

PARLIAMENT
OF KENYA
LIBRARY



INTERNAL MEMO

TO : THE CLERK OF THE SENATE

THRO' : DEPUTY CLERK, SENATE - EG

THRO' : DIRECTOR, COMMITTEE SERVICES

FROM : CLERK ASSISTANT

DATE : 23RD SEPTEMBER, 2021

SUBJECT : REPORT ON PUBLIC FINANCE MANAGEMENT
(EQUALISATION FUND) REGULATIONS, 2021

Kiambi
Hon. Speaker
We recommend that you approve the report for tabling.

24/09/21
Clerk, forwarded for your consideration and approval
23/09/21 (for EG)
forwarded for your consideration and further processing
23/09/21

The above matter refers.

At its Sitting held on 22nd September, 2021, the Senate Sessional Committee on Delegated Legislation considered and adopted a Report on the Public Finance Management (Equalization Fund) Regulations, 2021.

Herewith attached, please find the report, annexes and adoption minutes for your review and consideration for processing and tabling.


B.M. Kiambi

Approved
[Signature]
28/9/21

THE SENATE
RECEIVED
23 SEP 2021
DEPUTY CLERK

PARLIAMENT OF KENYA

Approved
28/9/21

Hon. Speaker
Recommended for approval
for tabling.



Scanned
28/09/2021

24/09/21

12TH PARLIAMENT - THE SENATE

SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION

A REPORT ON THE CONSIDERATION OF THE PUBLIC FINANCE
MANAGEMENT (EQUALIZATION FUND ADMINISTRATION)
REGULATIONS, 2021

The Senate,
Clerk's Chambers,
Parliament Buildings,
P.O. Box 41842-00100,
Nairobi.

PAPERS LAID	
DATE	28/9/2021
TABLED BY	Sen. Mohamad Muryahaji
COMMITTEE	Delegated Legislation
CLERK AT THE TABLE	P.M.O

September, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
PREFACE.....	iv
Establishment of the Committee	iv
Membership of the Committee	iv
The Senate Sessional Committee on Delegated Legislation is comprised of the following Senators:- ...	iv
Acknowledgement	iv
CHAPTER ONE.....	1
INTRODUCTION	1
1.0 BACKGROUND	1
1.1 LEGAL BASIS.....	4
1.2 OVERVIEW OF THE REGULATIONS	6
1.2.1 Purpose of the Regulations	6
1.2.2 Composition of the Equalization Fund Advisory Board.....	6
1.2.3 Functions of the Board.....	6
1.2.4 Administrative Structure of the Fund.....	7
1.2.5 County Technical Committee	7
1.2.6 Sub-County Technical Committee.....	7
1.2.7 Project Identification and Implementation Committee.....	7
1.2.8 Functions of the CEC Member responsible for finance.....	8
1.2.9 Withdrawals and Utilization of funds.....	8
CHAPTER TWO.....	9
STAKEHOLDER ENGAGEMENT.....	9
2.0 CONSULTATION WITH STAKEHOLDERS.....	9
2.1.1 The Cabinet Secretary, National Treasury.....	9
3.0 CONSULTATIONS BEFORE MAKING THE STATUTORY INSTRUMENT.....	10
1.1.1 SUBMISSIONS FROM THE COUNCIL OF GOVERNORS, GOVERNOR ALI ROBA.....	10
1.1.2 SUBMISSIONS FROM THE CHAIRPERSON, COMMISSION ON REVENUE ALLOCATION, DR. JANE KIRINGAI	11
1.1.3 SUBMISSIONS FROM THE CONTROLLER OF BUDGET, MRS. MARGARET NYAKANG'O, CPA	

1.1.4	SUBMISSIONS FROM THE CHAIRPERSON, COUNTY ASSEMBLIES FORUM, HON. NDEGWA WAHOME, MBS	12
1.1.5	SUBMISSIONS FROM THE GOVERNOR, CENTRAL BANK OF KENYA, DR. PATRICK NJORGE	13
	CHAPTER THREE	14
	OBSERVATIONS AND RECOMMENDATION	14
2.0	COMMITTEE OBSERVATIONS	14
3.0	COMMITTEE RECOMMENDATION	15

ABBREVIATIONS AND ACRONYMS

CBK	-	Central Bank of Kenya
CS	-	Cabinet Secretary
COB	-	Controller of Budget
COG	-	Council of Governors
CAF	-	County Assembly Forum
CRA	-	Commission on Revenue Allocation
FY	-	Financial Year
MP	-	Member of Parliament
PFM	-	Public Finance Management
Sen.	-	Senator

PREFACE

Establishment of the Committee

The Senate Sessional Committee on Delegated Legislation is established under standing order 221 of the Senate Standing Orders. The Committee is mandated to scrutinize statutory instruments laid before the Senate to ensure that they are consistent with the provisions of the Statutory Instruments Act, 2013.

Membership of the Committee

The Senate Sessional Committee on Delegated Legislation is comprised of the following Senators:-

Sen. Mwinyihaji Mohammed Faki, MP	- Chairperson
Sen. Agnes Kavindu Muthama MP	- Vice Chairperson
Sen. Samuel Poghio, EGH, MP	
Sen. Farhiya Ali Haji, CPA, MP	
Sen. Erick Okong'o Omogeni, SC, MP	
Sen. Judith Pareno, MP	
Sen. Mary Seneta, MP	
Sen. Abshiro Halake, MP	
Sen. Anwar Loiptip, MP	

Executive Summary

The Public Finance Management (Equalization Fund Administration) Regulations, 2021, attached herein as *Annex I*, were published by the Cabinet Secretary in charge of the National Treasury, on 29th April, 2021 pursuant to section 205(1) of the Public Finance Management Act, 2012 and are intended to be applied to provide guidance on the administration and management of the Equalization Fund.

The Regulations were submitted to the Senate by the Cabinet Secretary, National Treasury on 19th August, 2021 pursuant to section 11(1) of the Statutory Instruments Act, 2013. The Regulations were then tabled before the Senate by the Senate Majority Leader on 7th September, 2021 and subsequently committed to the Senate Sessional Committee on Delegated Legislation. Pursuant to section 15(2) of the Statutory Instruments Act, the Committee is required to scrutinize the Regulations and make a report to the House with a resolution that a statutory instrument that was referred to the committee be revoked.

The Sessional Committee on Delegated Legislation considered the Regulations and received submissions from the National Treasury, the Controller of Budget, the Council of Governors, the County Assemblies Forum, the Commission on Revenue Allocation and the Central Bank of Kenya.

Some of the key observations made by the Committee on the Public Finance Management (Equalization Fund Administration) Regulations, 2021 were as follows-

- (i) The Regulations will facilitate completion of ongoing projects and commencement of new projects in the marginalized areas before the lapse of the 20 year period as

provided for under Article 204(6) of the Constitution. Further, the regulations will enable release of payment for complete projects.

- (ii) The Regulations provide for project identification and implementation committees as recommended by the Commission on Revenue Allocation in the second Marginalization policy. The CRA recommended that the Equalization Fund Advisory Board establishes approximately 360 project implementation units (PIU) at the divisional level and transfers funds directly to it.
- (iii) The Regulations have brought on board the County Governments of the marginalized counties in the management of the fund. The Equalization Fund Advisory Board includes a person nominated by the Council of Governors drawn from the areas defined as marginalized. This addresses one of the issues raised by the Council of Governors with regards to the Constitutionality of the management of the fund.
- (iv) The Regulations provide for the implementation of both ongoing and new projects. This is important to avoid continued stalling of projects that were ongoing prior to the Court order.
- (v) The key stakeholders had been consulted at the drafting stage of the Regulations but still had various concerns on the published Regulations that needed to be addressed for effective implementation.
- (vi) The concerns brought before the Committee by the Stakeholders were different from those which the stakeholders had raised during consultations with the National Treasury.

- (vii) The Court had directed that the National Treasury should prepare an appropriate statutory instrument within six months from the date of the judgment, which was delivered on 5th November, 2019. The National Treasury is therefore under strict timelines issued by the court on the urgency of the regulations as funds need to be disbursed to the counties for service delivery to citizens.
- (viii) The National Treasury gave an undertaking that necessary amendments would be made to the Regulations within six months after approval by Parliament.

Based on the foregoing observations, **the Sessional Committee on Delegated Legislation recommends to the Senate that the Public Finance Management (Equalization Fund Administration) Regulations, 2021 be approved pursuant to section 205(4) of the Public Finance Management Act, 2012.**

Acknowledgement

The Committee wishes to thank the various stakeholders for honouring the invitation to appear before the Committee or submit written submissions on the Public Finance Management (Equalization Fund Administration) Regulations 2021.

Further, the Committee thanks the offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to it while fulfilling its mandate.

It is now my pleasant duty, to present the Report of the Sessional Committee on Delegated Legislation on the Public Finance Management (Equalization Fund Administration) Regulations 2021.



DATED: 22nd September, 2021

**SEN. MOHAMED MWINYIHAJI FAKI, MP,
CHAIRPERSON,
SESSIONAL COMMITTEE ON DELEGATED LEGISLATION.**

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

1. The 2010 Constitution introduced the Equalization Fund under Article 204. The Fund provides for annual appropriation of one half percent of all the revenue collected by National Government each year calculated on the basis of most recent audited accounts. Appropriation under this Fund is towards provision of basic services that include water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services to the level generally enjoyed by the rest of the country.
2. The 2013 Survey Report on Marginalized Areas in Kenya by CRA defines marginalized areas as places, which are usually cut-off from the national axis of growth due to distance and inaccessibility. They have poor road networks and do not have access to sufficient electricity for households or industrial usage. The availability of basic services, quality water, sanitation and security, which are core to economic growth, is limited in the marginalized areas.
3. The first policy for Equalization Fund was approved by Parliament in December 2014 and was to be effective for three financial years, which were 2014/15, 2015/16 and 2016/17. The first generation marginalization policy identified fourteen Counties to benefit from the Fund for the first three years namely: Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita Taveta, Isiolo and Lamu.
4. Allocation towards the Equalization Fund during the first policy was Ksh 21,778 million compared to statutory amount of Ksh 29,436 million as shown in table 1. There has however been delay in the operationalization of the Equalization Fund against section 18 of the Public Finance Management Act 2012. Under the first policy only Ksh 1.1 billion had been spent by June 2017 of which estimated Ksh

500 million was spent on recurrent expenditures by the Equalization Fund Advisory Board.

Financial Year	Equalization Fund Allocation	Equalization Fund Entitlement	Variation
2011/12	0	2,340.80	-2,340.80
2012/13	0	2,646.50	-2,646.50
2013/14	400	2,646.50	-2,646.50
2014/15	6000	3,884.50	-3,484.50
2015/16	4,678.00	3,884.50	2,115.50
2016/17	6,000.00	4,678.00	1,322.00
2017/18	0.00	4,678.00	-4,678.00
2018/19	4,700.00	4,678.00	22.00
Total	21,778.00	29,436.80	-7,658.80

Source; National Treasury

5. Table 2 shows the allocation to each of the fourteen counties from the Equalization Fund as a lump sum allocation for three financial years as Appropriated by Parliament. However, data on the actual disbursement of the Fund per county is not available at the moment.

	Description	% share	Amount (Ksh.)
Recurrent	Administration Expenses (4.82% of total)	4.83	598,820,000.00
	Name of County	% share	County share
Development	Garissa	6.6	783,520,000.00
	Isiolo	6.3	746,940,000.00
	Kilifi	6.5	763,500,000.00
	Kwale	6.7	795,300,000.00
	Lamu	6.1	722,200,000.00
	Mandera	8.2	967,600,000.00
	Marsabit	7.5	886,200,000.00

Table 2: Allocation From the Equalization Fund

	Description	% share	Amount (Ksh.)
	Narok	6.9	809,500,000.00
	Samburu	7.4	869,700,000.00
	TaitaTaveta	6.4	751,700,000.00
	Tana River	7.3	859,000,000.00
	Turkana	8.9	1,050,200,000.00
	Wajir	7.9	929,800,000.00
	West Pokot	7.3	866,100,000.00
Total		100.0	11,801,260,000.00
Grand Total			12,400,080,000.00

Source; CRA 2017

Second Marginalization Policy

6. Upon the lapse of the first policy, the second generation marginalization policy for identifying marginalized areas was launched on 22nd June, 2018 by the Commission for Revenue Allocation. The policy focuses on Sub-locations distributed across the Country in 34 Counties relative to the 14 counties recommended in the first policy. The policy uses information on access to safe water, school attendance, access to improved sanitation and electricity. Deprivation index was used to rank 7,131 areas mapped into 34 counties and 107 constituencies from the most deprived to the least deprived (See **Annex 2**).

Court's Decision on the Equalization Fund Guidelines, 2015

7. The National Treasury established the Equalization Fund guidelines vide Legal Notice 1711 of 13th March, 2015. The guidelines were approved by Parliament in December 2015. During the implementation of the first marginalization policy, the Equalization Fund Advisory Board chose to apply the fund directly using National Government structures to finance and implement projects identified in the then 14 marginalized counties.
8. The Council of Governors petitioned the High court on the Constitutionality of the administration and management of the Fund. The High Court Petition No.272 of 2016. In its ruling the three judge bench ordered -

- (a) that the Equalization Fund being for the benefit of marginalized counties can only be disbursed by the National Government through the respective and affected County Governments;
- (b) guidelines in the Legal Notice 1711 of 13th March, 2015 were declared unconstitutional, null and void for violating Articles 1(4),2(1),6,10,174,201,204 and 216 of the Constitution and section 12 and 18 of the PFM Act 2012; and
- (c) the Cabinet Secretary for the National Treasury shall within six (6) months of the date of the judgement and in consultation with all relevant stakeholders prepare an appropriate policy and /or statutory instrument on the administration of the Equalization fund.

1.1 LEGAL BASIS

9. Article 204 of the Constitution establishes the Equalization Fund whose resources shall be applied to marginalized areas as identified through the Marginalization Policy determined by the CRA in accordance with Article 216(4) of the Constitution. The Source of the capital for the Fund shall be half percent (0.5% or 0.005) of all revenue collected by the National Government each year calculated on the basis of the most audited accounts of revenue received as approved by the National Assembly.
10. Section 18 of the PFM Act, 2012 empowers the National Treasury to administer the Fund in accordance to Article 204 of the Constitution. Sections 12 (1) (e) and 205 of the Act also give the Cabinet Secretary responsible for Finance the powers to make further regulations therein.
11. The Regulations are made pursuant to section 205(1) of the Public Finance Management Act, 2012 and are intended to provide guidance on the administration and management of the Equalization Fund.

12. Section 205 of the Public Finance Management Act, 2012 provides as follows-

205. *Powers of the Cabinet Secretary to make regulations*
(1) *The Cabinet Secretary may make regulations, not inconsistent with this Act respecting any matter that is necessary or convenient to be prescribed under this Act or for the carrying out or giving effect to this Act.*

(2) *In making regulations under this Act, the Cabinet Secretary shall consult the Intergovernmental Budget and Economic Council.*

(3) *A provision of a regulation may—*

- (a) apply generally or be limited in its application;*
- (b) apply differently according to different factors;*
- (c) authorise any matter or thing to be done from time to time; or*
- (d) do any combination of those things.*

(3A) *Despite the generality in subsection (1), the Cabinet Secretary may make regulations for raising money by issuing a Sukuk bond which shall specify the purpose for which money may be raised.*

(3B) *Money raised through a Sukuk bond may be raised within or outside Kenya in Kenya shillings or in any other currency or medium of exchange.*

(4) *Regulations under subsection (1) shall not take effect unless approved by a resolution passed by Parliament.*

(5) *Regulations approved under subsection (4) shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.*

(6) *If a House of Parliament does not make a resolution either approving or rejecting any regulations within fifteen sitting days after submission to it for approval, the House shall be deemed to have approved those regulations.*

1.2 OVERVIEW OF THE REGULATIONS

1.2.1 Purpose of the Regulations

13. The purpose of the Regulations is to-

- (a) establish an unincorporated Board to advise the Cabinet secretary on the proper and effective performance of the fund;
- (b) provide guidance on the administration and management of the Fund;
- (c) provide for the withdrawals from the fund;
- (d) provide for completion of ongoing projects under the first policy;
- (e) provide for implementation of new projects under all subsequent policies;
and
- (f) provide for the procedures in relation to winding up of the Fund.

1.2.2 Composition of the Equalization Fund Advisory Board

14. Membership of the Board is proposed to comprise of a chairperson appointed by the CS, the PS (National Treasury), the PS (Devolution), a nominee of the National Assembly (from a pastoralist Community), one person nominated by the Senate, a nominee of the Council of Governors, a CEO and three others nominated from Organizations working in the beneficiary counties and special interest groups, appointed by the Cabinet Secretary.

15. Tenure of Office of the Board Members- To hold office for one term of six (6) years, non-renewable.

1.2.3 Functions of the Board

16. The functions of the Board include: appraisal and evaluation of proposed by the technical committees, oversee in consultation with the county governments implementation of the projects, establish framework for collaboration between national and county governments in implementation of government.

17. Secretary to the Board (Chief Executive Officer): To be appointed by the Cabinet Secretary.

1.2.4 Administrative Structure of the Fund

18. In addition to the Board at National Level, three administrative units are proposed for establishment by the respective County Commissioner in eligible counties, namely-

1.2.5 County Technical Committee

19. Composition: County Commissioner as chairperson: CEC Member for Finance, CDF Managers, Representative of County Assembly, and Chairperson of the CDF and representatives of implementing sectors.

20. Responsibility: approval of all projects to be financed from the Fund

1.2.6 Sub-County Technical Committee

21. Composition: Sub-County Commissioner (Chairperson), 4 technical officers from Ministries relevant to funding priorities, the Chairperson of Project Identification and Implementation Committee and Secretary of the CDF.

22. Key Functions: receive, evaluate, prioritize, assess the feasibility and cost of all development proposals from respective project identification and implementation Committees, submit the project proposals and funding requests to the County Government, monitor projects to ensure they meet the envisaged objectives.

1.2.7 Project Identification and Implementation Committee

23. Composition: Assistant Sub-County Commissioner (Chairperson), village administrators of marginalized areas, a representative of special interest group, a representative of the CDF committee member at the sub-county level and a representative of religious group or local NGO with office at ward level.

24. Functions: identify and prioritize project in beneficiary areas, prepare and submit funding proposals to the sub-county technical committee, provide over sight on project implementation.

1.2.8 Functions of the CEC Member responsible for finance

25. Consolidate all projects approved by the county technical committee and submit to the Secretary of the Board for funding with a copy to CRA, prepare financial Statements and submit to the Secretary of the Board. Prepare quarterly reports on funds received and implementation status of all projects financed by the Fund, prepare annual report on implementation of all projects financed by the Fund with a copy to the Secretary, CRA, CoB and Parliament.

1.2.9 Withdrawals and Utilization of funds

26. The Funds shall be utilized as conditional grants to the affected counties in accordance with the Division of Revenue Act and County Allocation of Revenue Act for the respective financial year. All withdrawals from the Fund shall be deposited into the respective spending counties account.

CHAPTER TWO

STAKEHOLDER ENGAGEMENT

2.0 CONSULTATION WITH STAKEHOLDERS

27. The Sessional Committee on Delegated Legislation received written submissions from the Central Bank of Kenya and held meetings with stakeholders on 17th September, 2021. The Committee therefore considered the written and oral submissions from the following stakeholders-

2.1.1 The Cabinet Secretary, National Treasury

28. The CAS on behalf of the CS, National Treasury took the members through the content of the Regulations. The treasury stated that the COG gave a written submission to the treasury and brought to the attention of the committee that the submissions of the COG in the workshop were only additional information that will be put to consideration during future amendment of the Regulations.

29. The treasury recognized the contributions and concerns by the County Assemblies Forum but urged that the Forum is not anchored in law hence cannot have a representation in the Fund's Board, however, the county technical committee establishment under Regulation 14, has a representative of county assemblies.

30. The Treasury had insisted on provision of written submissions from stakeholders and has a record of all submissions from various stakeholders which were incorporated into the regulations and all the additional information provided during the meeting with the committee was additional information for improvement which cannot form a basis for annulment of the Regulations.

31. The Treasury informed the committee that it was under strict timeline issued by the court on the urgency of the regulations as the treasury needed to disburse funds to the counties for service delivery to citizens.

3.0 CONSULTATIONS BEFORE MAKING THE STATUTORY INSTRUMENT

32. In its explanatory memorandum, the National Treasury stated that it had sought written comments from key stakeholders by writing letters to target institutions and placement of notices in the mainstream media.
33. The National Treasury informed the Committee that the key stakeholders had been consulted and an Inter-Agency Committee consisting of membership from the National Treasury, Office of the Attorney General, Office of the Controller of Budget, CRA, COG, the National Assembly and the Senate had assisted in coming up with the Regulations.

1.1.1 SUBMISSIONS FROM THE COUNCIL OF GOVERNORS, GOVERNOR ALI ROBA

34. The COG stated that the process of regulation formulation was consultative and commended the National Treasury for intensive public participation. However, despite the extensive public participation some of COG's contributions were not captured in the regulations and the COG would wish that the National Treasury get things right to avoid stakeholders challenging the Regulations in court.
35. The COG submitted that there was need to increase representation of counties in the Board administering the Fund from one to two as, the Fund seeks to benefit 33 counties, hence the need for adequate representation.
36. The COG also submitted that Regulation 16(a) states that the sub-county commissioner would be the chairperson of the sub-county technical committee,

yet such an office does not exist in the National Government Structure. These commissioners were replaced by deputy county commissioners. Further, under Regulation 18(a), the office mentioned does not exist and under Regulation 18(b), the village administrators should be replaced with ward administrators in the membership of the Project Implementation Committee, as some counties do not have village administrators while other counties have multiple village administrators in one ward.

37. The ownership of the projects as a result of the Equalization Fund should be owned by both the National Government and the County Government.

38. The COG proposed that the regulations should be halted to ensure that COG's proposals were incorporated as there was no need to approve Regulations that would eventually pose a challenge when it came to implementation.

The Submissions made by COG are annexed to this report as *Annex 3*.

1.1.2 SUBMISSIONS FROM THE CHAIRPERSON, COMMISSION ON REVENUE ALLOCATION, DR. JANE KIRINGAI

39. The Commission affirmed that they were part of the multi-agency taskforce process in the Public Finance Management (Equalization Fund) Regulations, 2021.

40. The CRA submitted that there were a few editorial issues that needed to be rectified and there was need to align the functions of the Board so that they did not overlap with the functions of the CRA. Further, there were a few Board functions which were overlapping with the functions of the various committees established under the Regulations.

41. The CRA was also of the view that there was need to clarify that the expenses of the Board contained under Regulation 10 would include the expenses of the three other committees established by the Regulations. Further, the representation of the CDF is too heavy in the County Technical Committee.

The Submissions made by CRA are annexed to this report as *Annex 4*.

**1.1.3 SUBMISSIONS FROM THE CONTROLLER OF BUDGET,
MRS. MARGARET NYAKANG'O, CPA**

42. The Controller of Budget affirmed that they were among the multiagency team involved in the formulations of the Public Finance Management (Equalization Fund) Regulations, 2021.

43. COB proposed that the qualifications of the CEO to the Fund should be provided and the Secretary to the Fund should be an ex-official Member. Further, there was need to qualify the nature of persons to be appointed to the Board so that state officers are excluded from such appointments. It was also the COB's submission that the functions of the CEC Finance and the Project Implementation Committee needed to be synchronized to avoid an overlap in functions.

44. The COB was of the view that a little more needed to be done on the regulations for them to work efficiently.

The Submissions made by COB are annexed to this report as *Annex 5*.

**1.1.4 SUBMISSIONS FROM THE CHAIRPERSON, COUNTY
ASSEMBLIES FORUM, HON. NDEGWA WAHOME, MBS**

45. CAF pointed out that there is no representation of the CAF in the Board and requested that it be added as one of the board member. They also added that a

Member of the County Assembly should be included as a member of the Committee at the ward Level.

46. CAF reiterated that it was critical for the treasury to get the right footing in the process and that pre-Publication scrutiny with the senate should have been done.
47. They pointed out that the County Assembly Forum were not invited to give their contribution in regard to the regulation and are grateful that the Senate recognized them as one of the stakeholder.

The Submissions made by CAF are annexed to this report as *Annex 6*

1.1.5 SUBMISSIONS FROM THE GOVERNOR, CENTRAL BANK OF KENYA, DR. PATRICK NJOROGE

48. The Governor, Central Bank of Kenya made written submissions to the Committee and observed that there was need to have greater specificity on Regulation 30(4) to ensure that there was no co-mingling of funds of the equalization fund monies with the other county monies. The Regulation is not explicit as to where the funds from the Equalization fund should be deposited.

The Submissions made by CBK are annexed to this report as *Annex 7*

CHAPTER THREE

OBSERVATIONS AND RECOMMENDATION

2.0 COMMITTEE OBSERVATIONS

49. The Regulations will facilitate completion of ongoing projects and commencement of new projects in the marginalized areas before the lapse of the 20 year period as provided for under Article 204(6) of the Constitution. Further, the regulations will enable release of payment for complete projects.
50. The Regulations provide for project identification and implementation committees as recommended by the Commission on Revenue Allocation in the second Marginalization policy. The CRA recommended that the Equalization Fund Advisory Board establishes approximately 360 project implementation units (PIU) at the divisional level and transfers funds directly to it.
51. The Regulations have brought on board the County Governments of the marginalized counties in the management of the fund. The Equalization Fund Advisory Board includes a person nominated by the Council of Governors drawn from the areas defined as marginalized. This addresses one of the issues raised by the Council of Governors with regards to the Constitutionality of the management of the fund.
52. The Regulations provide for the implementation of both ongoing and new projects. This is important to avoid continued stalling of projects that were ongoing prior to the Court order.
53. The key stakeholders had been consulted at the drafting stage of the Regulations but still had various concerns on the published Regulations that needed to be addressed for effective implementation.

54. The concerns brought before the Committee by the Stakeholders were different from those which the stakeholders had raised during consultations with the National Treasury.

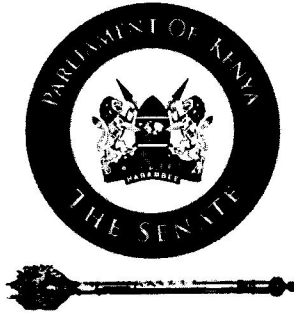
55. The Court had directed that the National Treasury should prepare an appropriate statutory instrument within six months from the date of the judgment, which was delivered on 5th November, 2019. The National Treasury is therefore under strict timelines issued by the court on the urgency of the regulations as funds need to be disbursed to the counties for service delivery to citizens.

56. The National Treasury gave an undertaking that necessary amendments would be made to the Regulations within six months after approval by Parliament.

3.0 COMMITTEE RECOMMENDATION

Based on the foregoing observations, the Sessional Committee on Delegated Legislation recommends to the Senate that the Public Finance Management (Equalization Fund Administration) Regulations, 2021 be approved pursuant to section 205(4) of the Public Finance Management Act, 2012.

ANNEXES



Annex 1- The Public Finance Management (Equalization Fund Administration) Regulations, 2021, Legal Notice No. 69 of 2021

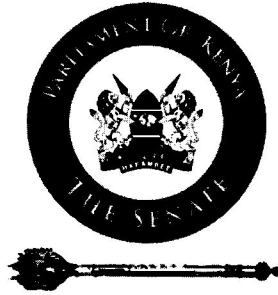
Annex 2- Marginalized areas by County and Constituency as per the Second Marginalization Policy

Annex 3- Submissions received from the Council of Governors

Annex 4- Submissions received from the Controller of Budget

Annex 5- Submissions received from the County Assemblies Forum

Annex 6- Submissions received from the Central Bank of Kenya



TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE SIXTEENTH MEETING OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD ON WEDNESDAY, 22ND SEPTEMBER, 2021 ON THE ZOOM ONLINE MEETING PLATFORM AT 12:30 PM.

PRESENT

- | | |
|--------------------------------------|-----------------------------------|
| 1. Sen. Mwinyihaji Mohammed Faki, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Agnes Kavindu Muthama, MP | - Vice Chairperson |
| 3. Sen. Poghisio Samuel Losuron, MP | - Member |
| 4. Sen. Farhiya Haji Ali, MP | - Member |
| 5. Sen. Judith Pareno, MP | - Member |
| 6. Sen. Halake Abshiro, MP | - Member |
| 7. Sen. Mary Yiane Seneta, MP | - Member |

ABSENT WITH APOLOGIES

- | | |
|--------------------------------------|----------|
| 1. Sen. Erick Okong'o Mogeni, SC, MP | - Member |
| 2. Sen. Anwar Loitip, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|-----------------------------|
| 1. Ms. Josephine Kusinyi | - Principal Legal Counsel |
| 2. Boniface Kiambi | - Committee Clerk Assistant |
| 3. Mr. Tiyan Joseph | - Research Officer |
| 4. Ms. Winfre Atieno | - Audio Officer |

MIN. NO. SEN/SCDL/042/2021:PRELIMINARIES

The Chairperson called the meeting to order at 12:30 p.m. followed by a word of prayer led by Sen. Agnes Kavindu Muthama, MP.

MIN. NO. SEN/SCDL/043/2021: ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, as set out below, having been proposed by Sen. Judith Pareno, MP and seconded by Sen. Farhiya Haji Ali, MP: -

1. Preliminaries;
 - a) Prayer
 - b) Introductions
2. Adoption of the Agenda;
3. Consideration of the Anti-Counterfeit (Amendment) Regulations, 2021;
4. Consideration of the Anti-Counterfeit (Recordation) Regulations, 2021;
5. Consideration of the Report on Public Finance Management (Equalization Fund) Regulations, 2021;
6. Any Other Business;
7. Date of the Next Meeting; and,
8. Adjournment.

MIN. NO. SEN/SCDL/044/2021:

**CONSIDERATION OF REPORT ON
THE PUBLIC FINANCE
MANAGEMENT (EQUALIZATION
FUND) REGULATIONS, 2021**

Ms. Josephine Kusinyi, Principal Legal Counsel took the Committee through the report and key observations made by the Committee on Public Finance Management (Equalization Fund) Regulations, 2021 were as follows-

- a) The Regulations will facilitate completion of ongoing projects and commencement of new projects in the marginalized areas before the lapse of the 20-year period as provided for under Article 204(6) of the Constitution.
- b) The Regulations provide for project identification and implementation committees as recommended by the Commission on Revenue Allocation in the second Marginalization policy. The CRA recommended that the Equalization Fund Advisory Board establishes approximately 360 project implementation units (PIU) at the divisional level and transfers funds directly to it.
- c) The Regulations have brought on board the County Governments of the marginalized counties in the management of the fund. The Equalization Fund

Advisory Board includes a person nominated by the Council of Governors drawn from the areas defined as marginalized. This addresses one of the issues raised by the Council of Governors with regards to the Constitutionality of the management of the fund.

- d) The Regulations provide for the implementation of both ongoing and new projects. This is important to avoid continued stalling of projects that were ongoing prior to the Court order.
- e) The key stakeholders informed the committee that they had been consulted at the drafting stage of the Regulations but still had various concerns on the published Regulations that needed to be addressed for effective implementation.
- f) The National Treasury informed the Committee that all the concerns brought before the Committee by the Stakeholders were different from those which the stakeholders had raised during consultations with the National Treasury.
- g) The Treasury informed the committee that it was under strict guidelines by the court on the urgency of the regulations as the treasury needed to disburse funds to the counties for service delivery to citizens.
- h) The National Treasury gave an undertaking that necessary amendments would be made to the Regulations within six months after approval by Parliament.

RECOMMENDATION

The Committee resolved to adopt the report and recommended it for tabling after it was proposed by Sen. Farhiya Haji Ali, MP and seconded by Sen. Poghisio Samuel Losuron, EGH, MP.

MIN. NO. SEN/SCDL/045/2021:

CONSIDERATION OF THE ANTI-COUNTERFEIT (AMENDMENT) REGULATIONS, 2021;

AND,

**CONSIDERATION OF THE ANTI-
COUNTERFEIT (RECORDATION)
REGULATIONS, 2021;**

The Committee resolved to adopt the Regulations after they were proposed and seconded by Sen. Mary Yiane Seneta, MP and Sen. Farhiya Haji Ali, MP respectively.

MIN. NO. SEN/SCDL/046/2021: ANY OTHER BUSINESS

The following issues were raised by committee members during AOB-

- a) Senator Poghisio commended the committee members for a fruitful retreat in considerations of the regulations and encouraged the same spirit going forward.

- b) The Committee congratulated Sen. Mary Yiane Seneta, MP for being elected vice Chair Health Committee.

MIN. NO. SEN/SCDL/047/2021: ADJOURNMENT

Having concluded the business as set out in the agenda, the meeting was adjourned at 1.15 p.m. The next meeting would be on notice.



SIGNED: **DATE: 22ND SEPTEMBER, 2021**

**SEN. MOHAMED MWINYIHAJI FAKI,
CHAIRPERSON,
SESSIONAL COMMITTEE ON DELEGATED LEGISLATION**

(Legislative Supplement No. 29)

LEGAL NOTICE NO. 54

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 205 (1) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND ADMINISTRATION) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (Equalization Fund Administration) Regulations, 2021.

Citation.

2. In these Regulations, unless the context otherwise requires—

Interpretation.

“Accounting Standards Board” has the meaning assigned to it under section 2 of the Act;

“administrator of the Fund” means the National Treasury as provided for under section 18(1) of the Act;

“Board” means the Equalization Fund Advisory Board established under regulation 4(1) of these Regulations;

“eligible county” means a county government identified as a beneficiary of the Fund by the Commission on Revenue in accordance with Article 216(4) of the Constitution;

“First Policy” means the First Policy determined by the Commission on Revenue Allocation under Article 216(4) of the Constitution in identifying marginalized areas for the purposes of Article 204(2) of the Constitution;

“Fund” means the Equalization Fund established under Article 204(1) of the Constitution;

“marginalized area” means an area identified under policy determined by the Commission on Revenue Allocation in accordance with Article 216 (4) of the Constitution;

“revenue” has the meaning assigned to it under section 2 of the Commission on Revenue Allocation Act, 2011; and

No.16 of 2011.

“Second Policy” means the Second Policy determined by the Commission on Revenue Allocation under Article 216(4) of the Constitution in identifying marginalized areas for the purposes of Article 204(2) of the Constitution;

“unutilized balance” means any —

- (a) amounts not withdrawn from the Fund at the end of financial year;
- (b) amount withdrawn from the Fund for purposes of provision of basic services under an Appropriations Act and not expended at the end of financial year;
- (c) amount earmarked for the First Policy with fourteen counties ongoing projects; or
- (d) amount earmarked for the Second Policy with thirty four counties new projects to be identified.

3. The purpose of these Regulations is to —

Purpose of these Regulations.

- (a) establish an unincorporated Board to advise the Cabinet Secretary on the proper and effective performance of the Fund;
- (b) provide guidance on the administration and management of the Fund;
- (c) provide for the withdrawals from the Fund;
- (d) provide for completion of ongoing projects under the first policy;
- (e) provide for implementation of new projects under all subsequent policies; and
- (f) provide for the procedures in relation to winding up of the Fund.

4. (1) There is established an advisory board to be known as the Equalization Fund Advisory Board which shall comprise of—

Establishment of the Board.

- (a) the Chairperson who shall be appointed by the Cabinet Secretary;
- (b) the Principal Secretary to the National Treasury or his representative designated in writing;
- (c) the Principal Secretary responsible for matters relating to devolution or his or her representative designated in writing;
- (d) one person from a pastoralist community nominated by the National Assembly;
- (e) one person nominated by the Senate;
- (f) one person nominated by the Council of Governors drawn from the areas defined as marginalised;
- (g) the Chief Executive Officer who shall be the secretary to the Board; and
- (h) three other persons nominated from organizations working in equalization fund beneficiary counties and special interest group, appointed by the Cabinet Secretary.

(2) All persons nominated under sub-regulation (1), paragraphs (d), (e), (f) and (h) shall be appointed by the Cabinet Secretary.

5. A person is qualified for appointment under regulation 4(1) (a), (d), (e), (f), and (h) if that person—

Qualification
requirement of
members.

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has at least five years' professional experience in a relevant field; and
- (d) meets the requirements of Chapter Six of the Constitution.

6. Members of the Board appointed under regulation 4(1) shall, subject to the provisions of these Regulations, hold office for a term of six years, non renewable, on such terms and conditions as may be specified in the instrument of appointment.

Tenure of office.

7. A member of the Board, other than *ex-officio* member, may—

Vacation of
office.

- (a) at any time resign from office by notice in writing to the appointing authority;
- (b) be removed from office by the appointing authority, if the member—
 - (i) has been absent from three consecutive meetings of the Board without permission from the chairperson;
 - (ii) is adjudged bankrupt or enters into a composition scheme or arrangement with his creditors;
 - (iii) is convicted of an offense involving dishonesty or fraud;
 - (iv) is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months;
 - (v) is incapacitated by prolonged physical or mental illness; or
 - (vi) is otherwise unable or unfit to discharge his functions.

8. The functions of the Board with regard to the Fund shall be to—

Functions of the
Board.

- (a) advise and make recommendations to the Cabinet Secretary on the distribution of resources for the provision of the basic services to the marginalized areas under Article 204 of the Constitution;
- (b) appraise and evaluate projects proposed under the workplans submitted by county technical committees to ensure compliance with the Constitution and the recommendations issued by the Commission on Revenue Allocation;
- (c) make recommendations on the priority areas requiring financing and implementation in accordance with the workplans considered under paragraph (b);

- (d) oversee, in consultation with the county governments, the implementation of the projects to ensure compliance with the Constitution;
- (e) monitor and evaluate the projects implemented by county governments using equalization funds to determine their impact in addressing the factors contributing to the marginalization of the areas identified in the counties;
- (f) put in place measures to ensure transparency and accountability in the implementation of equalization fund projects by county governments;
- (g) establish a framework for collaboration between the national government and county governments in the implementation of projects in line with the Constitution;
- (h) review the consolidated quarterly reports prepared by the Secretary on the implementation of the projects and make recommendations to the Cabinet Secretary on performance improvement;
- (i) review and propose the annual estimates of expenditure of the Fund for approval by the Cabinet Secretary; and
- (j) undertake project public participation in line with Article 201 of the Constitution.

9. The Board may establish such committees as it may consider necessary for the better performance of its functions and the exercise of its powers under these Regulations.

Establishment of committees.

10. (1) There shall be paid out of the Fund, expenses of the Board and such other expenses incurred pursuant to the object and purpose for which the Fund is established.

Expenses of the Board.

(2) The expenditure incurred on the Fund shall be on the basis of and limited to annual work programmes and budget estimates prepared by the Secretary and approved by the Board at the beginning of the financial year to which they relate.

(3) Board expenses shall not be more than three percent of annual approved equalization fund allocation.

11. (1) The Board shall meet not less than four times in every financial year and not more than four months shall elapse between the dates of the next meeting.

Meetings of the Board.

(2) Unless three quarters of the total members of the Board otherwise agree, at least fourteen days written notice of every meeting of the Board shall be given to every member of the Board.

(3) The quorum for the conduct of the business of the Board shall be five members, of whom the majority shall be from amongst the non *ex officio* members.

(4) The Chairperson shall preside at every meeting of the Board at which he or she is present but in his or her absence, the members

present shall elect one of their number who shall, with respect to that meeting and the business transacted, have all the powers of the Chairperson.

(5) Unless a unanimous decision is reached a decision on any matter before the Board shall be reached by voting.

(6) Subject to sub-regulation (3), no proceedings of the Board shall be invalid by reason only of a vacancy among the members thereof.

(7) Subject to the provisions of this regulation, the Board may determine its own procedure and the procedure for any committee of the Board and for the attendance of any other persons as its meetings and may make standing orders in respect thereof.

12. The Board Secretary shall cause minutes of all proceedings of meetings of the Board to be entered in books for that purpose.

Minutes.

13. (1) If a member is directly or indirectly interested in any contract, proposed contract or other matter before the Board and is present at a meeting of the Board at which the contract, proposed contract or other matter is the subject of consideration, he or she shall, at the meeting and as soon as practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion with respect to the contract or other matter, or be counted in the quorum of the meeting during consideration of the matter:

Disclosure of interest.

Provided that if the majority of the members present are of the opinion that the experience or expertise of the member is vital to the deliberations of the meeting, the Board may permit the member to participate in the deliberations subject to such restrictions as it may impose.

(2) A disclosure of interest made under sub-regulation (1) shall be recorded in the minutes of the meeting at which it is made.

14. Each County Commissioner of an eligible county shall establish and convene an all-inclusive committee to be known as county technical committee comprising of —

Establishment of county technical committee.

- (a) a chairperson who shall be the County Commissioner;
- (b) a County Executive Committee Member for Finance;
- (c) Constituency Development Fund managers;
- (d) a representative of County Assembly;
- (e) representatives of implementing sectors with prioritized projects; and
- (f) the chairperson of the Constituency Development Fund (CDF).

15. The County Technical Committee shall be responsible for approving all projects to be financed from the Fund.

Functions of the county technical committee.

16. Each County Commissioner of an eligible county shall establish a committee at the sub-county level to be known as sub-county technical committee comprising of—

Establishment of sub-county technical committee.

- (a) a chairperson who shall be the sub-county Commissioner;
- (b) a maximum of four technical officers from ministries relevant to funding priorities;
- (c) the chairpersons of Project Identification and Implementation Committees within the sub-county; and
- (d) the secretary of the Constituency Development Fund (CDF).

17. The functions of the sub-county technical committee shall be to—

Functions of the sub-county technical committee.

- (a) receive project funding proposals from respective Project Identification and Implementation committees;
- (b) evaluate and prioritize all development proposals from the Project Identification and Implementation Committees;
- (c) assess the feasibility and cost all project proposals received from the Project Identification and Implementation Committees;
- (d) submit project proposals and funding requests received from the Project Identification and Implementation Committees to the county government;
- (e) monitor all projects being undertaken and ensure they meet the objectives they are originally meant to achieve;
- (f) prepare quarterly reports on funds received and implementation status of all projects financed by the Fund to the county technical committee with a copy to the County Executive Committee Member responsible for matters relating to finance; and
- (g) prepare and submit annual reports on implementation of all projects financed by the Fund to the county technical committee with a copy to the County Executive Committee Member for Finance.

18. Each County Commissioner of an eligible county shall establish a committee at the ward level to be known as Project Identification and Implementation Committee comprising of —

Establishment of Project Identification and Implementation Committee.

- (a) a chairperson who shall be the Assistant Sub-County Commissioner;
- (b) the village administrators of areas defined by the Commission on Revenue Allocation as marginalized;

- (c) a representative of the women, youth, minorities and persons with disabilities from marginalized areas;
- (d) a representative of the Constituency Development Fund committee member at the sub-county level; and
- (e) a representative of religious group or local Non-Governmental Organisation (NGO) with office at ward level.

19. The functions of the Project Identification and Implementation Committee shall be to—

Functions of Project Identification and Implementation Committee.

- (a) undertake public participation, in beneficiary areas;
- (b) identify and prioritize project in beneficiary areas in line with guidelines issued by the administrator of the Fund;
- (c) prepare and submit project funding proposals to sub-county technical committee; and
- (d) provide oversight on project implementation.

20. The functions of the County Executive Committee Member responsible for matters relating to finance with respect to the Fund in each eligible county shall be to—

Functions of the County Executive Committee Member for finance.

- (a) consolidate all projects approved by the county technical committee and submit to the Secretary of the Board for funding with copy to the Commission on Revenue allocation;
- (b) prepare financial statements for the Fund for each financial year in a form prescribed by the Accounting Standards Board in accordance with the Act and submit to the Secretary of the Board;
- (c) prepare quarterly financial statements for the fund in a form prescribed by the Accounting Standards Board and submit to the Secretary of the Board;
- (d) prepare quarterly reports on funds received and implementation status of all projects financed by the Fund with a copy to the Secretary of the Board, Commission on Revenue Allocation and Controller of Budget; and
- (e) prepare annual report on implementation of all projects financed by the Fund with a copy to the Secretary, Commission on Revenue Allocation, Controller of Budget and Parliament.

21. (1) There shall be the Chief Executive Officer to the Board appointed by the Cabinet Secretary.

Chief Executive Officer

(2) The Chief Executive officer appointed under subparagraph (1) shall be the head of the Secretariat established under regulation 22.

22. There shall be a Secretariat constituted by the Chief Executive Officer and whose functions shall be to—
- Establishment and functions of the Secretariat.
- (a) provide technical and administrative services to the Board;
 - (b) implement the decisions, strategies and work plan of the Board;
 - (c) make recommendations to the Board on the formulation and implementation of programmes for the achievement of the functions of the Board;
 - (d) review and consolidate the work-plans received from counties for consideration by the Board;
 - (e) identify any challenges in the implementation of projects and make recommendations to the Board on the remedial measures required to be undertaken;
 - (f) maintain a data base setting out information on—
 - (i) projects, operations and programmes undertaken with respect to each county which has been identified by the Commission on Revenue Allocation as being marginalized;
 - (ii) monies appropriated from the Fund with respect to each project or programme; and
 - (iii) status of each project or programme undertake;
 - (g) prepare and ensure timely submission of reports to the Board and the Cabinet Secretary regarding the implementation of projects and programmes under the Fund;
 - (h) make arrangements for periodical monitoring, evaluation and reporting of the criteria, standards and programmes in relation to the objects and functions of the Board; and
 - (i) perform such other functions as may be assigned to it by the Board.
23. The County Executive Committee Member responsible for matters relating to finance shall submit work plans through county technical committee to the Board for approval.
- Approval of workplan.
24. (1) The funds shall be utilized as conditional grants to the affected counties in accordance with the Division of Revenue Act and the County Allocation Revenue Act for the respective financial year.
- Utilisation of funds and preparation of workplans.
- (2) The County Executive Committee Member responsible for matters relating to finance in each of the counties identified by the Commission on Revenue Allocation shall prepare a workplan setting out—
- (a) a schedule of projects and programmes proposed to be undertaken by the county government in the areas identified by Commission on Revenue Allocation;
 - (b) a technical assessment of the viability of the schedule of projects and programmes;

- (c) public participation undertaken during the process of identification of programmes and projects;
- (d) an assessment of the manner in which the programmes or projects would be expected to address the shortcomings identified by the Commission on Revenue Allocation in the provision of the identified basic needs;
- (e) an assessment of how the programmes and projects identified impact on the County Integrated Development Plan; and
- (f) the approximate cost of the works to be undertaken in relation to a project or programme identified in the workplan.

(3) In identifying programmes and projects for inclusion in the workplan, the County Executive Committee Member responsible for matters relating to finance shall—

- (a) take into account—
 - (i) the criteria recommended by Commission on Revenue Allocation;
 - (ii) the costing of the project and the time required for the implementation of the project on a priority basis;
 - (iii) recommendations by the Commission on Revenue Allocation;
 - (iv) recommendations, standards and guidelines issued by the Board;
 - (v) the interventions required to be undertaken on a priority basis in order to address the needs identified by the Commission on Revenue Allocation for the provision of identified basic services; and
 - (vi) the recommendations of the respective Ministry or State Department at the counties; and
- (b) collaborate with the Board and the relevant Ministry or State Department.

(4) The County Executive Committee Member responsible for matters relating to finance shall ensure that a work plan prepared under sub-regulation (1) of this regulation is aligned to the annual development plan of the county prepared under the Act.

(5) The Board, relevant Ministry or State Department shall make its recommendations to the County Executive Committee Member for matters relating to finance on the proposed workplan within fourteen days of the receipt of a request under sub-regulation (3) (b) of this regulation.

25. In determining and identifying projects or programmes for the provision of basic services and financing under the Fund, the County Executive Committee Member responsible for matters relating

Criteria for identification of projects.

to finance shall take into account the input of the Board and the committees established under these Regulations.

26. (1) The County Executive Committee Member responsible for matters relating to finance shall, upon approval of a workplan, submit the workplan to the Board.

Submission of workplan to the Board.

(2) Upon receipt of the workplan, the Board shall—

- (a) appraise the workplan to ensure compliance with these Regulations and that it adequately addresses the needs identified by the Commission on Revenue Allocation;
- (b) identify the programmes or projects that require to be implemented on a priority basis, and make its recommendations to the Cabinet Secretary.

27. The Board shall, on a quarterly basis, submit a report to the Cabinet Secretary with a copy to the Commission on Revenue Allocation and Controller of Budget, detailing—

Quarterly reports on projects and disbursements.

- (a) a summary of the project and programmes approved for financing in the preceding year indicating the funding status of such projects, if any;
- (b) a summary of the status of disbursements of funds to the various projects and implementation progress;
- (c) a summary of the status of disbursements from the Fund to the respective county governments or any agency involved in implementation of any projects financed from the Fund; and
- (d) any restriction imposed on a county government or any agency involved in the implementation of the projects or programmes of the national government.

28. (1) The County Executive Committee Member responsible for matters relating to finance—

Report by the County Executive Committee Member for finance.

- (a) shall prepare and submit to the Board quarterly reports on the implementation of the projects or programs under the workplan in the format prescribed by the Board; and with a copy to the Commission on Revenue allocation;
- (b) shall ensure that any projects undertaken under the workplan are carried out in accordance with the Public Procurement and Asset Disposal Act, 2015, and any other law.

No. 33 of 2015.

(2) A report prepared under sub-regulation (1) shall be submitted to the Secretary of the Board and shall include—

- (a) information relating to the procurement of services and works in relation to the projects and programmes under the workplan;

- (b) a schedule of the works required to be undertaken and status of the implementation of projects and programmes;
- (c) the timelines for completion of specific phases of projects and programmes;
- (d) the manner in which the funds received from the Fund have been utilized in relation to any project or programme;
- (e) the monies disbursed and any balance of unspent funds; and such other information as the Board may require.

(3) The Secretary to the Board shall consolidate the reports submitted for consideration by the Board.

29. (1) The County Executive Committee Member responsible for matters relating to finance shall, upon approval of a workplan, submit the workplan to the Board.

Submission of workplan to the Board.

(2) Upon receipt of the workplan, the Board—

- (a) shall appraise the workplan to ensure compliance with these Regulations and that it adequately addresses the needs identified by the Commission on Revenue Allocation;
- (b) shall identify the programmes or projects that require to be implemented on a priority basis, and make its recommendations to the Cabinet Secretary.

30. (1) The administrator of the Fund shall open a designated Equalisation Fund account at Central Bank of Kenya.

Withdrawals from the Fund.

(2) Where a withdrawal from the Fund is authorized under an Act of Parliament that approves the appropriation of money, the Secretary of the Board through the National Treasury shall make a requisition for the withdrawal and submit it to the Controller of Budget for authorization.

(3) The authorization by the Controller of Budget of a withdrawal from the Fund, together with written instructions from the National Treasury requesting for withdrawal, shall be sufficient authority for the Central Bank of Kenya to pay amounts from the Equalization Fund account in accordance with the authorization and instructions given.

(4) All withdrawals made from the Fund under sub-regulation (1) shall be deposited into the respective spending counties account.

(5) Any unutilised balances in the Equalisation Fund shall not lapse at the end of the Financial year, but shall be retained for use for the purposes for which the Equalisation Fund was established.

31. (1) At least eighteen months before the expiry of the term specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article 204(7) of the Constitution—

Winding up of the Fund.

- (a) the Board shall prepare a status report on all existing pending projects and their funding requirements in line with the submitted work plans; and
- (b) the Cabinet Secretary shall—
 - (i) make the necessary requisition for the transfer of monies to the county governments for the completion of the projects; and
 - (ii) ensure that monies required for the completion of the projects has been transferred to the respective county governments.

(2) At least twelve months before the expiry of the period specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article 204(7) of the Constitution the county executive committee members in charge of finance in the respective county governments shall submit to the Board, with copy to the Commission on Revenue allocation—

- (a) a schedule of the programmes and projects implemented pursuant to Article 204 of the Constitution and the expected completion date;
- (b) an assessment report of the impact of the programmes and projects that have been implemented pursuant to Article 204 of the Constitution;
- (c) a financial report on the projects and programmes; and
- (d) a terminal monitoring and evaluation report.

(3) The Board shall prepare the final winding up report of the Fund not later than three months from the period specified under Article 204(6) of the Constitution or in legislation enacted by Parliament pursuant to Article 204(7) of the Constitution for approval by the Cabinet Secretary.

(4) The Cabinet Secretary shall, submit the final report to the National Assembly and the Senate, with copy to the Commission on Revenue Allocation and Controller of Budget, within fourteen days of the receipt of the initial report under sub-regulation (3).

Dated the 23rd April, 2021.

UKUR YATANI,
*Cabinet Secretary,
The National Treasury.*



**PARLIAMENT OF KENYA
PARLIAMENTARY BUDGET OFFICE**

**BRIEF ON THE SECOND POLICY AND CRITERIA FOR SHARING
REVENUE AMONG MARGINALIZED AREAS TO THE SENATE STANDING
COMMITTEE ON DELEGATED LEGISLATION
SEPTEMBER 2021**

1.0 Introduction

- 1)** The Second Policy on Sharing of equalization fund among marginalized areas from the Commission on Revenue Allocation (CRA) was tabled in the National Assembly on Wednesday, June 27, 2018. The Policy identifies the criteria of sharing revenue from the Equalization Fund for the financial years 2018/19, 2019/20, and 2020/21.
- 2)** The 2010 Constitution introduced the Equalization Fund under Article 204. The Fund provides for annual appropriation of one half percent (1/2) of all the revenue collected by National Government each year calculated on the basis of most recent audited accounts. Appropriation under this Fund is towards provision of basic services that include water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services to the level generally enjoyed by the rest of the country.
- 3)** The 2013 Survey Report on Marginalized Areas/ Counties in Kenya by CRA defines marginalized areas as places, which are usually cut-off from the national axis of growth due to distance and inaccessibility. They have poor road networks and do not have access to sufficient electricity for households or industrial usage. The availability of basic services, quality water, sanitation and security, which are core to economic growth, is limited in the marginalized areas.

- 4)** The survey was based on selected indicators as follows;

i. Health

Health-percent of births assisted by qualified medical personnel, based on the 2009 census.

Percent of immunized children aged 12-23 months, based on the 2009 census.

Percent of the population with improved sanitation based on the 2009 census.

ii. Education

Percent of population, who can read and write, based on 2009 census.

Percent of population with secondary education, based on the 2009 census.

iii. Infrastructure

Percent of tarmacked roads, based on 2009 census.

Percent of population with electricity based on 2009 census.

Percent of population with access to clean water based on 2009 census.

All the counties were ranked using the selected indicators as per the survey. Consequently, the County Development Index (CDI) were compared with the national average of 0.520. The county with a CDI below the national average were classified as the most marginalized and recommended for support from Equalization Fund. Those with a CDI between 0.521 and 0.51 were categorized as moderately marginalized while those with a CDI greater than or equal to 0.6 were regarded as those enjoying better services.

- 5) The Constitution mandates the Commission for Revenue Allocation to determine, publish and regularly review a policy in which it shall set out the criteria by which to identify the marginalized areas for purposes of the Equalization Fund. Article 216 (5) also provides that the Commission on Revenue Allocation shall submit its recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives. It is expected that Parliament should consider the Commission's recommendation prior to any Bill appropriating money from the Equalization Fund as per the CRA Act, 2011.

1.1 Review of the Implementation of the First Policy

- 6) The first policy for Equalization Fund was approved by Parliament in December 2014 and was to be effective for three financial years, which were 2014/15, 2015/16 and 2016/17. The first generation marginalization policy identified fourteen Counties to benefit from the Fund for the first three years namely: Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, Taita Taveta, Isiolo and Lamu.
- 7) The criteria for identifying marginalized counties in the first policy was based on County Development Index (CDI) constructed from indicators measuring health, education, infrastructure and poverty. This was complemented by expert analysis of historical discrimination and the report of Commissions County Marginalization Survey.
- 8) The first policy designated a two-step process of distributing the Equalization Fund. Half of the funds were to be distributed to the marginalized counties equally, and then used the County Development Index (CDI) to distribute the other half of the Equalization Fund among the 14 counties. In the process, the policy used

counties as the unit of distribution of the Equalization Fund. Implementation of projects was done by the line ministries.

- 9) Project identification under the first policy was on the guidance of the Equalization Fund Advisory Board (EFAB). Completion of stalled/ongoing projects, projects whose benefits accrue in more than one constituency, projects contained in the County Integrated Development Plan, projects that are fiscally viable, projects that were meant to address extreme poverty and projects that promote growth and job creation within a county were given priority.
- 10) Allocation towards the Equalization Fund during the first policy was Ksh 21,778 million compared to statutory amount of Ksh 29,436 million as shown in table 1. There has however been delay in the operationalization of the Equalization Fund against section 18 of the Public Finance Management Act 2012. Under the first policy only Ksh 1.1 billion had been spent by June 2017 of which estimated Ksh 500 million was spent on recurrent expenditures by the Equalization Fund Advisory Board.

Financial Year	Equalization Fund Allocation	Equalization Fund Entitlement	Variation
2011/12	0	2,340.80	-2,340.80
2012/13	0	2,646.50	-2,646.50
2013/14	400	2,646.50	-2,646.50
2014/15	6000	3,884.50	-3,484.50
2015/16	4,678.00	3,884.50	2,115.50
2016/17	6,000.00	4,678.00	1,322.00
2017/18	0.00	4,678.00	-4,678.00
2018/19	4,700.00	4,678.00	22.00
Total	21,778.00	29,436.80	-7,658.80

Source; National Treasury

- 11) Table 2 shows the allocation to each of the fourteen counties from the Equalization Fund as a lump sum allocation for three financial years as Appropriated by Parliament. However, data on the actual disbursement of the Fund per county is not available at the moment.

	Description	% share	Amount (Ksh.)
Recurrent	Administration Expenses (4.82% of total)	4.83	598,820,000.00
	Name of County	% share	County share
Development	Garissa	6.6	783,520,000.00
	Isiolo	6.3	746,940,000.00
	Kilifi	6.5	763,500,000.00
	Kwale	6.7	795,300,000.00
	Lamu	6.1	722,200,000.00
	Mandera	8.2	967,600,000.00
	Marsabit	7.5	886,200,000.00
	Narok	6.9	809,500,000.00
	Samburu	7.4	869,700,000.00
	TaitaTaveta	6.4	751,700,000.00
	Tana River	7.3	859,000,000.00
	Turkana	8.9	1,050,200,000.00
	Wajir	7.9	929,800,000.00
	West Pokot	7.3	866,100,000.00
Total		100.0	11,801,260,000.00
Grand Total			12,400,080,000.00

Source; CRA 2017

2.0 Second Marginalization Policy

- 12)** Upon the lapse of the first policy, the second generation marginalization policy for identifying marginalized areas was launched on 22nd June, 2018 by the Commission for Revenue Allocation. The policy focuses on Sub-locations distributed across the Country in 34 Counties relative to the 14 counties recommended in the first policy. The policy uses information on access to safe water, school attendance, access to improved sanitation and electricity. Deprivation index was used to rank 7,131 areas mapped into 34 counties and 107 constituencies from the most deprived to the least deprived (See annex 1 attached).
- 13)** The policy also used the principals of subsidiarity, equity, efficiency, transparency and public participation as a guide to identify marginalized areas. In the process

the policy moved away from counties as the unit of distributing resources to a more micro unit of sub-location.

- 14)** The policy brought out minorities that need special consideration even within marginalized areas using selected anthropological approaches. The policy identified the Elmolo, the Makonde, the Waata, and the Dorobo-Salieta to be the most deserving of special consideration in improvement of services, a concept that was missing in the first policy.
- 15)** Consistent with the principle of subsidiarity the second marginalization policy recommended a bottom-up approach in project implementation and recommends for the strengthening and rationalization of implementation mechanisms. The policy recommends that the Equalization Fund Advisory Board establishes approximately 360 project implementation units (PIU) at the divisional level and transfers funds directly to it. The Assistant County Commissioner shall be the Chairman of the PIU working with selected county and national government staffs responsible for water, health, education, roads and electricity.
- 16)** The choice of indicator in the second policy was merited on the provision of Article 204 (2) of the Constitution and availability of reliable data. The policy considered a total of five indicators that include access to safe drinking water, use of improved sanitation ,use of electricity, net primary school attendance rate and net secondary school attendance rate.

Annex 1: No. of Marginalized Areas by County and Constituency

No.	County	Constituency	No. of marginalized areas
1	Baringo	Baringo North	9
		Baringo South	14
		Mogotio	19
		Tiaty	48
2	Bomet	Chepalungu	3
3	Bungoma	Mt Elgon	9
4	Busia	Budalangi	1
		Teso North	2
5	Elgeyo Marakwet	Keiyo South	1
		Marakwet East	9
		Marakwet West	1
6	Garissa	Balambala	20
		Dadaab	12
		Fafi	12
		Garissa Township	2
		Ijara	25
		Lagdera	12
7	Homa Bay	Homa Bay Town	1
		Ndhiwa	11
		Suba North	3
		Suba South	5
8	Isiolo	Isiolo North	15
		Isiolo South	10
9	Kajiado	Kajiado Central	23
		Kajiado South	9
		Kajiado West	32
10	Kericho	Bureti	1
		Kipkelion West	1
		Sigowet/Soin	8
		Ganze	29

11	Kilifi	Kaloleni	15
		Kilifi North	1
		Magarini	26
		Malindi	5
		Rabai	2

No.	County	Constituency	No. of marginalized areas
12	Kisumu	Muhoroni	2
		Nyando	2
13	Kitui	Kitui East	21
		Kitui South	15
		Mwingi Central	9
		Mwingi North	18
14	Kwale	Kinango	22
		Lunga Lunga	10
		Matuga	5
		Msambweni	2
15	Laikipia	Laikipia North	17
		Laikipia West	1
16	Lamu	Lamu East	5
		Lamu West	5
17	Machakos	Masinga	2
18	Mandera	Banissa	11
		Lafey	20
		Mandera East	19
		Mandera North	18
		Mandera South	18
		Mandera West	11
19	Marsabit	Laisamis	27
		Moyale	16
		North Horr	20
		Saku	5
20	Meru	Igembe South	2
		South Imenti	1
		Tigania East	2

21	Migori	Kuria West	1
		Nyatike	17
		Suna West	7
		Uriri	2
22	Migori	Gatanga	1
23	Nakuru	Rongai	1
24	Nandi	Nandi Hills	2
		Tinderet	17

No.	County	Constituency	No. of marginalized areas
25	Narok	Emurua Dikirr	3
		Kilgoris	33
		Narok East	14
		Narok North	22
		Narok South	24
		Narok West	16
26	Samburu	Samburu East	27
		Samburu North	44
		Samburu West	24
27	Siaya	Bondo	2
		Gem	2
		Rarieda	1
28	Taita Taveta	Taveta	1
		Voi	1
29	Tana River	Bura	22
		Galole	19
		Garsen	24
30	Tharaka Nithi	Maara	2
		Tharaka	5

31	Trans Nzoia	Endebess	1
		Loima	26
		Turkana Central	16

32	Turkana	Turkana East	16
		Turkana North	41
		Turkana South	14
		Turkana West	31
33	Wajir	Eldas	12
		Tarbaj	15
		Wajir East	7
		Wajir North	19
		Wajir South	28
		Wajir West	13
34	West Pokot	Kacheliba	47
		Kapenguria	42
		Pokot South	22
		Sigor	38
Grand total			1424

Governor

BANKI
KUU YA
KENYA



CENTRAL
BANK OF
KENYA

Haile Selassie Avenue
P.O. Box 60000 - 00200 Nairobi, Kenya
Telephone: 2861003/24, Fax: 2716556

September 17, 2021

Mr. J. M. Nyegenye, CBS
Clerk of the Senate
Office of the Clerk of the Senate
Parliament Buildings
P.O. Box 41842-00100
NAIROBI

Dear Mr Nyegenye,

**CONSULTATIVE RETREAT WITH THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION TO CONSIDER THE PUBLIC FINANCE MANAGEMENT
(EQUALIZATION FUND) REGULATIONS, 2021**

This is in reference to your letter REF: SEN/SCDL/CORR/2021/026 dated September 9, 2021, on the above subject. In spite of the assurances that we had received, poor connectivity thwarted our joining you virtually at the Retreat to examine the *Public Finance Management (Equalization Fund) Regulations, 2021*. As agreed, I set down in this letter our views on the *Regulations*.

We have reviewed the noted *Regulations* and observe that they attempt to define the governance structure around the projects (expenditures) that will be supported by the *Equalization Fund*. While we appreciate the overall objective of supporting the marginalized areas, we do not have a view about the governance structure that is proposed in these *Regulations*.

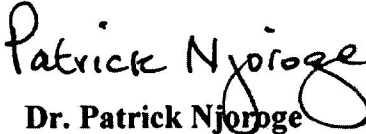
Further, we have reviewed closely Section 30 of the *Regulations* which deals with *Withdrawals from the Fund* that is to be maintained at the Central Bank of Kenya (CBK). We propose an amendment to provide greater clarity around the related transfers.

- We observe that Section 30(4) is not explicit as to where the funds from the Equalization Fund account should be deposited, only stating that the funds "*shall be deposited into the respective spending counties account.*" Greater specificity is needed, also to ensure that there is no co-mingling of Equalization Fund monies with other county monies. We recommend Section 30(4) be amended as follows:

"All withdrawals made from the Fund under the sub-regulation (1) shall be deposited into the respective *Equalization Fund* spending counties' account(s)."

For the avoidance of doubt, we note that the *Public Finance Management Act 2012*, Section 119(1), provides that the **County Executive Committee Member for Finance (CECM-F)**, in his/her role as head of the County Treasury, is responsible for all County Government accounts. It is therefore clear that the CECM-F would be responsible for the Equalization Fund spending county accounts.

Sincerely,

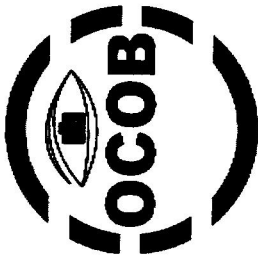

Dr. Patrick Njoroge

cc: Hon. (Amb.) Ukur K. Yatani, EGH
Cabinet Secretary
The National Treasury and Planning
P.O. Box 30007- 00100
NAIROBI

Dr. Margaret Nyakang'o, CPA,
Controller of Budget
Bima House, Harambee Avenue
NAIROBI

Dr. Jane Kiringai
Chairperson
Commission on Revenue Allocation
14 Riverside Drive, Grosvenor Suite
NAIROBI

OFFICE OF THE CONTROLLER OF BUDGET



Tel: 020 2211068, 0738466721, 0709910000
 Email: cob@cob.go.ke/info@cob.go.ke
 Website: www.cob.go.ke



Bima House, 12th Floor
 Harambee Avenue
 P.O. Box 35616-00100
 Nairobi Kenya

ANALYSIS OF THE DRAFT EQUALIZATION FUND ADMINISTRATION REGULATIONS, 2021

The analysis and review of the Equalization Fund Administration Regulations 2021:-

No.	Clause	Issue	Recommendation
	4(b)	Editorial issue insert "his and her"	Include for legislative harmony
	4(1)d	It qualifies the nature of person to be nominated by the National Assembly and not the person to be nominated by the Senate. Delete 'One person from a pastoralists community' so as to have same qualification as the Senate nominee	Delete <i>'pastoralists community'</i> It discriminates against other marginalized communities/areas.

	Pastoralist community is represented under special interest groups.		
4(1) (d) &(e)	Qualify the nature of persons nominated. The persons appointed to exclude State officers. This is to promote oversight roles and ensure separation of powers.	Exclude state officers from being appointed	
4(g)	Amend to make the secretary an ex-official member of the Board	To synchronize it with section 7 which provides for an ex-official member	
8(a)	Need to qualify the advice and making of recommendation so as to be in accordance with the policy presented by CRA	Distribution of resources should be within the policy guidelines issued by CRA. Align it with CRA mandate.	
11(3)	Editorial issue delete 'of immediately after 'majority'	Editorial Issue	
13	It is proposed to delete the proviso to the section	The proviso may be arbitrarily used to defeat the purpose of declaring conflict of interest. It can be subject to abuse.	
14(b)	Designate the County Executive Member for Finance as the secretary of the County Technical Committee	This will make him responsible for reporting and will enable the CEC-F execute the functions provided for under Regulation 23 and 24	
14(c)	Include the word "National Government" before Constituency so as to read "National Government Constituency Development Fund managers"	Legislative harmony	
14 (d)	Qualify to read "A nominee of the County Assembly who shall not be a State officer "	To comply with section 9(2) of the County Government Act which bars County	

			Assembly from performing County Government executive functions.
14(c) and (f)	<p>Include "of the marginalized area" and delete (f) the managers should be drawn from the eligible counties.</p> <p>Include National Government" to read National Government Constituency Development Fund</p>	<p>To provide clarity</p> <p>The National "Government Constituency Development Fund is represented by the Fund Managers and the Chairperson. (f) should be deleted so that representation is only by Fund managers from the eligible sub-counties.</p> <p>It is pragmatic and ensures responsibility are placed on a person</p> <p>Legislative harmony</p>	
16	Include a clause to designate a secretary to the Committee		
16 d)	Include "National Government" to read "National Government Constituency Development Fund"		
18(d)	Delete the word "member" immediately after "committee"	Editorial issue	
20(a)	Include giving a copy of the consolidated projects approved to the Controller of Budget	This will guide in the monitoring and the implementation of the budget and will act as a control measure.	
21	Should be moved to immediately after establishment of the Board	To improve on the flow of the Regulations.	
21	To provide for the qualification of the CEO	Qualifications not provided.	
22(d)	Add "eligible" immediately after "from"	To provide clarity by substantiating the eligible counties from other counties	

				Editorial issues
22(f)iii	Delete "undertake" and replace with "undertaken"			This will provide for implementation of other Appropriation Legislation
24(1)	Delete "Division of Revenue Act and the County Allocation Revenue Act" and replace with the "Relevant Act"			To avoid overlap of functions These functions can be best implemented by the Project implementation committee and not the CEC-F
24(3)	Should be moved to 19(2) as a criteria for identifying projects by the project implementation committee			To avoid overlap of functions
25	Should be moved to 19(3) as a criteria for identifying projects by the project implementation committee			Promotes accountability
27	Amend to include timelines for reporting. We propose 10 days after the end of every quarter			This function should be bestowed upon the Secretary and not the Board.
27	Change the "Board" to Secretary to the County Technical Committee whom we have proposed to be the CEC-F.			Promotes accountability
28(a)	Amend to include timelines for reporting. We propose 10 days after the end of every quarter			To enable that money goes to a dedicated account.
30(4)	Provide for a Special Purpose Account specifically for the Equalization Fund and clearly state the signatories.			For information and reporting purposes Legislative harmony
31(2)	A Copy should also be submitted to the Controller of Budget Use eligible county and not respective county			



COUNTY ASSEMBLIES FORUM (CAF)

Flamingo Towers, 5th Floor Wing B, Mara Road, Upper Hill P.o Box 73552- 00200 Nairobi Kenya Tel: 0701 046 933
Email:communication@countyassembliesforum.org www.countyassembliesforum.org

MEMORANDUM ON THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS, 2021

TO: The Senate Sessional Committee on Delegated Legislation

THROUGH: Mr. Jeremiah Nyegenye, CBS,
Clerk of the Senate,
Parliament of Kenya.

FROM: The County Assemblies Forum.

DATE: Thursday, 16th September 2021.

SUBJECT: CAF Memorandum on the P, 2021



INTRODUCTION

The County Assemblies Forum (CAF) is the coordinating body of the 47 County Assemblies in Kenya. The primary mandate of CAF is to promote networking and synergy among the 47 County Assemblies, coordinate intergovernmental relations and enhance good practice in legislative development. Our Mission is to provide effective leadership and coordination of the 47 County Assemblies and through policy and legislative action, promote a conducive working environment for all its members, and in that way deliver quality services to the people.

As one of the pillars of the devolved government system CAF is committed to engage in processes that lead to the further strengthening of prudent financial management.

BACKGROUND

The Equalization Fund was established by the 2010 Constitution to address historical marginalization and unequal development across Kenya. According to the Constitution, the Fund is to be used by the national government “only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation.”

The Fund is supposed to receive 0.5% of all the revenue collected by the national government each year as approved by the National Assembly. How is the Equalization Fund distributed? Distribution is based on the Commission on Revenue Allocation's (CRA) marginalization policy. The policy designates a two-step process of distributing the Equalization Fund.

GENERAL COMMENTS

First, it identifies 14 counties as marginalized areas based on the presence of marginalized communities and analysis of historical marginalization. It then gives half the funds to the marginalized counties equally, and then uses the County Development Index to distribute the other half of the Equalization Fund among these counties. Is this criteria fair?

The criteria is intended to measure only one of the five principles: need. However, it falls short for a number of reasons: In the attempt to correct historical marginalization, the policy targets counties as the unit of distribution for the Equalization Fund. This approach leaves out constituencies, wards, and locations that are equally poor in income or access to services, but are not located in the selected 14 counties that are considered as 'marginalized'. Inequalities in Kenya are actually more severe at constituency and ward level than at county level, thus these would have been more appropriate targets for sharing the Equalization Fund.



Second, the County Development Index uses four parameters, poverty, infrastructure, health and education, to measure need. However, these indicators do not measure need very well. Why not?

The indicators used to measure access to health are the percentage of mothers per county who delivered in facilities with the help of qualified medical personnel, access to improved sanitation and the percentage of immunized children in each county. These indicators measure access to very specific services, but ignore overall access to health facilities which is also highly unequal across the counties.

The policy uses the percentage of tarmacked roads, access to improved sources of water and access to electricity to measure infrastructure gaps in the counties. Using percentage of tarmacked roads ignores the fact that each county's need for roads is dependent on the size of the county and its population density. It is also a poor measure of need because, while a county may have all roads tarmacked, it may have very few roads to begin with.

CRA used data from the 2005/06 Kenya Integrated Household and Budget Survey to calculate the poverty gap for each county. This survey measures income poverty, but does not directly reflect access to the services that the Fund is supposed to address.

The criteria weights education, health, and infrastructure equally. Generally, a distributive formula should look at needs not just in terms of access but also in terms of cost of delivery. The cost of health is much higher than education for counties so weighting them equally does not correspond to their needs. Furthermore, this approach ignores other drivers of cost beyond access levels.

For example, counties with larger land areas have a higher cost of service delivery due to more expensive logistics, something the CRA has recognized in its overall county revenue sharing formula.

There is also a need to ensure strong and efficient implementation of the projects to achieve maximum impact of the marginalization policy and directly target the beneficiary communities. There is need to provide for more economic justification of the choices of the project funded through the Equalization Fund and carry out independent evaluations on the impact of the fund on marginalization to inform future decisions

The other concern is the lack of proper public participation and transparency in the allocation and use of the funds. There is need for effective public consultation with all the interested stakeholders on the Equalization Fund regulation. The gazette notice mentions that consultation was carried out with stakeholders that mainly involved public officers like the CRA commissioners, controller of budget, members of parliament, county officials, and donors like IMF, World Bank etc. Despite the notice in national newspapers that was posted by the National Treasury, no proper consultation appears to have been done with potential beneficiaries of the Equalization Fund. Most of the marginalized



areas are rarely reached by national newspapers; therefore, while the newspaper advert may fulfil a public notice requirements, it does not ensure that consultation with the marginalized communities can be achieved. There has also been no consultation with the citizens from the marginalized areas on what type of projects will be funded that can maximize impact on reducing marginalization in their area.

There is need to expedite the operationalization of the equalization fund so as to enable the marginalized counties reap the benefits enshrined in the constitution. In addition, the National Government needs to create awareness on the administration of the fund as well as ensure participation of the marginalized communities in the, identification, implementation, monitoring and evaluation of the projects to be implemented through the fund.

The National Government needs to support the counties in establishing uniform monitoring, evaluation and learning System. This will aid in tracking progress, enhancing accountability as well as informing decisions on resource allocation. In addition, it will assist in studies and assessment of devolution impact in Kenya.

Improve county data management system and adhere to the legal requirement of publishing quarterly implementation reports. This will enhance information sharing with the public and other interested stakeholders.

County government should provide a clear justification on disparities in resource allocation and distribution of projects within the counties.



SUMMARY MATRIX OF THE PROPOSED AMENDMENTS

THE PROPOSED AMENDMENTS TO THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS, 2021			
NO.	SECTION	PROPOSED AMENDMENTS	JUSTIFICATION
1.	Section 4. establishment of the Equalization Fund Advisory Board	Amend to include representation of the legislative arm of county governments. (One Member nominated to represent County Assemblies)	The non-inclusion of County Assemblies leaves out a critical stakeholder, hence ensuring that the voices of the Assemblies is left out at the national advisory level.
2.	Section 14: Establishment of county technical committee.	Retain as is	The Composition of the county technical committee is inclusive of all stakeholders.
3.	Section 18: Project Identification and Implementation Committee.	Amend to include representation of the Ward Member of County Assembly	The non-inclusion of the member elected in the respective ward in project identification committee established at the ward level is contrary to their constitutional representative role. This will create a rift in prioritisation, as the elected Member is not able to convey the interests of those he/she represents in the ward.



CAF Memorandum on the PFM Equalization Regulation 2021

<p>4.</p>	<p>Oversight of the Board</p>	<p>Include a clause providing for tabling of the reports to the respective County Assemblies. Further provide for tabling of the consolidated national report to either houses of Parliament.</p>	<p>Section 28 provides for preparation and tabling of report by the County Executive Committee Member for finance, but omits the tabling of these reports at the County Assembly which has the Constitutional oversight role over all functions of the county executive. There is need to ensure good governance through oversight, by providing for the tabling of these reports to the Assembly and thus bringing them to the purview of the Public Accounts and Investment Committees.</p>
-----------	-------------------------------	---	--

Thank you.

Yours sincerely,

JUDY ODUMA WANGALWA
CHIEF EXECUTIVE OFFICER.



COUNCIL OF GOVERNORS

Westlands Delta House 2nd Floor, Waiyaki Way.
P.O. BOX 40401-00100,
Nairobi.

Tel: (020) 2403314, 2403313
+254 718 242 203
E-mail: info@cog.go.ke

Our Ref: COG/8/5A Vol. 6(45)

16th September, 2021

Mr. Jeremiah Nyegenye, CBS
Clerk of the Senate
Parliament Buildings
NAIROBI

Dear *Mr. Nyegenye, CBS*

**LETTER FORWARDING THE LEGISLATIVE MEMORANDUM ON THE PUBLIC
FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS, 2021**

The above subject matter refers.

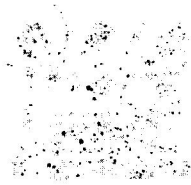
The Council of Governors appreciates that in realizing the objects of Devolution, the principles of consultation and cooperation under Article 6(2) and Article 189 of the Constitution are inevitable.

Based on these principles, the Council of Governors has reviewed the Public Finance Management (Equalization Fund) Regulations, 2021 and would like to forward for the consideration of the Senate the legislative memoranda attached herewith.

Yours

Sincerely,

Mary Mwiti
Ag. Chief Executive Officer



.....

.....

.....



COUNCIL OF GOVERNORS

**LEGISLATIVE MEMORANDUM ON THE PUBLIC FINANCE MANAGEMENT (EQUALISATION FUND
ADMINISTRATION) REGULATIONS, 2021**

TO:

THE SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION

FROM:

THE COUNCIL OF GOVERNORS

MEMORANDUM ON THE PUBLIC FINANCE MANAGEMENT (EQUALISATION FUND ADMINISTRATION) REGULATIONS, 2021

The Council of Governors,

In recognition of Article 1(4) of the Constitution of Kenya, that sovereign power of the people is exercised at the national level and the county level;

In further recognition of Article 6 (2) that governments at the national and county levels are distinct and interdependent; and

Aware of the need for coordination and consultation between the National Government and County Governments to ensure that legislation responds to the key issues facing devolution, and further reflects the spirit and objects of devolution.

The Council hereby makes the following proposals on the Regulations:

A. GENERAL COMMENTS/KEY CONCERNS

1. The Equalisation Fund is established under Article 204(1) of the Constitution of Kenya with the aim of addressing historical marginalization in the country, accelerate development in the marginalized areas and ensure as far as possible those areas are at par with the rest of the country. The equalisation fund was therefore intended to address the fair distribution of resources in order to bridge the gap of poverty in Kenya occasioned by unfair distribution of resources by successive administrations post-independence.

Article 204(2) stipulates that, *“the National Government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the Nation, so far as possible.”*

2. In line with Article 216(4) of the Constitution, which mandates the Commission on Revenue Allocation (CRA) to identify the marginalized areas for purposes of Article 204 (2), the first policy was developed on the criteria for identifying the

marginalized areas and sharing of the Equalisation Fund for the Financial Year 2011 – 2014. The Policy identified fourteen (14) marginalized Counties as beneficiaries and recommended as follows:

- a. That the spending of the funds commences in 2013 when the County Governments will have been formed
 - b. The Equalisation Fund be appropriated as conditional grants to marginalized counties. Thus, the Fund should be spent when county governments are in place
 - c. The Fund should be appropriated in a single budget line instead of the sectors under the Medium Term Expenditure Framework (MTEF);
 - d. Unspent funds earmarked for a specific project in each year should be rolled over to ensure project completion
3. The first policy was to be applied for three Financial Years 2014/15, 2015/16, 2016/17 and a total sum of Kshs. 24, 377, 764,688 appropriated has not been disbursed for identified projects in the fourteen beneficiary counties under the first policy. The delay in disbursement and utilization of the fund has failed to achieve the intended purpose of the Fund. In this regard, the Council proposes as follows:
- a. That monies appropriated under the First Policy be ring-fenced for the benefit of the 14 marginalised counties identified as beneficiaries of the Fund
 - b. That the monies be released indirectly through conditional grants to the identified counties.

B. SPECIFIC COMMENTS

Regulation	Specific Provision in the regulation	Proposed Amendment	Rationale/Justification for Amendment
Reg 2 Interpretation	<p>“eligible county” means a county government identified as a beneficiary of the Fund by the Commission on Revenue in accordance with Article 216(4) of the Constitution;</p> <p>New regulation</p>	<p>Amend to read as follows:</p> <p>“eligible county” means a county government identified as a beneficiary of the Fund by the Commission on Revenue Allocation in accordance with Article 216(4) of the Constitution;</p>	<p>To provide proper citation of the institution being referred to.</p>
		<p>Introduce a new clause to read as follows:</p> <p>“Fund Administrator” means an officer designated by the CS National Treasury in line with regulation 20(1) (i) of the Public Finance Management (National Government) Regulations, 2015 which vests this role to the Office of the Accountant-General.</p>	<p>The roles of a fund administrator are provided for under Section 84 and 85 of the PFM Act which is the overarching legal framework where the regulations are anchored.</p>

<p>Reg 3</p> <p>Purpose of the regulations</p>	<p>New regulation</p>	<p>Introduce new clauses immediately after (f) to read as follows:</p> <p>(g) to provide for the criteria of identification and selection of projects</p> <p>(h) Assess the status of all ongoing projects and utilization of funds appropriated towards the same.</p> <p>(i) to ring-fence funds appropriated for the 14 marginalised counties under the first policy</p> <p>(j) to provide for the commencement date of the disbursements of funds</p>	<p>To avoid duplication of projects being undertaken by both levels of Governments.</p> <p>To ascertain the utilization of funds as appropriated towards the projects</p> <p>To ensure utilization of funds specifically appropriated for the identified projects in the 14 counties.</p> <p>To ensure timely disbursement and utilization of funds given that the fund has a timeframe.</p>
<p>Reg 4</p> <p>Establishment of the Board</p>	<p>4. (1) There is established an advisory board to be known as the Equalization Fund Advisory Board which shall comprise of-</p> <p>(a) the Chairperson who shall be appointed by the Cabinet Secretary;</p> <p>(b) the Principal Secretary to the National Treasury or his representative designated in writing;</p> <p>(c) the Principal Secretary responsible for matters relating to devolution or his or her representative designated in writing;</p>	<p>Amend clause (f) to read as follows:</p> <p>(f) Two Governors from the beneficiary counties nominated by the Council of Governors</p>	<p>The second policy seeks to benefit 33 counties. There is therefore need for adequate representation of County Governments in the Board.</p>

	<p>(d) one person from a pastoralist community nominated by the National Assembly;</p> <p>(e) one person nominated by the Senate;</p> <p>(f) one person nominated by the Council of Governors drawn from the areas defined as marginalised;</p> <p>(g) the Chief Executive Officer who shall be the secretary to the Board; and</p> <p>(h) three other persons nominated from organizations working in equalization fund beneficiary counties and special interest group, appointed by the Cabinet Secretary.</p>		
<p>New regulation</p>		<p>Introduce a new clause immediately after regulation 8 to provide for the following:</p> <p>Establishment of fund Management</p> <p>(i) Fund Administrator</p> <p>The Cabinet Secretary, National Treasury shall appoint the Fund Administrator in line with regulation 20(1) (i) of the Public Finance Management (National Government) Regulations, 2015 which vests this role to the Office of the Accountant-General.</p>	<p>The roles of a fund administrator are provided for under Section 84 and 85 of the PFM Act which is the overarching legal framework where the regulations are anchored.</p>

		<p>(ii) Functions of the Administrator</p> <p>The administrator of the Fund shall</p> <ul style="list-style-type: none"> a) Ensure timely disbursements of funds from the Equalisation Fund to marginalised areas; b) Ensure that the earnings of, or accruals to the Equalization Fund are retained in the Fund; c) Appropriate Equalization Funds in line with the framework developed by the Commission for Revenue Allocation in the policy identifying marginalised areas; d) Issue guidelines in line with the policy on marginalised areas on public participation, project identification, prioritisation and costing; e) Receive approved funding proposals from county governments with areas defined by the Commission on Revenue Allocation as marginalised; f) Review implementation reports submitted by county governments on all projects 		
--	--	---	--	--

		<p>financed from the Equalisation Fund;</p> <p>g) Prepare financial statements for the Fund for each financial year in a form prescribed by the Accounting Standards Board in line with section 84 of the PFM Act;</p> <p>h) Manage, control and administer assets of the Fund in such manner and for such purposes as best to promote the purpose for which it is established;</p> <p>i) be the custodian of all the assets, equipment and properties under the Fund.</p>	
<p>Reg 8 Functions of the Board</p>	<p>The functions of the Board with regard to the Fund shall be (a – j)</p> <p>(j) undertake project public participation in line with Article 201 of the Constitution.</p>	<p>Delete clause (j)</p>	<p>The Board undertakes an oversight role hence cannot undertake public participation.</p>
<p>Reg 10 Expenses of the Board</p>	<p>10. There shall be paid out of the Fund, expenses of the Board and such other expenses incurred pursuant to the object and purpose for which the Fund was established.</p>	<p>Amend to read as follows:</p> <p>There shall be paid out of the Fund, expenses of the Board and all committees established under the regulations and such other expenses</p>	<p>All committees established under the regulations ought to be financed.</p>

		<p>incurred pursuant to the object and purpose for which the Fund was established.</p> <p>Amend the marginal note to read as follows:</p> <p>Expenses of the Board and committees</p>	
<p>Reg 14</p> <p>Establishment of county technical committee</p>	<p>14. Each County Commissioner of an eligible county shall establish and convene an all-inclusive committee to be known as county technical committee comprising of – (a-f)</p> <p>(a) a chairperson who shall be the County Commissioner;</p> <p>(b) a County Executive Committee Member for Finance</p>	<p>Amend to read as follows:</p> <p>14. Each County Commissioner of an eligible county shall establish and convene an all-inclusive committee to be known as county technical committee comprising of – (a-f)</p> <p>(a) a chairperson who shall be the County Commissioner;</p> <p>(b) a County Executive Committee Member for Finance who shall be the Co-chairperson</p>	<p>To CECM Finance should be the co-chairperson of the committee to avoid a vacuum in the absence of the Chairperson.</p>
<p>Reg 16</p> <p>Establishment of sub-county technical committee</p>	<p>16. Each County Commissioner of an eligible county shall establish a committee at the sub-county level to be known as sub-county technical committee comprising of–</p> <p>(a) a chairperson who shall be the sub-county Commissioner;</p>	<p>Amend to read as follows:</p> <p>16. Each County Commissioner of an eligible county shall establish a committee at the sub-county level to be known as sub-county technical committee comprising of–</p>	<p>The Sub-county Commissioners were replaced with deputy county commissioners as cited in the National Government Coordination Act.</p> <p>Further, the clause needs to specify that the officers shall be drawn from</p>

	<p>(b) a maximum of four technical officers from ministries relevant to funding priorities;</p> <p>(c) the chairpersons of Project Identification and Implementation Committees within the sub-county; and</p> <p>(d) the secretary of the Constituency Development Fund (CDF).</p>	<p>(a) a chairperson who shall be the deputy county commissioner;</p> <p>(b) a maximum of four technical officers; Two (2) from the National Government and Two (2) from the County Government ministries relevant to funding priorities;</p> <p>(c) the chairpersons of Project Identification and Implementation Committees within the sub-county;</p> <p>(d) the secretary of the Constituency Development Fund (CDF).</p> <p>(e) the sub-county administrator who shall be the co-chairperson.</p>	<p>Ministries from the two levels of Government.</p> <p>Lastly, the sub-county administrator ought to be included as a member of the committee as the co-chairperson.</p>
<p>Reg 18</p> <p>Establishment of project Identification and Implementation Committee</p>	<p>18. Each County Commissioner of an eligible county shall establish a committee at the ward level to be known as Project Identification and Implementation Committee comprising of –</p> <p>(a) a chairperson who shall be the Assistant Sub-County Commissioner</p> <p>(b) the village administrators of areas defined by the Commission on Revenue Allocation as marginalized.</p>	<p>18. Each County Commissioner of an eligible county shall establish a committee at the ward level to be known as Project Identification and Implementation Committee comprising of –</p> <p>(a) a chairperson who shall be the Assistant County Commissioner</p> <p>(b) the ward administrator of areas defined by the Commission on Revenue Allocation as marginalized who shall be the co-chairperson.</p>	<p>Some Counties do not have village administrators while in other Counties there are multiple village administrators in one ward. Therefore, it would be better to have a Ward Administrator sit in the Committee.</p> <p>Assistant Sub-County Commissioner have been replaced with Assistant County Commissioner.</p> <p>Further, the equivalent of an Assistant County Commissioner is a Ward Administrator. Lastly, the ward administrator should be a co-chairperson to avoid a vacuum.</p>

	New Regulation	Introduce a new clause after regulation 20 to read as follows: 20A. The utilization of the Equalisation Fund shall be in line with the approved CIDP.	To avoid duplication of projects in the Counties.
Reg 22 Establishment and functions of the Secretariat	22. There shall be a Secretariat constituted by the Chief Executive Officer and whose functions shall be to – (a – i)	Introduce a new clause to read as follows: The Secretariat services shall extend to the fund administrator.	In line with the Council proposal for the inclusion of a fund administrator with functions assigned to the administrators office, it is imperative that the secretariat services are extended to the office.
Reg 24 Utilisation of funds and preparation of workplans	24 (1) The funds shall be utilized as conditional grants to the affected counties in accordance with the Division of Revenue Act and the County Allocation Revenue Act for the respective financial year.	24(1) The funds shall be utilized as conditional grants to the affected counties in accordance with the County Governments Grants Act for the respective financial year.	This is in line with the proposed framework for disbursements of conditional allocations from the national government's share of revenue and from development partners to the County Governments.