions of Section 26 (8) of the Capital Markets Act and Section 4 of the Fair Administrative actions Act, Xxx is entitled to submit its response giving a detailed explanation for the failure to comply with the [provision of the capital markets regulatory framework

breached]. Should the Company opt to exercise this option under the Act, kindly note to respond in writing **within ABC (ooo) days** of this letter, and in any case **not later than *[indicate deadline for submission of response]*** to enable the Authority arrive at an objective decision. The Authority will consider the response submitted and make a determination of the appropriate sanctions, if any, to be meted out to Xxx in accordance with the provisions of the Capital Markets Act.

[signature]

[insert name and title of senior official authorized to issue formal Notices/Resolutions of the Regulator]

Appendix 5: Template Notification of Enforcement Action

Our Ref: CMA/CMD/000/E.000/00

Date

Addressee

Dear Mr. / Ms. ABC,

RE: NOTIFICATION OF ENFORCEMENT ACTION
[Description of respective contravention]

We refer to the Authority's Notice to Show Cause dated Xoxo and your response dated Xoxo.

The Authority notes that :

1. *[indicate relevant and clear factual findings supporting position reached by the Authority and addressing responses submitted by the Addressee]*

The Authority has further noted that:-

- i. *[indicate applicable provisions of the capital markets regulatory framework]*

The Authority has taken into all the submissions made by Xoxo and all the relevant facts and circumstances in this matter and determined that:-

- a) *[Indicate the determinations reached by the Authority to establish culpability/breach of the applicable provisions of the capital markets regulatory framework]*

Pursuant to the provisions of [indicate the statutory provisions relied on by the Authority to impose administrative sanctions e.g. Section 11(1) (d) and Section 11(3)(cc)(ii) of the Capital Markets Act], Xoxo is hereby **DIRECTED [or sanctioned ...as the case may be]**:-

1. *[details of the directives and/or sanctions imposed by the Authority, including timelines for compliance];*
2. **[indicate the period within which Xoxo is required to submit details of compliance and the proof of compliance which is required eg. Compliance officer Reports, proof of payment made in restitution]**

Please⁶ note that the said financial penalty should be made out in favor of the **CMA Investor Compensation Fund** and be **paid within ABC (ooo) days from the date hereof and in any event not later than *[indicate the deadline for payment]***. The details of the CMA Investor Compensation Fund Account are as follows:-

Account Name: CMA Investor Compensation Fund
Bank: Kenya Commercial Bank
Branch: S& L Salama House Branch
Account No: 1100110496

Pursuant to the provisions of Section 35 A (4) of the Capital Markets Act, kindly note that you have the right of appeal against this decision to the Capital Markets Tribunal.

[signature]

[insert name and title of senior official authorized to issue formal Notices/Resolutions of the Regulator]

⁶ To be included in cases where financial penalty is imposed