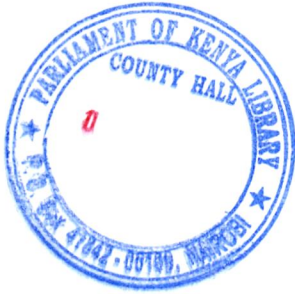


Approved for tabling in the House.

SNA
17/2/2022



REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT- SIXTH SESSION (2022)

COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE CONSIDERATION OF THE PUBLIC FINANCE
MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021
(LN. No. 222 of 2021)

FEBRUARY, 2022

THE NATIONAL ASSEMBLY	
DATE: 17 FEB 2022	DAY: There
TABBLED BY:	Chair, Delegated Legis Hon. William Kamket
CLERK-AT-THE-TABLE:	C. Ndintu

The Directorate of Audit, Appropriations & other Select Committees
The National Assembly,
Parliament Buildings,
NAIROBI.

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ABBREVIATIONS

LN	Legal Notice
PFM	Public Finance Management
PPP	Public Private Partnership
RMA	Regulatory Making Authority
SI	Statutory Instruments
SO	Standing Order

CHAIRPERSON'S FOREWORD

The Public Finance Management (National Roads Toll Fund) Regulations, 2021, were made by the Cabinet Secretary for the National Treasury and Planning pursuant to section 24 (4) of the Public Finance Management Act, 2012 and was published in the gazette *vide* Legal Notice No.222 of 2021.

The Regulations were submitted to the Clerk of the National Assembly on 11th November, 2021 and tabled before the House on 16th November, 2021 hence within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act, 2013, and subsequently referred to the Committee on Delegated Legislation for consideration.

The Public Finance Management (National Roads Toll Fund) Regulations, 2021 seek to-

- a) to establish a centralized fund into which all revenues collected pursuant to the regulations shall be paid and administered;
- b) to provide for the oversight and administration of the Fund;
- c) to prescribe the processes by which money is paid into and out of the fund;
- d) to provide investors and financiers of project roads as well as the general public necessary information on the status of the Fund to support investment decisions; and
- e) to make provisions for purposes connected with and incidental to the foregoing objects and purposes.

Pursuant to section 16 of the Statutory Instruments Act, 2013, the Committee invited the Regulation making Authority (The National Treasury) to a pre-publication scrutiny meeting on Wednesday 1st September, 2021 to consider the said Instrument and the following issues arose during the plenary -

1. The Committee sought clarity on whether the regulations by their very nature provide benefits and solutions of public interest or whether it is a government project?
2. The Committee was apprised *inter alia* that the main purpose of the regulations is to facilitate legal collection of all toll revenues across the country. The National Roads Toll Fund will be domiciled at the National Treasury and Planning and to be administered by the Principal Secretary.
3. The National Treasury further highlighted that the first obligation is given to the specific road under tolling services and the surplus is given to rural roads or other roads requiring maintenance and that rural roads are hindered by low volumes of use commercial cars.
4. The Committee sought clarity on the meaning of "political activities" used in the draft regulation 7 (i) and the National Treasury indicated that the use of those words in the context included events that would lead to cancellation of a project, such as nationalization, civil war, changes in law or collapse of an institution.
5. The Committee was of the opinion that the process for appointment of the three committee members proposed under Regulation. 8 (1) (e), ought to be a competitive process.

6. The Committee sought clarity on what would be the consequence in the event of termination of payment from the member as proposed under the draft regulation. 11(e).
7. According to the Committee, there would be an anomaly in the appointment of the officer administering the Fund as proposed under regulation 12 since it is not anchored in the law and the qualifications of the officers are not indicated.
8. The National Treasury clarified, upon inquiry by the Committee, that the toll fees would only be used for toll roads and specifically roads under Public Private Partnership.
9. The Committee proposed that to avoid misuse of power by the officer administering the Fund as contemplated under the draft regulation 26, the systems, protocols and procedures to be established by the officer should be made clear in the regulations.
10. The Committee advised that the National Treasury need to come up with an elaborate structure capturing the whole process from collection to usage of the funds from the Fund.

The Committee at its scrutiny of the Regulations after publication considered and established that the National Treasury had conformed to the resolutions arrived at during the joint meeting.

Consultation / Public participation

Articles 10 and 118 of the Constitution requires a mandatory conduct of Public Participation by all regulation making Authorities before publication of a statutory instrument. The National Treasury indicated in the Explanatory memorandum submitted along with the Regulations that extensive consultations were done while preparing the Regulations, with key stakeholders whose input were taken into account before finalization of the Regulations. The National Treasury & Planning further attached a schedule of persons with whom they met during their public participation exercises.

Having examined the Public Finance Management (National Roads Toll Fund) Regulations, 2021 (*LN. No. 222 of 2021*) against the Constitution, the Interpretations and General Provisions Act (Cap 2), the Statutory Instruments Act, 2013 (*No. 23 of 2013*), the Public Finance Management Act, 2012 (*No. 18 of 2012*), Section 6A of the Public Roads Toll Act (Cap 407) as amended by the Finance Act of 2020, the Committee **resolved to recommend to the House to approve in its entirety the Public Finance Management (National Roads Toll Fund) Regulations (L.N. No. 222 of 2021).**

I wish to most sincerely thank the Speaker and the Office of the Clerk of the National Assembly for the invaluable support accorded to the Committee in the discharge of its mandate.

On behalf of the Members of the Select Committee on Delegated Legislation and pursuant to Standing Order 210 (4) (b) it is my pleasure and duty to present to the House, the Committee's **Report on the Consideration of the Public Finance Management (National Roads Toll Fund) Regulations, 2021(LN. No 222 of 2021).**

HON. WILLIAM KASSAIT KAMKET, M.P.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Delegated Legislation is established pursuant to *Standing Order No. 210* and is mandated to consider statutory instruments submitted to Parliament for consideration. The Committee is expected to consider in respect of any statutory instrument, whether it is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws.
2. The Committee is mandated to consider in respect of any statutory instrument, whether it:
 - a) is in accordance with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written laws;
 - b) infringes on fundamental rights and freedoms of the public;
 - c) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
 - d) contains imposition of taxation;
 - e) directly or indirectly bars the jurisdiction of the court;
 - f) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
 - g) it involves expenditure from the consolidated fund or other public revenues;
 - h) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
 - i) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
 - j) appears to have had unjustifiable delay in its publication or laying before Parliament;
 - k) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
 - l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
 - m) inappropriately delegates legislative powers;
 - n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
 - o) appears for any reason to infringe on the rule of law;
 - p) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and
 - q) Accords to any other reason that the Committee considers fit to examine.

1.2 Committee Membership

3. The Committee membership comprises –

The Hon. William Kassait Kamket, M.P. (Chairperson)

Tiaty Constituency

KANU

The Hon. Muriuki Njagagua, M.P. (Vice Chairperson)

Mbeere North Constituency

Jubilee Party

COMMITTEE MEMBERS

The Hon. Waihenya Ndirangu, M.P.

Roysambu Constituency

Jubilee Party

The Hon. William Cheptumo, M.P.

Baringo North Constituency

Jubilee Party

The Hon. Cecily Mbarire, MGH, M.P.

Nominated

Jubilee Party

The Hon. Alice Wahome, M.P.

Kandara Constituency

Jubilee Party

The Hon. Robert Mbui, M.P.

Kathiani Constituency

Wiper Democratic Movement -Kenya

The Hon. Daniel Maanzo, M.P.

Makueni Constituency

Wiper Democratic Movement -Kenya

The Hon. Timothy Wanyonyi, M.P.

Westlands Constituency

Orange Democratic Movement

The Hon. Ronald Tonui, M.P.

Bomet Central Constituency

Jubilee Party

The Hon. William Kamoti, M.P.

Rabai Constituency

Orange Democratic Movement

The Hon. Martha Wangari, M.P.

Gilgil Constituency

Jubilee Party

The Hon. Gideon Mulyungi, M.P.

Mwingi Constituency

Wiper Democratic Movement – Kenya

The Hon. (Dr.) Wilberforce Oundo, M.P.

Funyula Constituency

Orange Democratic Movement

The Hon. George G. Murugara, M.P.

Tharaka Constituency

Democratic Party

The Hon. Jennifer Shamalla, M.P.

Nominated

Jubilee Party

The Hon. Munene Wambugu, M.P.

Kirinyaga Central Constituency

Jubilee Party

The Hon. Patrick Mariru, M.P.

Laikipia West Constituency

Jubilee Party

The Hon. Sammy Seroney, M.P.
Nominated

Wiper Democratic Movement – Kenya

The Hon. Tindi Mwale, M.P.
Butere Constituency

Amani National Congress

The Hon. Robert Gichimu, M.P.
Gichugu Constituency

Jubilee Party

The Hon. Edith Nyenze, M.P.
Kitui West Constituency

Wiper Democratic Movement – Kenya

The Hon. Abdi Koropu Tepo, M.P.
Isiolo South Constituency

Kenya Patriots Party

1.3 Committee Secretariat

4. The secretariat facilitating the Committee comprises -

Mr. Mohamed Jimale
Clerk Assistant II (Team Leader)

Ms. Ruth Mwihaki Gakuya
Clerk Assistant II

Mr. Dima Dima
Principal Legal Counsel

Mr. Josphat Motonu
Fiscal Analyst I

Ms. Fiona Musili
Research Assistant II

Ms. Noelle Chelangat
Media Relations Officer II

Mr. Anthony Wamae
Serjeant at Arms

Mr. Charles Ayari
Superintendent of Electronics

2.0 CONSIDERATION OF THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS (L.N. NO. 222 OF 2021)

1.4 Introduction

5. The Cabinet Secretary for the National Treasury is mandated under section 24(4) of the Public Finance Management Act, 2012 (No. 18 of 2012) to establish a Fund to be known as the National Roads Toll Fund. Section 6A of the Public Roads Toll Act (Cap 407) as amended by the Finance Act of 2020, provides that all tolls, except transit tolls, collected by the persons appointed under section 4 shall be remitted to the Fund.
6. The Fund is to be administered in accordance with section 24 of the Public Finance Management Act, 2012, and the regulations made thereunder.
7. Pursuant to section 24(4) of the Public Finance Management Act, 2012 and section 6A of the Public Roads Toll Act (Cap 407), the Cabinet Secretary, National Treasury made the regulations which were, tabled in the House on 16th November, 2021 and subsequently committed to the Committee on Delegated Legislation for scrutiny. The regulation making authority therefore met the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act.
8. Pursuant to section 16 of the Statutory Instruments Act, 2013, the Committee engaged the National Treasury during a consultative meeting held on 9th December, 2021 in Naivasha where the Regulation making authority made submissions on the regulations.

1.5 Purpose of the Regulations

9. The purpose of the Regulations is to establish a dedicated fund pool for meeting Government's payment obligations contracted under project agreements for road development programs in Kenya, especially those implemented under the tolling framework.
10. The Fund shall be operated under the budgeting, accounting, reporting and auditing framework of the Public Finance Management Act, 2012 and the Regulations provide for the way the Fund will be administered and how money will be paid into and out of the Fund, and for the control and administration of the Fund. The Fund, and the Regulations, make it possible for Public Private Partnership toll roads to be implemented in Kenya, as it gives visibility of the toll revenues and certainty in governance practices to investors as a key bankability requirement.

1.6 Legislative Context

11. The Regulations are being enacted to establish the National Roads Toll Fund pursuant to Section 6A of the Public Roads Toll Act, (Cap 407), which provides as follows:

“6A. (1) The Minister responsible for the National Treasury shall establish a Fund to be known as the National Roads Toll Fund under the Public Finance Management Act, 2012.”

12. Section 6A of the Public Roads Toll Act (Cap 407) was introduced through Section 28 of the Finance Act, 2020. Sections 24 to 29 of the Finance Act, 2020, introduced amendments to the Public Roads Toll Act that will facilitate the implementation of the tolling framework in Kenya.
13. Pursuant to Section 6A of the Public Roads Toll Act, Cap 407, the Cabinet Secretary for the National Treasury proposes the promulgation of the Regulations establishing the National Roads Toll Fund under section 24(4) of the Public Finance Management Act, 2012, which states as follows: '**24(5) The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly.**'
14. The Public Finance Management (National Government) Regulations, 2015 prescribe additional rules to those explicitly set out under section 24 of the Public Finance Management Act, 2012 on the justification for the establishment of a public fund and prescriptions on the administration and control of such funds.
15. During the scrutiny the committee took note that the Regulations in particular, and, in summary provide for -
 - (a) the definitions, objects and purpose of the fund.
 - (b) the capitalization of the Fund which shall be appropriated by the cabinet secretary.
 - (c) sources of the funds; and
 - (d) the governance structure of the Fund, which is comprised of the Oversight Committee, Fund Administrator and the Secretariat of the Fund (Appointed by the Cabinet Secretary Finance)

1.7 Policy Background

16. The National Roads Toll Fund is proposed to be established under the Public Finance Management Act, 2012 as a resource mobilization strategy of the National Treasury to support Government's investment agenda for roads modernization in Kenya. Under the National Tolling Policy of 2016, the Government has articulated its commitment to national transport infrastructure investment over a ten-year planning window, from 2016 to 2025, through the development of a National Surface Transport Sector Funding Policy. The purpose of the 2016 Tolling Policy statement is to support the National Surface Transport Sector Funding Policy by summarizing how road tolls will be applied in order to fund National Road infrastructure expenditure.
17. The Integrated National Transport Policy prioritizes the improvement and development of Kenya's national road network to achieve the aspirations of Kenya Vision 2030. Expenditure plans covering investment, rehabilitation and maintenance of Kenya's road sector show an annual funding deficit of over Ksh.100 billion, on top of a large pending bills portfolio of nearly Ksh. One trillion. Without action to identify additional funding sources, it is evident that Kenya may not manage to deliver on its aggressive growth agenda under both Vision 2030 and the Big Four Agenda, since national trunk roads are central enablers of economic growth.
18. The primary objective of tolling is therefore to raise additional funds directly from road users in a cost-effective and equitable manner in order to contribute to the sustainable

development, rehabilitation and maintenance of Kenya's National Road network. The National Tolling Policy of 2016 is consistent with the objectives of the Integrated National Transport Policy and the National Surface Transport Sector Funding Policy. The approach to tolling individual roads will also have regard to the implications for -

- (a) Road traffic management and congestion;
 - (b) Wider transport network objectives through the relative price of different modes of transport; and a road's economic and social impacts.
19. Tolling will be applied only where it is economically and financially beneficial, and where all relevant socio-economic implications have been fully taken into consideration. The decision on whether and how to toll a road will be independent of decisions on how to finance, build, operate and maintain that road. This means that both new (green-fields) and existing roads (brownfields) can be subject to tolling programmes, always providing that these are demonstrated to be both economically and financially feasible, and their social and environmental impacts are shown to be sustainable.

1.8 Overview of the Regulations

20. **Regulation 3:** outlines the Objects and Purposes of the fund raise additional funds directly from road users in a cost-effective and equitable manner in order to contribute to the sustainable development, rehabilitation and maintenance of Kenya's National Road network.
21. **Regulation 4 -5:** provides for the imposition of the fund and the establishment of the National Roads Toll Fund, which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act
22. **Regulation 6:** provides for the sources of the funds for the Fund which include-
- a) road tolls levied on road users for access to and use of project roads.
 - b) fees or charges imposed on road users accessing the project roads with overload axles levied in accordance with part II of the Kenya roads(KENHA) Regulations, 2013, section 58of the traffic act and section 21 of the East African Community Vehicle Load Control Act, 2016.
 - c) monies appropriated by parliament or otherwise paid into the fund by the government for the purposes of the fund.
 - d) grants and donations made to the fund.
 - e) any earnings, accruals or income generated from moneys held within the fund.
 - f) proceeds on levies from roadside developments including road side stations which form part of the scope of works for project roads, as well as proceeds from any access fees and advertisement along the project roads levied in accordance with part II of the Kenya Roads (KENHA) Regulations, 2013 and any other applicable framework as from time to time adopted in this regard.
 - g) penalties arising from any breaches by private partner under an agreement entered into under section 4A of the Public Roads Toll Act.
 - h) insurance proceeds payable to a contracting authority under a project agreement applied as reimbursement intended to make good a loss occasioned to and suffered by a contracting authority for an action of a private party only where the loss suffered

by the contracting authority, and linked to an insured event, have been met from the Fund.

- i) money from any other source approved by the cabinet secretary
23. **Regulation 8 - 9:** provide for the establishment of the Oversight Committee which shall consist of 8 members and Functions of the Oversight Committee. The Committee shall consist of ;
- a) the Principal Secretary for the time being responsible for matters relating to finance, who shall be its chairperson;
 - b) the Principal Secretary for the time being responsible for matters relating to roads;
 - c) the Principal Secretary for the time being responsible for matters relating to planning and statistics;
 - d) the Attorney-General or his representative;
 - e) three other persons being non-public officials drawn from technical, financial services, social services, life sciences, consumer rights and legal professions appointed competitively by the Cabinet Secretary; and
 - f) the Officer Administering the Fund, who shall be Secretary to the Committee
24. **Regulation 13:** provide for the Fund Administrator, The Functions of the Fund Administrator and Secretariat to the Fund with the functions of the Fund Administrator shall include: -
- a) the preparation of work programme and budget of the Fund.
 - b) financial control over the administration of the Fund,
 - c) reporting to the Committee on the operations and performance of the Fund
 - d) implement the Fund's investment policies with respect to declared surpluses as established by the Committee,
 - e) human resource management within the Fund,
25. **Regulation 14:** Provides for shortfalls in the Fund, the Officer Administering the Fund shall—
- a) calculate the Projected Fund Ratio for each quarter of the immediate subsequent 12-month period with the view to determining whether the Fund shall realize a Projected Shortfall or Projected Surplus for the forecast period;
 - b) upon the establishment of the Fund, and for as long as toll revenues lead to the realization of projected shortfalls in the Fund, where the Projected Fund Ratio is less than 1.3, cause to be appropriated such budgetary allocations as shall be adequate to cover the projected shortfall, that is, bring the Projected Fund Ratio to at least 1.3; and
 - c) make recommendations to the Committee on the carrying capacity of the Fund, and the Committee shall advise the Cabinet Secretary on the advisability and implications of admitting new project liabilities into the Fund.
26. **Regulation 25-26:** Provides for the administrative cost and the superintendence of the funds expenditure, The Officer Administering the Fund shall establish systems, Protocols and procedures necessary to ensure that –
- a) The Fund's expenditure is controlled and is monitored, on an annual basis, against the Fund's approved revenue and expenditure Plan.
 - b) Withdrawals from the Fund are only for the purposes of payment of approved expenditure in accordance with these Regulations.

c) The records of expenditure relating to the Fund are kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.

27. **Regulation 32:** Provides for the winding up of the fund. The cabinet secretary shall:-

- a) subject to the approval of the National Assembly, wind up the Fund where the Cabinet Secretary considers that the Fund has successfully completed the specific objectives for which it was created, or where it is demonstrated the Fund has irredeemably failed to meet such objectives.
- b) where the Fund no longer has obligations to eligible parties under these Regulations, or where such obligations exist, upon demonstration that alternative arrangements agreed with all project participants have been put into place to meet such obligations; and
- c) where the Committee has made its recommendations supporting such winding up or the setup of such alternative arrangements, and which opinion shall have taken into account any views and representations of any project participant supported under or through the Fund; and
- d) the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund or to set up such alternative arrangements, and Cabinet grants approval for such winding up to be moved before the National Assembly.

28. **On the winding up of the Fund –**

- (a) the Officer Administering the Fund shall call on the contracting authorities to request from the respective service providers or toll operators or other project parties or their agents financial statements to confirm that there are no valid outstanding obligations to service providers or toll operators or other involved project parties and commitments for payment;
- (b) subject to paragraph (a), the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
- (c) the Cabinet Secretary shall pay any deficit in the Fund, and shall meet any residual liabilities of the Fund at the time of such winding up from the funds of the national government in the National Exchequer Account with the approval of the National Assembly;
- (d) Assets other than cash of the Fund shall be transferred to the National Treasury; and
- (e) The Fund Secretariat shall be disbanded.
- (f) The Officer Administering the Fund shall prepare, and the Cabinet Secretary shall submit to Parliament and to the Auditor-General, a final statement of accounts for audit within nine months from the date of the decision to wind up the Fund.

1.9 Scrutiny of the Instrument

29. In accordance with section 16 of the Statutory Instruments Act, 2013, the Committee held pre-publication consultations with the regulation making authority, being the National Treasury & Planning on Wednesday 1st of September, 2021 in Mombasa and Thursday 9th December, 2021 in Naivasha and observed that the establishment of the Fund was necessitated to raise additional funds directly from road users in a cost-effective and

equitable manner in order to contribute to the sustainable development, rehabilitation and maintenance of Kenya's National Road network.

30. The National Tolling Policy of 2016 is consistent with the objectives of the Integrated National Transport Policy and the National Surface Transport Sector Funding Policy.
31. The Committee further considered the Public Finance Management (National Roads Toll Fund) Regulations, 2021 to check its conformity with the Constitution, the Interpretations and General Provisions Act (Cap 2), the Public Finance Management Act of 2012, the Statutory Instruments Act, 2013 (No. 23 of 2013).

1.10 Justification why a fund structure will improve service delivery

32. The following reasons motivate the preference of a fund structure over normal budget provisioning -
 - a) Externalises the funding burden from the Exchequer – hence permitting for alternative use of freed resources, while at the same time expanding the scope of public services that can be delivered by Government.
 - b) Matching services to users, hence realigning the logic in service delivery and service access, and promoting principles of equity and sustainable development .
 - c) Promotes fiscal discipline by ring-fencing specific revenue pools to specific public development objectives, without fungibility of funds within the wider Exchequer.
 - d) Gives visibility to external partners in infrastructure development – showing how revenues are raised, how they are administered, and establishing obligations for revenue certainty and predictability on specific functionaries .
 - e) Permits for revenue performance monitoring, and cash sweeps where surpluses are realized, the beneficiary of the surpluses being the wider Exchequer .
 - f) Guarantees accountability and transparency in fund administration by subjecting the fund to the budgeting, accounting, reporting and auditing framework of the Public Finance Management Act, 2012.
 - g) It links payments to performance of the public service – hence promotes discipline, accountability and fairness in public service delivery.
 - h) Provides platforms and mechanisms for punishing non-performance, thereby preventing
 - i) Resource waste, and promoting social accountability to the citizenry.

3.0 COMMITTEE OBSERVATIONS

33. Having examined the Public Finance Management (National Roads Toll Fund) Regulations, 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap. 2*), the Public Finance Act (*No 18 of 2012*), the Statutory Instruments Act (No 23 of 2013) and Section 6A of the Public Roads Toll Act (*Cap 407*) the Committee made the following observations –

1.11 Statutory Timelines

34. THAT the Regulations were published in the gazette on 3rd November, 2021, *vide* Legal Notice No 222 of 2021, submitted to the Clerk, National Assembly on 11th November, 2021 and laid in the House on 16th November, 2021 being within the statutory timelines set out in section 11(1) of the Statutory Instruments Act, 2013.

1.12 Public Participation

35. THAT, Articles 10 and 118 of the Constitution, section 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210 requires the regulation-making authority to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the Regulations.

36. During consultations with the regulation making authority, the National Treasury & Planning demonstrated through a schedule in the explanatory memorandum that they conducted public participation as listed hereunder – THAT -

- a. On Monday 6th, 14th and 20th April 2020, notices inviting submissions of memoranda by way of public participation by 24th April 2020, were published in both the Nation and Standard Newspapers.
- b. Additional specific emails were simultaneously sent to the Matatu Owners Association, Kenya Truck Owners Association, Kenya Transporters Association, Kenya Association of Manufacturers, Chamber of Commerce, Federation of Kenya Employers, Consumer Federation of Kenya, Katiba Institute, the Fourth Estate, the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Kenya Private sector Alliance, the Law Society of Kenya, the Institute of Certified Public Accountants and the Institute of Certified Secretaries.
- c. On Thursday 9th April, 2020, hardcopy letters were dispatched to the Chairpersons of the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Chairperson and the Chief Executive Officer of the Council of Governors, the Directors General of Kenya National Highways Authority, Kenya Urban Roads Authority and Kenya Rural Roads Authority, the PPP Committee and Directors general and Heads of Department of the National Treasury.

- d. The PPP Office furnished email contacts through which members of the public could submit their comments. The PPP Office Twitter handle was additionally notified to the general public and made available for submissions of comments on the proposed statutory instruments. Additionally, physical boxes for handwritten public comments were strategically positioned at the PPP offices at 6th floor of Kenya-Re Plaza and the physical locations were notified to the general public for good order.
- e. Written submissions were received from a wide cross section of interested institutions including the Rift Valley Connect (RVC), the World Bank, Consumers Federation of Kenya (COFEC), members of the PPP Committee, the Institute of Certified Public Accountants of Kenya, KeNHA, County Governments, the Motorists Association, law firms and various individuals. There is a list of 72 organizations and individuals that submitted comments on the proposed regulatory instrument.

1.13 Regulatory Impact Statement

- 37. Section 6 of the Statutory Instruments Act provides that regulatory Impact Assessment should be done and a statement alongside the Regulations as they are likely to impose significant costs on the community or a part of the community.
- 38. Through a gazette notice on Friday 3rd April, the Notice for preparation of a regulatory Impact Statement was published in the Kenya Gazette (*Gazette Notice Number 2797*). This publication was made in compliance with the Statutory Instruments Act 2013 which, require that a regulatory impact statement shall be notified in the Kenya Gazette and in a newspaper likely to be read by people particularly affected by the proposed statutory instrument.

4.0 COMMITTEE RECOMMENDATION

- 39. Having examined the Public Finance Management (National Roads Toll Fund) Regulations, 2021 in accordance with the Constitution of Kenya, the Interpretations and General Provisions Act (*Cap 2*), the Statutory Instruments Act (*No 23 of 2013*), the Public Finance Act (*No. 18 of 2012*) and Section 6A of the Public Roads Toll Act (*Cap 407*) as amended by the Finance Act of 2020, **the Committee recommends that the House approves the Public Finance Management (National Roads toll Fund) Regulations (LN. No. 222 of 2021) in accordance with section 24(4) the Public Finance Management Act (No. 18 of 2012).**

Signed.....

Date.....

**THE HON. WILLIAM KASSAIT KAMKET, M.P.
(CHAIRPERSON)**

ANNEXURES

- 1. Adoption List**
- 2. Legal Notice Number 222 of 2021 and the Explanatory Memorandum**
- 3. Committee Minutes**

COMMITTEE ON DELEGATED LEGISLATION


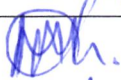
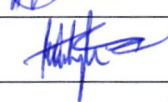
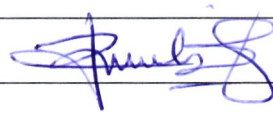
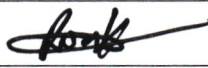
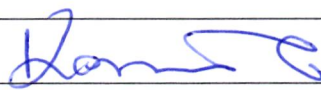




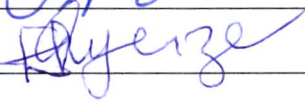
ADOPTION LIST

Adoption of the Report on consideration of the Public Finance Management (National Roads Toll Fund) Regulations, 2021 (L.N No. 222 of 2021)

We, the undersigned, hereby affix our signatures to this Report to affirm our approval:

DATE: 27/01/2022 **COMMITTEE ON DELEGATED LEGISLATION**

27/01/2022

	HON. MEMBER	SIGNATURE
1.	Hon. Kassait Kamket, MP (Chairperson)	
2.	Hon. Muriuki Njagagua, MP (Vice Chairperson)	
3.	Hon. Isaac Waihenya Ndirangu, MP	
4.	Hon. Cecily Mbarire, MP	
5.	Hon. Alice Wahome, MP	
6.	Hon. Daniel Maanzo, MP	
7.	Hon. Robert Mbui, MP	
8.	Hon. Martha Wangari, MP	
9.	Hon. Ronald Kiprotich Tonui, MP	
10.	Hon. Timothy Wanyonyi, MP	
11.	Hon. William Kamoti, MP	
12.	Hon. Gideon Mulyungi, MP	
13.	Hon. George Gitonga Murugara, MP	
14.	Hon. Jennifer Shamalla, MP	
15.	Hon. Munene Wambugu, MP	
16.	Hon. Patrick Kariuki Mariru, MP	
17.	Hon. (Dr.) Wilberforce Oundo, MP	
18.	Hon. Abdi K. Tepo, MP	
19.	Hon. Edith Nyenze, MP	
20.	Hon. Robert Githinji Gichimu, MP	
21.	Hon. Sammy Seroney, MP	
22.	Hon. Tindi Mwale, MP	
23.	Hon. William Cheptumo, M.P	

MINUTES OF THE 2ND SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON TUESDAY 27TH JANUARY, 2022 AT 10:00 A.M. IN THE COMMITTEE ROOM ON 2ND FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS

PRESENT

1. The Hon. Kassait Kamket, M.P. - Chairperson
2. The Hon. Muriuki Njagagua, M.P. - Vice chairperson
3. The Hon. George Murugara, M.P.
4. The Hon. Waihenya Ndirangu, M.P.
5. The Hon. Daniel Maanzo, M.P.
6. The Hon. Munene Wambugu, M.P.
7. The Hon. Kamoti Mwamkale, M.P.
8. The Hon. Ronald Tonui, M.P. - (Virtual Attendance)
9. The Hon. Robert Gichimu, M.P. - (Virtual Attendance)
10. The Hon. Robert Mbui, M.P. - (Virtual Attendance)

ABSENT WITH APOLOGY

1. The Hon. Alice Wahome, M.P.
2. The Hon. Timothy Wanyonyi, M.P.
3. The Hon. Cecily Mbarire, MGH, M.P.
4. The Hon. Abdi Tepo, M.P.
5. The Hon. Sammy Seroney, M.P.
6. The Hon. Jennifer Shamalla, M.P.
7. The Hon. Patrick Mariru, MP.
8. The Hon. Martha Wangari, M.P.
9. The Hon. Gideon Mulyungi, M.P.
10. The Hon. Edith Nyenze, M.P.
11. The Hon. (Dr.) Wilberforce Oundo, M.P.
12. The Hon. Nicholas Tindi Mwale, M.P.
13. The Hon. William Cheptumo, M.P.

IN-ATTENDANCE

National Assembly Secretariat

1. Mr. Jimale Mohamed - Clerk Assistant II
2. Ms. Ruth M Gakuya - Clerk Assistant II
3. Mr. Wilson Dima Dima - Principle Legal Counsel.
4. Mr. Charles Ayari - Superintendent of Electronics (Audio).
5. Ms. Noel Chelagat - Media Relations Officer
6. Mr. Mureithi Theuri - Intern
7. Ms. Angela Bonaya - Pupil
8. Ms. Dindi Kibathi - Pupil

MIN.NO. NA/CDL/2022/ 010 PRAYER AND PRELIMINARIES

The Chairperson called the meeting to order at 10.20 a.m. with the Prayer.

MIN.NO. NA/CDL/2022/ 011 ADOPTION OF THE AGENDA

The Committee unanimously adopted the Agenda as presented having being proposed by Hon. Muriuki Njagagua, M.P and seconded by Hon. George Murugara M.P.

MIN.NO. NA/CDL/2022/012 CONFIRMATION OF MINUTES

Minutes of the 1st sitting held on Thursday 25th January, 2022 were confirmed as a true record of the proceedings having been proposed by Hon. Munene Wambugu, M.P. and seconded by Hon. Muriuki Njagagua, M.P.

MIN.NO. /NA/CDL/2022/013 MATTERS ARISING

Under **MIN.NO. /NA/CDL/2022/006**, the Committee, pursuant to the provisions of Standing Order 49(2)(a), resolved to rescind its decision of Tuesday, January 25, 2022 regarding approval of the Tax Procedures (Unassembled Motorcycles) (amendment) Regulations vide LN No. 192 of LN. No. 192 of 2021) and (LN No. 223 of 2021). The Committee thereafter resolved to invite all the stakeholders who have submitted memoranda on the regulations to appear before the Committee on Delegated Legislation to make oral submissions on Thursday 10th February 2022.

MIN.NO. NA/CDL/2021/014 CONSIDERATION OF THE CONTROLLER OF BUDGET REGULATIONS, 2021 (LN NO. 254 OF 2021)

The Committee was informed as follows in respect to the regulations:-THAT

The Controller of Budget Regulations 2021 were made by controller of budget pursuant to section 25 of the Controller of Budget Act (*No 26 of 2016*). The Regulations were published in the Gazette as Legal Notice No 254 of 2021 on 3rd December, 2021. The Regulations were received by the Clerk of National Assembly on 10th December, 2021 and laid on table in the House on 16th December, 2021.

Summary of the Provisions of the Regulations

The Controller of Budget Regulations, 2021:

1. Seek to give effect to section 25 of the controller of Budget Act.
2. Seek to set out the procedure for;
 - a) Authorization of withdrawal from the Consolidated Fund; the Equalization Fund; a County Revenue Fund; or any other public fund;
 - b) The enforcement of budgetary ceilings on national and county government expenditure.
 - c) monitoring, evaluating, reporting and making recommendations to the national and county governments on measures to improve budget implementation;
 - d) Preparation and submission of quarterly reports and special reports;
 - e) Publishing and publicizing information on budget implementation;
 - f) Conduct of investigations as provided under Article 252(1) (a) of the Constitution; and

- g) Conciliation, mediation and negotiation as provided under Article 252(1) (b) of the Constitution.
3. Provide for the documentation to be provided to the Controller of Budget in the exercise of his or her powers and functions.
4. Provide for the process for requisition and approval of withdrawal of funds from the Consolidated Fund; the Equalization Fund; a County Revenue Fund; or any other public fund.

a) Statutory Timeline

The Regulations were published in the Gazette on 3rd December, 2021, vide Legal notice No 254 of 2021, submitted to the Clerk of the National Assembly on 10th December, 2021 and tabled on 16th December, 2021 within the requisite statutory timelines under section 11(1) of the Statutory Instruments Act.

b) Consultation/Public Participation

Articles 10 and 118 of the Constitution, sections 5, 5A and the Schedule to the Statutory Instruments Act, read together with Standing Order 210 requires the regulation-making authority to conduct public participation and sufficient consultation with the stakeholders and persons likely to be affected by the regulations.

During prepublication scrutiny meeting with the Office of the Controller of Budget, the Controller of Budget indicated that despite the inadequacy of funds to conduct several physical in-person meetings and the Covid 19 restrictions, they had undertaken a series of consultations with the stakeholders.

. It was also, observed that there was a print media advert in the Daily nation, Standard, People daily and My Government Newspapers, further there was a website advert of the same and that different institution in government and private sector were also involved.

c) Regulatory Impact Assessment

Section 6 of the Statutory Instruments Act requires any authority making regulations which are likely to impose significant costs on the community or part of the community to prepare an impact assessment of the instrument. The Regulations do not require a Regulatory Impact Statement within the meaning of sections 6, 7, and 8 of the Statutory Instruments Act, as they are not likely to impose significant costs on the community as they only seek to provide a regulatory framework for the credit guarantees. The Regulations therefore do not occasion any economic burden.

d) Compliance

Pursuant to Section 13(a) of the Statutory Instruments Act, the Regulations are in accord with the Constitution, the Parent Act and other written laws. They align themselves to the principles of public finance under Article 201 of the Constitution and Section 15 of the Act. They also take into consideration the provisions of Article 213 of the Constitution, read together with Sections 32-34 and 59 of the Act on Cabinet Secretary's reporting obligation to Parliament as a matter of accountability and oversight.

Committee Resolution

Having examined the Regulations against the Constitution, the interpretation and General Provisions Act (Cap 2), the Statutory Instrument Act, (No. 23 of 2013), the Controller of Budget Act (*No 26 of 2016*), Pursuant to which they are made, the Committee resolved to approve **the Controller of Budget Regulations, 2021 (LN No. 254 of 2021)**. The decision to approve them was proposed by Hon. Muriuki Njagagua, M.P. and seconded by Hon. George G. Murugara, M.P.

MIN.NO. NA/CDL/2022/0015 CONSIDERATION OF THE WATER ACT - DESIGNATION OF BASIN AREAS (LN NO. 235 OF 2021)

The Committee was informed as follows –

- (i) Section 24 of the Water Act (*No. 42 of 2016*) mandates the Water Resources Authority (hereinafter referred to as “the Authority”) in consultation with the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation, by notice published in the *Gazette* to designate a defined area from which rain water flows into a watercourse to be a basin area for the purposes of this Act.
- (ii) The Authority is further mandated under section 24(2) of the Act to designate a basin area lying wholly or partly within another basin area as a sub-basin.

The Authority in exercising the statutory mandate granted under section 24 of the Act, published, in consultation with the Cabinet Secretary, Legal Notice No. 235 of 2021 on the 3rd December, 2021 designating the following six Basin Areas with further divisions into sub basins.

- (a) Athi River Basin Area
- (b) Tana Basin Area
- (c) Rift Valley Basin Area
- (d) Lake Victoria North Basin Area
- (e) Lake Victoria South Basin Area
- (f) Ewaso Ng’iro North Basin Area

Committee Observations

a) Statutory Timelines

The Declaration was published in the gazette on 3rd December, 2022, *vide* Legal Notice No 235 of 2021, submitted to the Clerk, National Assembly on 10th December 2021 hence was within the statutory timelines contemplated under section 11(1) of the Statutory Instruments Act, 2013.

b) Consultation / Public participation

The Authority has submitted a detailed Explanatory Memorandum which outlines *inter alia* the Legislative context, the policy background, and the consultation outcome which provided that public consultation were held following an invitation for comments and input through an advertisement carried in the Standard Newspaper of 8th September, 2021 and that they received no objections and that applicable comments were incorporated into the document.

The Committee further made the following observations –

- (i) That, in designating the listed areas as basin area, the Authority has exercised its statutory mandate granted under section 24 of the Water Act, 2016.
- (ii) That, as provided under the Explanatory Memorandum forwarded by the Authority in designating the basins shall enhance capacity for comprehensive water resources management and planning and investment in climate resilient water infrastructure.
- (iii) That, the declaration is not a statutory instrument within the meaning of section 2 of the Statutory Instrument Act as it does not impose any legal obligations or legal prohibitions and hence may not be subjected to the strict test required under section 13 of the Statutory Instrument Act .
- (iv) The Authority made an advertisement and received no objections and incorporated the comments they received in the document.

Committee Resolution

The committee resolved that pursuant to the Statutory Instrument Act, (No. 23 of 2013), **the Water Act - Designation of Basin Areas** (LN No. 235 of 2021); are not statutory instruments and hence could not be further considered by the Committee on Delegated Legislation.

MIN.NO. NA/CDL/2022/0016 CONSIDERATION OF THE FOLLOWING INSTRUMENTS, ORDERS OF 2021

The Committee deferred the consideration of the following Orders and hence pursuant to section 16 of the Statutory instrument Act, 2013, the Committee resolved to invite the Water Resources Authority (WRA) to appear before the Committee to the retreat scheduled on 10th – 13th February, 2022 in Mombasa.

1. The Amu Sand-Dunes Groundwater Conservation Area Management Order, 2021
2. The Kikuyu Springs Aquifer Groundwater Conservation Area Management Order, 2021
3. The Lake Kenyatta Sub Catchment Conservation Area Order, 2021
4. The Ngarelen Springs Catchment Conservation Area Order, 2021
5. The Dik Dik Gardens Wetland Conservation Area Order, 2021

MIN.NO. /NA/CDL/2022/ 017 CONSIDERATION AND ADOPTION OF THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) (LN. NO. 222 of 2021)

Having examined the Regulations against the Constitution, the interpretation and General Provisions Act (*Cap 2*), the Statutory Instrument Act, (*No. 23 of 2013*) The Public Finance Management Act (*No. 18 of 2012*) pursuant to which they are made, the Committee resolved to Approve **Public Finance Management (National Roads Toll Fund) (LN. No. 222 of 2021)**. Having been proposed by Hon. Munene Wambugu, M.P. and seconded by Hon. Daniel Maanzo, M.P.

MIN.NO. /NA/CDL/2022/ 018 ADJOURNMENT

There being no other business, the meeting was adjourned at 11. 25 a.m. Next meeting to be held on Thursday 10th February 2022.

Signed.....
HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

Date.....03/02/2020.....

MINUTES OF THE 50TH SITTING OF THE COMMITTEE ON DELEGATED LEGISLATION HELD ON WEDNESDAY 1ST SEPTEMBER, 2021 AT 2.00 P.M. IN MAKUTANO MEETING ROOM, SAROVA WHITESANDS BEACH RESORT, MOMBASA.

PRESENT

1. **The Hon. Kassait Kamket, M.P.** - **Chairperson**
2. **The Hon. Muriuki Njagagua, M.P.** - **Vice Chairperson**
3. **The Hon. Robert Mbui, M.P.**
4. **The Hon. Daniel Maanzo, M.P.**
5. **The Hon. (Dr.) Wilberforce Oundo, M.P.**
6. **The Hon. Ronald Tonui, M.P.**
7. **The Hon. George Murugara, M.P.**
8. **The Hon. Martha Wangari, M.P.**
9. **The Hon. Edith Nyenze, M.P.**
10. **The Hon. Gideon Mulyungi, M.P.**
11. **The Hon. Abdi Tepo, M.P.**
12. **The Hon. Robert Gichimu, M.P.**
13. **The Hon. Kamoti Mwamkale, M.P.**
14. **The Hon. Nicholas Tindi Mwale, M.P.**

ABSENT WITH APOLOGY

1. **The Hon. Cecily Mbarire, MGH, M.P.**
2. **The Hon. Patrick Mariru, M.P.**
3. **The Hon. Waihenya Ndirangu, M.P.**
4. **The Hon. Alice Wahome, M.P.**
5. **The Hon. Timothy Wanyonyi, M.P.**
6. **The Hon. Sammy Seroney, M.P.**
7. **The Hon. Munene Wambugu, M.P.**
8. **The Hon. Jennifer Shamalla, M.P.**
9. **The Hon. William Cheptumo, M.P.**

IN-ATTENDANCE

National Assembly Secretariat

1. **Mrs. Florence Abonyo - Director, Audit Appropriations and Other Select Committee's**
2. **Mr. Mohamed Jimale - Clerk Assistant II**
3. **Ms. Ruth M. Gakuya - Clerk Assistant II**
4. **Mr. Wilson Dima Dima - Principal Legal Counsel**
5. **Mr. Josephat Motonu - Fiscal Analyst**
6. **Ms. Noelle Chelangat - Media Relations Officer**
7. **Mr. Charles Ayari - Superintendent of Electronics (Audio)**

8. Mr. Anthony Wamae - Serjeant-at-Arms
9. Mr. Mureithi Theuri - Intern

The National Treasury and Planning

1. Hon. Nelson Gaichuhie - Chief Administrative Secretary,
2. Mr. Christopher kirigia - Director General Public Private Partnership
3. Mr. Okusinga Humphrey - Director Debt management.
4. MR. Gideon O. Magera - Legal Officer, Public Private Partnership
5. Dr. Oluoch Wafula - Assistant Director, Public Private Partnership
6. Mr. Livingstone Bumbe - Deputy Director
7. Dr. Ronoh - Head Legal/PPP
8. Ms CPA Isabella Kogei - Asst. Director, Budget/Parliamentary Liaison Officer
9. Mr. Robert Osudi - Principle Economists
10. Ms. Naela Wanjala - legal Officer, PPP Directorate

MIN.NO. /NA/CDL/2021/216

PRAYER AND PRELIMINARIES

The meeting commenced at 2.00 p.m. with the Prayer.

MIN.NO./NA/CDL/2021/217

CONSIDERATION OF THE DRAFT PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOOL FUND) REGULATIONS, 2021

The Chief Administrative Secretary (CAS), the National Treasury and Planning informed as follows –

- (i) the Committee that the draft regulation were being enacted to establish the National Roads Toll Fund pursuant to section 6A(introduced through section 28 of the Finance Act, 2020) of the Public Roads Toll Act, (Cap 407).
- (ii) The Public Roads Toll Fund was previously extinguished after repealing section 7 of the Public Roads Toll, Act No. of 1984 (PRTA).
- (iii) In 2016 the government adopted the national policy to create an overarching framework on how road tolls would be applied in order to fund National Roads Infrastructure expenditure. Expenditure plans covering investment, rehabilitation and maintenance of Kenya’s road sector show an annual funding deficit of over Ksh.100 billion, on top of a large pending bills portfolio of nearly Ksh. 1 trillion.

The Committee was further informed that the main object of the tolling system was to raise additional funds directly from road users in a cost-effective and equitable manner in order to contribute to the sustainable development, rehabilitation and maintenance of Kenya’s National Road Network and further:

- a. Externalizes the funding burden from the Exchequer –hence permitting for alternative use of freed resources, while at the same time expanding the scope of public services that can be delivered by Government.

- b. Matching services to users, hence realigning the logic in service delivery and service access, and promoting principles of equity and sustainable development.
- c. Promotes fiscal discipline by ring-fencing specific revenue pools to specific public development objectives, without fungibility of funds within the wider Exchequer
- d. Gives visibility to external partners in infrastructure development –showing how revenues are raised, how they are administered, and establishing obligations for revenue certainty and predictability on specific functionaries.
- e. Permits for revenue performance monitoring, and cash sweeps where surpluses are realized, the beneficiary of the surpluses being the wider Exchequer.
- f. Guarantees accountability and transparency in fund administration by subjecting the fund to the budgeting, accounting, reporting and auditing framework of the Public Finance Management Act, 2012g)It links payments to performance of the public service–hence promotes discipline, accountability and fairness in public service delivery.
- g. Provides platforms and mechanisms for punishing non-performance, thereby preventing resource waste, and promoting social accountability to the citizenry.

The committee was informed of the measurable terms of the National Roads Toll fund Regulations 2021.

- a. The establishment of a National Toll Fund will facilitate financial closure on the Nairobi Nakuru Mau Summit Toll Road Project – which will facilitate the mobilization, off-balance sheet, of over Ksh.162 billion in road development funds, and the operation and maintenance of the Nairobi to Mau Summit Highway as a Public Private Partnership(PPP) toll road for 30 years, in pristine condition, and a return to the public at the end of the 30 year period of an asset with residual economic life in terms of the contracted obligations under the PPP agreement for the project.
- b. The attainment of financial close on the project will trigger the payment of a success of USD 3.5 Million into the Public Private Partnerships Project Facilitation Fund, established under section H68 of the Public Private Partnerships Act, 2013, to support the sustainability of the PPP programme in Kenya.
- c. The Toll Fund is expected to generate surplus revenues within the first decade of the project in achieving financial close –these surplus funds will provide additional revenue to the Exchequer to support wider social development in Kenya. In this way, this regulatory instrument will contribute directly to wider social development in Kenya.
- d. More projects are intended to be added to the National Toll Fund portfolio, meaning more projects will be supported through the fund to create a financing and contracting practice for road sector financing in Kenya, as has happened in mature jurisdictions around the world.

Plenary discussion

The following issues were raised as follows -

1. Are the regulations of public interest or a government project? The Treasury Officials responded that it's for the interest of the people. Public participation was carried out as guided by the constitution and the statutory instrument Act (*No. 23 of 2013*). The team was asked to include all evidence of public participation in the report including the memorandums received from stakeholders.
2. The Purpose of the regulations is to collect all toll revenues across the country. The National Roads Toll Fund will be domiciled at the National Treasury and Planning and Administered by the Principal Secretary.
3. The First obligation is given to the specific road under tolling services and the surplus is given to rural roads or other roads requiring maintain rural roads are hindered by low volumes of use commercial cars.
4. Under Reg. 7 (i) meaning of the term "Political events" were termed as events that would lead to cancellation of project, such as Nationalization, civil war, changes in law, collapse of an institution.
5. Reg. 8 (1) (e), process for appointment of the three committee members ought to be a competitive process.
6. Under Reg. 11(e) – what happens in the event of termination of payment from the member?
7. Reg. 12. - There is an anomaly in the appointment of the officer administering the Fund in that it isn't anchored in the law and the qualifications of the officers aren't indicated.
8. The toll fees would only be used for toll roads and specifically roads under Public Private Partnership.
9. Under Reg. 26. The systems, protocols and procedures to be established by the officer should be made clear in the regulations. To avoid misuse of power by the officer administering the fund.
10. The National Treasury need to come up with an elaborate structure capturing the whole process from collection to usage of the funds.

Way forward

The Committee advised the National Treasury and Planning to ensure that the draft Public Finance Management (National Roads Toll Fund) Regulations, 2021) are further reviewed taking into consideration the deliberations of the meeting and ensure that all concerns raised are captured and resubmitted to the Committee for further scrutiny.

MIN.NO./NA/CDL/2021/218

**CONSIDERATION OF THE PUBLIC FINANCE
MANAGEMENT (BIASHARA KENYA FUND)
REGULATIONS, 2021**

The Committee considered the following Regulations –

- 1) the Public Finance Management (Biashara Kenya Fund) Regulations, 2019 (*LN No. 55 of 2021*);

- 2) the Public Finance Management (Uwezo Fund) (Revocation) Regulations (LN No.56 of 2021),
- 3) the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (LN No. 57 of 2021); and
- 4) the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations (LN No. 58 of 2019)

Committee Resolution

Having examined the Regulations against the Constitution, the interpretation and General Provisions Act (*Cap 2*), the Statutory Instrument Act, (*No. 23 of 2013*), the Public Finance Management Act, 2012 (*No. 18 of 2012*) pursuant to which they are made, the Committee resolved to annul in entirety the following statutory instruments –

- (a) the Public Finance Management (Biashara Kenya Fund) Regulations, 2019 (LN No. 55 of 2021);
- (b) the Public Finance Management (Uwezo Fund) (Revocation) Regulations (LN No.56 of 2021),
- (c) the Public Finance Management (Women Enterprise Fund) (Revocation) Regulations, 2021 (LN No. 57 of 2021); and
- (d) the Public Finance Management (Youth Enterprise Development Fund) (Revocation) Regulations (LN No. 58 of 2019)

The decision was proposed by Hon. (Dr.) Wilberforce Oundo, M.P. and seconded by Hon. Daniel Maanzo, M.P.

The Report on annulment to be considered and adopted when the House resumes from the recess.

MIN.NO. /NA/CDL/2021/219 ADJOURNMENT

There being no other business the meeting was adjourned at 12.10 a.m. Next meeting will be called on Notice.

Signed.....

Date.....21/9/2021.....

HON. KASSAIT KAMKET, M.P.
(CHAIRPERSON)

(Legislative Supplement No. 90)

LEGAL NOTICE NO. 222

THE PUBLIC FINANCE MANAGEMENT ACT

(No. 18 of 2012)

IN EXERCISE of the powers conferred by section 24(4) of the Public Finance Management Act, 2012, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

1. These Regulations may be cited as the Public Finance Management (National Roads Toll Fund) Regulations, 2021.

Citation.

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

Interpretation.

“Act” means the Public Finance Management Act, 2012;

No. 18 of 2012.

“authorized toll collector” means a toll collector appointed as such under section 4 of the Public Roads Toll Act;

Cap. 407.

“budget framework” means the national government budget process under the Act;

“business day” means a working day and excludes weekends and public holidays;

“Cabinet Secretary” means the Cabinet Secretary responsible for finance;

“carrying capacity of the Fund” means the ability of the Fund to meet new funding obligations being imposed as a consequence to the admission of new project roads into the Fund’s liability portfolio, relative to obligations already existing under the Fund;

No. 15 of 2013.

“Committee” means the Oversight Committee established under regulation 8 of these Regulations;

“contracting authority” has the meaning assigned to it under section 2 of the Public Private Partnership Act, 2013;

“financial year” has the meaning assigned to it under Article 260 of the Constitution;

“Fund” means the National Roads Toll Fund established under regulation 5 of these Regulations;

“Fund Secretariat” means the Fund Secretariat established under regulation 16 of these Regulations;

“independent expert” means a person or organisation with substantial experience in the development of traffic forecasts, toll

revenue projections and road project agreements appointed to support the Officer Administering the Fund in the preparation of quarterly and annual inflow and outflow projections;

“inflows” means all payments into the Fund;

“Officer Administering the Fund” means the officer designated as such under regulation 12 of these Regulations;

“outflows” means payments out of the Fund to meet eligible expenditure under the Fund;

“Public Private Partnership Project Facilitation Fund” means the Fund established under section 68 of the Public Private Partnerships Act, 2013;

“PPP unit” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“private party” includes a service provider or a toll operator appointed as an authorised toll collector under a project agreement to perform services related to a toll road in Kenya;

“project agreement” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“project company” has the meaning assigned to it under section 2 of the Public Private Partnerships Act, 2013;

“project road” means a road declared as toll road under section 3(1) of the Public Roads Toll Act and for which a project agreement obligates service or other payments from the Fund;

“Projected Fund Ratio” as at a particular future date, means the ratio of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months:

Provided that this ratio shall, at a minimum, be computed taking into account arrears, amounts invoiced but not settled and not yet classified as arrears, and other amounts that will become due over the forecast period;

“projected shortfall” means the Projected Fund Ratio which is less than 1.3 in any projection period;

“projected surplus” means existing Projected Fund Ratio exceeding 1.3 in any projection period and where actual cash balances, excluding projected future inflows, within the Fund are the basis for determining the Projected Fund Ratio;

“road toll” means a user charge levied on road users in accordance with the Public Roads Toll Act;

“road users” means the categories of vehicular traffic subject to pay a prescribed toll;

“service payments” means scheduled payments due to and invoiced by a private party pursuant to a project agreement and in accordance with these Regulations;

“service provider” means a private party or project company that enters into a project agreement with a contracting authority to provide a project road, as detailed under a project agreement;

“Short-Term Liquid Instruments” means any marketable financial security having short-term maturity, readily convertible into cash, including fixed income instruments such as treasury bills, commercial paper and certificates of deposit as may from time to time be approved in accordance with these Regulations; and

“toll operator” means a private party appointed as an authorised toll collector under a project agreement by a contracting authority to establish, administer and operate a toll system.

3. The objects and purposes of these Regulations are—

Objects and
purpose of
Regulations.

- (a) to establish a centralized Fund into which all revenues collected pursuant to these Regulations shall be paid and administered;
- (b) to provide for the oversight and administration of the Fund;
- (c) to prescribe the processes by which money is paid into and out of the Fund;
- (d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and
- (e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.

4. There shall be imposition of road tolls which shall be set in accordance with the Public Roads Toll Act.

Imposition of
tolls. Cap. 407.

5. There is established a fund to be known as the National Roads Toll Fund, which shall be operated under the budgeting, accounting, reporting and auditing framework of the Act.

Establishment of
the Fund.

6. The sources of the Fund shall consist of the following—

Sources of the
Fund.

- (a) road tolls levied on road users for access to and use of project roads;
- (b) fees or charges imposed on road users accessing project roads with overloaded axles levied in accordance with Part III of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013, section 58 of the Traffic Act and section 21 of the East African Community Vehicle Load Control Act, 2016;
- (c) monies appropriated by Parliament or otherwise paid into the Fund by the Government for the purposes of the Fund;
- (d) grants and donations made to the Fund;
- (e) any earnings, accruals or income generated from moneys held within the Fund;
- (f) proceeds from levies on roadside developments including road side stations which form part of the scope of works for

Cap. 403.

project roads, as well as proceeds from any access fees and advertisements along the project roads levied in accordance with Part II of the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 and any other applicable framework as from time to time adopted in this regard;

- (g) penalties arising from any breaches by a private partner under an agreement entered into under section 4A of the Public Roads Toll Act;
- (h) insurance proceeds payable to a contracting authority under a project agreement applied as reimbursement intended to make good a loss occasioned to and suffered by a contracting authority for an action of a private party only where the loss suffered by the contracting authority, and linked to an insured event, have been met from the Fund; and
- (i) money from any other source approved by the Cabinet Secretary.

Cap. 407.

7. Payments out of the Fund shall comprise the following—

Payments out of the Fund.

- (a) payments certified by a contracting authority as being due to a service provider or a toll operator under a project agreement and in accordance with these Regulations, excluding—
 - (i) compensation for political risks as specified under a project agreement;
 - (ii) termination payments; and
 - (iii) any other large, unscheduled one-off payments arising under a project agreement which have not been or cannot be accommodated under the payment mechanism under a project agreement;
- (b) the approved annual operating budget of the Fund; and
- (c) any other eligible expenditure incurred in pursuance of the object and purpose for which the Fund is established:

Provided such costs are directly linked to the underlying projects supported under the Fund, and they are necessary and essential components of meeting the liabilities of the Fund under Project Roads.

8. (1) There is established a committee to be known as the Oversight Committee which shall consist of—

Establishment of Oversight Committee.

- (a) the Principal Secretary for the time being responsible for matters relating to finance, who shall be its chairperson;
- (b) the Principal Secretary for the time being responsible for matters relating to roads;
- (c) the Principal Secretary for the time being responsible for matters relating to planning and statistics;
- (d) the Attorney-General or his representative;

- (e) three other persons being non-public officials drawn from technical, financial services, social services, life sciences, consumer rights and legal professions appointed competitively by the Cabinet Secretary; and
- (f) the Officer Administering the Fund, who shall be Secretary to the Committee.

(2) The Committee may from time to time admit a representative of a contracting authority for the time being having a project road, a representative of the PPP Unit, the Accountant-General or any other public official it deems fit into its sittings and participate as an *ex officio* member.

9. A person shall be qualified to be appointed under regulation 8(1)(e) as a member of the Committee if that person—

Qualifications for appointment.

- (a) holds a degree in the relevant field from a university recognized in Kenya;
- (b) has proven fund management or other relevant professional experience;
- (c) has served in a position of senior management for a period of at least 6 years;
- (d) meets the requirements of Chapter six of the Constitution; and
- (e) has no convictions resulting from integrity related matters or civil liabilities.

10. (1) The functions and powers of the Committee shall be to—

Functions of the Committee.

- (a) review and approve the annual work programme and budget of the Fund;
- (b) authorise allocations in accordance with approved budgets as prescribed under these Regulations;
- (c) approve annual reports of the Fund before submission to the Cabinet Secretary and inform the Cabinet Secretary of the annual funding requirements of the Fund;
- (d) approve the opening of bank accounts of the Fund by the Officer Administering the Fund;
- (e) make recommendations to the Cabinet Secretary on the declaration and use of projected surpluses;
- (f) authorise withdrawals from the Fund of projected surpluses upon approval by the Cabinet Secretary in accordance with these Regulations and any guidelines it approves for this purpose;
- (g) approve the systems for the control and oversight of the operation of the Fund;

- (h) approve the recruitment and the terms and conditions of staff of the Fund;
- (i) appoint independent advisors to provide it with expert opinion on any matter falling within its mandate that is deemed to require such expertise, and require the Officer Administering the Fund to meet the costs, if any, attendant on such experts or advisors;
- (j) establish the Fund's investment policies with respect to surplus cash;
- (k) approve annual financial statement of accounts prepared by the Officer Administering the Fund;
- (l) oversee the performance of the Officer Administering the Fund;
- (m) oversee the performance of the Fund; and
- (n) perform any other function necessary to promote the objects and purpose of the Fund and consistent with these Regulations.

(2) The Committee shall, in discharging its functions under these Regulations—

- (a) take such measures and make such recommendations to the Cabinet Secretary as it shall be necessary to guarantee, sustain and improve the governance framework for toll road programmes with the view to promoting the long-term financial integrity and sustainability of the Fund with respect to the purposes for which it has been established;
- (b) meet regularly, and at least once a quarter, to consider the affairs, status and operation of the Fund; and
- (c) adopt such procedures as shall be necessary to organize the conduct of its business including the methods by which meetings shall be convened and the frequency and quorum thereof, the keeping of records, co-option of persons with such skills as the Committee may require to better discharge its duties under these Regulations, the formation of any sub-committees as the business of the Committee may demand, and for such other matters as the Committee shall deem fit and necessary to support its operational and functional efficiency and effectiveness.

11. (1) A vacancy shall arise under regulation 8(1)(e) where the member—

Vacation and filling of office.

- (a) dies;
- (b) resigns from office, by notice in writing addressed to the Cabinet Secretary;
- (c) is adjudged bankrupt or otherwise declared to be insolvent;
- (d) abandons the business of the Fund or fails to attend three consecutive meetings of the Committee without a valid reason; or

(e) is convicted of an offence involving dishonesty or fraud or moral turpitude and sentenced to imprisonment.

(2) The Cabinet Secretary shall appoint the person to fill the vacancy in the Committee in accordance with regulation 8(1)(e).

(3) The Cabinet Secretary shall, within seven days of appointing a person under regulation 8(1)(e) notify such appointment by notice in the Gazette.

12. Pursuant to section 24(5) of the Act, the Cabinet Secretary shall designate a person to be the Officer Administering the Fund.

Officer
Administering the
Fund.
Functions of
Officer
Administering the
Fund.

13. (1) The Officer Administering the Fund shall control the administration of the Fund, for which purpose it shall cause to be established proper systems for the operation of the Fund.

(2) The systems to be established under sub-regulation (1) shall include the following—

- (a) financial management systems;
- (b) audit control systems;
- (c) documentation and records systems;
- (d) human resource management systems;
- (e) assets, stores and supplies; and
- (f) reporting systems.

(3) The Officer Administering the Fund shall have the following key functions—

- (a) the preparation of work programme and budget of the Fund, and for this purpose shall—
 - (i) make preparation of the Fund's annual budget and work plans, and submit the same to the Committee for approval; and
 - (ii) address projected shortfalls in the Fund through the budget framework in accordance with the Act and these Regulations;
- (b) financial control over the administration of the Fund, which shall include the following—
 - (i) opening of a bank account and any sub-accounts of the Fund in a financial institution approved by the Cabinet Secretary;
 - (ii) making payments out of the Fund in accordance with these Regulations;
 - (iii) causing to be kept proper books of account and all records of the Fund;
 - (iv) specifying all forms and prepare all funding documentation required under these Regulations; and

- (v) ensuring that there are held within the Fund sufficient funds to meet the quarterly and annual obligations of the Fund;
- (c) reporting to the Committee on the operations and performance of the Fund, which shall include—
 - (i) annual financial accounts and reports of the Fund in accordance with the Act;
 - (ii) quarterly reports, on a rolling 12-month basis, of the projected inflows and outflows of the Fund and of the Projected Fund Ratio, and for any projected shortfalls or projected surpluses and make recommendations to the Committee for their approval;
 - (iii) quarterly reports, on a rolling 12-month basis, on the projected inflows and outflows of the Fund and of the Projected Fund Ratio, as well as statements on how any projected shortfalls are intended to be addressed which reports shall be submitted to contracting authorities and service providers, within 45 business days of the end of each quarter, following approval by the Committee;
 - (iv) quarterly and annual non-financial reports on the performance of the Fund in accordance with the Act; and
 - (v) preparation, signature, and with the approval of the Committee, transmission to the Auditor-General in respect of each financial year a statement of account relating to the Fund in such form and within such timelines as the Public Sector Accounting Standards Board established under section 192 of the Act may from time to time specify in accordance with the Act, a copy of which statement of account shall be filed with the National Treasury:

Provided that—

- (aa) for the purpose of paragraphs (c)(i) and (c)(ii), the Officer Administering the Fund, in making projections for the purpose of determining surpluses or addressing shortfalls, shall take into account such macroeconomic forward-looking assumptions derived from recognised and reputable independent sources for macroeconomic forecasts, to the extent these are available, such assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future service payments, and may retain advisors for this purpose; and

- (bb) the Officer Administering the Fund may recommend to the Committee, and the Committee may issue, such guidelines on conditions to be met before surpluses are declared and or withdrawn, taking into account the liabilities of the Fund, as may be necessary for the better carrying out of the objects of this regulation;
- (d) implement the Fund's investment policies with respect to declared surpluses as established by the Committee, which shall include—
 - (i) recommendations on the declaration of projected surpluses and their usage or application;
 - (ii) investment of surplus cash in approved Short-Term Liquid Instruments; and
 - (iii) raising additional resources for the Fund;
- (e) human resource management within the Fund, which shall include—
 - (i) recommendations on the appointment of Fund Secretariat staff to the Committee;
 - (ii) appointment of required, suitably qualified, independent experts or advisors, to prepare or advise on the preparation of the traffic and toll revenue projections supporting the estimates of inflows, and the estimates of payments to be made under project agreements supporting the estimates of outflows, and consult with the contracting authorities and service providers as necessary;
 - (iii) meeting the costs of advisors appointed by the Committee; and
 - (iv) performing any other function that the Committee may, consistent with these Regulations, delegate and require to be undertaken.

(4) Subject to the approval of the Committee, the Officer Administering the Fund may outsource some of its functions to agents or experts and advisors it may appoint for that purpose, which appointment shall be in writing, and time-bound.

(5) The act of outsourcing the performance of a function of the Officer Administering the Fund to an appointed agent, expert or advisor shall not divest the Officer Administering the Fund of the responsibility to ensure that the function is effectively and efficiently performed in the public interest or on behalf of public service as set out in these Regulations.

14. For the better implementation of the obligations under regulation 13(3)(c), (d) and (e), the Officer Administering the Fund shall—

Addressing
shortfalls in the
Fund.

- (a) calculate the Projected Fund Ratio for each quarter of the immediate subsequent 12-month period with the view to determining whether the Fund shall realize a Projected Shortfall or Projected Surplus for the forecast period;
- (b) upon the establishment of the Fund, and for as long as toll revenues lead to the realization of projected shortfalls in the Fund, where the Projected Fund Ratio is less than 1.3, cause to be appropriated such budgetary allocations as shall be adequate to cover the projected shortfall, that is, bring the Projected Fund Ratio to at least 1.3; and
- (c) make recommendations to the Committee on the carrying capacity of the Fund, and the Committee shall advise the Cabinet Secretary on the advisability and implications of admitting new project liabilities into the Fund.

15. (1) Projected shortfalls in the Fund shall be evidenced by—

Determining shortfalls in Fund.

- (a) contracted obligations under project agreements; and
- (b) quarterly estimates of inflows and outflows of the Fund prepared by the Officer Administering the Fund, as prescribed under Regulation 13(3)(c).

(2) For purposes of sub-regulation (1), the Officer Administering the Fund shall, at the start of the Fund, prepare and submit to the Committee for approval a detailed methodology for the determination of the quantum of projected shortfalls, as the basis for resolution of such projected shortfalls within the annual budget framework.

(3) The methodology referred to under sub-regulation (2) shall be subject to such periodic reviews as the Committee shall determine, taking into account actual experiences observed from the tolling programme.

16. The Officer Administering the Fund shall appoint such staff, in consultation with the Committee, as shall be deemed necessary to constitute the Fund Secretariat for the purposes supporting the discharge of the functions of the Officer Administering the Fund under these Regulations.

Fund Secretariat.

17. Disbursements out of the Fund shall be bound by the following broad principles—

Eligibility of disbursements out of Fund.

- (a) disbursements to service providers and toll operators shall be on the basis of contracted obligations of a contracting authority under a project agreement, as included in the approved annual budget of the Fund and shall be against proper documentation as detailed in regulation 18; and
- (b) disbursement of projected surpluses shall be subject to formal approval of the Cabinet Secretary as detailed in these Regulations.

18. (1) The Officer Administering the Fund shall satisfy himself or herself, with respect to every payment instruction received from a contracting authority—

Payment procedure by the Officer Administering the Fund.

- (a) that each payment instruction is made in writing and authenticated by the certificate of the contracting authority as to the payment amount, the nature of services rendered or the compensation due against which the payment instruction is submitted and the payment recipient;
- (b) that the payee's account is the same one indicated in the project agreement or where appropriate the payee's account pursuant to the provisions of the lender's direct agreement, unless an alternative payee has been communicated in writing to the Officer Administering the Fund by a contracting authority in accordance with a project agreement or a lenders' direct agreement entered into between the relevant contracting authority, service provider or the toll operator and project's financiers, as the case may be, payments to which alternative payee shall amount to complete and final discharge of the Fund and the contracting authority to the service provider and all its financiers for that particular invoice; and
- (c) that the payment processes of the Officer Administering the Fund, including the execution of the powers reserved for him or her under these Regulations shall be completed and payments made no later than the time stipulated for such payments under a project agreement.

(2) The Officer Administering the Fund shall specify forms and documents to be used by contracting authorities in submitting payment requests to the Fund, in accordance with the requirements of a project agreement.

(3) All payment requests to the Fund shall be submitted to the Fund not later than twenty one Business days before the due date for such payment, without prejudice to any larger period to the extent such is provided for under a project agreement.

(4) Any application for payment under this regulation shall, without prejudice to any provision in these Regulations, be supported by such documents as may be required under a project agreement, including the following—

- (a) the name and address of the payee;
- (b) the bank account details of the payee;
- (c) an invoice from the contractor or other eligible contract party;
- (d) any certificate required from a contracting authority and any independent expert under the terms of a project agreement;
- (e) a certified payment voucher, with all material fields duly populated and vetted; and
- (f) any other information as may be specified by the Officer Administering the Fund under sub-regulation (2) of this regulation.

19. The Officer Administering the Fund shall, where it establishes that the requirements in regulation 18 have not been met in any material particular, have the right to request for clarification and rectification from the contracting authority, and the power to withhold disbursements against invoices until such matters are resolved.

Right to question and withhold payment instruction.

20. (1) The Officer Administering the Fund shall cause to be opened in the name of the Fund such bank accounts for the Fund in a bank or banks approved in accordance with section 28 of the Act, as may be necessary for the purposes for which the Fund is established.

Opening of accounts, and equality of Fund liabilities.

(2) All liabilities relating to contracted obligations of the Fund shall be settled in the manner prescribed under this regulation.

(3) The Officer Administering the Fund shall open sub-accounts in the name of each project road supported under the Fund, and into which sub-account shall be remitted all toll revenues realized from the said project road by a private party pursuant to these Regulations.

(4) Funds within a project sub-account shall be applied to the following purposes in the following order, and for which reason the Officer Administering the Fund shall establish a cash waterfall –

- (a) payments for the toll operator;
- (b) payments for the service provider;
- (c) proportional payments to meet the costs of the Officer Administering the Fund;
- (d) any professional fees incurred in the proper discharge of obligations under the Regulations by the Officer Administering the Fund and the Oversight Committee:

Provided such fees shall be proportionally met out of the various project sub-accounts where the advisory relates to a portfolio-wide matter, and allocated to a specific project sub-account, where the advisory relates to issues on that individual project road;

- (e) any other payment declared to be eligible and directly linked to the project road supported under the Fund.

21. The Officer Administering the Fund shall ensure that no bank accounts of the Fund are overdrawn.

Fund not to be overdrawn.

22. (1) Further to regulation 14 and upon the establishment of the Fund, and until toll revenues collected on annual basis attain such a scale that the Projected Fund Ratio is equal to or exceeds 1.3 times annual obligations of the Fund, the Officer Administering the Fund shall cause to be appropriated such budgetary allocations as shall be adequate to meet the Fund's projected shortfall, and this shall be an ongoing duty until such a time as toll revenues attain a Projected Fund Ratio of 1.3 or more.

Procedure for prefunding the Fund.

(2) The Officer Administering the Fund shall, for purposes of this regulation, observe the budget process for national government entities as prescribed in the Act.

23. (1) Where, and pursuant to regulation 13(3) (c) and (d), there is a projected surplus, the Committee, on the advice of the Officer Administering the Fund, may recommend to the Cabinet Secretary the declaration of a projected surplus in the Fund, subject to sub-regulation (2) of this Regulation.
- (2) A projected surplus may only be declared where the Projected Fund Ratio is derived against actual cash balances held within the Fund and not projected inflows.
- (3) Subject to sub-regulation (4) of this regulation, and regulation 13, projected surpluses may be paid out of the Fund into the National Exchequer Account, provided such withdrawal does not exceed the amount of the projected surplus and does not lead to a projected shortfall.
- (4) Where projected surpluses are taken out of the Fund under the terms of these Regulations, the surpluses shall be paid into the National Exchequer and applied to such purposes as shall be determined by the Cabinet Secretary within the national budget framework.
24. All receipts, savings and accruals of the Fund and the balance of the Fund at the close of each financial year, shall be retained for the purpose for which the Fund is established.
25. The Officer Administering the Fund shall ensure the administration costs of the Fund are managed within the framework permissible under the Act.
26. The Officer Administering the Fund shall establish systems, protocols and procedures necessary to ensure that –
- (a) the Fund's expenditure is controlled and is monitored, on an annual basis, against the Fund's approved revenue and expenditure plan;
 - (b) withdrawals from the Fund are only for the purposes of payment of approved expenditure in accordance with these Regulations; and
 - (c) the records of expenditure relating to the Fund are kept and maintained in accordance with the provisions of the Act and Regulations made thereunder.
27. In furtherance of its mandate under these Regulations, the Officer Administering the Fund shall have power –
- (a) to access any project related data that he or she may need from contracting authorities in furtherance of his or her functions with respect to invoice settlement;
 - (b) to call for such additional information with respect to requests for payments out of the Fund as are necessary to satisfy the requirements of regulation 18;
 - (c) to issue financial management guidelines upon approval of the Committee relating to the purposes and objects of these Regulations; and

Declaration and use of surplus Funds.

Moneys to be retained in Fund.

Administrative costs.

Superintendence of Fund expenditure

Access to information.

- (d) to publish at the start of each financial year, on its website, the following information –
- (i) amount and source of money received into the Fund as at the close of the previous financial year;
 - (ii) clear credit balances of available funds for the current financial year;
 - (iii) quantum of committed eligible expenditure for the current financial year;
 - (iv) total number of projects and other eligible activities supported under the Fund for the current financial year; and
 - (v) such other information that Fund stakeholders may reasonably request, and approved by the Committee, from time to time.

28. The existing government financial and procurement Regulations shall, to the extent they relate to the administration of public funds established under the Act, apply in the administration of the Fund.

Government
financial
Regulations.

29. The Officer Administering the Fund shall prepare and submit to the Committee and the Cabinet Secretary, within three months after the end of each financial year, an annual Fund performance report relating to the previous financial year, detailing the extent to which the Fund met its regulatory and development objectives in the period under review, and highlighting challenges, threats and opportunities for the enhanced effectiveness of the Fund in promoting the public interests secured under these Regulations.

Submission of
annual
performance
reports.

30. The provisions of the Act relating to offences by public officers, including financial misconduct, shall apply to these Regulations.

Misconduct of
public officers.

31. (1) The Cabinet Secretary shall at the elapse of ten years from the date of commencement of these Regulations cause a review to be conducted of the performance of the Fund in accordance with the requirements of the Act.

Review of
performance of
the Fund.

(2) The review shall determine whether the Fund has met the objectives for which it was established.

(3) The report on the review shall be submitted to the Cabinet for approval.

(4) The review of the performance of the Fund under this regulation 31 shall be without prejudice to the obligations of the Oversight Committee and the Officer Administering the Fund prescribed under these Regulations for the more frequent reviews of the Fund's performance, in particular under Regulations 5, 10, 13, 14, 15, 22, 23, 26 and 29.

32. (1) The Cabinet Secretary may, subject to the approval of the National Assembly, wind up the Fund where the Cabinet Secretary

Alternative
Arrangements and
Winding Up.

considers that the Fund has successfully completed the specific objectives for which it was created, or where it is demonstrated the Fund has irredeemably failed to meet such objectives.

(2) Despite the provisions of sub-regulation (1), the Cabinet Secretary may wind up the Fund if—

- (a) the Fund no longer has obligations to eligible parties under these Regulations, or where such obligations exist, upon demonstration that alternative arrangements agreed with all project participants have been put into place to meet such obligations; and
- (b) the Committee has made its recommendations supporting such winding up or the set up of such alternative arrangements, and which opinion shall have taken into account any views and representations of any project participant supported under or through the Fund; and
- (c) the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund or to set up such alternative arrangements, and Cabinet grants approval for such winding up to be moved before the National Assembly.

(3) On the winding up of the Fund –

- (a) the Officer Administering the Fund shall call on the contracting authorities to request from the respective service providers or toll operators or other project parties or their agents financial statements to confirm that there are no valid outstanding obligations to service providers or toll operators or other involved project parties and commitments for payment;
- (b) subject to paragraph (a), the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
- (c) the Cabinet Secretary shall pay any deficit in the Fund, and shall meet any residual liabilities of the Fund at the time of such winding up from the funds of the national government in the National Exchequer Account with the approval of the National Assembly;
- (d) assets other than cash of the Fund shall be transferred to the National Treasury; and
- (e) the Fund Secretariat shall be disbanded.

(4) The Officer Administering the Fund shall prepare, and the Cabinet Secretary shall submit to Parliament and to the Auditor-General, a final statement of accounts for audit within nine months from the date of the decision to wind up the Fund.

33. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 made under the Public Roads Toll Act are hereby revoked.

Revocation of L.N
No.307/1986.

Made on the 29th October, 2021.

UKUR YATANI,
Cabinet Secretary
The National Treasury and Planning.

LEGAL NOTICE NO. 223

THE TAX PROCEDURES ACT

(No. 29 of 2015)

IN EXERCISE of the powers conferred by section 112 of the Tax Procedures Act, 2015, the Cabinet Secretary for the National Treasury and Planning makes the following Regulations—

THE TAX PROCEDURES (UNASSEMBLED MOTORCYCLES)
(AMENDMENT) (NO. 2) REGULATIONS, 2021

1. These Regulations may be cited as the Tax Procedures (Unassembled Motorcycle) (Amendment) (No. 2) Regulations, 2021.

Citation.

2. Regulation 14 (1) of the Tax Procedures (Unassembled Motorcycle) Regulations, 2020, is amended—

L.N. 112/2020.

(a) by deleting paragraph (c) and substituting therefor the following new paragraph—

(c) pillion handle bar or pillion or grip set; and

(b) in paragraph (f), by deleting the words ‘side stand, kick stand and prop stand’ and substituting therefor the words ‘side stand, kick stand or prop stand’.

Dated the 29th October, 2021.

UKUR YATANI,
Cabinet Secretary for the National Treasury and Planning.

MATRIX OF RESPONSES TO THE COMMENTS FROM THE COMMITTEE ON DELEGATED LEGISLATION ON THE PFM (NATIONAL ROADS TOLL FUND) REGULATIONS 2021, DRAWN FROM THE MEETING HELD AT WHITESANDS HOTEL IN MOMBASA ON 1ST SEPTEMBER 2021

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
1	General point	The Regulations appear to apply to 'National Roads'. This may lead to inequity for other roads ie KenHA and KeRRA roads.	The Public Roads Toll Act (Cap 407) is the principal legislation on tolling and deals with all public roads regardless of location. Section 6A of this Act establishes the National Roads Toll Fund and requires that it be established under the PFMA, 2012. The Act has a framework on how public roads and structures can be declared toll roads by the sector. The present Regulations therefore fulfil the mandate under the Public Roads Toll Act by establishing the Fund.
2	Regulation 3	The purpose of the Fund appears unclear. When does it stop operating?	The objects and purpose of the Fund are outlined under Section 6A(3) of the Public Roads Toll Act and Regulation 3 of the draft PFM(National Roads Toll Fund Regulations) as follows: <u>Section 6A(3) of the Act: "The purpose of the Fund shall be to provide funds for the –(a) proper functioning of toll roads and toll stations; and (b) development, repair or maintenance of roads as the Minister may direct, taking into account regional balancing.</u>
			<u>Regulation 3 of the draft Regulations</u> provide that the purpose of the Fund is to:
			<ul style="list-style-type: none"> a) to establish a centralized Fund into which all revenues pursuant to these Regulations shall be paid and administered b) to provide for the oversight and administration of the Fund, c) to prescribe the processes by which money is paid into and out of the Fund; d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
3	Regulation 7	The Regulation deals with payments out of the Fund. What are 'political events'. Why do we compensate for political events, and how do we pay for them? Why not use the terminology 'political risks'?	To address the concern, 'Political Events' will be defined as a closed list of risks specified in the Project Agreement and attributable to Government
4	Regulation 8(1)(e)	Deals with the establishment of the Oversight Committee and the appointment of non-public officers (private sector representatives). This should be done through a competitive process.	Agreed. Regulations have been amended to incorporate the requirement for a competitive recruitment process.
5	Regulation 11(1)(e)	The Regulation deals with Vacation of Office of a non-public officer on the Oversight Committee and permits an officer to remain on the Committee if the conviction is less than six months. Conviction on account of dishonesty or moral turpitude, regardless of the severity of punishment or sanction, should be the trigger for termination of appointment.	Agreed. The six-month condition has been deleted.
6	Regulation 12	Deals with the appointment of the Officer Administering the Fund. The OAF appointment procedure should be competitive, and these should be a formal appointment procedure declared in the Regulations. Need to also include minimum qualifications.	The designation of the OAF is based on Section 24(5) of the PFMA, 2012 which provides that the Cabinet Secretary shall designate a person to administer every national public fund established under subsection (4). The precedent therefore with other Regulations under the PFMA (eg the PFM (Strategic Food Reserve Trust Fund) Regulations, 2015 and the PFM (State Officers House Mortgage Scheme Fund) 2015), has been to replicate the provisions of the parent statute and provide for the designation of the Officer Administering the Fund rather than have an appointment process.
7	Regulation 14	Regulation 14 appears to be a tacit subsidization of laziness and poor project selection. Why should shortfalls arise if the Feasibility Study was adequate, so the taxpayer need not carry this cost? Only commercially viable projects should progress.	Toll revenue failure is not really linked to poor project selection or laziness but has everything to do with the social acceptability of tolls, and potentially permutation in traffic volumes in future. It is a necessary provision for the bankability of the NRTF Regulations

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
8	Regulation 26	Regulation 26 on superintendence of Fund expenditure gives the Officer Administering the Fund (OAF) room to make other guidelines. It therefore appears the OAF has power to do things that border on further issuance of regulations: OAF role should be definitive and express, to curb abuse.	The systems, protocols and procedures that the OAF can establish under this part are overseen by the Oversight Committee. Regulation 10(1)(e) provides that the Committee shall approve the systems for the control and oversight of the operation of the Fund.
9	General	Which Principal or Cabinet Secretary does the Oversight Committee report to? In which Ministry is the Fund domiciled?	The Principal Secretary, National Treasury is the Chairperson of the Committee. The Cabinet Secretary, National Treasury and Planning also has an important role under the Regulations, including authorising withdrawals of projected surpluses from the Fund; ensuring sustenance of the governance framework of the tolling framework with the view to promoting the long-term financial integrity of the Fund; approving the financial institution where the Fund shall be administered; appointing non-public officers to the Committee; amongst other key roles
10	General	Will the Regulations amount to double taxation since people will pay fuel levy as well as the proposed tolls?	Tolling does not amount to double taxation. RMLF only funds maintenance which is not adequate for the entire road network of 160,876km. The maintenance requirement for the entire network is KES 40B against an annual collection of 25B. This clearly depicts the funding gap and the outstanding maintenance backlog for paved roads only which is estimated at 400B to date. Therefore, tolls will be used to develop and maintain the specific project roads and it will be a portion of savings realized by road users because of improved levels of service. Toll roads will not receive any allocations from the RMLF.
11	General	There is a fuel levy fund administered by the Kenya Roads Board. Are we not establishing too many funds for the roads sector? There are several others already existing. What impact will this Fund have?	The RMLF is a fund purely dedicated to road maintenance. The proposed National Roads Toll Fund Regulations will purely deal with tolling of roads

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
12	General	The full architecture of who will collect the tolls and how is not clear from the Regulations.	The main purpose of the Regulations is to establish a centralised Fund. Details on how the tolls will be collected is outlined under the provisions of the Public Roads Toll Act (Cap 407).
13	General	On public participation in the making of the regulations, Treasury should table actual evidence of public participation, not just a summary.	Agreed. The file containing the evidence of public participation is available for review
14	General	The National Treasury needs to coordinate civic education on the tolling structure and sensitize Kenyans to understand the process and where the tolls will be effected.	This is ongoing in liaison with KeNHA.
15	General	Toll stations operate elsewhere. Pick examples to benchmark against. Highlight success stories and explain the legal framework under which they are established. Is it through a statute, rules and regulations?	A good example within Africa is the N4 Highway, which links the economic heartland of South Africa (Gauteng Province) to Maputo Port in Mozambique. The rehabilitation and tolling of the 571-kilometer highway is considered a major success and demonstrates the power of political cooperation between neighbouring countries and the benefits of PPP deals to the private and public sectors. In terms of the legal frameworks there are several parallels that can be drawn to the Kenyan scenario including: the commencement of the tolling process through a National Tolling Policy; the establishment of the Road Fund under the National Roads Act; the exclusivity of the use of the tolls collected such that they are only spent on funding, development and operations of toll roads and do not go to the general fiscus.
16	General	There should be a provision for suspension of Oversight Committee members and the Officer Administering the Fund upon the commencement of formal investigations.	Since the PSC Act 2017 only prescribes suspension by an authority in situations where the officer has been charged with a serious criminal offence, these provisions would apply to the OAF. No is a public servant.

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THE PUBLIC FINANCE MANAGEMENT (NATIONAL ROADS TOLL FUND) REGULATIONS, 2021

EXPLANATORY MEMORANDUM PURSUANT TO THE STATUTORY INSTRUMENTS ACT, NO.23 OF 2013

(Section 8 and Schedule to Act No.23 of 2013)

PART 1

Name of the Statutory Instrument:	The Public Finance Management (National Roads Toll Fund) Regulations, 2021
Name of the Parent Act:	Public Finance Management Act of 2012
Enacted pursuant to:	(i) Section 24 of the Public Finance Management Act, 2012; (ii) Regulations 207, 208 and 209 of The Public Finance Management (National Government) Regulations, 2015. Regulation: <i>Part XV on Public Funds</i> (iii) Section 6A of the Public Roads Toll Act (Cap 407) as amended by the Finance Act of 2020
Name of Ministry:	The National Treasury and Planning
Department:	The PPP Directorate
Gazetted on:	3 rd November 2021
Tabled on:	8 th November 2021

PART II

1. Purpose of the Statutory Instrument

The purpose of the Regulations is to establish a dedicated fund pool for meeting Government's payment obligations contracted under project agreements for road development programs in Kenya, especially those implemented under the tolling framework. The Fund shall be operated under the budgeting, accounting, reporting and auditing framework of the Public Finance Management Act 2012 and the Regulations provide for the way the Fund will be administered and how money will be paid into and out of the Fund, and for the control and administration of the Fund. The Fund, and the Regulations, make it possible for PPP toll roads to be implemented in Kenya, as it gives visibility of the toll revenues and certainty in governance practices to investors as a key bankability requirement.

2. Legislative Context

The Regulations are being enacted to establish the National Roads Toll Fund pursuant to Section 6A of the Public Roads Toll Act, (Cap 407), which provides as follows:

" 6A. (1) The Minister responsible for the National Treasury shall establish a Fund to be known as the National Roads Toll Fund under the Public Finance Management Act, 2012."

Section 6A of the Public Roads Toll Act (Cap 407) was introduced through Section 28 of the Finance Act, 2020. Sections 24 to 29 of the Finance Act, 2020, introduced amendments to the Public Roads Toll Act that will facilitate the implementation of the tolling framework in Kenya.

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Pursuant to Section 6A of the Public Roads Toll Act, Cap 407, the Cabinet Secretary for National Treasury proposes the promulgation of the Regulations establishing the National Roads Toll Fund under section 24(5) of the Public Finance Management Act, 2012, which states as follows:

'24(5) The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly.'

The Public Finance Management (National Government) Regulations, 2015 prescribe additional rules to those explicitly set out under section 24 of the Public Finance Management Act, 2012 on the justification for the establishment of a public fund and prescriptions on the administration and control of such funds.

The proposed statutory instrument has been prepared in compliance with the foregoing legislative context.

3. Policy Background

a) Policy Objectives

The National Roads Toll Fund is proposed to be established under the Public Finance Management Act, 2012 as a resource mobilisation strategy of the National Treasury – to support Government's investment agenda for roads modernization in Kenya.

Under the National Tolling Policy of 2016, the Government has articulated its commitment to national transport infrastructure investment over a ten year planning window, from 2016 to 2025, through the development of a National Surface Transport Sector Funding Policy. The purpose of the 2016 Tolling Policy statement is to support the National Surface Transport Sector Funding Policy by summarising how road tolls will be applied in order to fund National Road infrastructure expenditure.

b) Statement of the Problem

The Integrated National Transport Policy prioritises the improvement and development of Kenya's national road network to achieve the aspirations of Kenya Vision 2030. Expenditure plans covering investment, rehabilitation and maintenance of Kenya's road sector show an annual funding deficit of over Ksh.100 billion, on top of a large pending bills portfolio of nearly Ksh. 1 trillion. Without action to identify additional funding sources, it is evident that Kenya may not manage to deliver on its aggressive growth agenda under both Vision 2030 and the Big Four Agenda, since national trunk roads are central enablers of economic growth.

c) Objectives

The primary objective of tolling is therefore to raise additional funds directly from road users in a cost-effective and equitable manner in order to contribute to the sustainable development, rehabilitation and maintenance of Kenya's National Road network. The National Tolling Policy of 2016 is consistent with the objectives of the Integrated National Transport Policy and the National Surface Transport Sector Funding Policy.

The approach to tolling individual roads will also have regard to the implications for:

- road traffic management and congestion;

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- wider transport network objectives through the relative price of different modes of transport; and
- a road's economic and social impacts.

Tolling will be applied only where it is economically and financially beneficial, and where all relevant socio-economic implications have been fully taken into consideration. The decision on whether and how to toll a road will be independent of decisions on how to finance, build, operate and maintain that road. This means that both new (green-fields) and existing roads (brownfields) can be subject to tolling programmes, always providing that these are demonstrated to be both economically and financially feasible, and their social and environmental impacts are shown to be sustainable.

d) Justification why a fund structure will improve service delivery

The following reasons motivate the preference of a fund structure over normal budget provisioning -

- a) Externalises the funding burden from the Exchequer – hence permitting for alternative use of freed resources, while at the same time expanding the scope of public services that can be delivered by Government
- b) Matching services to users, hence realigning the logic in service delivery and service access, and promoting principles of equity and sustainable development
- c) Promotes fiscal discipline by ringfencing specific revenue pools to specific public development objectives, without fungibility of funds within the wider Exchequer
- d) Gives visibility to external partners in infrastructure development – showing how revenues are raised, how they are administered, and establishing obligations for revenue certainty and predictability on specific functionalities
- e) Permits for revenue performance monitoring, and cash sweeps where surpluses are realized, the beneficiary of the surpluses being the wider Exchequer
- f) Guarantees accountability and transparency in fund administration by subjecting the fund to the budgeting, accounting, reporting and auditing framework of the Public Finance Management Act, 2012
- g) It links payments to performance of the public service – hence promotes discipline, accountability and fairness in public service delivery
- h) Provides platforms and mechanisms for punishing non-performance, thereby preventing resource waste, and promoting social accountability to the citizenry.

4. Consultation Outcome

a) Who was consulted

Through a gazette notice of Friday 3rd April 2020, the Notice of preparation of a Regulatory Impact Statement was published in the Kenya Gazette (Gazette Notice Number 2797). This publication was made in compliance with section 8 (1) of the Statutory Instruments Act, 2013 which requires that a regulatory Impact Statement be notified in the Kenya Gazette and in a newspaper likely to be read by people particularly affected by the proposed statutory instrument.

On the same day, the draft NTF Regulations and the Regulatory Impact Statement were uploaded on the National Treasury and the PPP Unit websites, giving the public twenty-one (21) days until 24th April 2020, within which to submit their comments/memoranda on the draft regulations.

On Monday 6th, 14th and 20th April 2020, further notices inviting submission of memoranda by way of public participation by 24th April 2020, were published in the both the Nation and Standard Newspapers.

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Additional specific emails were simultaneously sent to the Matatu Owners Association, Kenya Truck Owners Association, Kenya Transporters Association, Kenya Association of Manufacturers, Chamber of Commerce, Federation of Kenya Employers, Consumer Federation of Kenya, Katiba Institute, the Fourth Estate, the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Kenya Private Sector Alliance, the Law Society of Kenya, the Institute of Certified Public Accountants and the Institute of Certified Secretaries.

On Thursday 9th April 2020, hard copy letters were dispatched to the Chairpersons of the Transport Committees of the Senate and the National Assembly, the Council of Governors, the Governors of the Counties of Machakos, Kiambu, Nakuru, Uasin Gishu, Kitui, Nairobi and Mombasa, the Chairperson of and the Chief Executive Officer of the Council of Governors, the Directors General of Kenya National Highways Authority, Kenya Urban Roads Authority and Kenya Rural Roads Authority, the PPP Committee and Directors General and Heads of Department of the National Treasury .

The PPP Office furnished email contacts through which members of the public could submit their comments. The PPP Office Twitter handle was additionally notified to the general public and made available for submission of comments on the proposed statutory instrument. Additionally, physical boxes for handwritten public comments were strategically positioned at the PPP offices at 6th Floor of Kenya Re Plaza, and the physical locations were notified to the general public for good order.

In view of the public health threat of COVID-19, and the Presidential Directive on this matter made on 17th March, 2020, it was not possible to hold public hearings on the Regulations, but the public consultation was conducted in strict compliance with section 5 generally, and 5(3) in particular, of the Statutory Instruments Act No.23 of 2013.

b) Responses

Written submissions were received from a wide cross section of interested institutions including the Rift Valley Connect (RVC), the World Bank, Consumers Federation of Kenya (COFEK), Members of the PPP Committee, the Institute of Certified Public Accountants of Kenya, KeNHA, County Governments, the Motorists Association, law firms and various individuals. **We have provided a list of 72 organisations and individuals that submitted comment on the proposed regulatory instrument.**

The Unit collated the comments and compiled a matrix categorising the responses into 6 thematic areas namely: Establishment of the Fund, Operationalisation of the Fund, Governance, Levying of Tolls, Tolling System and Infrastructure and a General comments section. **The file containing details of the public consultation process is enclosed herewith as Annex 4.**

c) Summary of changes made to the Regulations as a result of the consultation

1. In addition, to refinements on drafting language from the legal draftspersons at the Office of the Attorney General, the following is a summary of the key amendments made to the Regulations:
2. Specificity on the powers pursuant to which the Regulations have been made. While mention of the establishment of the Roads Toll Fund is contained in the Public Roads Toll Act, Regulations

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for the management of public funds are made pursuant to Section 24(4) of the Public Finance Management Act, 2021

3. Definitions: The following additions have been incorporated:
 - a. For the avoidance of doubt, definitions of "Act", "business day" and Cabinet Secretary" have been incorporated
 - b. Clarity that an "Authorized Toll Collector" includes a relevant Contracting Authority or a private party authorized by a Contracting Authority.
 - c. Recognition of the national government "budget framework" as the framework within which annual budget shortfalls will be catered for.
 - d. Introduction of the 'carrying capacity of the Fund' as a measure to ensure that new project liabilities are only admitted to the Fund following due diligence and advice from the Committee and recommendations to the Cabinet Secretary on the implications thereof.
 - e. "Financial year" is now defined to provide alignment of the reference with the meaning under the Constitution.
 - f. Specificity on the precise ratio that will apply to the phrase 'Projected Fund Ratio' and clarity of the applicable period has been provided. Accordingly, the ratio has been enhanced from the previous 1.05 to 1.3 times of the projected future Inflows plus any moneys currently held within the accounts of the Fund divided by the projected future Outflows of the Fund up to that future date, calculated for twelve forward rolling months.
 - g. Enhancement of the ratio that shall be considered as the "Projected Surplus" from 1.10 in any projection period to 1.3. Further clarity has been provided to the effect that this projection shall apply where cash balances, excluding projected inflows within the Fund are the basis for determining the Projected Fund Ratio.
 - h. "Service Payments" clarity introduced by making reference to 'scheduled' payments.
 - i. Deletion of the terminology "termination payments" as this is catered for in the respective Project Agreements.
4. The imposition of tolls pursuant to the Public Roads Toll Act has been expressly included as an important cross reference in the Public Finance Management Act, Regulations. (Regulation 4).
5. Repetitive language within the objects and purpose and the establishment of the Fund has been removed and greater clarity provided under each. (Regulations 3 and 5).
6. Sources of finances for the Fund have been enhanced to include proceeds from levies from roadside developments, fees for access and advertisements and penalties from breaches of tolling arrangements by private partners. Where applicable, the statutory basis for the various sources of the funds has also been incorporated. (Regulation 6).
7. **Under payments out of the Fund, there is an inclusion of large, unscheduled payments under that cannot be accommodated under the project agreement as well as a safeguarding proviso on 'any other eligible expenditure'.(Regulation 7)**

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8. Membership of the Oversight committee has been expanded to include 3 members from the private sector appointed by the CS, the PS responsible for roads and the Officer Administering the Fund. The qualifications for the appointment of the private members have also been prescribed as well as provisions on vacation and filling of office for the private members specified. Ambiguous provisions have been expunged. (Regulations 8, 9 and 11).
9. The functions of the Oversight Committee have been streamlined and mundane administrative and routine tasks expunged. (Regulation 10).
10. Alignment has been made to the requirements of the Public Finance Management Act, for the designation as opposed to the appointment of the Officer Administering the Fund. (Regulation 12).
11. The presentation of the functions of the Officer Administering the Fund (OAF) has been overhauled to set out the overall purpose of the Fund, clarify the systems for the proper operation of the Fund and itemize in more explanatory detail, the key functions of the OAF. (Regulation 13).
12. Regulation 14 on addressing shortfalls in the Fund now contains greater clarity on the calculation of the Projected Fund Ratio.
13. Bank statements, financial statements and statements of amounts held within the designated Fund accounts have been expunged from the evidence that is required to determine Projected Shortfalls. The methodology for determining shortfalls has also been clarified. (Regulation 15).
14. Regulation 16 on the Fund Secretariat narrows the scope of the appointment of staff to those who will support the discharge of the functions of the Officer Administering the Fund.
15. Disbursements from the Fund have been expanded to include 'Toll Operators' in addition to 'Service Providers', based on contracted obligations to a Contracting Authority under a Project Agreement and to reflect the eligibility criteria more accurately. (Regulation 17).
16. A more elaborate process for the 'Payment Procedure by the Officer Administering the Fund' has been included. This includes specifications of payment timelines and the format for submitting payment requests as well as a prescription of the appropriate supporting documentation to facilitate payment. (Regulation 18).
17. To reflect *pari passu* treatment of the Fund's liabilities, a provision has been included to clarify that all liabilities relating to contracted obligations of the Fund shall rank equally. The drafting has been revised to reflect legislative drafting language. (Regulation 20).
18. To facilitate the initial establishment of the Fund, a provision for the procedure for the pre-funding of the Fund, as a national budget appropriation, has been introduced. (Regulation 22).

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19. An important proviso has been introduced for the determination of a projected surplus and to guard against any irregular utilization of anticipatory cash flows, to the effect that the declaration of a projected surplus can only be derived from a Projected Fund Ratio that has been calculated against actual cash balances within the Fund and not projected inflows and require that such balances be paid to the Exchequer. (Regulation 23).
20. In line with the Public Finance Management Regulations, express provision has been made within the Regulations to cross reference the operational framework for managing costs to the provisions of the Act rather than prescribe percentages in the Regulations. (Regulation 25).
21. The provisions on 'Access to Information' have been expanded to require the OAF to publish on the Fund's website at the start of each financial year, specified financial information, including the Fund inflows and sources thereof; the credit balances of available funds for the current financial year; the quantum of committed eligible expenditure; the total number of projects and other activities supported by the fund for the current financial year; and such other information that Fund beneficiaries may reasonably request and approved by the Committee from time to time. (Regulation 27)
22. A new provision on "Submission of Annual Performance Reports" to the Committee by the OAF within 3 months of the end of each financial year has been incorporated, together with the salient themes of what this annual report should include. (Regulation 29).
23. Sub Regulation 31(4) on the review of performance of the Fund has been restated in appropriate legislative drafting terms.
24. The Winding Up provisions have been expanded to include alternative arrangements where the Fund is irredeemable and ensure that the winding up of the Fund by the Cabinet Secretary can only take place once all the Project Agreements have been terminated/expired; the Committee has made recommendations supporting such termination taking into account views and representations of project participants; and the Cabinet has considered and approved the recommendation of the Cabinet Secretary to wind up the Fund through the prescribed process that requires National Assembly approval. These conditions shall apply conjunctively. (Regulation 32)
25. The revocation of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 made under the Public Roads Toll Act, has been provided for. (Regulation 33).

5. Guidance

In implementing the proposed statutory instrument, there will be need for structured, and empowering public communication on the subject of tolling, to socialize the idea of tolls being introduced on Kenyan roads, to address wider concerns around mobility and freedom of movement, and to entrench the principles of sustainable development and shared responsibility in that regard. The identification of which tolls should be included in the tolling portfolio will require careful government coordination to ensure the highest economic impact for the selected roads

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on the wider economy, in a demonstrable manner, and to ensure that sustainability of the Toll Fund is assured through such future additions of toll road projects under the Fund.

A publicity agenda on toll revenue performance, and the application of any declared surpluses, will be necessary to ensure the general public is kept aware of Government's conduct and accountability in the administration of tolling programmes. This will secure long term goodwill on the part of the affected persons.

In addition, social and environmental considerations will remain central to the success of any tolling agenda, as projected affected persons have interests that will need to be secured. In executing any toll project (be it a road, a tunnel or a bridge), there will be requirements for project land acquisition, relocation of persons, and disruption of livelihoods. Careful stakeholder analysis, engagement and cogent social and economic and environmental remediation programmes and resettlement action plans will require careful development, development and social buy-in.

Ultimately, contract enforcement of all these obligations will be the catalytic determinant on how successfully these programmes may be implemented. Consequently, guidance will be required to be provided to project implementing entities on contract management ethics, reporting protocols and remediation actions and regimes, always for public accountability and effectiveness in programme execution.

6. **Impact:** The Gazettement of the Regulatory Instrument will have the following impacts –
- a. **Impact on Fundamental Rights and Freedoms:** the proposed statutory instrument will not impede any of the fundamental rights and freedoms guaranteed under the Constitution, since citizens and all other road users will have a toll-free alternative to each tolled motorway. Payment of the toll fee will also be a free-will choice, of an end user purchasing a service. Even roads funded on the general Exchequer are not free to the end user ultimately: they are funded on the back of taxes generally, and development aid by way of loans borrowed by Government and repaid using tax payer money. Toll fees contribute to the Government's resource mobilization strategy, in a similar manner that applies in the electricity service platform, where the end user pays for the service, without altering the public good character of electricity generation and distribution.
 - b. **Impact on Private Sector:** The proposed regulatory instrument will have insignificant impact on the private sector, generally, save for those that transport goods through the tolled motorway, and those that travel through the tolled motorway, who will be obligated to pay a toll fee to access and enjoy the tolled motorway. The toll fee will be notified through a notice in the Kenya Gazette, and will typically be prescribed and determined by the Cabinet Secretary responsible for the Public Roads Toll Act, Cap 407. Payment of the toll fee will be voluntary, since toll-free alternatives will be provided to each tolled motorway.
 - c. **Impact on Public Sector:** promulgation of the proposed regulatory instrument has a contingent liability impact on the public sector, since the instrument commits the public sector to address funding shortfalls that arise under the Fund, where the fund has obligations to a private sector entity that has been contracted by Government to deliver a public toll road. Contingent liabilities are not debt: they only become fiscal commitments if the identified contingent liability event crystallizes. Consequently, the risk

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in the identified contingent liability event is deemed to be affordable and manageable, on the basis that detailed feasibility study assessments on toll revenue projections were conducted as part of the framework for the design of the national tolling programme, which is the agenda to which the regulatory instrument is intended to be applied.

- d. **An impact assessment has not been prepared for this statutory instrument**, as it relates to the establishment of an institutional framework for a toll fund, to support projects implemented under the national tolling framework, and whose revenues are dedicated for collection and administration through such a toll fund. The draft regulatory instrument sets down an institutional framework and procedure for the ongoing review, oversight and management of the identified contingent liability under the statutory instrument (funding shortfalls and the need for budget allocations).

7. Monitoring and Review

What are the success criteria for this statutory instrument?

The main success criteria for this statutory instrument, **in measurable terms**, are the following –

- a) The establishment of a National Toll Fund will facilitate financial closure on the Nairobi Nakuru Mau Summit Toll Road Project – which will facilitate the mobilization, off-balance sheet, of over Ksh.162 billion in road development funds, and the operation and maintenance of the Nairobi to Mau Summit Highway as a PPP toll road for 30 years, in pristine condition, and a return to the public at the end of the 30 year period of an asset with residual economic life in terms of the contracted obligations under the PPP agreement for the project.
- b) The attainment of financial close on the project will trigger the payment of a success of USD 3.5 Million into the Public Private Partnerships Project Facilitation Fund, established under section 68 of the Public Private Partnerships Act, 2013, to support the sustainability of the PPP programme in Kenya.
- c) The Toll Fund is expected to generate surplus revenues within the first decade of the project in (a) achieving financial close – these surplus funds will provide additional revenue to the Exchequer to support wider social development in Kenya. In this way, this regulatory instrument will contribute directly to wider social development in Kenya.
- d) More projects are intended to be added to the National Toll Fund portfolio, meaning more projects will be supported through the fund to create a financing and contracting practice for road sector financing in Kenya, as has happened in mature jurisdictions around the world.

When and how will the outcomes be reviewed?

The foregoing outcomes will be reviewed as follows –

- a) Financial close on the project is expected to be achieved by April, 2022: the National Treasury will publicly announce the attainment of Financial Close and submit a report to Cabinet and Parliament in that regard.
- b) The National Treasury will report on the receipt of the USD 3.5 Million success fees into the PPP Project Facilitation Fund, expected at Financial Close.
- c) The National Treasury will ensure the Officer Administering the Fund publishes the information obligated under Regulation 27 of the proposed statutory instrument, annually, and more frequently as the case may be, to ensure full publicity of the ongoing current status of the proposed Toll Fund.

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- d) Any surpluses declared under the Fund will be appropriated and allocated through the normal budget process.
- e) The proposed Toll Fund will be subject to annual audits like all public funds, and this provides for an in-depth mechanism for the annual review of the performance of the Fund relative to the purposes for which it was established.
- f) There will be a review of the Fund's overall performance every tenth year, as stipulated under the Public Finance Management Act, the performance review to be conducted by the National Assembly.

8. **Contact**

Contact person on questions relating to the Regulations: **Christopher Kirigua, OGW, Director General, Public Private Partnerships Directorate, the National Treasury**
Telephone number: **+254 721 427 575**

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REPUBLIC OF KENYA
THE NATIONAL TREASURY

IN THE MATTER OF PUBLIC PARTICIPATION ON THE DRAFT
PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND)
REGULATIONS, 2020

SUBMISSION OF MEMORANDA

Article 201(a) of the Constitution establishes the principles of public finance in the Republic, among which is the requirement for openness and accountability, including public participation in financial matters.

Section 5(1) of the Statutory Instruments Act No.23 of 2013 provides that before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to— (a) have a direct, or a substantial indirect effect on business; or (b) restrict competition, the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument. Section 5(2) provides that public participation should (a) draw on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and (b) ensure that persons likely to be affected by the proposed statutory instrument have been afforded an adequate opportunity to comment on its proposed content.

Section 5(3) of the Statutory Instruments Act No.23 of 2013 prescribes that public participation may take any of the following forms: (a) notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, or are likely to be affected by the proposed instrument; or (b) invitation of submissions to be made by a specified date or (c) invitation to participate in public hearings to be held concerning the proposed instrument.

The Public Finance Management (National Toll Fund) Regulations, 2020 seek to establish a national toll fund to support the implementation of toll road projects implemented under the public private partnerships framework in Kenya, and to create a governance and procedural framework for the collection, administration and accounting for collected toll revenues pursuant to the foregoing objective.

Further to the Gazette Notice Number 2797 dated 3rd April, 2020, and pursuant to Article 201(a) of the Constitution of Kenya and section 5 of the Statutory Instruments Act No.23 of 2013, the National Treasury and Planning now invites interested members of the public to submit any representations they may have on the said draft National Toll Fund Regulations, 2020, which may be accessed on the National Treasury website: www.treasury.go.ke and the PPP Unit website: www.pppunit.go.ke.

A Regulatory Impact Statement has also been prepared for the proposed draft Regulations and may be accessed from the same websites.

The representations and written memoranda may be submitted by email to juddie.nyakawa@pppunit.go.ke and copied to info@pppunit.go.ke and icheson@pppunit.go.ke, addressed to the Principal Secretary, National Treasury. Hand-delivered memoranda and representations should be delivered to: The Director, PPP Unit, Reinsurance Plaza, 6th Floor, Taifa Road, Nairobi.

In view of the public health threat of COVID-19, and the Presidential Directive on this matter made on 17th March, 2020, no public hearing/oral submissions will be held.

All representations and memoranda should be received on or before Friday 24 April 2020 at 5:00p.m.

PRINCIPAL SECRETARY



Evacuation

More foreigners flee country as fear of coronavirus spread rises

More foreign embassies in Nairobi continued to evacuate their citizens over fear of coronavirus spread.

Today, more than 100 foreigners from Japan and South Korea are scheduled to leave Nairobi for their countries in hired private jets.

Sources said the foreigners are among thousands who have left the country and the region at large in the past week. Last week, dozens of Germans left Mombasa in a hired jet for their country.

A number of embassies had been working with the Kenya Civil Aviation Authority (KCAA) and other government agencies and airlines to facilitate travel of their citizens back home.

Some of them fear with the alleged indiscipline among some Kenyans failing to observe strict measures outlined by the government to prevent the spread of the

virus, the situation could easily get out of control and their nationals might be caught up in the mix.

Officials said the embassies also feared that local hospitals would not handle huge numbers of infected people in case of a major outbreak.

Some officials went for commercial flights while others chartered.

Officials at the airports in Nairobi and Mombasa said there has been a marked departure of foreigners in the last few days. This happened even after the deadline for the commercial airlines passed.

Specific embassies in Nairobi asked their airlines to be allowed to the country to evacuate their nationals.

Those that pushed their citizens to leave ahead of the deadline included United Kingdom,

Germany, US, Norway, Netherlands and Switzerland.

KCAA had alerted airlines of plans to suspend international flights to Kenya over coronavirus spread.

KCAA boss Gilbert Kibe said this followed a directive issued by the National Emergency Response Committee on March 22.

Germany, Danish and Norwegian embassies had also been organising for the evacuation of their citizens.

Kenya Airways announced cargo flights will however remain operational to offer emergency services and supplies.

"To comply with this directive, we have therefore temporarily suspended all international services effective midnight 25th March 2020, until further notice," said KQ Managing Director Allan Kilavuka. [Cyrus Ombati]

Succession. The seat should now go to Kenya Army, as per tradition

Mwathethe set to get one more year as KDF boss



President Uhuru Kenyatta and Chief of Defence Forces Samson Mwathethe during a past Mashujaa Day celebration at Nyayo National Stadium in Nairobi. [File Standard]

Official was expected to leave office in May, but sources say there are no signs of ceremonies leading to imminent departure of a military chief.

By Cyrus Ombati
newsdesk@standardmedia.co.ke

Chief of Defence Forces (CDF) Samson Mwathethe is likely to have his term extended by a year.

If it happens, it would be the second time Gen Mwathethe's stay in office would be extended. The first time was in May last year.

He was to officially leave office next month, but sources say there are no signs of ceremonies associated with the imminent departure of a KDF chief.

"If he was leaving, he would already have started visiting service command stations to bid them farewell. We would be seeing activities here and there but as of now, it is quiet. We are just waiting," the source said.

There is speculation President Uhuru Kenyatta, who is the Commander-in-Chief of the armed forces, may extend Gen Mwathethe's term by a year.

Mwathethe's predecessor Gen Julius Karangi also got two extensions.

Meetings for the military succession plans have been disrupted by the outbreak of coronavirus. Military chiefs are said to be planning to hold virtual meetings to plan the succession.

The Number One Board,

the organ that decides appointment and promotion of senior military officers and retirement or extension of contracts of Kenya Army, Kenya Navy and Kenya Air Force bosses, is expected to meet this month.

The KDF Act says a CDF, his deputy and service commanders shall serve a single term of four years, or retire upon attaining the mandatory retirement age.

But the Act also says the president may, on the recommendation of the National Defence Council, extend the CDF's term for a period not exceeding one year in times of war or emergencies such as political uncertainty.

"If he was leaving, he would already have started visiting service command stations to bid them farewell. We would be seeing activities here and there but as of now, it is quiet. We are just waiting."

Source at KDF

Mwathethe, a naval officer, was named CDF on April 17, 2015, replacing Gen Karangi of Kenya Air Force. This now means the seat will automatically go to Kenya Army, going by tradition.

Top on the list of those to succeed Mwathethe are his deputy Lt Gen Robert Kibochi, Army Commander Lt

Gen Walter ole Raria and Lt Gen Leonard Ngoni, the force commander of the AU-UN Hybrid operation in Darfur, Sudan.

The other high-ranking officer who has a chance of being promoted to full General is National Defence College Commandant Lt-Gen Adan Mulata. He is, however, disadvantaged by the fact that he is from Kenya Air Force.

Whatever happens will depend on the outcome of the National Defence Council meeting where a decision on the way forward will be taken and the president advised accordingly.

Under the Tonje rules, the post of CDF is rotated among the three services - Kenya Army, Kenya Air Force and Kenya Navy. The rules, by Retired Chief of General Staff Gen Daudi Tonje, have guided appointments in KDF.

There has been silent lobbying by those hoping to succeed Mwathethe.

The new CDF will oversee the transition from the Kenyatta presidency in 2022. Regarding Somalia, KDF is supposed to withdraw its troops from the war-torn country by 2021, which the new CDF will also oversee.

The KDF Act also notes that in appointing the CDF, the president shall take into account the service, seniority, military and formal civil education - a degree from a university - and military and security experience.

A military general is supposed to retire at 62, a Lieutenant-General at 61, a Major-General at 59 and a Brigadier at 57 years.



REPUBLIC OF KENYA
THE NATIONAL TREASURY

IN THE MATTER OF PUBLIC PARTICIPATION ON THE DRAFT
PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020
SUBMISSION OF MEMORANDA

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Further to the Gazette Notice Number 2797 dated 3rd April, 2020, and pursuant to Article 201(a) of the Constitution of Kenya, and section 5 of the Statutory Instruments Act No.23, of 2013, the National Treasury and Planning now invites interested members of the public to submit any representations they may have on the said draft National Toll Fund Regulations, 2020, which may be accessed on the National Treasury website: www.treasury.go.ke and the PPP Unit website: www.pppunit.go.ke.

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PRINCIPAL SECRETARY
THE NATIONAL TREASURY



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THE NATIONAL TREASURY & PLANNING

IN THE MATTER OF PUBLIC PARTICIPATION ON THE DRAFT PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020

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THE NATIONAL TREASURY & PLANNING

INFRASTRUCTURE FINANCE AND PUBLIC PRIVATE PARTNERSHIPS PROJECT - ADDITIONAL FINANCING

REQUEST FOR BIDS

SUPPLY & DELIVERY OF HEAVY DUTY, UTILITY PASSENGER VEHICLES

TENDER NO. IFPPP/PIU/PFF/NC/06/2019-2020

Credit No: 61210 KE
Project ID No: P121019

- The Government of Kenya (GoK) has received financing from the World Bank towards the cost of the Infrastructure Finance and Public Private Partnerships Project (IFPPP), and intends to apply part of the proceeds toward payments under the contract for the Supply & Delivery of Heavy Duty Utility Passenger Vehicles
- The National Treasury (the Client), through its Project Implementation Unit (PIU) now invites sealed bids from eligible bidders for the Supply & Delivery of Heavy Duty, Utility Passenger Vehicles. The Items to be procured are listed below; **TENDER NO. IFPPP/PIU/ PFF/NC/06/2019-2020**
Heavy Duty, Utility Passenger Vehicles, 4x4, L.W.B, 2200-2500cc, Diesel - Quantity 2No.
Bidders **MUST** bid for all quantities. Bidders quoting for incomplete corresponding quantities will be considered non-responsive and rejected.
Final Delivery point of the goods is to the Kenya -Re Plaza, 6th Floor within 30 days or earlier following the date of Contract effectiveness. A Bidder must demonstrate that it has successfully completed at least three contracts of similar goods in the past three years and provide proof of existing contracts or completion certificates.
- Bidding will be conducted through the National Competitive procurement using a Request for Bids (RFB) as specified in the World Bank's "Procurement Regulations for IPF Borrowers" July 2016 and revised in August 2018 ("Procurement Regulations"), and is open to all eligible Bidders as defined in the Procurement Regulations
- Interested eligible bidders may obtain further information from the Project Manager, The National Treasury - Infrastructure Finance & Public Private Partnerships Project and inspect the bidding documents during office hours, Monday to Friday, 0900 to 1600 hours Kenyan Time excluding holidays, at the address given below.
- The bidding document in the English language is also available online and may be downloaded without a charge from www.treasury.go.ke/tenders.html and www.pppunit.go.ke by interested eligible bidders. Interested eligible bidders are requested to submit a written application with details of Company name, postal and physical address, e-mail and contacts telephone number (s) for purposes of registration to procurement.ifppp@piu.go.ke. This information will be used for submitting clarification questions on the bidding documents and receiving answers and of addenda to the bidding documents.
- Bids must be delivered to the address below on or before Thursday 28th May 2020 at 1230 hours local time. Electronic bidding will not be permitted. Late bids will be rejected. Bids will be publicly opened immediately thereafter in the presence of the bidders' designated representatives and anyone who may choose to attend at the address below on Thursday 28th May 2020 at 1230 hours local time
- All bids must be accompanied by a Bid Security of Kenya Shillings Four Hundred Forty Thousand (KES 440,000.00) from a commercial Bank only.
- The addresses referred to above are:

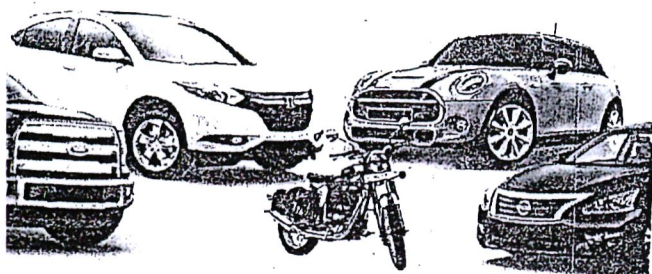
Postal Address: Project Implementation Unit Attention: Procurement Specialist P.O Box 21190 -00100 Nairobi, Kenya.	Physical Address: Project Implementation Unit Attention: Procurement Specialist 7 th Floor, Anniversary Towers, North Tower. Building No.19 Monrovia Street/University Way Nairobi, Kenya. E-mail: procurement.ifppp@piu.go.ke info@pppunit.go.ke
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DIRECTOR, PUBLIC PRIVATE PARTNERSHIPS UNIT
FOR: PRINCIPAL SECRETARY/NATIONAL TREASURY

MOTOR WEDNESDAY

TO ADVERTISE CONTACT US ON

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020 328 8614, 020 328 8630, 020 328 8694, 020 328 8626.



Research. Ethiopia is relying on traditional medical knowledge combined with modern science to find a Covid-19 cure

The global race to find virus vaccine

Under normal circumstances, the process would take years. But with a pandemic ravaging the world, pharmaceuticals are keen to compress this timeline.

By Anyango Otieno
anyango@standardmedia.co.ke

Government agencies, regulatory authorities and non-profit organisations have won their weight behind arch institutions in the race to get a coronavirus vaccine to fight the Covid-19 pandemic.

As of yesterday, infections had hit 17 million globally, with more than 109,000 deaths.

The following countries have set themselves apart in a race to find a vaccine.

Australia

On April 8, Novavax, a Maryland-based biotech company, said it would begin human trials in Australia in mid-May for a vaccine it is developing.

On the same day, stem-cell company Mesoblast said it would launch a 240-patient clinical trial that would test if cells derived from bone marrow could help patients who developed a deadly immune reaction to the coronavirus. Silviu Itescu, the Mesoblast CEO, said the company decided to carry out the tests on Covid-19 patients because the product it is developing has shown good results in children who developed a similar deadly immune response.

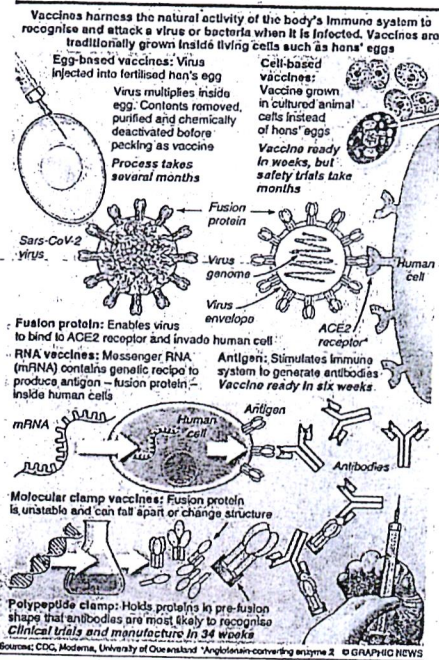
According to the *New York Times*, nine coronavirus patients at Mount Sinai Hospital in the US have received the Mesoblast treatment on an emergency basis.

Doctors there said the initial response was promising. Six patients were removed from ventilation and others were being weaned off or had remained stable — a welcome development when most patients who need ventilator support do not survive.

United States

A vaccine made by the biotech company Moderna is already in a clinical trial, which was launched on March 15. About two-thirds of trial participants have received the first of two doses.

Another vaccine developed by Inovio Pharmaceuticals was injected into the first adult volunteers last Monday. This is the second phase of its clinical trials, which uses a skin-deep shot that feels like a simple skin test, instead of the usual deeper jab.



"It's the most important trial that we've ever done," John Ervin of the Center for Pharmaceutical Research told The Associated Press.

Inovio's study is set to test two doses of its vaccine, INO-4800, in 40 healthy volunteers at the Kansas City research lab and the University of Pennsylvania.

Inovio is working with Chinese researchers to begin a similar study in China soon.

Healthcare giant Johnson & Johnson expects to start clinical trials for a vaccine it is developing in September, and has received \$500 million (Sh53 billion) for it from the US Department of Health and Human Services.

Ethiopia

Ethiopia, in a statement released by the country's health ministry this month, said "a domestic treatment drug" is being developed by local traditional medicine experts.

The ministry said the drug is

"We are conscious that a vaccine is needed as soon as possible; certainly between June and July, when we expect a huge peak in mortality."

Prof Adrian Hill, UK

being made by integrating traditional medical knowledge with modern science, and had undergone basic research procedures and was successful in laboratory modelling processes. "Since the outbreak, different Ethiopian scientists both in the country and abroad have been carrying out research," said Innovation Minister Abraham Belay, adding that the lab research phase of the project has been completed.

"It has passed through various testing stages and the green light has been given for further clinical trials. The next step is testing the product."

UK

Researchers at Oxford University, led by Sarah Gilbert, are planning a safety trial on humans of what is expected to be the UK's first coronavirus vaccine next month.

The same vaccine will start animal trials this week at the Public Health England (PHE) laboratory near Salisbury, according to *The Guardian*.

Normally, animal trials must be completed before human trials can start, but because similar vaccines have worked safely in trials for other diseases, the work has been accelerated.

"We are conscious that a vaccine is needed as soon as possible; certainly between June and July, when we expect a huge peak in mortality," said Adrian Hill, director of the Jenner Institute at Oxford.

"This is not a normal situation. We will follow all standard trial safety requirements, but as soon as we have a vaccine that's working, we anticipate there will be an accelerated pathway to get it deployed to save lives. The more vaccine we can provide sooner, the better."

Anthony Fauci, director of the US National Institute of Allergy and Infectious Diseases, had earlier said a vaccine was 12 to 18 months away. This was echoed by the UK chief scientific adviser, Patrick Vallance.

Prof Hill, however, said the Oxford team and others were "aiming for much earlier".

The Oxford trial is expected to recruit people from a range of ages. Scientists will be particularly keen to see how it performs among older people who are

most vulnerable to the virus, and tend to respond less well to vaccinations because of their weaker immune systems.

China

Barely a week after Chinese scientists finished injecting an experimental coronavirus vaccine into their first group of volunteers, official news outlets reported last Thursday that a second batch of participants was being recruited.

The trial programme is recruiting 500 people aged 18 or older who reside in Hubei province, the epicentre of the coronavirus outbreak.

China commenced phase one clinical trials on March 16. Beijing's clinical trial, which handed the vaccine to 108 subjects on April 2, is being carried out by a team led by Chen Wei, a virolo-

gist in China's military.

Japan

Japanese biopharmaceutical firm Angen Inc said last Tuesday that it had partnered with Osaka University to complete development of a DNA vaccine against coronavirus. Angen Inc said it would begin testing the vaccine on animals soon.

DNA vaccines are produced using an inactivated virus and can be manufactured faster than protein-based vaccines, according to Angen Inc.

Market leader Takeda Pharmaceutical is also working on a plasma-derived therapy, while the active ingredient in Fujifilm Holdings Corp's Avigan anti-flu drug is being tested as a treatment in China. Kenya and Japan are in talks on launching the latter drug in Kenya.



REPUBLIC OF KENYA

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War-torn Mali votes in election runoff

West African state conducts polls despite virus and jihadist threats

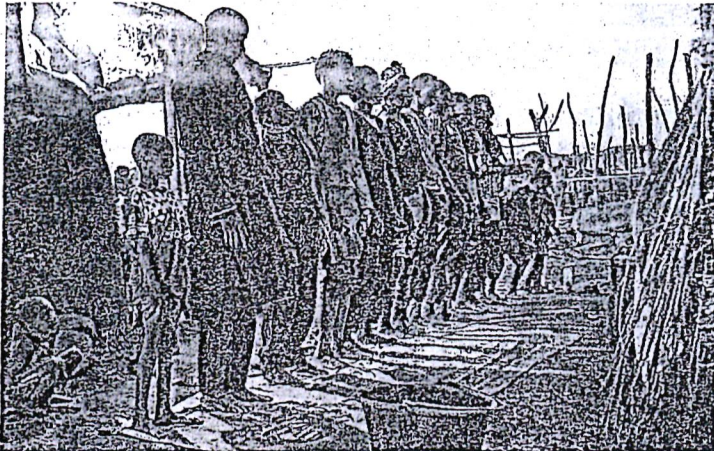
BAMAKO, Sunday

Mali headed into the final round of legislative elections Sunday, aiming to revive public faith in its embattled institutions despite a bloody jihadist conflict and looming viral pandemic.

Voters in the nation of 19 million will cast their ballots in the runoff for 147 seats in the National Assembly.

The elections have been repeatedly delayed, eroding trust in institutions as the country struggles with an Islamist revolt that has claimed thousands of lives and forced hundreds of thousands from their homes.

The first round on March 29 was disrupted by jihadist attacks and intimidation,



Displaced Mallans pray in a camp in Bamako on April 2. Since June 2018, more than 1,200 displaced people who fled their villages in central Mali have found a shelter in a camp built in proximity of a landfill.

including the kidnapping of opposition leader Soumaila Cisse.

The turnout nationwide averaged 35.6 per cent, but was just 12.9 per cent in the capital Bamako. It is the country's first parliamentary poll since 2013 when President Ibrahim Boubacar Keita's Rally for Mali party won a big majority.

Promote decentralisation

The elections were meant to take place in late 2018 after Keita was returned to office but were postponed several times because of security concerns.

A "national dialogue" staged last year to discuss Mali's spiral of violence called for the ballot to be completed by May. The hope is that the new MPs will endorse changes to the constitution that will promote decentralisation.

That is the key to pushing ahead with the government's plans for peace — it signed a deal with separatists in 2015 but the pact has stalled. (AFP)

AFRICA WEEKEND

- MONDAY, April 20** — Addis Ababa (Ethiopia): The African Union set to begin distributing Covid-19 tests.
 - Algiers (Algeria)**: 40th anniversary of the Berber Spring.
 - Bamako (Mali)**: Nation awaits the results of the second round of long-delayed parliamentary elections.
 - TUESDAY** — Conakry (Guinea): New parliament dominated by President Alpha Conde supporters convenes after disputed elections (0800GMT).
 - Abuja (Nigeria)**: West Africa court to rule on 2012 Guinea massacre. (1700GMT).
 - WEDNESDAY** — World Earth Day
 - THURSDAY** — Ramadan (date to be confirmed)
 - FRIDAY** — Global climate strike, day called by Greta Thunberg's Fridays for Future
 - SATURDAY** — World Malaria Day.
 - Accra (Ghana)**: Ruling party expected to hold primary vote to choose presidential candidate.
- (Compiled by Charles Omondi and agencies)

BRIEFLY

KAMPALA

Uganda procures two mobile labs for tests

Uganda has procured two mobile polymerase chain reaction (PCR) laboratories to accelerate Covid-19 tests on cross-border cargo drivers, a health official said Saturday. The PCR laboratories will help on-site testing and shorten the time to transport samples to the country's top laboratory Uganda Virus Research Institute, Health Minister Ruth Aceng said in a televised address. (Xinhua)

HARARE

Zimbabwe marks independence day

Zimbabwean President Emmerson Mnangagwa on Saturday led the nation in celebrating its 40th independence anniversary with a rallying call for Zimbabweans to keep observing lockdown regulations. Mnangagwa said once the lockdown imposed on March 30 to curb the spread of Covid-19 is over, the nation must quickly reignite production to ensure a quick economic recovery. The President was speaking in a televised address to the nation. (Xinhua)

KHARTOUM

Sudan launches move to contain coronavirus

Sudan on Saturday launched a community initiative titled "Sudan Platform for Confronting Coronavirus" with the aim to prevent Covid-19 spread. The platform brings together government institutions and around 500 youth and professional organisations as well as civil societies. While addressing the launching ceremony, member of Sudan's Sovereign Council Siddiqi Tower reiterated the importance of joining the efforts of all community categories to prevent the spread of coronavirus. (AFP)

Covid-19: Buhari pays tribute to fallen aide

ABUJA, Saturday

Nigerian President Muhammadu Buhari on Saturday paid tribute to his chief of staff, Mallam Abba Kyari, who died of Covid-19 on Friday.

"Mallam Abba Kyari was the very best of us. He was made of the stuff that makes Nigeria great," Buhari said while mourning the top presidential aide. Kyari, 67, who had had underlying health conditions; "was a true Nigerian patriot," the president said.

He was notably one of the closest allies of Buhari. "My loyal friend and compatriot for the last 42 years — and latterly, my chief-of-staff — he never wavered in his commitment to the betterment of every one of us," said Buhari.

Kyari's passing marked the first high-profile death since the novel coronavirus hit the West African country.

Buhari recalled the time he first met Kyari when in his 20s. While possessing the sharpest legal and organisational mind,

Kyari's true focus was always on the development of infrastructure and the assurance of security for Nigerians.

"For he knew that without both in tandem there can never be the development of the respectful society and vibrant economy that all Nigerian citizens deserve," the President said of the man who was a lawyer, a former newspaper editor, a former bank executive, and public administrator at various times in his life.

No personal gain

Buhari on Saturday received several messages of condolences from foreign and national leaders, following the death of his top aide, according to a statement.

Kyari became Buhari's chief-of-staff in 2015 and strove quietly and without any interest in publicity or personal gain to implement the President's agenda. The aide tested positive after he returned from an official trip to Germany in March. (Xinhua)



Mallam Abba Kyari was the very best of us. He was made of the stuff that makes Nigeria great. He was a true patriot who never wavered in his commitment to the betterment of our nation."

Nigerian President Muhammadu Buhari



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This advert appeared on 6th and 14th April 2020

Article 201(e) of the Constitution establishes the principles of public finance in the Republic, among which is the requirement for openness and accountability, including public participation in financial matters.

Section 5(1) of the Statutory Instruments Act No.23 of 2013 provides that before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to- (a) have a direct, or a substantial indirect effect on business; or (b) restrict competition, the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument. Section 5(2) provides that public participation should (a) draw on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and (b) ensure that persons likely to be affected by the proposed statutory instrument have been afforded an adequate opportunity to comment on its proposed content.

Section 5(3) of the Statutory Instruments Act No.23 of 2013 prescribes that public participation may take any of the following forms: (a) notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, or are likely to be affected by the proposed instrument; (b) invitation of submissions to be made by a specified date or (c) invitation to participate in public meetings to be held concerning the proposed instrument.

Public Finance Management (National Toll Fund) Regulations, 2020 seek to establish a national fund to support the implementation of toll road projects implemented under the public private partnerships framework in Kenya, and to create a governance and procedural framework for the collection, administration and accounting for collected toll revenues pursuant to the foregoing objective.

April, 2020, vide Gazette Notice Number 2797 and further through newspaper advertisements and 14th April, 2020, issued in compliance with Article 201(a) of the Constitution of Kenya and section 5 of the Statutory Instruments Act No.23 of 2013, the National Treasury and Planning invited interested members of the public to submit any representations they may have on the said draft National Toll Fund Regulations, 2020, which may be accessed on the National Treasury website: www.treasury.go.ke and the PPP Unit website: www.pppunit.go.ke

A Regulatory Impact Statement has also been prepared for the proposed draft Regulations and may be accessed from the same websites.

The representations and written memoranda may be submitted by email to judda.nyakawa@pppunit.go.ke and copied to info@pppunit.go.ke and jchesoni@pppunit.go.ke, addressed to the Principal Secretary, National Treasury. Hand-delivered memoranda and representations should be submitted at the 6th Floor Kenya Reinsurance Plaza on Tala Road, at the PPP Unit Offices.

In view of the public health threat of COVID-19, and the Presidential Directive on this matter made on 17th March, 2020, no public hearing/oral submissions will be held.

Members of the public are hereby reminded that all representations and memoranda should be received on or before Friday 24th April, 2020 at 5:00p.m.

PRINCIPAL SECRETARY,
THE NATIONAL TREASURY

Standard
Ad Center
Open Weekdays: 8:00am - 5:00pm
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REPUBLIC OF KENYA



TURKANA COUNTY GOVERNMENT
MINISTRY OF AGRICULTURE, PASTORAL ECONOMY AND FISHERIES

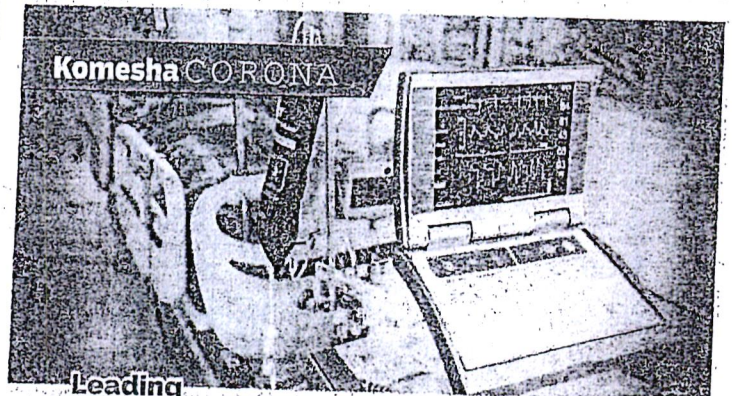
INVITATION FOR BIDS

NATIONAL COMPETITIVE BIDDING (NCB)

NAME OF PROJECT:	National Agricultural and Rural Inclusive Growth Project
CREDIT NO:	IDA 5900KE
PROJECT ID:	P153349
CONTRACT TITLE:	Tender No. TCG/MOAFEP/NARIGP/001/2019-2020 Construction of KAPU water pan and associated Infrastructure in Turkana county (Lopeipuke village).
Reference No:	STEP: KE-155130-CW-RFB

- The National treasury has received financing from the World Bank toward the cost of the National Agricultural and Rural Inclusive Growth Project, and intends to apply part of the proceeds toward payments under the contracts for Construction of KAPU water pan & associated Infrastructure.
- Turkana County Government (TCG), now invites sealed bids from eligible bidders for the Construction of KAPU water pans and Associated Infrastructure in Lopeipuke village to be completed within 120 days from the date of contract signing.
- Bidding will be conducted through the National Competitive procurement using request for bids (RFB) as specified in the World Bank's Procurement regulations for IPP Borrowers- procurement in investment project financing.
- Interested National contractors shall download the tender document from TCG website freely: www.turkana.go.ke or government portal: <https://tenders.go.ke>. And MUST forward their particulars immediately for recording and further clarification and addenda to supplychainoffice@turkana.go.ke & NARIGP, County project coordinator through email address narigp.turkana@gmail.com
- All Bids must be accompanied by a Bid security equivalent to Kshs. 900,000 of the total value of the lot/s the bidder has quoted and should be only from a reputable Commercial bank. The bid security should be valid for one hundred and fifty days (150) from the opening date.
- Completed tender documents (Original and two copies) are to be enclosed in plain sealed envelopes clearly marked with tender reference number TCG/MOAFEP/NARIGP/001/2019-2020 and be deposited in the Tender Box situated at the Procurement department of Turkana County Government Headquarters and addressed to the County Secretary, Turkana County Government, P. O. BOX 11-30500 LODWAR on or before 6th May, 2020 at 10.00 a. m East African Time. Due to COVID-19 Pandemic there will be no pre-site visit.
- Electronic Bidding will not be permitted. Late Bids will be rejected. Bids will be publicly opened in the presence of the Bidders' designated representatives and anyone who chooses to attend: at Turkana County Government Headquarters at 10.00 a. m East African Time.

CHIEF OFFICER,
DEPARTMENT OF AGRICULTURE AND LAND RECLAMATION
TURKANA COUNTY GOVERNMENT
P.O. BOX 11-30500 LODWAR.



Leading

Healthcare Facilities in Kenya

The Standard Newspaper will be publishing an informative feature dubbed, "Leading Healthcare Facilities In Kenya". The Initiative seeks to inform the public on their responsibilities against the COVID - 19 pandemic as infected or affected persons.

- The feature will also highlight on-
- Leading healthcare facilities in the country
 - County preparedness
 - Emergency and Medical Insurance Covers
 - Ambulance, Evacuation and Emergency Services
 - Healthcare equipment suppliers

As one of the key providers, you are invited to showcase your contribution in combating this pandemic.

To participate kindly contact
Richard on Tel: 0725 974 837 or E-mail: rokiko@standardmedia.co.ke



List of Persons Consulted by the PPP Directorate during the year 2020 & 2021 to submit comments on the draft National Roads Toll Fund Regulations, 2021

1. Kenya National Highways Authority (KeNHA)
2. Kenya Rural Roads Authority (KeRRA)
3. Kenya Urban Roads Authority (KURA)
4. Kenya Roads Board
5. Saitoti Torome, CBS: PS State Department of Planning
6. Charles Sunkuli, CBS: PS Devolution
7. Dr. Nicholas Muraguri, CBS: PS Lands
8. Prof. Paul Maringa, CBS: PS Infrastructure
9. Solomon Kitungu, PS Transport
10. Dr.(Eng) Joseph Njoroge : PS State Department for Energy
11. Mr.Charles Hinga Mwaura, CBS : PS State Department for Housing & Urban Development
12. Ms. Zeinab Hussein, CBS: State Department for Correctional Services
13. The Office of the Attorney General
14. Mahat Somane: Member, Public Private Partnerships Committee
15. Eng. Francis Ngokonyo: Member, Public Private Partnerships Committee
16. Stephen Mallowah: Member, Public Private Partnerships Committee
17. Bertha Joseph Dena: Member, Public Private Partnerships Committee
18. All Directors General and all Heads of Department, National Treasury
19. CEO, Council of Governors
20. Chairperson, Council of Governors
21. Chairperson, Senate Committee on Roads and Transportation
22. Chaiman, Parliamentary Committee on Transport, Public Works and Housing
23. Governor, Kiambu County
24. Governor, Machakos County
25. Governor, Muranga County
26. Governor, Nairobi County
27. Governor, Nakuru County
28. Governor, Nyeri County
29. Governor, Uasin Gishu County
30. Governor, Mombasa County
31. Governor, Kitui County
32. World Bank
33. Rift Valley Connect Consortium
34. Norton Rose Fullbright LLP and Walker Kontos Advocates
35. Institute of Certified Public Accountants (ICPAK)
36. Institute of Certified Public Secretaries (ICS)
37. Motorists Association of Kenya
38. Law Society of Kenya
39. African Institute for Development Policy
40. Agency for Cooperation and Research in Development
41. Institute of Economic Affairs
42. Kenya Debt Relief Network
43. Tax Justice Network – Africa Limited
44. Transparency International
45. National Council of Persons with Disability
46. Matatu Owners Association
47. Kenya Truck Owners Association
48. Truckers Association of Kenya

49. Kenya Transporters Association
50. Kenya National Chamber of Commerce
51. National Tax Payers Association
52. Federation of Kenya Employers
53. Consumers Federation of Kenya
54. Kenya Association of Manufacturers
55. Katiba Institute
56. Fourth Estate
57. Kenya Private Sector Alliance
58. Youth and Governance Kenya
59. Geoffrey Malombe, National Treasury
60. Kipkenda & Co Advocates
61. Daniel Mutegi Giti
62. Robert Kariuki (Twitter)
63. Solomon L Sakana (Twitter)
64. George Muga (Twitter)
65. Njoroge Wachira (Twitter)
66. Peter Kimani (Twitter)
67. James Opere (Twitter)
68. Barrack Otieno (Twitter)
69. Mwangi L (Twitter)
70. Murwa Mundu (Twitter)
71. Alexander Sarikas (Twitter)
72. Mc Blax (Twitter)

GAZETTE NOTICE No. 2796

THE TAX APPEALS TRIBUNAL ACT

(No. 40 of 2013)

APPOINTMENT

IN EXERCISE of the powers conferred by section 4 (1) of the Tax Appeals Tribunal Act, 2013, the Cabinet Secretary for the National Treasury and Planning appoints—

Habon, Billow Farrah,
Wangari John Kinyua,

to be members of the Tax Appeals Tribunal, for a period of three (3) years, with effect from the 20th December, 2019.

Dated the 20th December, 2019.

UKUR YATANI,

Cabinet Secretary for the National Treasury and Planning.

GAZETTE NOTICE No. 2797

THE STATUTORY INSTRUMENTS ACT

(No. 23 of 2013)

REGULATORY IMPACT STATEMENT ON THE PROPOSED PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020

PURSUANT to section 8 of the Statutory Instruments Act, 2013, the National Treasury and Planning has prepared a regulatory impact statement for the draft Public Finance Management (National Toll Fund) Regulations, 2020. The policy objective sought to be achieved by the National Toll Fund Regulations, 2020, is to promote sustainable funding and administrative mechanisms for the implementation of toll road projects in Kenya under the public private partnerships framework.

The proposed regulatory instrument and copies of the regulatory impact statement may be obtained or inspected at the Public Private Partnerships Unit Offices on the 6th Floor, Kenya Reinsurance Plaza on Taifa Road, Nairobi, during working hours, or downloaded from the National Treasury Website: www.treasury.go.ke or the PPP Unit website: www.pppunit.go.ke. Comments and further consultations on the statement may be channeled through the email address info@pppunit.go.ke or jchesoni@pppunit.go.ke.

Take notice that following the Presidential Directive on Covid-19 issued on the 17th March, 2020 no public and or oral submission shall be held for this purpose.

All interested members of the public are invited to submit their written memoranda on the Statement and draft National Toll Fund Regulations within twenty-one (21) days of publication of this notice.

JULIUS M. MUIA,

Principal Secretary, The National Treasury.

GAZETTE NOTICE No. 2798

THE VICTIM PROTECTION ACT

(No. 14 of 2014)

APPOINTMENT

IN EXERCISE of the powers conferred by section 31 (3) of the Victim Protection Act, 2014, the Attorney-General appoints—

HANNAH MAINGI (Ms.)

to be a member of the Victim Protection Board as per section 31 (2) of the Victim Protection Act and revokes the appointment of Clement Oketch.

Dated the 26th March, 2020.

P. KIHARA KARIUKI,

Attorney-General.

GAZETTE NOTICE No. 2799

THE CENTRAL BANK OF KENYA ACT

(Cap. 491)

NOTIFICATION OF CHANGE OF NAME

IT IS notified for general information that the specified bank formerly known as Barclays Bank of Kenya Limited has by resolution

of the Board and the approval of the Registrar of Companies, effected a change of name from Barclays Bank of Kenya Limited to Absa Bank Kenya PLC, with effect from the 7th February, 2020. Gazette Notice No. 1631 of 2020 is revoked.

Dated the 20th March, 2020.

PATRICK NJORGE,
Governor, Central Bank of Kenya.

GAZETTE NOTICE No. 2800

THE CONSTITUTION OF KENYA, 2010

THE COUNTY GOVERNMENTS ACT

(No. 17 of 2012)

MAKUENI COUNTY PUBLIC SERVICE BOARD

APPOINTMENT

IN EXERCISE of the powers conferred by Article 235 (1) of the Constitution of Kenya, as read with sections 57 and 58 (1) (a), (b), (c), (2), (3) and (4) of the County Governments Act, 2012, and upon approval by the Makueni County Assembly, I, Kivutha Kibwana, Governor of Makueni County, appoint the persons named below to be Secretary and Member of the Makueni County Public Service Board.

Name	Position
Isaac Savali Sila	Secretary
Margaret Ndunge Musyoka (Ms.)	Member

Dated the 18th March, 2020.

MR/0734894

KIVUTHA KIBWANA,
Governor, Makueni County.

GAZETTE NOTICE No. 2801

THE LAND REGISTRATION ACT

(No. 3 of 2012)

ISSUE OF A NEW LAND TITLE DEED

WHEREAS Peter Kamau Kihungi, of P.O. Box 203, Karuri in the Republic of Kenya, is registered as proprietor in absolute ownership interest of all that piece of land situate in the district of Kiambu, registered under title deed No. Kiambaa/Thimbigua/4073, and whereas sufficient evidence has been adduced to show that the land title deed issued thereof has been lost, notice is given that after the expiration of sixty (60) days from the date hereof, I shall issue a new land title deed provided that no objection has been received within that period.

Dated the 3rd April, 2020.

MR/0734941

J. M. KITHUKA,
Land Registrar, Kiambu District.

GAZETTE NOTICE No. 2802

THE LAND REGISTRATION ACT

(No. 3 of 2012)

ISSUE OF A NEW LAND TITLE DEED

WHEREAS Henry Maina Kiunuro (ID/2568813), of P.O. Box 81, Kinamba in the Republic of Kenya, is registered as proprietor in absolute ownership interest of all that piece of land containing 0.66 hectare or thereabouts, situate in the district of Laikipia, registered under title deed No. Laikipia/Ndindika/1896, and whereas sufficient evidence has been adduced to show that the land title deed issued thereof has been lost, notice is given that after the expiration of sixty (60) days from the date hereof, I shall issue a new land title deed provided that no objection has been received within that period.

Dated the 3rd April, 2020.

MR/0734767

C. A. NYANGICHA,
Land Registrar, Laikipia District.

REPUBLIC OF KENYA



THE NATIONAL TREASURY

IN THE MATTER OF PUBLIC PARTICIPATION ON THE DRAFT

**REGULATORY IMPACT STATEMENT ON THE DRAFT PUBLIC FINANCE
MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020**

(1) The objectives of and reasons for the proposed National Toll Fund Regulations are mainly the following:

- (a) To support the Government of Kenya's agenda to develop world class roads across the country in aid of development and promotion of productive sectors of the economy;
- (b) To promote protection of human life and property through reducing the numbers and severity of road accidents, while reducing the financial burden of borrowing to build such roads;
- (c) To establish a dedicated fund pool into which toll revenues will be paid to support the Government of Kenya's payment obligations under public private partnership contract arrangements;
- (d) To give project lenders and private parties under PPP arrangements confidence in the Government's commitment to meet its payment obligations adequately, timeously, consistently and for the entire duration of signed PPP contracts;
- (e) To give lenders and private parties visibility over the amount of funds actually available for debt service and operations and maintenance cost requirements of contracted projects;
- (f) To promote better market practices and promote better value for money price discovery outcomes in competitively procured PPP projects;
- (g) To promote fiscal responsibility through dedication and strict application of designated funds to designated public purposes;
- (h) To promote the quality and quantity of public services through linking performance to payments, and allowing for mechanisms for sanctioning non-performance while protecting the public interest and public resources from financial loss arising from service non-performance;
- (i) To give effect to the intentions of the [Kenya Roads Act, 2018]; and
- (j) To promote the Government's objective of promoting and securing public private partnerships in roads development in Kenya.

(2) The effect of the proposed National Toll Fund Regulations include the following:

- (a) The regulations give regulatory effect to the approved National

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Tolling Policy, and is consistent with the principles of the Constitution, as well as the [Kenya Roads Act, 2018], which require that the imposition of a charge related to access to a toll road system shall be first published in the Kenya Gazette;

- (b) The regulations establish a centralized and mandatory framework on the administration of toll revenues in Kenya;
- (c) The Regulations impose a charge for every person accessing a toll road network in Kenya, and the effect of the charge will be to control access to the tolled network, meaning that only those persons that pay the prescribed toll will have the unimpeded right to travel on and through the tolled road network;
- (d) The regulations enable the Government of Kenya to implement public private partnerships for roads development and modernisation quickly, and to high standard, with guaranteed high level performance of Kenya's critical roads over a long period of time, with minimal burden on the National Exchequer.

(3) Possible alternative and practicable means of achieving the foregoing objectives, including other regulatory as well as non-regulatory options:

- (a) An alternative to financing new roads development is the use of the National Exchequer Account – implying the on-boarding of the full project cost on the national budget, or borrowing by Government to finance the construction of the roads, and such financing solutions being budgeted for in the normal manner: this simply means the creation of fiscal space, and the withdrawal of available public funds from other competing needs and uses, with concomitant burdens on the individual tax payer;
- (b) The Kenya Roads Fund could be remodelled for utilization in the development of new roads (currently, it is applied primarily to rehabilitation of existing roads) – but this would be faced with the challenge of statutory re-engineering, as well as the fundamental question on how such a Fund could be funded to attain the same objectives – with the answer typically being the tax payer shouldering the cost, at a general country level, regardless of whether such tax payer actually ever uses the improved road network;
- (c) Ultimately, the alternative options imply the full retention of the financing risk by Government, and the expansion of the tax exposure (increased tax burden) of the ordinary tax payer.

(4) Assessment of the costs and benefits of the proposed National Toll Fund Regulations and of any other practicable means of achieving the same objectives;

- (a) A direct cost that arises from this regulatory instrument is the imposition of an additional cost to travel, but only for vehicles

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falling under the approved classes under the National Tolling Policy, and which actually use the tolled road network;

- (b) Owing to the improved road infrastructure, however, every single user of the toll road network will experience the immense benefits of traveling efficiently through the network, without exposure to heavy traffic snarl-ups, and without the wear and tear common on less well-constructed and poorly maintained roads;
- (c) Vehicle running and operating costs will be significantly less, with the outcome that the cost of paying a toll will be compensated many times over from savings arising from dramatically reduced vehicle operating costs (being a function of the time spent on roads, the fuel wasted on travel delays, and excessive wear and tear stemming from poor and damaged road surfaces);
- (d) Travellers through the toll network will be assured of transit time, representing a substantial cost of time saving for both business travellers and commercial undertakings – as it can enable smaller operations to operate Just-in-Time systems, and save substantial money from costly stockpiling solutions they currently implement owing to uncertainty, currently, in travel time across the networks intended to be tolled;
- (e) The toll is not a tax of general application – it is a user fee, which represents a fair allocation of costs and benefits at the macroeconomic level of society: only such persons that actually use the service are obliged to pay for the service, in exchange for the wide package of benefits that come from that service. Those that do not are not exposed to the toll charge, which is a fair proposition. In addition, tolled roads will not be subject to maintenance, repairs and rehabilitation under the Kenya Roads Fund – all of that cost will be bundled up in the PPP arrangement, and will be fully catered for under the tolling arrangement. There is therefore no double jeopardy even for the toll-payer, and the non-toll-payer is neither unduly exposed to toll nor the Roads Maintenance Levy Fund. On either side, there will be no double jeopardy, and no double taxation, and no unjust enrichment.
- (f) All the other alternatives to tolling are beset by various challenges and limitations, and none of the alternatives represent true viability and utility in helping the Government of Kenya to achieve its development agenda within the target timelines. These reasons are better outlined in section (5) below.

(5) The Reasons why the other means set out in section (3) are not appropriate:

- (a) While the national budgeting platform is stable and mature, it is faced with significant constraints arising from numerous competing needs. To deliver world class infrastructure rapidly, massive resource deployment is necessary. It is not possible under present fiscal space constraints to dedicate the size of financial resources required at a minimum to roll out the road modernisation agenda. The budget, put

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simply, is inadequate. An alternative solution is required – and tolling represents that solution: it is credible, it is fair as it apportions costs appropriately, and it is grounded on a performance based contract which assures the highest levels of public service delivery in the form of modern well-built and well-maintained roads.

- (b) In addition to budgetary inadequacy, it is also the case that the budgeting framework, from a resource allocation perspective, is not always predictable. Supervening events, altering prerogatives, among others, may require resource re-allocation amongst Government priority programmes, which in itself may mean that funds initially earmarked for such projects as roads development, may subsequently be vired to alternative public uses.
- (c) Furthermore, every year, Government stipulates varying budget ceilings for various economic sectors, and this process is not precise since various actors are involved at the Executive and Legislative arms of Government. The idea of budget ceilings at the sectoral level therefore imports uncertainty which can be a significant constraint for investors whose decisions are hinged on long-term visibility of governance arrangements around a project.
- (d) Partnership projects are always grounded on trust – trust that one's partner will keep their end of the bargain. In project finance-based investments, trust is motivated by visibility and predictability – and the budgeting process on multi-year, sometimes multi-decade financial obligations, may represent a certain level of uncertainty. Project lenders therefore require confidence contracted obligations will survive political cycles, will stand the test of time, and their rights will not only be recognized, but also protected.
- (e) Outside of the budgeting framework, other potential platforms for pursuing the toll road financing solutions, such as the Kenya Roads Fund, are beset by structural rigidity principles built into such funds. The Roads Maintenance Levy Fund is a rigid tool: bound by rigid formulae on how moneys within the Fund are to be distributed amongst the qualifying stakeholders, who are named within the constitutive legal instrument. Furthermore, the Fund is open only to maintenance and rehabilitation works, not the development of new road infrastructure. This last bit is the singular impediment the utility of this Fund for the intended objectives of the Regulations.
- (f) None of the alternative options for financing the Government's ambitious infrastructure modernisation agenda portends the kind of sustainability that tolls represent.
- (g) To implement the programme on a budget basis, it would be imperative to first identify and dedicate actual financing under the budget, prior to project implementation commencing. Under the rules of the Public Finance Management Act, 2012, it is unlawful to initiate a public tender process if one does not have financing within its approved budget estimates for the year in question. This means the pace of implementing the roads modernisation programme must be slowed down and pursued incrementally were it to be pursued under the budget framework. Under a tolling arrangement, the ambitious

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programme can be pursued simultaneously, and Government's overall exposure to all such projects would remain low, covering only that component of shortfall that is realized from time to time by the toll operator.

(6) any other matters specified by the guidelines;

Overall, the net impact of the proposed regulatory rule is positive on both the Kenyan economy and the individual road user. The benefits outweigh the costs, many times over.

(7) a draft copy of the proposed statutory rule.

A draft copy of the Public Finance Management (National Toll Fund) Regulations, 2018 can be downloaded from www.pppunit.go.ke.

MATRIX OF RESPONSES TO THE COMMENTS FROM THE COMMITTEE ON DELEGATED LEGISLATION on the PFM (NATIONAL ROADS TOLL FUND) REGULATIONS 2021, DRAWN FROM THE MEETING HELD AT WHITESANDS HOTEL IN MOMBASA ON 1ST SEPTEMBER 2021

# Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
1 General point	The Regulations appear to apply to 'National Roads'. This may lead to iniquity for other roads ie KenHA and KerRA roads.	The Public Roads Toll Act (Cap 407) is the principal legislation on tolling and deals with all public roads regardless of location. Section 6A of this Act establishes the National Roads Toll Fund and requires that it be established under the PFMA, 2012. The Act has a framework on how public roads and structures can be declared toll roads by the sector. The present Regulations therefore fulfil the mandate under the Public Roads Toll Act by establishing the Fund.
2 Regulation 3	The purpose of the Fund appears unclear. When does it stop operating?	The objects and purpose of the Fund are outlined under Section 6A(3) of the Public Roads Toll Act and Regulation 3 of the draft PFM(National Roads Toll Fund Regulations) as follows: <i>Section 6A(3) of the Act: "The purpose of the Fund shall be to provide funds for the –(a) proper functioning of toll roads and toll stations; and (b) development, repair or maintenance of roads as the Minister may direct, taking into account regional balancing.</i> <u>Regulation 3 of the draft Regulations</u> provide that the purpose of the Fund is to: a) to establish a centralized Fund into which all revenues collected pursuant to these Regulations shall be paid and administered; b) to provide for the oversight and administration of the Fund; c) to prescribe the processes by which money is paid into and out of the Fund; d) to provide investors in and financiers of project roads, as well as the general public, necessary information on the status of the Fund to support investment decisions; and e) to make provision for purposes connected with and incidental to the foregoing objects and purposes.

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
3	Regulation 7	The Regulation deals with payments out of the Fund. What are 'political events'. Why do we compensate for political events, and how do we pay for them? Why not use the terminology 'political risks'?	To address the concern, 'Political Events' will be defined as a closed list of risks specified in the Project Agreement and attributable to Government
4	Regulation 8(1)(e)	Deals with the establishment of the Oversight Committee and the appointment of non-public officers (private sector representatives). This should be done through a competitive process.	Agreed. Regulations have been amended to incorporate the requirement for a competitive recruitment process.
5	Regulation 11(1)(e)	The Regulation deals with Vacation of Office of a non-public officer on the Oversight Committee and permits an officer to remain on the Committee if the conviction is less than six months. Conviction on account of dishonesty or moral turpitude, regardless of the severity of punishment or sanction, should be the trigger for termination of appointment.	Agreed. The six-month condition has been deleted.
6	Regulation 12	Deals with the appointment of the Officer Administering the Fund. The OAF appointment procedure should be competitive, and there should be a formal appointment procedure declared in the Regulations. Need to also include minimum qualifications.	The designation of the OAF is based on Section 24(5) of the PFMA, 2012 which provides that the Cabinet Secretary shall designate a person to administer every national public fund established under subsection (4). The precedent therefore with other Regulations under the PFMA (eg the PFM (Strategic Food Reserve Trust Fund) Regulations, 2015 and the PFM(State Officers House Mortgage Scheme Fund) 2015), has been to replicate the provisions of the parent statute and provide for the designation of the Officer Administering the Fund rather than have an appointment process.
7	Regulation 14	Regulation 14 appears to be a tacit subsidization of laziness and poor project selection. Why should shortfalls arise if the Feasibility Study was adequate, so the taxpayer need not carry this cost? Only commercially viable projects should progress.	Toll revenue failure is not really linked to poor project selection or laziness but has everything to do with the social acceptability of tolls, and potentially permutation in traffic volumes in future. It is a necessary provision for the bankability of the NRTF Regulations

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
8	Regulation 26	Regulation 26 on superintendence of Fund expenditure gives the Officer Administering the Fund (OAF) room to make other guidelines. It therefore appears the OAF has power to do things that border on further issuance of regulations: OAF role should be definitive and express, to curb abuse.	The systems, protocols and procedures that the OAF can establish under this part are overseen by the Oversight Committee. Regulation 10(1)(e) provides that the Committee shall approve the systems for the control and oversight of the operation of the Fund.
9	General	Which Principal or Cabinet Secretary does the Oversight Committee report to? In which Ministry is the Fund domiciled?	The Principal Secretary, National Treasury is the Chairperson of the Committee. The Cabinet Secretary, National Treasury and Planning also has an important role under the Regulations, including authorising withdrawals of projected surpluses from the Fund; ensuring sustenance of the governance framework of the tolling framework with the view to promoting the long-term financial integrity of the Fund; approving the financial institution where the Fund shall be administered; appointing non-public officers to the Committee; amongst other key roles
10	General	Will the Regulations amount to double taxation since people will pay fuel levy as well as the proposed tolls?	Tolling does not amount to double taxation. RMLF only funds maintenance which is not adequate for the entire road network of 160,876km. The maintenance requirement for the entire network is KES 40B against an annual collection of 25B. This clearly depicts the funding gap and the outstanding maintenance backlog for paved roads only which is estimated at 400B to date. Therefore, tolls will be used to develop and maintain the specific project roads and it will be a portion of savings realized by road users because of improved levels of service. Toll roads will not receive any allocations from the RMLF.
11	General	There is a fuel levy fund administered by the Kenya Roads Board. Are we not establishing too many funds for the roads sector? There are several others already existing. What impact will this Fund have?	The RMLF is a fund purely dedicated to road maintenance. The proposed National Roads Toll Fund Regulations will purely deal with tolling of roads

#	Clause in the Regulations	Comments from the Committee on Delegated Legislation	Responses from the National Treasury
12	General	The full architecture of who will collect the tolls and how is not clear from the Regulations.	The main purpose of the Regulations is to establish a centralised Fund. Details on how the tolls will be collected is outlined under the provisions of the Public Roads Toll Act (Cap 407).
13	General	On public participation in the making of the regulations, Treasury should table actual evidence of public participation, not just a summary.	Agreed. The file containing the evidence of public participation is available for review
14	General	The National Treasury needs to coordinate civic education on the tolling structure and sensitize Kenyans to understand the process and where the tolls will be effected.	This is ongoing in liaison with KeNHA.
15	General	Toll stations operate elsewhere. Pick examples to benchmark against. Highlight success stories and explain the legal framework under which they are established. Is it through a statute, rules and regulations?	A good example within Africa is the N4 Highway, which links the economic heartland of South Africa (Gauteng Province) to Maputo Port in Mozambique. The rehabilitation and tolling of the 571-kilometer highway is considered a major success and demonstrates the power of political cooperation between neighbouring countries and the benefits of PPP deals to the private and public sectors. In terms of the legal frameworks there are several parallels that can be drawn to the Kenyan scenario including: the commencement of the tolling process through a National Tolling Policy; the establishment of the Road Fund under the National Roads Act; the exclusivity of the use of the tolls collected such that they are only spent on funding, development and operations of toll roads and do not go to the general fiscus.
16	General	There should be a provision for suspension of Oversight Committee members and the Officer Administering the Fund upon the commencement of formal investigations.	Since the PSC Act 2017 only prescribes suspension by an authorised officer in situations where the officer has been charged with a serious criminal offence, these provisions would apply to the OAF who is a public servant.

STAKEHOLDER COMMENTS ON THE PUBLIC FINANCE MANAGEMENT (NATIONAL TOLL FUND) REGULATIONS, 2020 AS AT 29TH APRIL 2020.

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<u>THEMATIC AREA: 1. ESTABLISHMENT OF THE FUND</u>				
<p>Consumers Federation of Kenya (COFEK)</p>	<p>1.0 The setting of a National Toll Fund is a welcome idea especially if it is premised on the following; 1.1 Based on Principles of Public Finance Management under Article 201 of the Constitution and specifically on fair taxation so as to avoid cases of multiple taxation 1.2 Based on and respects provisions of Article 46 of the Constitution especially on ensuring that consumers have the absolute right to information necessary for them to gain full benefit of the services to be and or being provided by the proposed National Toll Fund</p>	<p>GoK takes note of these comments The Fund is established under the Public Finance Management Act, 2012. Section 3 defines the object of the Act as follows “to ensure that— (a) public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and (b) public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies. The regulations therefore fully embrace the principles of public financial management and consumer rights and public office</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
World Bank	<p>Purpose of the NTF: We understand that the only purpose of the NTF to make the availability payments under the Project Agreements and no other "other exceptional payments" such as Political Risk and Early Termination Events. This is a positive feature that must be preserved (and applied to all potential exceptional payments) as the NTF is not an appropriate source of large one-off payments. This must be explicitly clarified in the regulations.</p>	<p>Gok has clarified these Comments This is correct and the restrictive scope of the Regulations has been preserved under Regulation 7, which specifically excludes Compensation for Political Events and termination Payments from the payments regime. In addition, the eligibility, payment and oversight provisions for disbursements from the Fund under Regulations 13, 14 and 15 ringfence this position. Section 24(7) of the PFM Act solidifies this position by providing that the administrator of a public fund shall ensure money held in a fund is spent only for the purpose for which the Fund is established.</p>	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Access to Information Fund shall have the 'power to access any project related data'. This should be tied to the underlying Project Agreement and should be within the purview of Confidentiality provisions.</p>	<p>GoK has clarified these comments. The right of the Fund to access information is contained in Reg.21. The broad reference to 'any project related data', ensures the Project Agreement is captured.</p> <p>An additional provision to cater for the confidentiality shall be included. GoK recognizes Confidentiality clauses under a Project Agreement. (However, the confidentiality aspect is not in these Regulations?)</p> <p>Right of Access to information held by GoK shall be exercised as per the provisions of the Access to Information Act, 2016 Laws of Kenya. (This Act relates to the members of the public seeking information and may therefore not be appropriate)</p>	Reg 21	<p>Amend Reg 21 by inserting the following proviso after sub regulation (c) "Provided however that all information or data received pursuant to sub regulations (a) and (b) shall be confidential."</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>What is the Effective Date of this regulation and when will the Officer start preparing the projections for shortfall/surplus?</p> <p>Objectives and Purposes: refers to providing investors and financiers visibility and structure in participation process – Does this contemplate providing role for investors and financiers to participate in the Fund?</p>	<p>Comment clarified.</p> <p>Section 205 of the PFMA provides that regulations made under the Act 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.</p> <p>For Statutory Instruments under the Statutory Instruments Act 2013, however, where they are of a delegated nature, the instrument takes effect on the date of publication in the Kenya Gazette, provided it is tabled in Parliament within 7 days of Gazetting.</p> <p>The context is that a dedicated fund pool provides transparency, which in turn drives comfort for investors about the availability of resources for the Government to consistently meet its end of the bargain. This is particularly crucial given historicity in Kenya with regard to road construction contracts, which have witnessed varying levels of</p>	None	None

CONTRIBUTORS NAIVE	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
		<p>pending bills, a phenomenon that does not induce confidence about repayment ability, effectively constraining lender risk appetite for exposure to such project development models.</p> <p>By promoting visibility of the repayment ability, the effect is a lowering of risk pricing by private partners, with the overall outcome that the cost of delivering public services tends to benefit from lower prices, because the market for engagement is more certain, marked by lower information asymmetries.</p>		

<p>Kipkenda & Co. Advocates Off Riverside Drive P.O. Box 56832-00200 Nairobi. Info: info@kipkenda.co.ke</p>	<p>Clarity on the Place of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986. The Public Roads Toll Act Cap. 407 of the Laws of Kenya has subsidiary legislation known as the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 established vide legal notice number 307 of 1986. A reading of the Rules shows the existence of a Public Roads Toll Fund and an officer administering the fund. The Public Roads Toll Fund was established under section 7 of the Public Roads Toll Act cap. 407. We, however, note that the said section 7 was deleted by Act No. 2 of 2007 Fifth Schedule (Kenya Roads Act, 2007). Although Section 7 of the Public Roads Toll Act Cap. 407 was deleted, the subsidiary legislation under the Act continue to be in force. This is in accordance with Section 24 of the Interpretations and General Provisions Act, Cap. 2 which provides as follows: "Where an Act or part of an Act is repealed, subsidiary/legislation issued under or made in virtue thereof shall, unless a contrary</p>	<p>Comments are incorporated as recommended.</p>	<p>Introduce a new Reg.26 titled 'Repeal and Transition'</p>	<p>Repeal and Transition "26. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 under the Public Roads Toll Act, Cap 407 of the Laws of Kenya is hereby repealed.</p>
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intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder. "

As per the above foregoing, the question then begs what the place of Public Roads Toll (Public Roads Toll Fund) Rules, 1986 is vis-à-vis the Public Finance Management (National Toll Fund) Regulations, 2020. The two regimes of law cannot exist at the same time since they are serving more or less the same purpose hence we propose for the repeal of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986 before the operationalization of the Public Finance Management (National Toll Fund) Regulations, 2020.

The Public Finance Management (National Toll Fund) Regulations, 2020 is more comprehensive as compared to the 1986 Rules hence our proposal for the repeal of the Public Roads Toll (Public Roads Toll Fund) Rules, 1986. Further,

	<p>Regulation 5 of the proposed regulations provide that Road Tolls shall be set in accordance with the Public Roads Toll Act, Cap 407 of the Laws of Kenya. This further buttresses the need to harmonise both legislations on the issue of Toll Fund. There is need for clarity that the 1986 rules have been repealed. In that regard, we propose the addition of Regulation 26 to the draft which we proceed to word as follows:</p> <p>Repeal and Transition</p> <p>"26. The Public Roads Toll (Public Roads Toll Fund) Rules, 1986 under the Public Roads Toll Act, Cap 407 of the Laws of Kenya is hereby repealed.</p>			
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<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Definitions of "Projected Shortfall" and "Projected Surplus"</p> <p>As per the draft Regulations, a Projected Shortfall is 5% above projected requirements and a Projected Surplus is 10% above projected requirements for the next 12 months. This seems low as it leaves very little cushion to address any change (in particular in actual traffic or in the exchange rate affecting the level of service payments) over the contemplated period. The ratios used in the relevant definitions should therefore be revised.</p> <p>The appropriate ratio will depend on whether the National Treasury agrees to reflect the ring fencing approach in the Regulations (as explained in paragraph 1 above). Thus, in a ring-fencing scenario, the ratios should be as follows:</p> <p>"Projected Shortfall" means where the Projected Fund Ratio falls below 1.35x3 in any projection period;</p> <p>"Projected Surplus" means where the Project Fund Ratio exceeds 1.45x in any projection period.</p>	<p>The threshold for projected shortfalls and surpluses have both been raised to 30% above projected requirements.</p>	<p>Regulation 11 has been appropriately amended. The definitions of both terms have also been updated.</p> <p>Projection window: 12 months rolling forward.</p>	<p>Projected shortfall arise where the Fund is below 1.3 times contracted obligations.</p> <p>Projected surpluses arise where the Fund is above 1.3 times contracted obligations.</p> <p>These projections will be made by the Officer Administering the Fund, and will adopt a 12-month forward rolling outlook.</p>
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	<p>Should the National Treasury decide to reject the ring-fencing approach, ratios should be even higher than the levels indicated above (1.35x and 1.45x) to address the uncertainty associated with the amalgamation of several projects cash flows. Further, utilisation of Project Surpluses should be based on long-term cash projected coverage ratio (akin to a "Project Life Coverage Ratio" as can be seen in a project financing) that includes toll collections versus projected future Service Payments. The ratio specified in sections 11(1)(a) and (c) should be revised accordingly.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>NortonRose Fulbright LLP and Walker Kontos, in their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 3(d) (Objects and Purpose of Regulations) One of the object and purpose of the Regulations is to provide investors and financiers of Project Roads visibility and structure in the participation processes under the Fund. It is not clear what participation rights (if any) investors and financiers have been afforded under the Regulations. Recommendation: Appropriate provisions to enable investors and financiers participate or obtain information on the operation of the Fund. For instance, see our recommendation in item 8 below requiring the Officer Administering the Fund to publish either on the Ministry's website, the Kenya Gazette and/or 2 newspapers of national circulation, quarterly reports of the projected Inflows and Outflows from the Fund, as well as balance of the Fund at the end each quarter.</p>	<p>There is need to redraft Regulation 3 (d) to provide more clarity on the participation of the investors The comments could be numbered to allow for cross referencing with the explanation on 'providing visibility to investors' as furnished to the World Bank hereabove Section 82 of the PFMA contains provisions that address accountability and publication of financial reports. It provides" Annual reporting by receivers of revenue (1) At the end of each financial year, a receiver of revenue for the national government shall prepare an account in respect of the revenue received and collected by the receiver during that financial year. (2) An account prepared under subsection (1) shall include— (a) a statement of receipts and</p>	<p>Timely and consistent publication of quarterly reports is in line with the Constitutional principles of transparency and accountability in public finance administration.</p>	<p>Regulation 27 has been enhanced on access to information requirements. Regulation 3(d) finds better implementation under Regulation 27.</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
		<p>disbursements in such form as the National Treasury may direct; and (b) a statement of arrears of revenue. (3) Not later than three months after the end of the financial year, the receiver of revenue for the national government shall— (a) submit the accounts to the Auditor-General and a copy to the National Treasury, Controller of Budget and the Commission on Revenue Allocation; and (b) publish and publicise the financial statements.</p>		

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 4(2) (Objects and Purpose of the Fund) Regulation 4(2) mentions that the purpose of the Fund is to provide a dedicated public fund from which the "Government's" payment obligations arising from the Project Agreements for the Project Roads shall be met. Reference to the Government in this clause appears incorrect as GoK is not a party to the Project Agreements, and hence the relevant clause should in fact refer to the "Contracting Authority" instead.</p> <p>Recommendation: Appropriate amendments to be made.</p>	<p>Proposal not accepted.</p> <p>Consideration may be given to accommodating the proposed clarification as follows:</p>	<p>Contracting Authority is a juridical component of the GoK Reg 4</p>	<p>"The objective and purpose of the Fund shall be to provide a dedicated public fund from which Government's payment obligations, for Contracting Authorities that have executed Project Agreements for Project Roads, shall be met."</p>
Bertha Dena	<p>1. Regulation 4(2) Page 4: Objects and Purpose of the Fund: The regulation states that the fund will meet the Government's payment obligations arising from Project Agreements for Project Roads shall be met. This is confusing since in the definition of terms in my understanding</p>	<p>Comment clarified. Agreed. It is necessary to reflect the position that the Project Roads may be PPP arrangements or other Roads declared as toll roads under the PRT Act.</p>	<p>The definition of project roads will be updated to make the reference clearer</p>	<p>The definition of project roads has been updated in the Regulations to refer to all roads declared as toll roads.</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>- Projects Agreements refers to PPP road projects and Project Roads refers to all roads declared as toll roads by the Cabinet Secretary responsible for roads. In that case which is "Project Agreements for Project Roads."</p>			
<p>Institute of Certified Public Accountants (ICPAK)</p>	<p>New Regulation: Toll Road Project Risks The main risks facing toll road projects include preconstruction, construction, traffic, revenue, currency, political, and financial. These risks must all be addressed in a manner satisfactory to debt and equity investors to make investment attractive for committing funds to toll road projects. Recommendation: The regulation should include a clause on toll road project risk management.</p>	<p>Proposal is understood, and relate to risks carefully allocated under the primary contract documents. They are not subjects for the Toll Fund Regulations, hence proposal is well noted, but not accepted for the toll fund regulations framework</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>New Regulation: Guiding Principles Introduce a new Regulation on Guiding Principles to anchor the key tenets of public finance management as enshrined in the PFM Act 2012</p> <p>Recommendation: Introduce a new Regulation to read, The following principles shall guide all aspects of governance, management and administration of the Fund— a) there shall be transparency, accountability, ethical and results-oriented management of the Fund; b) monies from the Fund shall be used in a prudent and responsible way; and c) financial management of the Fund shall be responsible, and fiscal reporting shall be clear. Anchors important PFM principles to guide in the management of the Fund. It is essential to have this provision at the Regulations level.</p>	<p>Proposal is noted, but not included for the following reasons. The Regulations are based on the PFM Act. Indeed the Preamble expressly provides that the Regulations are made pursuant to Section 24 thereof. The recommended principles and values are therefore drawn from the parent PFM Act. Accordingly, the cited tenets are appropriately anchored in the regulations. In addition, the substratum of the proposed principles are embedded in the roles and mandates of the Oversight Committee and the Officer Administering the Fund.</p>	None	None

THEMATIC AREA: 2. OPERATIONALIZATION OF THE FUND

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
World Bank	<p>Allocation of Funds: The current drafting of the regulation does not provide indication as to whether or not the fund will serve projects on a pooled "pari-passu" basis, or by treating projects separately through segregated accounts. A clear statement of principle (including security and ranking) along these lines as well as a well-defined cash waterfall may be useful to clarify the payment mechanics of the NTF. We note that the documentation makes indications of accounts and sub-accounts (which would indicate that separate allocations will be available for certain projects). However, for the avoidance of doubt, more clarity on this aspect is advisable.</p>	<p>Government accepts the proposal to introduce project specific subaccounts, but not in a manner that subrogates liabilities within the Fund.</p> <p>The subaccounts will implement a cash waterfall from each project account that adopts the following broad outlook:</p> <ul style="list-style-type: none"> • Payments for toll operator costs; • Payments to the project companies supported under the Fund; • Costs of the officer administering the fund as contracted or otherwise determined; • Costs of any advisors hired by under the Regulations for any 	Reg.20	Regulation 20 has been revised to create the cash water fall mechanism and the project sub-accounts.

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
		<p>function authorized under the Regulations;</p> <ul style="list-style-type: none"> Any other eligible costs provided these are relevant to the supported projects under the Fund 		
	<p>Fund Inflows – Confirmation on readiness of project roads to be able to collect tolls for meeting first payment obligation under the Project Agreement? Approval for any initial contribution expected from the Govt Budget to meet payment obligation, if the first toll revenues are insufficient/not ready? The regulation should provide clear indication of how the GOK budget allocation will take place with regards to funding NTF shortfalls, including timing. A fundamental aspect is to make sure that NTF will always have sufficient funds to meet its payment obligations.</p>	<p>Government accepts the proposal on including obligations to pre-fund the Toll Fund to get it mission ready from the date of the first sectional completion.</p>	<p>Introduce a new clause to address prefunding obligations</p>	<p>Regulation 22 has been inserted in the Regulations to address prefunding of the Toll Fund</p>

<p>Projected Surplus - We understand that the GoK wants to have the ability to sweep a portion of the excess cash of the NTF. While we fully appreciate the rationale, such mechanism should be carefully contemplated to avoid impacting the financial robustness of the NTF. This should be seen as a source of funds for the GOK only in very extreme and robust circumstances. For example, the release of funds should take place only if: i) the Projected Fund Ratio is very high (i.e. the 1.10x trigger is quite low); and ii) the NTF is fully-funded on a stand-alone basis with toll collections only, without any previous or future exogenous government injections of funding. Keep in mind that Service Payments will be impacted by traffic flows as well as foreign exchange fluctuations, so we would recommend a much more conservative threshold in all cases.</p> <p>ii. In our view, the release of funds should be allowed based on two fundamental criteria:</p> <ul style="list-style-type: none"> • long-term cash projected coverage 	<p>GoK will retain the right to sweep surpluses from the Toll Fund into the Wider Exchequer to support other social development purposes. It is not the policy of Government to hold idle cash in public funds under constrained fiscal frameworks.</p> <p>However, Government has raised the threshold of declaration of the existence of a surplus to 30% above contracted obligations under the Fund, determined annually.</p>	<p>A detailed provision on the management of surpluses (how they are to be determined, how they are to be declared) will be included in the Regulations.</p>	<p>Regulation 23 has been inserted to regulate the question of surplus determination and declarations</p>
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ratio that includes toll collections versus projected future payments, similar to a lender's Loan Life Coverage Ratio; and short term cash coverage ratio which would be based on immediately available cash available versus the projected future outflows for the next 12-24 months, akin to a Debt Service Coverage Ratio.

iii. This cocktail of ratios would enhance short term liquidity as well as longer term solvency in creating a more bankable NTF and providing a better credit risk for the Bank's PRG, as well as a more robust credit profile for the private market.

iv. Ratio Level of Projected Shortfall - Similar to the point above about the release of surplus funds,

	<p>the 1.05x level which triggers a projected shortfall is quite low considering the uncertainties around the service payments and toll revenues of the Projects (i.e. number of projects, level of tariffs during the life of the projects, level of traffic, FX risk, inflation etc). Given the degree of traffic and macroeconomic variables that are included in the payment formulas, we would recommend a much more robust level to trigger the projected shortfall procedures.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Other uncertainties of the current drafting of the regulation relate to the amount of cash that should remain in the account after any surplus payment (i.e a significant cash cushion shall remain in the NTF) and the timing and method of the calculation as it seems difficult to allow such outflows based on projections (i.e. in our opinion, it shall be authorized only based on available cash after costs have been fully covered).</p>	<p>GoK accepts that the Fund should have an adequate cash buffer above contracted obligations, and has accepted a 30% cash buffer over required funds on an annual basis. A projected fund shortfall is declared where the funds within the Fund fall below 1.3 times contracted obligations. This is consistent with the policy outlined above on surplus declarations.</p>	<p>Provisions dealing with fund shortfalls to be beefed up for better clarity.</p>	<p>Regulations 14 and 15 have been updated to address this concern</p>
	<p>Procedures of the Fund: Disbursements from the Fund will be against "proper documentation" as detailed in these regulations. It is important that the timing for the review of the documentation by the NTF is clearly stated to avoid misunderstandings, delays/or any other administrative problems that could interrupt the smooth flow of funds when due.</p>	<p>The disbursement procedures by the OAF are fiducial responsibilities, and these are detailed at Regulations 18 and 19.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>What is the projection period for calculating the Projected Fund Ratio? Are Projected Shortfall/Surplus calculated for 12 rolling months? Definition to state this clearly.</p>	<p>Yes. 12 months. Forward looking.</p>	<p>None</p>	<p>None</p>
	<p>Officer to satisfy itself that each payment instruction submitted is "eligible" – The invoices should have already been agreed/reviewed/approved at the underlying Project Agreement level (for example 29.3.1 and 29.3.2 clarifies this). What is the need for additional 'eligibility' criteria check at the Fund level?</p>	<p>The OAF discharges a fiducial duty as the person in control of a public fund. He/it must satisfy himself/itself that each payment is warranted, because the OAF carries personal liability for improper payments</p>	<p>Reg.18 & 19</p>	<p>None</p>
	<p>Right to Question and Reject Payment Instruction – The Officer has the 'power to suspend disbursements against invoices until such matters are resolved' – this is not consistent with the provisions of the underlying Project Agreement, where eligible payments would have been already certified. Once certified under the Project</p>	<p>As above.</p>	<p>As above</p>	<p>As above</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Agreement, there should not be further suspensions of payments by the Fund. The rationale for this right could be questionable. It is important to note that the Fund is not a party to the underlying Project Agreement</p>			
	<p>The document is a bit silent on the actions that the NTF can implement to invest the surplus of the fund, if any, to compensate for inflation and FX risk – I understand that APs are paid in US</p>	<p>The Regulations provide for the Oversight Committee power to approve the Fund's investment policies. The details of such policies are not suitable for rigid governance in a regulation platform.</p>	<p>Regulation 10(1)(g)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THESE REGULATIONS
<p>Geoffrey Koehn National TaxPayer Association Pioneer Building Room 308 Oginga Odinga Street P.O. Box 204- 40123 Kisumu +254100176341</p>	<p>Disbursement from the fund. To enhance accountability, we are of the opinion that the input of the Controller of budget should be factored in when it comes to the disbursement of the funds. The Administrator should also require the approval of the COG committee on transport on County Roads that have benefitted through the PPP agreements.</p>	<p>Proposal not accepted – the proposal runs counter to the PFM Act, 2012 under section 24, which empowers and requires the CS for the National Treasury to designate fund administrators for public funds. Fund administrators control the fund's inflows and outflows in line with the governing instruments, in this case, these regulations.</p> <p>In addition, the enhanced accountability requirement is adequately prescribed in Section 82 of the PFMA, which inter alia, requires annual receivers of revenue, not later than 3 months after the end of the financial year, to (a) submit the accounts to the Auditor-General with a copy to the National Treasury, Controller of Budget and the Commission on Revenue Allocation; and (b) publish and publicize the financial statements.</p>	<p>There are accountability mechanisms under Regulations 13 and 14 to ensure eligibility of disbursements under the fund.</p>	<p>None</p>

<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Ring fencing / Other projects The Consortium's remains of the strong opinion that the Fund should have segregated funds to support each project individually and thus the Regulations should provide for ring fencing provisions.</p> <p>If however the National Treasury decides to maintain the current approach reflected in the draft Regulations (absence of ring fencing), the Consortium considers that the following adjustments to the functioning of the Fund should be made:</p> <p>(i) A list of the initial Project Roads intended to be covered by payments from the Fund should be included as an appendix to the Regulations.</p> <p>(ii) Addition of any new project to the scope of payment obligations of the Fund should be subject to the approval of the existing Service Providers, which cannot be withheld if the Cabinet Secretary is able to demonstrate to the reasonable satisfaction of the Service Providers the financial capacity of the Fund to meet the payment obligations under such new project;</p>	<p>GoK has accepted the introduction of project sub-accounts, with a cash waterfall mechanism. This issue is addressed through the sub-accounts resolution framework.</p>	<p>Regulation 20</p>	<p>As resolved above.</p>
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	<p>(iii) The Regulations should clarify that all Service Payments (i.e. payments to be made under all Project Agreements) shall be made on a pari passu basis (i.e. the available funds to be allocated between all Service Providers pro rata to the amount of the Service Payment due and payable to each such Service Provider); and</p> <p>(iv) Further, the quarterly periods/payment dates should be the same under each Project Agreement. Otherwise, there could be some inherent subordination on a quarterly basis if multiple projects are grouped together.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Payments into the Fund</p> <p>2.1 Initial funding of the Fund – Regulation 11(1)(c)</p> <p>Upon establishment of the fund, and until the Projected Fund Ratio is equal to or exceeds the Projected Shortfall threshold¹, the Officer Administering the Fund shall “cause to be appropriated such budgetary allocations as shall be adequate to cover all of the Fund’s obligations”.</p> <p>The Consortium would expect that a certain minimum amount is deposited to the Fund upon its establishment and that</p> <p>ii. further, a certain level of funding of the Fund is reached at the end of each quarter, so that there is a progressive build-up of the Fund (failing which the annual or supplementary budget process should be initiated to secure budgetary appropriations to cover the required level of funding) in order to ensure that the Projected Fund Ratio is equal to or exceeds</p>	<p>GeK has accepted the proposal to introduce clearer mechanism for prefunding of the Toll Fund. It is however not agreeable to set out a specific finite number within the regulations, on the amount of the prefunding.</p> <p>The fund sufficiency assessments are subject to periodic reviews, and annual forecasts, as stipulated under Regulations 13 of the draft Regulations.</p> <p>Any shortfalls will be subject to a funding shortfall resolution mechanism set out under regulations 14 and 15 of the Regulations.</p>	<p>Reg.22</p> <p>Reg.13</p> <p>Reg.14 Reg.15</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Projected Shortfall threshold² by the start of the operation period of the Project (and of each subsequent project). It would be desirable for the schedule of such initial build-up to be documented as part of the Regulations so as to provide appropriate visibility to the relevant stakeholders.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Further, and as noted below, the Consortium would like to understand what sources of funding are being considered to address the initial funding requirements of the Fund.</p> <p>2.2 Appropriation of the budgetary allocations - Regulation 11(1)(b) and (c)</p> <p>The Consortium understands that the provisions of paragraphs (b) and (c) of section 11(1) would not be construed as an obligation on the Parliament to provide sufficient funding. Therefore, the Regulations should also deal with the case where the Parliament would reject a budget proposal for appropriation of funds to the Fund</p>	<p>GoK will provide all shortfall and prefunding cash through the normal GoK Budget Framework. These are therefore Exchequer Resources.</p>	<p>Reg.14 Reg.22</p>	<p>None</p>
	<p>Insurance – Regulation 6(f) The type of insurance referred to in this section should be clarified (e.g. business interruption insurance). Besides the last part of this provision: “only where the losses suffered by the Contracting</p>	<p>This is a subject of the scope of relevant policies, and may include business interruption covers or others. The issue is that GoK should be held harmless if it suffers a loss that</p>	<p>6(f)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Authority have been met from the Fund" should be clarified.</p> <p>Other sources of funding - Regulation 6(g) The other sources of funding mentioned in this section should be specified, especially in light of the need to address the initial funding requirements of the Fund</p>	<p>is in fact insured, for whatever reason.</p> <p>Government prefers to keep the provision as drafted. This retains Gok flexibility in fundraising for the Toll Fund, as the case may be.</p>	6(g)	None

<p>Payments out of the Fund Hierarchy of payments – Regulation 7</p> <p>There is no hierarchy between the permitted payments out of the Fund, meaning that payments other than Service Payments could be prioritised over Service Payments. In our view, and without prejudice of our comment under paragraph 1 above (ring fencing), the following hierarchy should be established between various permitted payments:</p> <p>1) Service Payments; 2) Other payments under the Project Agreement (other than compensation for Political Events and Termination Payments) including in particular compensation that may be due and payable by the Contracting Authority in accordance with the provisions on Compensation Event, Qualifying Change in Law, Contracting Authority Change, shifting on obstructing utilities etc...; 3) The approved annual operating budget of the Fund; and 4) Any other eligible expenditure incurred in pursuance of</p>	<p>GoK has accepted the creation of project specific subaccounts, subject to cash waterfalls.</p>	<p>Reg 20</p> <p>Other Payments include costs of toll operator, costs of the OAF, costs of hired advisors and experts, other project-linked costs</p>	<p>None</p>
<p>Proposal to add additional limb in 2nd rank covering other payments which may become due under the Project Agreement is acceptable in principle subject to drafting</p>			

	<p>the object and purpose for which the Fund is established.</p> <p>The Consortium proposes an additional limb in 2nd rank covering other payments which may become due under the Project Agreement(s) and which in our opinion should also be payable from the Fund. The Consortium further notes with respect to the last limb 4) that it is not clear what qualifies as "eligible expenditure" in pursuance of the object of the Fund. This term should therefore be clearly defined.</p> <p>Additionally, it should be clarified that the payment from the Fund can be made to finance such "eligible expenditure" only to the extent that</p> <ul style="list-style-type: none">(i) there is a Projected Surplus and(ii) such payment does not exceed the amount of the available Projected Surplus.			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Recipient of payment – Regulation 13(1) The draft Regulations do not clearly state who is the recipient of the payments from the Fund (regulation 13(1) and 14(b) imply that these are the Service Providers but they do not state that explicitly). The disbursement procedure should therefore be clarified to specify that all payments out of the Fund are made directly to the Service Providers (or the Lenders, as the case may be), in discharge of the corresponding Contracting Authority payment obligations, but not to the Contracting Authority.</p>	<p>Proposal accepted – and Regulation 17 has been revised to account for the requested clarity</p>	<p>Reg 17</p>	<p>Regulation 17 now delineates the disbursement procedures more clearly</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Payment accounts - Regulation 14(b)</p> <p>Under this section, payments can be made only to the bank account indicated in the Project Agreement. We note that in circumstances of enforcement, the Lenders will have the right to direct the Contracting Authority to make payments to a different bank account for the benefit of the Lenders under the Lenders' Direct Agreement. This provision should be clarified to provide that payments to accounts specified in the LDA are also permitted, as otherwise it would cut across the rights of the Lenders (and give rise to concerns on their part).</p>	<p>The procedure in the updated Regulation 18 makes the framework clear</p>	<p>Reg 18</p>	<p>Reg 18 has been updated to make the framework clear that payments by the OAF must be checked against specific requirements to ensure the correct person receives payments from the Fund</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Payment instruction and proper documentation – Regulation 13(1)(c), 14(a) and 15</p> <p>The Consortium notes that the Officer Administering the Fund has a certain degree of discretion in the appreciation of the “eligibility” of the payment to be made (i.e. requirement for “proper documentation”, appreciation of “eligibility of the payment recipient” and the “power to suspend disbursements”).</p> <p>The Consortium would expect a more “automatic” payment procedure: i.e. all invoices are reviewed and certified by the Contracting Authority (with the assistance of the Independent Expert) in accordance with the relevant provisions of the Project Agreement. Once the Contracting Authority has submitted a payment instruction to the Fund, there should be no further consideration with respect to the eligibility of payment/payment recipient by the</p>	<p>GoK does not accept this proposal – for the reason that the OAF discharges a fiducial duty over the propriety of payments out of the Fund.</p>	<p>Reg 18 and 19</p>	<p>Reg 18 and 19 have been revised to make the process clearer</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Officer Administering the Fund, and therefore no possibility to suspend or delay the disbursements. In order to avoid any potential discussion on whether a payment instruction is sufficiently detailed/explanatory, a payment instruction form could be attached to the Regulations and be used by all Contracting Authorities for the purpose of any payment to the Service Provider.</p>			

CONTRIBUTORS NAIVE	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Use of Project Surplus – Regulation 18(2) In line with our previous comment on the use of the Project Surplus, this section should be clarified to add the following: “provided such withdrawal does not exceed the amount of the available Projected Surplus and does not lead to a Projected Shortfall”.</p>	<p>GoK has accepted liability for shortfalls. This obligation is complete. The regime for determining existence of a surplus has also been strengthened to ensure the Fund remains viable as a going concern.</p>	<p>Regulations 14, 15 and 23 are adequately drafted and establish a credible, accountable and transparent regime on these matters</p>	<p>None</p>
	<p>Security over the Fund’s accounts – Regulation 16 and 17 The Regulations should make clear that no pledge of other security interest shall be granted on any bank account of the Fund.</p>	<p>The proposal is peculiar for public funds. Not accepted</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Bank to hold the Fund's bank account(s) – Regulation 16 Regulation 16 provides that the Fund will be held in a bank account with a bank approved under the Public Finance Management Act. It is suggested that the Fund be held with the Central Bank as it seems to be the practice for most national road funds seen in other parts of the world that the accounts are sitting within the Central Bank.</p>	<p>Section 23 of the PFMA 2012 prescribes the rules on selection of banks within which to hold a accounts of a public fund.</p>	20	None

<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 7(a) (Payments of out the Fund), Regulation 13(1)(a) and Regulation 18(3)</p> <p>We note that (a) compensation for Political Events and (b) Termination Payments are excluded from payment certified by a Contracting Authority as being due to a Service Provider, however there is still some uncertainty as to what payments are intended to be covered by the Regulations. Regulation 13(1)(a) refers expressly to the Fund covering "contracted obligations", whereas Regulation 18(3) assumes that surpluses from the Fund will cover "contingent liabilities arising from Project Agreements". Aside from Political Events and Termination Payments, a typical Project Agreement may cover a number of other contractual payment obligations of the Contracting Authority over and above the regular payments due to the Service Provider, for example:</p> <ul style="list-style-type: none"> (i) Compensation Event moneys; (ii) payments for Variations or Changes in Law; (iii) moneys paid where the Authority is self-insurance following an Insurability; (iv) 	<p>GoK notes the proposal, but all categories listed are elements for which the payment mechanism under the underlying project agreement already accounts for, and the outcome of which is the consolidated service availability payments invoice. There is no alternative mechanism for invoicing for FM-related contingencies.</p> <p>No amendment to Regulations is warranted.</p>	<p>Reg 7 and 17</p>	<p>None</p>
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	<p>indemnity payments, etc. These are neither Political Events nor Termination Payments (so are not expressly excluded, and they are also "contracted obligations" of a sort, but they are also contingent liabilities). We note that the Public Finance Management (Roads Annuity Fund) Regulations, 2015 (the Road Annuity Fund Regulations) appeared to take a restrictive approach, with the intent that that fund would cover only annuity payments and not other payments. If the intention is that the Fund should only cover similar, regularly contracted payments (e.g. availability payments) rather than contingent liabilities, then this should be made clear.</p> <p>Recommendation: Wording to be reconsidered for clarity</p>			
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	<p>Regulation 6(c) (Payments in and Out)</p> <p>It is doubtful whether the Road Tolls levied on Road Users would in the formative years of the Fund be sufficient to cover payments due to Service Providers. It is further uncertain what amount of moneys will need be appropriated by Parliament to the Fund under Regulation 11 to allow the Projected Fund Ratio to be met in these early years, but it could be a significant sum. There should be clear statements in the reports to be delivered in respect of the Fund as to the level of shortfalls expected from the Road Tolls against Fund liabilities, with appropriate contingency to reflect possible delays or slower implementation / phasing-in / public acceptance of road tolling, so that there is transparency in advance of the appropriation process.</p> <p>In contrast, the Public Finance Management (Roads Annuity Fund) Regulations, 2015 (the Road Annuity Fund Regulations) provides that the initial capital of the Funder under the Road Annuity Programme</p>	<p>The GoK accepts the duty to prefund the Toll Fund, and to address shortfalls on an ongoing basis until the projects supported by the Fund raise adequate toll revenues.</p>	<p>Reg.22</p>	<p>As above</p>
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	<p>would be KES 500 Million (approx. USD5 Million) for the 2014/2015 financial year when the Road Annuity Regulations came into force.</p> <p>Recommendation: Greater clarity should be provided as to the level of government appropriations expected to be made in the early years of the Fund's operation. It may also be appropriate for an initial capital of a fixed amount to be appropriated by Parliament to the Fund.</p>			
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	<p>Regulation 14(Payment Procedure by the Officer Administering the Fund)</p> <p>We note that for purposes of payment out of the Fund by the Officer Administering the Fund, each payment instruction must be made in writing and authenticated by the certificate of the Contracting Authority. It is not clear what the contents of the payment instruction should be and whether or not it should contain any accompanying documentation, to be submitted by a Contracting Authority. Such information is critical in order to avoid time loss due to incomplete payment instructions or clarifications sought by the Officer Administering the Fund which may cause the suspension of disbursement against invoices by the Officer Administering the Fund (see regulation 15) until such requests have been complied with.</p> <p>In contrast, the Road Annuity Fund Regulations require applications for payment out of the Road Annuity Funds to be made by a contracting authority in a format prescribed by the Officer Administering the Fund,</p>	<p>The regulations provide that the OAF shall prescribe forms and documents for this purpose</p>	<p>Reg18(2)</p>	<p>None</p>
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	<p>and further provides a list of supporting documentation which should accompany the application for payment out of the Fund. Further, we believe that the statement in Regulation 14(c) should be a stand-alone obligation on the Officer Administering the Fund to ensure that the payment processes take place within the required period; whereas at the moment it is subject to the opening wording which appears to be a weaker obligation on the Officer to "satisfy itself" about the payment processes. Compare Regulation 21(c) of the Road Annuity Fund Regulations which is clearer.</p> <p>Recommendation: We recommend that there be a format prescribed by the Officer Administering the Fund in respect of a payment instruction and the setting out in the Regulations of a list of the supporting documentation thereto (if any) to be submitted by a Contracting Authority. The obligation of the Officer Administering the Fund in Regulation 14(c) to ensure payments are made should be made clearer.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Francis Ngonkonyo, PPP Committee Member</p>	<p>Project Finance principles require that a PPP project has its own account operated by the Special Purpose Vehicle Company ensuring that all revenues for that project are used in respect of the project concerned only. In some cases, the Project Lenders want to have a say at how the project revenues are used. Monitoring of inflows and outflows will tell how a particular project is performing. How is this covered in the NTF Regulations 2020?</p>	<p>The OAF is obligated to facilitate access to Fund information. However, the control of the Fund remains squarely on the OAF as a non-shared responsibility. This is consistent with the framework for public funds</p>	<p>Reg.27</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Bertha Dena	<p>Regulation 18(3) Page 6: Declaration and use of surplus fund:</p> <p>The regulation states that surplus fund application will include payment towards Any sovereign debt contracted toward development of road projects in Kenya. This means the fund will be applied to even roads, not under toll regime which seems to contradict the justification</p> <p>statement for tolling that excludes development of roads as one way to apply the toll funds -</p> <p>See section 5e of the "Regulatory Impact Statement on the Draft Public Finance Management(NTF)Regulation 2020" that states;</p> <p>Furthermore, the Fund is open only to maintenance and rehabilitation works, not the development of new road infrastructure). Please clarify this part of the regulation</p>	<p>The Regulations have been amended to simply refer to the surpluses realized being remitted into the Exchequer.</p> <p>How surpluses are utilized should remain the prerogative of Government, as surpluses form part of the overall revenue of the State.</p>	Reg.23(4)	Regulation 23 (4) is amended to reflect the position indicated – surpluses to go into Exchequer.

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THESE REGULATIONS
<p>Eng. Peter. M. Mundinia DIRECTOR GENERAL KeNHA</p>	<p>Regulation 6 - we should consider the following inflows into the Fund: -</p> <ul style="list-style-type: none"> i. Proceeds from levies on roadside development ii. Proceeds from any roadside stations which form part of the project scope iii. Penalties arising from any breaches by the Service Provider iv. Proceeds from value capture. This will only apply if appropriate laws are amended 	<p>GoK accepts this proposal subject to drafting</p>	<p>Reg.6</p>	<p>Reg.6(f), (g) appropriately included</p>
	<p>Regulation 7 — Delayed payments also constitute Political Events. Given the sums involved, we should consider excluding delayed payments from the list of Political Events to allow direct settlement from the fund.</p>	<p>GoK does not agree to this interpretation – delayed payments attract an interest, and the payee suffers no prejudice.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Regulation 7: Payments Out of the Fund Regulations under 7(a) recognises Compensation for Political Events as part of the eligible expenditure by the officer administering the fund. However, political risks must be well analysed and proper mitigation measures put in place. Recommendation: Amend by deleting 7(a) as follows: 7(a) Payments certified by a Contracting Authority as being due to a Service Provider or a Toll Operator under a Project Agreement and in accordance with these Regulations, excluding: ‘ Compensation for Political Events’ Paying for political events from toll funds might lead to wastage of the collected funds at the expense of its core mandate. The regulations should be rigid not to allow political interference. Toll fund must be de linked from all political events.</p>	<p>This is not correct – political events are not compensated under the Toll Fund. Reg. 7 is correctly drafted.</p>	<p>Reg.7(a)</p>	<p>None</p>

CONTRIBUTORS NAIVE	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation. 15: Right to Question and Reject Payment Instruction Lack of clarity in terms of administrative cost as a percentage of the fund.</p> <p>Recommendation: The administration costs (allowances, general administration costs, et al) should not exceed three per centum (3%) of the fund. The provision should be aligned with the requirement of PFM Act.</p>	<p>Regulation 207-209 of the PFM (National Government) Regulations 2015 declare the 3% principle.</p> <p>The Toll Fund Regulations will however silence this principle since it is contained in the parent act, and also since the toll operator may be a contracted agent, in which case the costs will be the contract sum, expected to always be a fraction of the possible 3% headroom.</p>	<p>Reg.25</p>	<p>Reference to 3% in Reg 25 deleted.</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 18: Declaration and Use of Surplus Funds It is very risky to declare existence of a surplus based on projections as described in Regulation 18(1). It gets worse when such projected surplus is expended or utilized as described in regulation 18(2) & (3) Recommendation: Project surplus should only be declared retrospectively This will ensure that such declaration is based on a surplus that has been realized. Retrospective declaration of project surplus will safeguard the funds and will avoid a situation where the proposed National Toll Fund gets financially distressed</p>	<p>GOK welcomes the concern expressed, and the governance framework for surplus declarations has been revised to weed out the weaknesses observed.</p>	<p>Reg.23(b)</p>	<p>Projected Fund Ratio is derived against actual cash balances held within the Fund Reg23(b)</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 24: Review of Performance of the Fund Reviewing body, no clarity on the body/institution that will undertake this function. Recommendation: Specify the body which shall undertake review under this regulation. For clarity of roles.</p>	<p>GoK accepts this proposal – the CS shall be the reviewing body, with a report to the Cabinet .</p>	<p>Reg.31</p>	<p>Reg.31(1) reflects this position</p>
	<p>Regulation 25: Winding Up No proper gap analysis has been provided especially with regard to the existing funds. Why establish a temporary Fund yet there exists other Funds such as the Roads Maintenance Levy which ought to be revised to cater for the gaps which these Fund seeks to address? Recommendation: The Regulation proposes to be for a period of ten years and then it shall be wound up. No proper gap analysis has been provided especially with regard to the existing funds.</p>	<p>All public funds under the PFMA are established for an initial period of 10 years. That period is subject to extension – this is also provided for under the PFMA 2012.</p>	<p>Reg.32</p>	<p>Reg.32(2) sets down the preconditions to winding up, demonstrating the Fund is not temporary, but offers Government and the National Assembly opportunity to keep public funds under tight leash.</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Uasin Gishu County	<p>Regulation 7 Should read;</p> <p>7. Payments out of the Fund shall comprise of the following;</p> <p>a) Payments certified by a contracting authority as being due to a service provider of a Toll operator under a Project Agreement and in accordance with these Regulations being;</p> <p>a. The approved annual operating budget of the Fund.</p> <p>b. Any other eligible expenditure incurred in pursuance of the object and purpose for which the Fund is established and excluding;</p> <p>a. Compensation for political events.</p> <p>b. Termination payments.</p>	<p>Regulation 7 is adequately drafted. The framework for disbursements under Regulation 17 is an additional safeguard in this regard</p>	<p>Regs 7 and 17</p>	<p>None</p>
<p><u>THEMATIC AREA 3: GOVERNANCE</u></p>				

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Consumers Federation of Kenya (COFEK)	<p>Composition of the Oversight Committee:</p> <p>In terms of composition, COFEK must be allowed to nominate a member to the Fund</p>	<p>The GoK notes the expression of interest, and further notes that the qualification framework for the private sector members of the Oversight Committee do not exclude the possibility that a COFEK representative may be appointed.</p>	Reg 8(1)(e)	None
World Bank	<p>The Oversight Committee needs to be described in more details (including decision process, frequency of meetings, etc). It should be staffed with independent parties as well as secretaries and the Attorney General. We consider that it is important that the projections, management and audit functions of the NTF are "depoliticized" entirely. The management is carried out by the Officer Administering the Fund who can delegate some of his functions to a designated entity. We would need to better understand this delegation.</p>	<p>GoK notes these proposals, and holds the view that the Toll Fund is a public fund, whose governance framework mirrors those of similar public funds. The Oversight Committee membership comprises both public and private sector representatives.</p> <p>The Committee will regulate its procedure.</p>	Reg.8 Reg.10(2)	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Functions and powers of the Oversight Committee:</p> <p>a. What does the 'review and approve the annual work programme mean? Per 4.2 objectives and purpose, the Fund provides a dedicated public fund to meet Government's payment obligations arising from Project Agreements. Considering that the payment obligations under the Project Agreement should have been already entered, what is the role of 'approval' function?</p> <p>b. What is the timeline/process for approving requests for budgetary appropriations to meet projected shortfalls? How long it will take to receive the additional budget for shortfalls?</p> <p>c. What does 'authorize allocation' mean? Will there be a prioritization or payments for each Project Agreement?</p>	<p>Reference is made to Reg.5 of the Regulations.</p> <p>The Fund has an annual outlook in terms of inflows and outflows.</p> <p>Estimates of expenditure comprise the Fund's annual work programme, as measured against its sources of funds for that particular year.</p> <p>Budgets must be approved. They must be appropriated.</p> <p>The issues here are matters of understanding, but the Regulations establish the correct regime for the administration of public funds</p>	<p>Reg.5, Reg.10, Reg.13</p>	<p>None</p>

CONTRIBUTORS NAVIE	COMMENTS	GOK RESPONSE	Relevant Provisions of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>We note that the Regulation 11 provides for the monitoring of Projected Shortfall by the Officer Administering the Fund. It is also important to have clarity on the process related to the obligations of the GoK to compensate for Projected Shortfalls once identified. What will be the administrative process to enable the transfer of cash? Would it be possible to consider that the introduction of the obligation for the GoK to top up the NTF within [X] days following notification by the Officer Administering? Is there an extraordinary process in case of an unexpected cash shortfall? Clarity is needed here as this is a key creditworthiness consideration.</p>	<p>Regulations 14 and 15 adequately address these issues, together with the framework under Regulation 13 as to the duties of the OAF</p>	<p>Regs 13, 14, 15</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Review of the performance of the NTF: The review of the performance of the NTF after 10 years seems quite late. If the NTF is facing issues, would another process be implemented? In addition, funders may require the Fund to be audited annually by a Big Four auditor, which would seem prudent in any case. This should be further considered in light of Kenyan Regulations and Laws for such entities.</p>	<p>Under Reg.13, there is an annual monitoring of the Fund as to revenue performance (shortfalls, surpluses). There is an annual budgeting process, and a quarterly review mandate of the Oversight Committee. This comment fails to take into account the full framework under the Regulations for these matters.</p>	Reg.13	None
	<p>Winding up of the NTF: We would like to understand if the winding up of the NTF can only take place once all the Project Agreements have been terminated/expired (i.e. no more GOK payment obligations)? If not, the winding up of the NTF should carry early termination rights for any concessionaires that are still operating. This may be implied by</p>	<p>Regulation 32(2) addresses this matter by laying down specific preconditions to be met prior to winding up, one of which includes there being no further contracted obligations under the Fund.</p>	Reg 32(2)	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>clause 25, but it may be worth reiterating</p>			
	<p>Oversight Committee: Only the Principal Secretary ('for the time being') has almost all the responsibilities. When will the roles for the committee be distributed?</p>	<p>The comment is not understood. The appointment of members of the Oversight Committee is specific and clear, and the drafting language adopted is standard.</p>	<p>Reg.8(1)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager; International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development Email: mtegiigit@gmail.com Tel: +254726295038 Twitter: @danielgiti</p>	<p>Regulation 8 on "Oversight and Administration of the fund" can be said to be heavily leaning on government. My proposal is for the broadening of this team to include key private sector players, who can be conveniently be brought on board from KEPSA or KPDA (PPPs requires a thorough engagement of the private sector to finance a robust PPP programme, hence their inclusion will ensure they understand the PPP process and have a buy in for its application beyond the tolling programme). It should also have a representative of Banks through Kenya Bankers Association (a robust regime of PPPs financing will require that local banks dedicate substantial amounts to financing PPPs in infrastructure, which has the effect of addressing the risks as a result of currency depreciation risks where much of the funds are sourced externally). There should also be a representative of universities</p>	<p>Regulation 8(1)(e) includes private sector members, and Regulation 8(2) allows for co-option as necessary. This framework is deemed adequate and appropriate for a fund of the nature of the Toll Fund. In addition, the qualification framework for private sector members is broad and inclusive.</p>	<p>Reg.8(1-e)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>(application of PPPs is a nascent concept in Kenya which requires more research into how to customize international best practices into the local context and also innovative financing of the same locally) in Kenya and Council of Governors. The projects to be undertaken will involve some function or jurisdiction under counties and as such, they should be brought on board to ensure more stakeholders are on board, ensure they understand the financing regimes of PPPs and make these entities to appreciate and factor the concept in their future developments.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 8 (3) on the functions of the oversight committee should have their functions expanded to include such functions as ... raising additional funding/soliciting for funds/ developing a bigger envelope for increased roads financing programme – which can be done through appropriate incorporation of commercial bank loans, sponsor equities, use of local capital example from pension funds and Saccos; the programme can net additional funds through pollution taxing – vehicles that emit more CO2 can pay a little higher; we can have roads built using loans, funds from enterprises and individuals and investments made from corporations, consider tolls for design, build, own, operate and transfer as sources of greater financing of roads, infrastructure equity placements... among others. There should be a section that rightly shows that the country will be keen to apply a wide range of</p>	<p>The principle in the recommendation is well noted and agreed, and implemented in Regulation 8(2). All other details observed on are operational matters, not subjects for inclusion in a regulation.</p>	Reg.8(2)	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>incentives and avenues for enhanced private sector lead in the tolling programme. There must be tradeoffs between transparency, accountability and competitiveness on one hand and flexibility and innovativeness of the private sector on the other hand in successfully implementing such a programme.</p>			

<p>Kipkenda and Co Advocates Off Riverside Drive P.O. Box 56832-00200 Nairobi. Info: info@kipkenda.co.ke</p>	<p>Membership to the Oversight Committee under Regulation 8 the Draft Regulations: Regulation 8(1) of the Public Finance Management (National Toll Fund) Regulations, 2020 provides for the establishment of an oversight committee which shall consist of inter alia the Principal Secretary for the time being responsible for matters relating to roads and the Principal Secretary for the time being responsible for matters relating to transport. Currently, the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works consists of the following state departments:</p> <ul style="list-style-type: none"> a) State Department for Transport; b) State Department for Infrastructure; c) State Department for Maritime and Shipping Affairs; d) State Department for Public Works; and e) State Department for Housing and Urban Development. <p>Further, the Ministry is composed of four Principal Secretaries namely:</p>	<p>The Oversight Committee is deliberately lean to make it an efficient institution.</p> <p>Roads, not transport in its generic application, is the core subject frame for a tolling legal regime. The principal secretary responsible for roads is a member already.</p>	<p>Reg.8(1)</p>	<p>None</p>
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	<p>a) Principal Secretary for Transport and Infrastructure;</p> <p>b) Principal Secretary for Maritime and Shipping Affairs;</p> <p>c) Principal Secretary for Public Works; and</p> <p>d) Principal Secretary for Housing and Urban Development.</p> <p>From the above foregoing, it is important to note that there is NO Principal Secretary for roads. The Principal Secretary for Transport and Infrastructure deals with matters relating to all the means of transport in Kenya. It is therefore our considered opinion that having a Principal Secretary for the time being responsible for matters relating to roads and the Principal Secretary for the time being responsible for matters relating to transport as members of the oversight committee is just but unnecessary duplicity of roles as the State Department for Transport has only one Principal Secretary. Having the Principal Secretary for Transport in the Oversight Committee should suffice as their function within the Committee established under Regulation 8 of</p>			
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	<p>the Public Finance Management (National Toll Fund) Regulations, 2020 will only be limited to matters roads which is the all essence of these regulations; dealing with road tolls and their management</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Geoffrey Koech National TaxPayers Association Pioneer Building Room 308 Oginga Odinga Street P.O. Box 204- 40123 Kisumu. +254100176341</p>	<p>The composition of the Committee. As per the provisions of Regulation 8, the membership of the committee is strictly made up of the executive, this is against the spirit of inclusion and this will lock other players in the industry. As representatives of the taxpayers we propose the inclusion of representatives from the Council of Governors, Auditor General, the road users association, be it matatu operators association, truck owners association or COFEK representative. This will ensure inclusion in the management and administration of the fund.</p>	<p>The Oversight Committee has been expanded to include private sector members. The qualification framework for private sector members is broad enough to cover all sponsors of potential appointees in that regard</p>	<p>Reg.8(1)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Access to information. In a bid to ensure accountability, it will be of interest to the users to access information on the management and administration of the fund. We are of the view that among the functions of the administrator, let there be an express duty that he or she will be the custodian of all information concerning the fund and he/she will come up with regulations on how to fulfill Article 35 of the Constitution. In the spirit of promoting Open Governance, the Administrator should be able to avail the contracts and all project related documents to the members of the public.</p>	<p>This proposal is accepted and implemented in the Regulations</p>	<p>Reg.27</p>	<p>None</p>
	<p>Conflict management and resolution. The oversight committee is in charge of approvals of payment, in the event of non-approval and a party is not satisfied with the decision a mechanism on conflict</p>	<p>The project agreements carry provisions governing conflict resolution. A rejected payment gives rise to rights under the primary contract, for which adequate mechanisms already exist. The proposal is therefore</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	resolution should be spelt out in the regulations.	not implemented in the Regulations		

<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Projections – Regulation 10(1) The Consortium notes the importance of certain functions of the Fund being handled by independent parties. This seems particularly important as regards the projection function. The Consortium would expect that all projections of the Fund are produced by the Independent Expert, which should be an internationally recognized and reputable person or organization with substantial experience in the development of traffic forecasts, toll revenue projections and road project agreements (and not by the Officer Administering the Fund himself). The Regulations should also explicitly mention that such projections should be based on macroeconomic forward-looking assumptions (with regards in particular to GDP Growth, inflation, or foreign exchange rate assumptions) derived from a consensus of three internationally recognized and reputable independent sources for macro-economic forecasts, such</p>	<p>The Regulations create an enabling for the OAF to seek necessary expertise in the discharge of its functions. That empowerment is adequate. The proposal here is tantamount to locking in job opportunities where none may be warranted for private sector players. It introduces unacceptable rigidity and constrains the autonomy of the OAF in the discharge of its functions. The macroeconomic parameters indicated cannot be legislated. They are however noted.</p>	<p>Reg.13(3)</p>	<p>None</p>
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assumptions to be used both to produce traffic and revenue forecasts as well as to forecast future Service Payments (specifically as regards foreign exchange and inflation assumptions).

We note that under section 10(1)(f) the Independent Expert is required to consult with the Contracting Authority in preparing the projections, but not with the Service Providers. We think such projections should be prepared in consultation with the Service Providers in a transparent manner to ensure that their views are also taken into account and the projections are more accurate. Upon approval by the Oversight Committee, all final projections should be sent to each Contracting Authority and each Service Provider.

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Performance of the Fund – Regulation 24(1) The Consortium would expect that the performance of the Fund is reviewed on the annual basis by an independent auditor from a reputable international accounting firm.</p>	<p>As a public fund, the Toll Fund will be audited by the Auditor General of the Government of Kenya, and the audit reports will be published.</p>	Reg.13(3)(c-v)	None
	<p>Winding-up of the Fund – Regulation 25(1) It should be clarified that the winding up of the Fund can only take place if all the relevant payment obligations under all Project Agreements are satisfied in full.</p>	<p>As above – Regulation 32(2) is adequately drafted to address the concern raised.</p>	Reg 32(2)	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 8(2) (Oversight Committee) We note that the proposed ex-officio members of the Oversight Committee (i.e. a representative of each Contracting Authority involved in a Project Road and a representative of the PPP Unit) are already represented through the principal secretaries of the various line ministries. Instead of the proposed ex-officio members, and for purposes of better oversight and management of the Fund, the Oversight Committee should be broadened to include representatives from the relevant industry practitioners or professional bodies (i.e. engineers, accountants and/or lawyers). This is indeed the case under the Road Annuity Regulations Recommendation: Oversight Committee should, for better oversight and management, be expanded to include representatives</p>	<p>GoK does not accept this proposal – the OAF may accommodate a wider set of voices in the conduct of its business, and take such voices into account in the recommendations it makes to the Oversight Committee.</p>	<p>Reg 13(3)(e), (4) & (5)</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	from professional bodies i.e. engineers, accountant or lawyers.			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 9 (Officer Administering the Fund) Unlike the Officer Administering the Fund under the Road Annuity Regulations (who is the Principal Secretary for the time being responsible for matters related to roads), we note that the officer administering the Fund, for purposes of the Regulations is an appointee of the Cabinet Secretary. As such, there is in need to ensure that a suitable person possessing the necessary qualifications and technical skills is appointed to administer the Fund (rather than merely a political appointee). Recommendation: We recommend the setting out of minimum qualification (i.e. academic and technical requirements) requirements for a person to be appointed as the Officer Administering the Fund to ensure professional and good management of the Fund.</p>	<p>GoK accepts this proposal and effects an amendment to Regulation 12 as to the designation of the OAF, not limited to public officials.</p>	<p>Reg.12</p>	<p>None</p>

	<p>Regulation 10(1)(e) (Functions of Officer Administering the Fund) We note that the reporting obligations or provision of information relating to the Fund's project inflows and outflows, the Projected Fund Ratio and statement on the Projected Shortfalls by the Officer Administering the Fund is limited only to Contracting Authorities and Service Providers. In contrast, we note that the Roads Annuity Fund Regulations require the Officer Administering the Fund to (a) publish on an annual basis on the website of the ministry responsible for matters relating to roads, the estimates prepared of Roads Annuity Programme funding and payment obligations for the forthcoming financial year and (b) publish on a quarterly basis on the website of the ministry responsible for matters relating to roads, the balance of funds held in the account designated for annuity payment obligations.</p> <p>Recommendation: In addition to providing the Contracting Authorities and the Service Providers with information relating</p>	<p>Access to information provisions have been updated to address the proposal</p>	<p>Reg.27</p>	<p>None</p>
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to the project inflow and outflows of the Fund, the Projected Fund Ratio and statement on the Projected Shortfalls, we recommend that the Officer Administering the Fund be further obligated to publish either on the Ministry's website, the Kenya Gazette and/or 2 newspapers of national circulation, quarterly reports of the projected Inflows and Outflows from the Fund, the Projected Fund Ratio and statement on the Projected Shortfalls, as well as balance of the Fund at each Quarter.

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Francis Ngokonyo, PPP Committee Member</p>	<p>At Regulation 8 on Oversight Committee, It appears to me that we may require one or two Private Sector Members as this process is governing PPP project funds.</p>	<p>This is accepted and implemented.</p>	<p>Reg.8(1-e)</p>	<p>None</p>
	<p>In the same Regulation, it appears to me like the Administrator of the Fund should be part of the Committee to facilitate discussions of the Fund. This can be ex officio</p>	<p>The OAF is the Secretary to the Oversight Committee</p>	<p>Reg.8(1)(f)</p>	<p>None</p>
	<p>In the same Regulation at (3) i)& j) we may require to emphasize for roads projects only.</p>	<p>The proposal is noted, but in view of the regime for surpluses, the proposal would operate as an unintended limitation.</p>	<p>None</p>	<p>None</p>
	<p>At Regulation 10 (f) on appointment of the Independent Expert, this should not be left to the Administrator of the Fund only. The Oversight Committee and possibly the CS can be brought into this process.</p>	<p>This is an operational matter for the OAF and the discharge of the OAF mandate. It is best to leave it at the level of the OAF, subject to the same being included in the approved budget of the OAF for proper fiscal discipline.</p>	<p>Reg.13(3-e)</p>	<p>None</p>

<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Regulation 8: Oversight Committee This is a finance and money collection law. It is also geared to PPP, but the private sector is not represented in the Committee. In line with corporate governance principles of oversight, there is need for the oversight committee to have representation from outside the government. Recommendation: Amend the Regulations to include the following: The committee members to be capped at nine (9) members, ii. Broaden representation to include private sector Amend therefore by adding 8(1)(f) Four other persons representing the following institutions: Institution of Engineers of Kenya ii. Institute of Certified Public Accountants of Kenya iii. Kenya Private Sector Alliance iv. Private Sector entity in the roads subsector</p>	<p>This is addressed as above – the Oversight Committee has both public and private sector representatives. Qualification framework is open, but not strategic or acceptable to rigidify institutions from which nominees may be drawn.</p>	<p>Reg.8(1-e)</p>	<p>None</p>
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	<p>Regulation 9: Officer Administering the Fund Appointment of officer administering the fund. The regulation provides that the "Cabinet Secretary will appoint an officer to administer the Fund" There is need for guidance on the "how" of appointment of the officer administering the Fund need to be provided to allow for fair selection With oversight measure above, let this position be treated as CEO of pseudo government position. Let it be advertised. Let committee carry out interviews and nominate 3 names for appointment by the Cabinet Secretary Recommendation: Amend Regulation 9 to read as follows: Officer Administering the Fund 1. There shall be an Officer Administering the Fund appointed by the Cabinet Secretary 2. A person shall qualify to be appointed as Officer Administering the Fund under this Regulation if he or she — a) is a citizen of Kenya b) has a degree in business, finance, accounting or related field</p>	<p>GoK notes the proposal, but is guided by Section 24(5) of the PFMA 2012. It has been elected to leave the appointment mechanics unregulated.</p>	<p>Section 24(5), PFMA and Regulation 12</p>	<p>None</p>
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	<p>of study from a university recognized in Kenya, and is a member of a professional body in good standing</p> <p>c) meets the requirements of Chapter Six of the Constitution. Independence of the Officer administering the fund is important. The Officer should have tenure of office and his removal from office should vest in the committee. This is revenue collection that needs to be treated independently of the National Treasury</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Regulation 10(1) (a) Functions of Officer Administering the Fund The Officer administering the Fund is responsible for the day to day administration of the Fund. Supervision shall be carried out by the Oversight Committee Recommendation: Delete the words to supervise. For efficient administration and accountability</p>	<p>GoK accepts this proposal, and Regulation 13 has been restructured fundamentally in that regard. Proper function separation between the Oversight Committee and the OAF has been achieved in the revisions to the Regulations</p>	<p>Regs 10 and 13</p>	<p>None</p>
	<p>Regulation 11: Addressing Shortfalls in the Fund The provision is an administrative one and hence ought not to be in law. Recommendation: The provision ought to be deleted. For enhanced efficient administration and accountability</p>	<p>This is a key bankability issue for private sector participants in toll road programmes. It is consequently retained, and expanded.</p>	<p>Reg.14 and Reg.15</p>	<p>As drafted</p>
<p>Uasin Gishu County</p>	<p>Regulation 8: In the oversight committee, the Council of Governors should have two (2) representatives. The Principal Secretary for Devolution should also be included in the committee. This is because the entire purpose of the</p>	<p>GoK does not accept this proposal since the toll fund is a national government fund, and does not address matters to do with devolution</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	Regulations directly affects counties on the projects being undertaken.			
	Regulation 9 This Section should specify qualifications and process of recruitment of an Administrator. The nature of engagement of an Administrator should also be specified.	As above	Reg13	None
	Regulation 16 There is need to expressly state who are the signatories to the bank accounts.	This is an operational matter.	Reg.20	None
THEMATIC AREA NO. 4: LEVYING OF TOLLS				

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Consumers Federation of Kenya (COFEK)	In terms of operationalization, the proposed Toll Fund will only decide the roads to be tolled based on credible statistics of traffic and type of traffic flow, by time, day, month and from which basis a decision will be made to what extent toll fees may be decided.	This is noted, but is an issue that falls outside the remit of the toll fund regulations	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager; International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development Email: mtegi@mutegi.com Tel: +254726295038 Twitter: @danielgiti</p>	<p>The regulations should consider ensuring that adequate information and disclosure is provided to show the categories of roads to be subjected to the programme</p>	<p>Gok accepts this proposal, and it is implemented in Reg 27 in adequate detail</p>	<p>Reg27</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Robert Kariuki bobjkariuki@gmail.com</p>	<p>I find this idea to apply toll on the specified roads namely JKIA Expressway, Southern Bypass, Mau Summit Road alongside others to be a double burden on road users and the tax payers. Already we are paying a hefty road development levy on the fuel that our cars use. What then is the basis for applying a toll fee for us to use roads built with borrowed money which our children will pay for? If it's to punish us, then please go ahead. It's not as if being a Kenyan isn't a handicap already. In addition, the Kenyan government of this day cannot be trusted to be accountable with any resources that it pools</p>	<p>GoK notes the concerns raised, which do not relate to the structure of the Toll Fund Regulations, but to the subject matter of tolling. Toll fees are a user fee, not a tax. Those not traveling through a tolled road do not make payments for the road. Fuel levies applied to the RMLF are applied to roads maintenance, not development of new roads, and will not be applied to toll roads, which are fully funded under the commercial contracts applying to such roads.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THESE REGULATIONS
<p>Solomon L Sakana Producer Studio 46 LinkedIn:Solomon Sakana Facebook : Solomon Sawyer Twitter: @leina01 Number: +254-710-357-267</p>	<p>I am by no means against the tolls, what I am against is that currently as motorists we are overburdened by unnecessary tax, currently for every litre of fuel I take the government takes 47 Ksh, and let's be honest no car only buys a litre of fuel at the pump. Within the same taxes and levies we have a road tax which let's face it our roads could use an upgrade, we also have the fuel levy which has affected the most vulnerable of communities who rely on kerosene to cook as well as other home uses. I suggest this, if you are going to implement the said bill ensure that taxes on roads and fuel are eliminated as well as lower the VAT on fuel, thus making it a more favorable bill to all Kenyans</p>	<p>As above</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>George Muga mugagow@gmail.com</p>	<p>Kindly let me know how you intend to proceed with this and still maintain road maintenance levy. Amounts to double dipping or taxation.</p> <p>ii. In countries where road toll fees are charged there is corresponding liability on the collector for damages to the suspension and tyres of the toll payer's vehicle caused by poor road. What is the enforcement of this component and the time frame for the collector to remedy this?</p>	<p>As above</p> <p>On the second point, the contractors for toll road projects will be subject to service level agreements under contract, which SLAs will be made available to the general public through a formal PPP disclosure framework.</p> <p>Performance failures against contracted SLAs will be contractually penalized.</p>	<p>None</p>	<p>None</p>
<p>Njoroge Wachira wachiraen@gmail.com Nakuru.</p>	<p>Widespread road improvement in a resource poor nation like Kenya cannot be achieved without partnership with the private sector. Such roads should be of high quality (dual carriage way), of high use and durable. As such this system should be reserved for class A and B roads for now. The government should use its resources to improve the other classes of road.</p>	<p>GoK notes the observations made, and agrees with them in principle. However, where strategic to do so, brownfield corridors meeting the same criteria set down by this stakeholder should qualify for tolling, provided social and economic as well as financial benefits for doing so can be demonstrated.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO BE REGULATIONS
	Already existing roads such as Thika road which were built using other funding mechanisms should not be included in the toll system.			
Peter Kymani Twitter: @Petikim	The idea of introducing 'fuel levy' for diesel and petrol was to cater for road maintenance. If Ministry of Transport re-introduces toll for the same old highways, motorists will suffer double jeopardy.	The issue of tolls as double taxation has been clarified in responses to similar questions above.	None	None
James Opere Twitter: @JamesOpere1	Paying toll fees on a road where you sometimes hit potholes breaking the car, sometimes you spend hours on traffic, what's the toll meant to cater for if not individual interest?	The concern raised is noted – however, toll roads will be subject to extremely strict SLAs as clarified above.	None	None
Barrack Oieno Twitter: @okushjanam	Unacceptable at all, we cannot pay Ksh. 18 per litre and pay toll again let them choose between the two which one they prefer	This issue on toll fees and taxation is already clarified in responses above	None	None
Mwangil_ Twitter: @mwangini	We can't pay both fuel levy and toll charges	As above.	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
Murwa mundu Twitter: @Gicicio	There is a Road levy in each litre of fuel sold. Even power generators and tractors which do not use the road pay it as consumption tax. The Senate and National Assembly have a fuel allowance so they do not care. Toll stations amounts to double taxation	As above – tolls versus taxes	None	None
Alexander sarikas Twitter: @AlexanderSarika4	If 18 bob is removed per litre, then tolls are okay, but not both.	As above	None	None
Mc Twitter: @mcblax	I choose toll over 18 Kshs road levy.	Well noted, however, issues are as above.	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>National TaxPayers Association Pioneer Building Room 308 Oginga Odinga Street P. O. Box 204-40123 Kisumu</p>	<p>Toll fees. The total fees chargeable should be agreeable annually with the input of relevant stakeholders.</p>	<p>Gok takes note of the comment.</p>	<p>None</p>	<p>None</p>
<p>Saitoti Torome, CBS Principal Secretary State Department of Planning</p>	<p>The existing Fuel Levy Fund should be reviewed to allow the use of funds to construct new roads. The tolling roads should be identified prior so that those willing to pay will be made aware early and those not willing to pay have alternatives routes for easier movement.</p>	<p>This proposal is in order, however, a subject matter that falls outside the toll fund regulations. As above. Nonetheless, a toll free alternative will be provided in all feasible circumstances.</p>	<p>None None</p>	<p>None None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>The Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>New Regulation: Seed Capital and classification of Roads to be tolled These Regulations do not classify the roads to be tolled. Recommendation: For the toll to be successful, the regulation should give a guideline on the seed capital for operation the Toll fund. It should also come clear on which roads to be tolled. This must be clear and understandable to all stakeholders. Therefore, there must be a cut off on which roads or bridges to be classified as a toll section. The government must raise sufficient funds to support the kick starting of the toll fund. This can be done through infrastructure bond or any other instrument of financing available to the government. Recommendation: Amend by inserting a new Regulation (a) Classifying the roads to be tolled and criteria for identification of such roads. (b) Provision of seed capital to the Fund before roll-out and</p>	<p>Classification of toll roads is a matter regulated under the Public Roads Toll Act, Cap 407, not a subject for the Toll Fund Regulations. On seed funding, Regulation 22 addresses the point.</p>	<p>Reg22</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>implementation The seed capital for the toll fund will ensure a smooth take off of the tolling as an alternative of road funding.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<u>THEMATIC AREA NO.5: TOLLING SYSTEM AND STRUCTURE</u>				
<p>Daniel Mutegi Giti PHD in Urban Management Candidate, University of Nairobi; Principal Housing Officer; Lead Expert EIA/EA; MEIK; Public Private Partnerships (PPPs) Expert; Urban Manager; International Project Management; Transformational Leader. Ministry of Transport, Infrastructure, Housing and Urban Development</p>	<p>The regulations should consider the application of advanced tolling technology which will reduce the actual costs in implementing the programme – use of GPS to measure distant traveled by vehicles, age, size and level of emissions, use of automated tolling stations such that it's easy to use and does not lead to traffic jams. This is because research has shown a strong correlation between willingness to use toll roads, hence pay the user fees, and the development of roads provided the exercise is easy to use and effective. This can be done by installing toll booths that are electronically operated, which can then be linked to a system that links one driving license and their banks to enhance the effective operationalization of fines and payment for services. The electronic details can be addressed in specific contracts such that it has a</p>	<p>The GoK welcomes and notes the observation. Tolling technology is however not a subject within the scope of the toll fund regulations</p>	<p>None</p>	<p>None</p>
<p>Email: mutegigiti@gmail.com Tel: +254726295038 Twitter: @danielgiti</p>				

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>toll transponder in the vehicle's windscreen, toll recording systems on the road and a way to enforce and monitor its application. Studies have shown that manual tolling leads to 40% diversion from the toll to the traditional road, hence technological tolling have a higher success rate because persons willing to pay tolls have a high value for their time.</p>			

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>The tolling programme should be made in an innovative manner to win wider public support – adding extra lanes in already constructed highways; graduated tolling as per the peak of the road; congestion pricing which will enable Kenya to address multiple objectives of addressing traffic congestion and also reduce usage of small cars on the other hand; introduction of charging incentives – more charges for emission free cars, persons that do carpooling; rely on infrastructure equity placements, infrastructure revenue bonds, non-recourse financing on the basis of toll revenue; introduction of innovative designs- widening existing infrastructure like roads, construction of bridges and tunnels in densely populated areas which will make users to have a choice of using traditional or the toll road</p>	<p>As above. Comment well noted.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THESE REGULATIONS
<p>Institute of Certified Public Accountants of Kenya (ICPAK)</p>	<p>Procedures of the Fund: Regulations 13, 14 and 16 Administration and procedures of the fund is majorly manual. This is cumbersome and could provide a loophole for corruption ensure efficiency Recommendation: Amend to introduce Regulation 14 on Electronic Tolling This should read as follows: The Officer Administering the Fund shall, establish electronic mechanisms in the administration and management of the Fund, including disbursement out; and payment into the fund; The model which will be employed by the Toll Fund to collect revenue will create confidence to the users. Otherwise it may lead to resistance in paying for the facility. Advances in electronic tolling technologies—such as automatic vehicle identification, which allows motorists to pay tolls without stopping—can make toll collection</p>	<p>This is a misreading of the Regulations. The OAF is not a toll systems administrator – that is subject to a separate contract that sits outside of the toll fund framework. There is nothing in the regulations that prevent systems automation in payments administration at the level of the OAF.</p>	<p>None</p>	<p>None</p>

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	more convenient, lower toll collection costs. The Toll fund revenue collection process should be paperless with little or no human intervention.			
THEMATIC AREA NO: 6 ; GENERAL				
Consumer Federation of Kenya (COFEK) @	Has physical public participation been conducted?	Public participation conducted for these Regulations was strictly in compliance with Act No.23 of 2013. Comments were invited from members of the public, and all stipulations of the Statutory Instruments Act were complied with.	None	None
World Bank	Definitions such as 'Private Party' and 'Service Provider' are not defined in the Project Agreement; while 'Service Payments' and 'Independent Expert' have different definitions between the Regulations and Project Agreement.	This is noted and all definitions have been harmonized in the revised regulations	Reg.2	None

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<p>Motorist Association</p>	<p>Has enough public participation been carried out?</p>	<p>Yes, as far as this statutory instrument is concerned.</p> <p>Communication on the wider subject of tolling is however an ongoing conversation. This should be distinguished from the regulatory instrument comprised in the toll fund regulations.</p>	<p>None</p>	<p>None</p>
<p>Rift Valley Connect Consortium (the "Consortium"), acting as preferred bidder for Public-Private Partnership project of Nairobi-Nakuru-Mau Summit Highway</p>	<p>Regulation 4(2) (Objects and Purpose of Fund) The drafting of this section should be made consistent with section 7(a) which provides for exclusions from permitted payments (i.e. compensation for Political Events and Termination Payments) to make clear that not all of the Government's payment obligations will be paid from the Fund (ex, "...a dedicated public fund from which certain Government's obligations... shall be met").</p>	<p>There is drafting consistency and harmony in the drafting for Regulations 4 and 7.</p>	<p>None</p>	<p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Definition of "Projected Fund Ratio" The Consortium notes that unpaid invoice amounts / unpaid service payments / those in arrears are not treated in this definition. We suggest that such amounts be aggregated in the required NTF balance and fund ratios, i.e. the requirement to reserve for them does not go away by virtue of time having passed, in which case the definition of the "Projected Fund Ratio" should be revised accordingly.</p>	<p>The definition of Project Fund Ratio has been revised.</p>	<p>Regulation 2</p>	<p>None</p>
	<p>Regulation 22 provides that "the existing government financial and procurement regulations shall apply in the administration of the Fund." This provision should be more specific. In any case, it should be clarified that the Regulations supersede the other regulations to the extent of any inconsistency.</p>	<p>The observation is noted, however, the principle is consistent with standard GoK drafting of instruments such as this. Regard should be had to Regulation 5 as well.</p>	<p>None</p>	<p>None</p>

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<p>NortonRose Fulbright LLP and Walker Kontos, In their capacity as Lender's Legal Advisers on the Nairobi-Nakuru-Mau PPP Project</p>	<p>Regulation 2 (Interpretation) The term "Fund" as used in the Regulations has not been defined in the interpretation section thereunder. Recommendation: Appropriate definition to be inserted in the interpretation section.</p> <p>ii. The term "Gazette" as used in the Regulations has not been used or referred to in the Regulations. Recommendation: To be deleted if not relevant for purposes of the Regulations, or alternatively, to be adopted in accordance with our recommendations under item 8 below. (recommendation under Regulation 10(1)(e) (Functions of Officer Administering the Fund))</p> <p>iii. The term "Private Party" has an ambiguity – commas should be put around the phrase "or all Toll Operator ... Authorised Toll Collector" to make it clear that Service Providers do not also need to be authorised toll collectors</p>	<p>GOK accepts this proposal and it is implemented.</p> <p>GOK accepts this proposal</p> <p>GOK does not accept this proposal.</p>	<p>Reg. 2</p> <p>Deletion of the definition 'Gazette' at regulation 2</p>	<p>None – already effected</p> <p>None</p> <p>None</p>

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>Recommendation: Appropriate amendment to be made.</p> <p>iv. The definition of the term "Project Roads" does not specify the legislation under which the Cabinet Secretary may declare a road to be a toll road. Also, it is possible that a Project Agreement may relate to a road that is partially tolled and partially free-to-use, but the definition of Project Road only relates to a toll road. The term "Project Road" should for the purposes of the Regulations also include any non-tolled roads which are part of a Project Agreement that principally relates to a tolled road.</p> <p>Recommendation: Relevant amendments to be made to refer to section 3(a) of the Public Toll Roads Act which empowers the Cabinet Secretary to declare any public road</p>	<p>This is noted, however it is regulated under the PRTA, not a matter falling within the scope of the Regulations.</p> <p>Regulation 14(c) addresses fund adequacy for projects in future requiring support under and through the Fund.</p>	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>or a portion thereof as a toll road. Relevant amendment to be made to ensure that the Fund can still be used to cover availability payments for a non-tolled road within a relevant Project Agreement.</p> <p>v. The "Projected Fund Ratio" is used in the context of a 12 month look forward. This period seems understandable in the context of assessing the minimum value of the Fund to meet payments over the next year, but in terms of assessing whether to safely pull out any Projected Surplus, we would have</p>	<p>Threshold for both shortfalls and surpluses is set at 1.3 times funded obligations, an annual basis. Surpluses under Reg.23 are based on actual cash balances.</p>	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provisions of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
	<p>perhaps expected that a longer-term look-forward would be used. Recommendation: Matter for consideration.</p>			
	<p>The term "contracting authority" as used in regulation 8(2) should read "Contracting Authority" since it is a defined term. Recommendation: Appropriate amendments should be made.</p>	<p>GoK accepts this proposal</p>	<p>Reg.8</p>	<p>Reg 8(2)</p>
<p>Eng. Francis Ngokonyo, PPP Committee Member</p>	<p>There are a few typos you may need to correct on the Regulations such as: - At Regulation 2 on Independent Expert, line 3, the word project is repeated for Project Agreements. ii. At Regulation 8 3(f) allocation in accordance. The word on is used.</p>	<p>GoK accepts the recommendation to delete the word "project" immediately before "Project Agreements" under Regulation 2</p>	<p>Reg.2</p>	<p>Reg.2</p>

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Saitoti Torome, CBS Principal Secretary State Department of Planning	To get the acceptability of the tolling roads from the public, more comprehensive sensitization should be done so that we can change the public attitudes toward the tolling road system. The roads users should be aware of the objective and the benefits in a simple way.	Gok accepts this recommendation	None	None
	Make the public aware of National Tolling Fund ex ante and ex post	This is accepted as a generic recommendation.	None	None
	Involve the Ministry responsible for National Planning during planning process for easier monitoring and feedback	This is well noted.	None	None
Bertha Dena	I request the PPP Committee be given the Toll Policy to be able to have a meaningful debate on the proposed Toll regulation with respect to its appropriateness.	This is well noted	None	None

CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Eng. Peter. M. Mundinia DIRECTOR GENERAL KeNHA</p>	<p>Definitions Under the definition of Officer Administering Fund, the appropriate cross reference should be Regulation 9 and not 11 Section 4 - the name of the Fund should be consistent in both the NTF Regulations and the proposed amendments to the Public Road Toll Act, 1984.</p> <p>We are fine with the rest of the provisions and hope that it will be established at the earliest since the bankability of Nairobi — Nakuru — Mau Summit PPP project is dependent on it.</p> <p>Regulation 18(3), the third paragraph should be amended to read .budgetary allocations out of the Fund.."</p>	<p>These recommendations are well noted and the Regulations have been cleaned up by effecting necessary corrections</p> <p>This is well noted</p> <p>This is noted for appropriate clean up.</p>	<p>Reg 2, 9 & 11</p> <p>None</p> <p>Reg.13 – amended extensively.</p>	<p>Reg.2, 9 & 11</p> <p>None</p> <p>Reg.13</p>

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Institute of Certified Public Accountants of Kenya (ICPAK)	<p>Regulation 2: Interpretation Cross referencing Recommendation: In the definition of the term "Fund Secretariat" delete the phrase "regulation 14" and substitute therefor the phrase "regulation 12". Correct referencing: Fund secretariat is established under regulation 12.</p>	GoK accepts this recommendation, and the updated regulations have been appropriately cross-referenced	Reg.2	Reg.2
	<p>Regulation 2: Interpretation Cross referencing Recommendation: In the definition of the term "Officer administering the Fund" delete the phrase "regulation 11" and substitute therefor the phrase "regulation 9". Correct referencing: The officer administering the Fund is designated under regulation 9.</p>	As above	As above	As above
<p>Regulation 7: Payments Out of the Fund Numbering Recommendation: Change the numbering a,b,c,d to i, ii, iii, iv To avoid confusion since the same numbering style appears twice.</p>	GoK accepts to redraft Regulation 7	Reg.7	Reg.7	

<p>The Institute of Certified Public Accountants (ICPAK)</p>	<p>New Regulation: Public Participation and consultation in national tolling process</p> <p>These regulations lack elaborate provisions on consultation and participation of the public (road users). This can lead to public resistance to Tolling</p> <p>One of the greatest impediments to toll roads is the public's resistance to paying tolls, especially on existing roads that the public often perceives as already paid for through tax revenues. Public resistance to tolling has impeded or halted private toll road programs in environment</p> <p>Advances in electronic tolling should reduce public resistance associated with the inconvenience of having to stop to pay tolls.</p> <p>However, the concept of road pricing is still not widely accepted. Of particular concern to some opponents of tolling is the alleged inequity of charging the public, especially low-income passengers, to use a vital public facility. There is a need to undertake proper public sensitization and provide an assurance that the collected funds will be utilized to better lives of all</p>	<p>GoK takes note of this comment. Regulation 27 on access to the platform and avenue for wider public participation.</p> <p>Not all consultations on the subject of tolling will work under the toll fund regulations. A significant amount of public consultations will occur within the framework of the PRTA Cap 407.</p> <p>Quite a significant set of the issues raised here relate to elements that fall within that external platform – external to the toll fund regulations.</p> <p>It is however accepted that these are all part and parcel of the overall tolling agenda in Kenya.</p>	<p>Reg.27</p>	<p>None</p>
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	<p>citizens. Willingness to pay survey should also give an indicator before signing a toll fund project agreement</p> <p>Recommendation: Amend by including a new Regulation</p> <p>The Officer Administering the Fund shall facilitate public participation in the management of National Toll Fund in accordance to Public Finance Management Act 2012 and Article 10 and Article 201 of the Constitution of Kenya.</p> <p>There should be a willingness to pay survey and thorough stake holder involvement in each of the proposed toll project.</p>			
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CONTRIBUTORS NAME	COMMENTS	GOK RESPONSE	Relevant Provision of the Regulations	PROPOSED DRAFTING TO THE REGULATIONS
<p>Paul Mwangi Maringa Principal Secretary State Department of Public Works.</p>	<p>Why the singular reference to KURA? We have KeNHA, KERRA, KRB & ERB too. The sponsor of all our current road toll initiatives so far is KeNHA</p>	<p>This recommendation is noted – Reg.6(f) is appropriately amended to facilitate additional platforms</p>	<p>Reg.6(f)</p>	<p>Amended to provide for other applicable frameworks as from time to time adopted.</p>
<p>Uasin Gishu County</p>	<p>Regulation 3 (d) This section is not clear in flow of language and meaning. Regulation 3 (e) should be amended to read "make provisions for connected purposes with and incidental to the foregoing objects and purposes." Regulation 6 (a) This section takes us back to definition of Toll Roads under the interpretation part. The power by the Cabinet Secretary to declare a Toll Road should be in consultation with the County Government where the road cuts through and approved by the National Assembly. The declaration of a Toll Road to be made by the Cabinet Secretary for Roads.</p>	<p>GoK notes the observations, but believes the Regulations are appropriately drafted as they are in the regard indicated. Regulation 3(d) is couched in standard legislative drafting language - The proposed amendment obfuscates the meaning under Regulation 3(e) as currently drafted. There is no legal requirement for consulting the County Governments in declaring a Toll Road. Section 18 of Part 1 of the Fourth schedule of the Constitution provides that</p>		

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	<p>The Regulations should operate under the public Finance Management Act, 2012 and should not make any reference to the Public Roads Toll Act, Cap. 407. If it has to make reference to Public Roads Toll Act, then the same to be amended to be in line with Public Finance Management Act, 2012 and these Regulation in respect to our proposed definition of Project Roads.</p> <p>Regulation 8 (3) (m) Should be deleted in its entirety as the same is well catered under Section 10(q) and (12).</p>	<p>transport and communication is a national government function.</p> <p>The statutory basis for the Toll Fund Regulations are –</p> <ul style="list-style-type: none"> - Section 24 PFMA 2012 - Section 6A of the PRTA 1984 - Regulations 207-209 of the PFM (National Government) Regulations 2015 <p>The observation of the stakeholder is not correct at law.</p> <p>Gok does not accept this proposed amendment. Regulations 8 (3)(m) and 10(d) are different in scope. The latter provides that the Officer Administering the Fund shall recommend the appointment of Fund secretariat staff while the former provides that the Oversight Committee shall approve the recruitment and remuneration of staff of the fund</p>	None	None

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	Regulation 14 the use of the word "itself" in reference to Administrator is not proper. Use word "he "	GoK does not accept this proposal.	The word "itself" refers to the office and is not indicative of gender	None